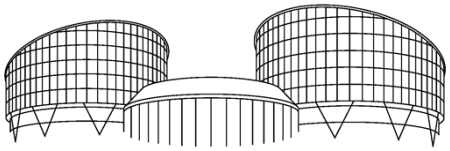

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF MUHAMMAD AND MUHAMMAD v. ROMANIA

(Application no. 80982/12)

JUDGMENT

Art 1 P7 • Procedural safeguards relating to expulsion of aliens • Expulsion on national security grounds decided by court on the basis of classified information not disclosed to applicants, without sufficient counterbalancing safeguards • Right to be informed of the relevant factual elements underlying the expulsion decision • Right of access to the content of the documents and the information relied upon by the competent national authority • Requirement that limitations on these rights are duly justified by competent independent authority and sufficiently compensated for by counterbalancing factors, including procedural safeguards • Strict scrutiny of counterbalancing factors, in absence of stringent domestic examination of the need for significant limitation of the applicants' rights • Inadequate information disclosed to applicants on grounds for expulsion, conduct of proceedings and their rights • Ineffective defence by lawyers without access to case file information • Involvement of highest judicial authority a significant safeguard, but insufficient in absence of information on nature and degree of scrutiny applied

STRASBOURG

15 October 2020

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

In the case of Muhammad and Muhammad v. Romania,

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

Robert Spano, *President,*
Linos-Alexandre Sicilianos,
Jon Fridrik Kjølbro,
Ksenija Turković,
Angelika Nußberger,
Paul Lemmens,
Ganna Yudkivska,
Paulo Pinto de Albuquerque,
Faris Vehabović,
Iulia Antoanella Motoc,
Carlo Ranzoni,
Pauliine Koskelo,
Georgios A. Serghides,
Marko Bošnjak,
Jovan Ilievski,
Péter Paczolay,
María Elósegui, *judges,*

and Johan Callewaert, *Deputy Grand Chamber Registrar,*

Having deliberated in private on 25 September 2019 and 18 June 2020,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 80982/12) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Pakistani nationals, Mr Adeel Muhammad and Mr Ramzan Muhammad ("the applicants"), on 19 December 2012.

2. The applicants, who had been granted legal aid, were represented by Ms E. Crângariu and Ms F. Dumitru, lawyers practising in Bucharest. The Romanian Government ("the Government") were represented by their Agent, Ms S.-M. Teodoroiu, of the Ministry of Foreign Affairs.

3. The applicants complained that they had been deported from Romania to Pakistan, allegedly in breach of their rights under Article 13 of the Convention and Article 1 of Protocol No. 7 to the Convention.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). On 10 July 2015 the Government were given notice of the complaint under Article 1 of Protocol No. 7 and the applicants' complaints under Articles 5 and 8 of the Convention were declared inadmissible pursuant to Rule 54 § 3. The application was subsequently allocated to the Court's Fourth Section. On 26 February 2019

a Chamber of that Section composed of Ganna Yudkivska, President, Paulo Pinto de Albuquerque, Faris Vehabović, Iulia Antoanella Motoc, Carlo Ranzoni, Marko Bošnjak and Péter Paczolay, judges, together with Marialena Tsirli, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected thereto (Article 30 of the Convention and Rule 72).

5. The composition of the Grand Chamber was determined in accordance with Article 26 §§ 4 and 5 of the Convention and Rule 24.

6. The applicants and the Government each filed written observations on the admissibility and the merits of the case. The Helsinki Foundation for Human Rights based in Poland and the Association for Legal Intervention, together with Amnesty International and the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, which had been given leave to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3), also submitted observations.

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 25 September 2019 (Rules 71 and 59 § 3).

There appeared before the Court:

(a) *for the Government*

Ms S.-M. TEODOROIU, Ministry of Foreign Affairs, *Agent*,
Ms O. EZER, diplomatic adviser,
Ministry of Foreign Affairs,
Ms S.D. POPA, deputy to the Permanent Representative
of Romania to the Council of Europe,
Ms D.A. STĂNIȘOR, judge at the High Court
of Cassation and Justice,
Ms I. MĂIEREANU, judge at the High Court
of Cassation and Justice,
Mr O. SPÎNU, judge at the Bucharest Court of Appeal, *Advisers*;

(b) *for the applicants*

Ms E. CRÂNGARIU, lawyer,
Ms F. DUMITRU, lawyer, *Counsel*.

The Court heard addresses by Ms Teodoroiu, Ms Crângariu and Ms Dumitru, followed by their answers to questions from judges.

As authorised by the President of the Grand Chamber, the Government submitted in writing additional answers to some of the questions put by judges during the hearing. Those answers were notified to the applicants, who submitted observations in that connection.

THE FACTS

I. BACKGROUND TO THE CASE

8. Adeel Muhammad was born in 1993 and lives in Tehsil Karor (Pakistan). Ramzan Muhammad was born in 1982 and lives in Dubai (United Arab Emirates).

9. Adeel Muhammad ("the first applicant") entered Romania in September 2012, on a student visa he had obtained on 7 September 2012 and which was valid until 2015. He received an "Erasmus Mundus" scholarship and studied in the economic sciences faculty of Lucian Blaga University in Sibiu.

10. Ramzan Muhammad ("the second applicant") entered Romania on 17 February 2009 on a long-stay student visa. He completed his first year of preparatory studies in Piteşti before being transferred to Lucian Blaga University in Sibiu on being granted an "Erasmus Mundus" scholarship. His wife arrived in Romania on 14 April 2012, having obtained a long-stay visa for family reunification purposes.

II. THE APPLICATION OF THE PUBLIC PROSECUTOR'S OFFICE FOR THE APPLICANTS TO BE DECLARED UNDESIRABLE PERSONS

11. In a note of 4 December 2012 the Romanian Intelligence Service (*Serviciul român de informaţii* – "the SRI") asked the public prosecutor's office at the Bucharest Court of Appeal (the "public prosecutor's office") to apply to the appropriate court to assess whether the applicants should be declared "undesirable persons" in Romania for a fifteen-year period. In support of its request, the SRI provided classified documents at the "secret" (*strict secret*) level (see paragraph 51 below).

12. On 4 December 2012 the public prosecutor's office submitted an application (*rezoluție*) to the Administrative Division of that court (the "Court of Appeal") asking it to declare the two applicants undesirable in Romania. The application stated that, according to the "secret" classified intelligence transmitted to the public prosecutor by the SRI, there were serious indications that the applicants intended to engage in activities capable of endangering national security within the meaning of Article 85 § 1 of Emergency Ordinance (*ordonanţei de urgenţă a Guvernului* – "OUG") no. 194/2002 on the status of aliens in Romania ("OUG no. 194/2002") in conjunction with section 3 points (i) and (l) of Law no. 51/1991 on national security ("Law no. 51/1991") and section 44 of Law no. 535/2004 on the prevention and countering of terrorism ("Law no. 535/2004"). The public prosecutor's office also stated that the safeguards provided for under Article 1 of Protocol No. 7 to the Convention

would not be breached by the measure, given that an alien could be expelled before exercising the rights enumerated in paragraph 1 (a)-(c) of that Article where such expulsion was necessary in the interests of public order or for national security reasons. The public prosecutor's office based its application on Article 85 § 2 and Article 97 § 3 of OUG no. 194/2002.

13. In support of its application, the public prosecutor's office submitted to the Court of Appeal the "secret" classified documents it had received from the SRI, indicating that those documents could be used in compliance with the provisions of Government Order no. 585/2002 on the approval of national standards for the protection of classified information in Romania ("Government Order no. 585/2002"). The president of the Administrative Division of the Court of Appeal was informed that the public prosecutor's office had filed a "document" classified as "secret" with the classified information department at the Court of Appeal so that it could be studied by the judge who would be examining the applicants' case.

14. According to the Government's observations, the classified document transmitted by the SRI to the public prosecutor's office gave details and examples of the activities of the two applicants in support of a fundamentalist Islamist group linked ideologically to al-Qaeda, showing their connections with various terrorist entities and their training. It also contained specific data and information concerning the two applicants' involvement in activities which endangered national security, as collected by the SRI using its technical intelligence gathering resources.

15. Also on 4 December 2012, after 5.20 p.m., the Sibiu police summoned the applicants to appear the next day, at 9 a.m., in the Court of Appeal, in connection with proceedings for the purpose of examining the application of the public prosecutor's office. The summonses were not accompanied by any documents.

16. On 5 December 2012, after travelling overnight by bus the applicants reached Bucharest at 5 a.m. They arrived at the Court of Appeal at the time indicated.

III. THE FIRST-INSTANCE PROCEEDINGS BEFORE THE COURT OF APPEAL

17. In an interlocutory judgment of 5 December 2012, the bench to which the case had first been allocated relinquished it, on the grounds that the judge did not have the authorisation required by Law no. 182/2002 on the protection of secret information ("Law no. 182/2002") to have access to the classified document adduced by the public prosecutor's office. The Inspectorate General for Immigration (the "IGI") was joined as a party to the proceedings, being the competent authority for the execution of the Court of Appeal's decision.

18. The case was allocated to a different bench, which had been issued by the Office of the national register for State secret information (the "ORNISS") with authorisation to access documents corresponding to the level of classification of the information in question.

19. A hearing took place on 5 December 2012 during which the applicants were present, assisted by an Urdu interpreter.

20. The Court of Appeal allowed the applicants the time necessary to apprise themselves, through the interpreter, of the application by which the case had been referred to the court. It was noted in that document that there were strong indications that the applicants had planned to carry out activities capable of endangering national security and falling within the scope of Article 85 § 1 of OUG no. 194/2002, in conjunction with section 3 points (i) and (l) of Law no. 51/1991 and section 44 of Law no. 535/2004. It was also mentioned that the data and intelligence underlying the initiating application had been forwarded to the Court of Appeal.

21. The applicants indicated orally to the Court of Appeal that they did not understand the reasons why they had been summoned, bearing in mind that the initiating application merely contained references to legal provisions. The Court of Appeal replied that the documents in the file were classified and that only the judge was authorised to consult them.

22. As the applicants stated that they had no preliminary requests, the Court of Appeal called on the parties to submit evidence. The public prosecutor's office requested the admission in evidence of the classified documents that it had filed with the classified information department of the Court of Appeal (see paragraph 13 above). The applicants indicated that they had no evidence to adduce and they asked the Court of Appeal to scrutinise the case documents strictly, given that, in their submission, they had done nothing to endanger national security. The IGI representative asked that the classified documents submitted to the Court of Appeal be admitted in evidence.

23. Referring to Article 167 of the Code of Civil Procedure, the Court of Appeal decided that the classified documents should be admitted in evidence, indicating that such evidence was conclusive, pertinent and useful for the resolution of the case. It then opened the proceedings on the merits of the case.

24. The public prosecutor's office asked the court to declare the applicants undesirable persons and order their expulsion from Romania, submitting that it was apparent from the classified documents that they had engaged in activities capable of endangering national security.

25. The applicants replied that they had done nothing illegal, that they were merely students and that the first applicant had arrived in Romania only two months earlier. They complained that they had been wrongly suspected and asked to be assisted by officially assigned defence counsel.

26. After submitting the applicants' request for legal assistance to adversarial debate, the Court of Appeal rejected it as out of time, on the ground that such a request should have been submitted before the opening of the proceedings on the merits of the case (see paragraph 23 above).

27. In a judgment of the same date, delivered in private, the Court of Appeal declared the applicants undesirable for a fifteen-year period and ordered that they be placed in administrative custody (*luare în custodie publică*) pending their deportation.

28. The Court of Appeal's reasoning was as follows:

> "... Ramzan Muhammad and Adeel Muhammad, Pakistani nationals, are in Romania on student visas, both having 'Erasmus Mundus' scholarships to study in the economic sciences faculty of Lucian Blaga University in Sibiu.
>
> After examining the information transmitted by the SRI, classified for State secrecy purposes at the 'secret' level, the Court [of Appeal] regards it as proof that the aliens [in question] are engaging in activities capable of endangering national security.
>
> Account should be taken of the provisions of section 3 points (i) and (l) of Law no. 51/1991 [on national security] under which the following acts represent threats for the national security of Romania: (i) terrorist acts, and any planning or suspicion [*sic*] related thereto, by any means whatsoever; ... (l) the creation or constitution of an organisation or group, or the fact of belonging to one or supporting one by any means, in pursuit of any of the activities listed in points (a) to (k) ..., and the covert pursuit of such activities by lawfully established organisations or groups.
>
> The Court [of Appeal] also takes into consideration section 44 of Law no. 535/2004 [on the prevention and countering of terrorism], which provides that foreign nationals or stateless persons concerning whom there are data or serious indications that they intend to engage in terrorist activities or to promote terrorism are to be declared undesirable in Romania and that their leave to remain may be curtailed, if they have not been prohibited from leaving the country, in accordance with the law on immigration status in Romania.
>
> The Court [of Appeal] also has regard to the fact that Romania, as a member of the United Nations, has undertaken to deny leave to remain to anyone who finances, prepare or commits terrorist acts, or who supports such acts.
>
> The measure ordered [in the present case] does not breach Article 8 of the [European] Convention [on Human Rights] given that, even if this measure constitutes an interference with [the right to] private and family life [of those concerned] it is in accordance with the law, pursues a legitimate aim and is necessary in a democratic society.
>
> The measure is indeed provided for by Article 85 of OUG no. 194/2002, which authorises the ordering of an alien's removal or exclusion from the country, [namely by a] normative instrument published in the Official Gazette, which thus satisfies the condition of accessibility of the law.
>
> Similarly, procedural safeguards are upheld for an alien who is declared undesirable, as the measure is ordered by a tribunal within the meaning of Article 6 of the ECHR, ensuring due respect for the adversarial principle and for defence rights.

A measure declaring aliens undesirable pursues a legitimate aim, namely the prevention of serious acts that are capable of endangering the national security of the Romanian State.

As to the need to adopt such a measure in respect of aliens, it is justified by the nature and seriousness of the activities carried out [by them], in respect of which it should be verified that the measure is proportionate to the aim pursued.

Having regard to these considerations and in the light of the provisions of Article 85 § 5 of OUG no. 194/2002 to the effect that, where an alien is declared undesirable for national security reasons, the judgment does not mention the data or intelligence underlying its decision, the Court [of Appeal] grants the application and declares [the applicants] undesirable in Romania, on national security grounds, for a fifteen-year period.

In the meantime, the placement of the aliens in administrative detention is hereby ordered, in accordance with Article 97 § 3 of OUG no. 194/2002, pending their deportation, [without this detention exceeding] eighteen months."

29. Also on 5 December 2012 the applicants were informed, by a letter from the IGI of Bucharest in Romanian and English, that they had been declared undesirable persons and that they would be removed from Romania under escort. They were placed in the Otopeni immigration holding facility pending their deportation.

IV. THE SRI PRESS RELEASE

30. On 6 December 2012 the SRI published a press release, which read as follows:

"In the context of the measures taken by the Romanian authorities responsible for the prevention and countering of terrorism, which formed the basis of decision no. 6906 of Bucharest Court of Appeal of 5 December 2012, in which the foreign nationals R.M. and A.M. [the applicants, whose names were not disclosed] were declared undesirable for a period of fifteen years, the SRI is authorised to communicate as follows:

On the basis of the intelligence gathered through the National System for the Prevention and Countering of Terrorism (the 'SNPCT'), the SRI, in cooperation with the other institutions [operating within the framework of that] System, undertook complex investigations to obtain information on activities conducted in preparation for a terrorist attack on Romanian soil, during the period of the end-of-year festivities, by an extremist entity ideologically affiliated to al-Qaeda.

For that purpose, the competent bodies monitored the activities of the entity's members in our country, [these individuals] being regarded as 'support points', who were acting by way of conspiracy under external coordination. It was established that they were supposed to provide support for the whole operation to be carried out. It should be noted that one of those individuals [who were] implicated had the necessary knowledge to make improvised explosive devices.

Similarly, according to the information obtained [by the competent bodies], in order to implement the action thus planned, there was an attempt [by the extremist entity] to co-opt certain individuals who were known to support Jihadi groups and who were supposed to act in collaboration with the 'support points' in Romania.

> The relevant data and information obtained in this case were transmitted, in accordance with the law, to the public prosecutor's office at the Bucharest Court of Appeal, which supported, in the proceedings before that court, the SRI's proposal to declare undesirable the foreign nationals R.M. and A.M., on the grounds of their involvement in activities capable of seriously endangering national security in the counter-terrorism field.
>
> Following the decision of the Bucharest Court of Appeal, the two foreign nationals were arrested and placed in administrative detention pending their deportation.
>
> In its capacity as national authority for counter-terrorism, the SRI, together with the other institutions of the SNPCT, prioritises the prevention of any terrorist risk and threat."

31. Two articles were published in the newspaper *Adevărul* reporting the information in the SRI's press release, but without citing it as the source of that information, while indicating the applicants' names and the details of their university studies in Romania. At an unknown date the applicants became aware of the content of the press release.

V. APPEAL PROCEEDINGS IN THE HIGH COURT OF CASSATION AND JUSTICE

32. The applicants, who in the meantime had retained two lawyers to represent them in the proceedings, appealed to the High Court of Cassation and Justice (the "High Court") against the Court of Appeal's judgment of 5 December 2012 (see paragraphs 27 and 28 above). Those lawyers did not hold an ORNISS certificate and thus did not have access to the classified documents in the file (see paragraph 54 below).

33. In their grounds of appeal the applicants complained that they had not been informed by the Court of Appeal of the procedure to be followed and more specifically of the conditions in which they could have sought legal assistance. They further submitted that, in breach of Article 85 § 4 of OUG no. 194/2002, the Court of Appeal had not informed them of the facts "underlying the proposal" to have them declared undesirable, merely referring to the "secret" level of classification of the documents in the file. They submitted that there was no mention in the file of classified documents at any level of classification and in their view, even assuming that it did contain classified documents, the Court of Appeal had a legal obligation to inform them of the case against them. That failure to inform them of the precise accusations against them had deprived them of the possibility of defending themselves and had thus breached their right to a fair hearing and to an effective remedy.

34. The applicants further complained that, even though they themselves had been denied access to the case against them on the ground that the documents in the file were classified as "secret", the day after the judgment of the Court of Appeal the SRI had published a press release, relayed by the media, in which the accusations against them were set out.

35. They alleged that the Court of Appeal could have informed them of the specific acts they were said to have committed without disclosing secret intelligence, concerning for example the SRI's investigative methods, the names of the SRI's officers who had monitored them or the evidence gathered. The Court of Appeal had explained its decision by the "activities" in which they had allegedly "engaged" and the nature of those activities, thus implying in their view that they were accused of performing specific acts and not merely an intention to perform activities undermining national security. In the absence of such disclosure, it had been impossible for them to submit evidence in their defence.

36. They added, lastly, that the second applicant had previously been persecuted by agents of the SRI and that, for this reason, on 19 November 2012, they had already submitted a request to the University to have their situation clarified and if possible to be transferred to another country participating in the "Erasmus Mundus" scholarship scheme.

37. A hearing took place on 20 December 2012 before the High Court. The applicants, who were present at the hearing, assisted by their two lawyers and an interpreter, sought permission to produce documents attesting to their conduct at the university and their integration into university life.

38. The applicants also asked the High Court to contact bank T. to obtain a bank statement showing their financial situation and to admit it in evidence. They adduced a note issued by bank T. dated 18 December 2012, which stated that, pursuant to Articles 111-113 of Government Ordinance no. 99/2006 on credit institutions and the sufficiency of equity capital, which guaranteed the secrecy of data, the bank could not disclose their account statements to a third party but could make them available to the High Court, if need be. They argued that, given that neither they nor their lawyers, who did not have the requisite authorisation, had access to the classified evidence in the file, the bank statement would enable them to counter the accusations made against them in the SRI press release and to show that they had not financed terrorist activities (see paragraph 30 above).

39. The public prosecutor's office and the Romanian Immigration Office (the "ORI"), which had been joined as parties to the proceedings, opposed that request, submitting that the bank statement could not provide any relevant or useful evidence in the case. The ORI explained that only the classified documents were pertinent to the case, as the proceedings concerned the information contained therein, and not any information subsequently published in the press. The public prosecutor responsible for the case expressed the view that the requested evidence would not be relevant or useful for the examination of the case.

40. Referring to Article 305 of the Code of Civil Procedure, the High Court admitted evidence of the applicants' conduct at university and

rejected the applicants' request to obtain the bank documents. It then put the case to adversarial debate.

41. On the merits of the case, the applicants submitted that they were mere students and had not committed terrorist acts. They reiterated that the Court of Appeal had not communicated the facts underlying the public prosecutor's application, in breach of the relevant provisions of OUG no. 194/2002. In spite of the "secret" classification of the evidence in the file, the day after the first-instance judgment had been delivered the accusations against them had been published in the SRI press release (see paragraph 30 above). They had not been informed of their right to be assisted by a lawyer or of the accusations against them. They had not been afforded the procedural safeguards of a fair trial as the proceedings had been a mere formality.

42. In a final judgment of 20 December 2012 the High Court dismissed the applicants' appeal. After summing up the decision of the Court of Appeal, the High Court found that it could be seen from the classified documents available to it that the court below had rightly taken account of the existence of indications that the applicants had intended to engage in activities capable of endangering national security. It further observed that, pursuant to Article 85 § 5 of OUG no. 194/2002, where a decision to declare an alien undesirable was based on reasons of national security, the data and information, together with the factual grounds (*motivele de fapt*) underlying the judges' opinion, could not be mentioned in the judgment. It added as follows:

> "The applicants' arguments about their good conduct at university cannot prosper and fail to rebut the conviction of the court, based as it is on the classified documents containing information which is necessary and sufficient to prove the existence of strong indications that they intended to engage in activities that were capable of endangering national security."

43. The High Court then analysed the applicants' ground of appeal based on the alleged breach of their fundamental rights and procedural safeguards during the first-instance proceedings. It found as follows:

> "The measures of expulsion, administrative detention and removal under escort of aliens who have been declared undesirable in Romania are legitimate, being governed in domestic law by the provisions of Chapter V ('Rules governing the removal of aliens from Romania') of OUG no. 194/2002; [they] are necessary and proportionate to the aim pursued in so far as the court (*instanța de judecată*) has found that the evidence gathered proves that there are strong indications (*indicii temeinice*) that the persons concerned intend to engage in activities that are capable of endangering national security."

44. The High Court further noted that the provisions of Article 1 of Protocol No. 7 to the Convention were applicable to the case. The applicants were legally in Romania when the expulsion procedure was initiated but that the provisions of paragraph 2 of that Article were not applicable to

them, given that they had not been expelled before the exercise of their rights. After referring to the Court's findings in *Ahmed v. Romania* (no. 34621/03, 13 July 2010), *Kaya v. Romania* (no. 33970/05, 12 October 2006), and *Lupsa v. Romania* (no. 10337/04, ECHR 2006-VII), where a breach of Article 1 of Protocol No. 7 to the Convention had been found because the competent authorities had not notified the aliens concerned of the document initiating the proceedings or of the slightest information as to the accusations against them, the High Court found that the circumstances of the present case were different.

45. The High Court noted that, in the present case, the applicants had been notified of the public prosecutor's initiating application and had been allotted the necessary time, with the assistance of an interpreter, to study its content and the supporting documents in the file. They had thus been in a position to know the reason why they had been summoned to court in the exclusion and expulsion proceedings. It gave the following reasoning:

> "It is true that the documents classified as 'secret' in the file, [which] were available to the court [which examined the case], were not disclosed to the appellants.
>
> The lack of direct and specific disclosure of the information contained in the documents classified as a State secret (*secret de Stat*) at the level 'secret' (*strict secret*) submitted by the SRI is consistent with the statutory obligation, binding on the court, under the provisions of Article 85 § 5 of Ordinance no. 194/2002 ... and especially the provisions of Law no. 182/2002 on the protection of classified information [citation of sections 2(2), 15 (f) and 39(1) and (2) of the Law].
>
> Under those provisions, the court, having taken note of the information contained in the classified documents in the case file, is bound by a duty not to disclose that information.
>
> Compliance with the safeguard imposed by Article 1 of Protocol No. 7 to the Convention, [namely that of] ensuring the protection of the person (being deported) against any arbitrary interference by the authorities with his or her Convention rights (see ECtHR, *Ahmed* case, cited above, § 52), is secured in the present case by the fact that both the first-instance court and the appellate court had the possibility of examining the validity of the existence of the indications [that those concerned] 'intended to engage in activities capable of endangering national security' (within the meaning of Article 85 § 1 of OUG no. 194/2002); the case has thus been examined at two levels of jurisdiction before an 'independent and impartial tribunal' within the meaning of Article 6 § 1 of the Convention.
>
> If it were considered that the need to inform the deportee of the grounds for his deportation entailed, unequivocally, the direct, effective, concrete and timely presentation of the indications ... this would be tantamount – in the High Court's opinion and in relation to its obligation not to disclose or encourage the disclosure of information which could cause serious harm to national security – to calling into question the very notion of national security together with all the measures aimed at protecting information falling within this concept.
>
> The [High Court] notes that [in the present case] the rights secured by Article 1 of Protocol No. 7 to the Convention were upheld in the judicial proceedings: [the appellants] had the genuine possibility of being present both before the first-instance court and the appeal court, assisted by lawyers of their choosing; [they were able to

submit] reasons against their expulsion; their case was examined directly and effectively by an independent and impartial tribunal; [and] they were represented by lawyers of their choosing.

Having regard to the arguments set out above, the High Court takes the view that there has not been – contrary to the grounds of appeal – any breach of the right to an effective remedy or the right of access to a court, as guaranteed by Article 6 of the Convention, nor has there been any disregard of the non-discrimination principle guaranteed by Article 14 of the Convention and Article 1 of Protocol No. 12, as prohibited by Article 18 § 1 of the Constitution.

The fact that, after the delivery of the Court of Appeal's judgment, the press and broadcasting media revealed information on which the expulsion decision was based does not lead to the conclusion that the right of access to a court or the right to a fair hearing have been breached. For the same reasons as those given above, the [appellants'] argument that their right of access to a court was only nominally respected cannot prosper.

The [appellants'] argument as to the protection of individuals under Article 3 of the Convention is also ill-founded since the risk of being subjected to inhuman or degrading treatment in the country of destination has not been proved by documents emanating from State authorities (*statale*); [the appellants] merely adduced a report by the Romanian National Council for Refugees drawn up on the basis of certain 'public information, selected and translated following an on-line search'.

Also ill-founded is the argument raised by [the appellant] Muhammad Ramzan under Article 8 of the Convention on the basis of the presence in Romania of his wife, who is nine months' pregnant and is dependent on his doctoral grant. Even though his deportation constitutes an interference with the exercise of his right to respect for his family life, the [High Court] takes the view that, for the reasons given above, this interference meets the requirements of Article 8 § 2 of the Convention, being in accordance with the law and necessary in the interest of national security.

As to the upholding of the [appellants'] defence rights before the Court of Appeal, the High Court notes that [they] had the possibility of submitting arguments against their expulsion and were able to express themselves in their mother tongue, through an interpreter. Moreover, it should be noted that, pursuant to the law (*în mod legal*) the Court of Appeal had declared out of time their request for assistance by officially assigned counsel, on the ground that this request had been submitted once the merits of the case had been put to adversarial debate, not at the earlier stage of the proceedings. In addition, before the appellate court, they have been assisted by lawyers of their choosing and have been able to submit all their arguments in their defence. Consequently, it cannot be admitted that there has been a breach of the right to a fair trial, as protected by Article 21 § 3 of the Constitution and by Article 6 § 1 of the Convention.

The [appellants'] arguments to the effect that the Court of Appeal had written [that they had] 'engaged in activities' (*desfășurarea de activități*), whereas the public prosecutor's application had referred to an 'intention to engage in certain activities', and had erroneously cited the text of section 3 point (i) of Law no. 51/1991, are not capable of negating the lawfulness and validity of the decision delivered.

Having regard to the foregoing, ... the High Court dismisses the appeal as unfounded ...".

46. The applicants left Romania on 27 December 2012.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

A. Domestic law

1. The Constitution

47. The relevant provisions of the Constitution read as follows:

Article 18
Foreign nationals and stateless persons

"(1) Foreign nationals and stateless persons who live in Romania enjoy the general protection of individuals and property, as secured by the Constitution and other laws."

Article 21
Free access to the courts

"(3) Parties have the right to a fair hearing and to the settlement of their disputes within a reasonable time ..."

Article 24
Defence rights

"(1) Defence rights are guaranteed.

(2) Throughout the proceedings, the parties have the right to be assisted by counsel, whether of their own choosing or officially assigned."

Article 31
The right to information

"(3) The right to information shall not compromise measures for protection ... of national security."

2. Code of Civil Procedure

48. The relevant provisions of the Code of Civil Procedure, as in force at the material time, read as follows:

Article 129

"(2) The court informs the parties of their rights and obligations depending on their capacity in the proceedings ..."

Article 167

"(1) Evidence can only be admitted if the court (*instanța*) is of the view that it is capable of contributing to the manifestation of the truth (*că ele pot să aducă dezlegarea pricinii*) ...

(2) It will be added to the file before the opening of the proceedings on the merits.

(3) Evidence for and against will be gathered, as far as possible, at the same time.

...”

Article 305

“No new evidence may be presented for the purposes of an appeal (*recurs*), except for the written documents which may be adduced until the close of the proceedings.”

3. Law no. 51/1991 on national security

49. The relevant provisions of Law no. 51/1991 on national security read as follows:

Section 3

“The following shall constitute threats to the national security of Romania:

(a) plans and activities seeking to abolish or undermine the sovereignty, unity, independence or indivisibility of the Romanian State;

(b) activities whose direct or indirect aim is to trigger a war against the State or a civil war, to facilitate foreign military occupation or servitude towards a foreign power or to help a foreign power or organisation achieve such aims;

(c) treason committed by aiding enemies;

(d) armed or violent acts which seek to weaken the power of the State;

(e) espionage, the transmission of State secrets to a foreign power or organisation or to their agents, the illegal possession of State secrets with a view to their transmission to a foreign power or organisation or to the agents thereof ...;

(f) the acts of undermining, sabotaging or any other act which seeks to destroy by force the democratic institutions of the State or which seriously breaches the fundamental rights and freedoms of Romanian citizens or which may interfere with the defence capacity or other similar interests of the State, and any destruction or damage ... of the infrastructures necessary for the proper functioning of social and economic life or for national defence purposes;

(g) acts through which harm is caused to life, to physical integrity or to the health of individuals who perform significant State duties ...;

(h) the conception, organisation or commission of radical or extremist acts, of a communist, fascist ... racist, anti-Semitic, negationist or separatist nature, which may endanger, in any manner, the territorial unity and integrity of Romania, or incitement to commit acts which may undermine the rule of law;

(i) terrorist acts, and any planning or support related thereto, by any means whatsoever;

(j) attacks against an authority perpetrated by any means whatsoever;

(k) the theft of weapons, munitions, explosives, or radioactive, toxic or biological substances from the units authorised to hold them, the smuggling of such material, or the fabrication, possession, disposal, transport or use thereof in conditions other than those prescribed by law, and the unlawful possession of weapons or munitions endangering national security;

(l) the creation or constitution of an organisation or group, or the fact of belonging to one or supporting one by any means, in pursuit of any of the activities listed in

points (a) to (k) above, and the covert pursuit of such activities by lawfully established organisations or groups."

Section 8

"Intelligence activities, aimed at the preservation of national security, shall be carried out by the Romanian intelligence service, ..."

Section 10

"Intelligence activities for the protection of national security shall be classified as a State secret (*secret de stat*)."

Section 11(1)

"Information relating to national security may be transmitted:

...

(d) to the organs of public prosecution, where the information concerns the commission of an offence.

The disclosure of [such] information must be approved by the heads of the bodies responsible for national security."

4. Law no. 535/2004 on the prevention and combating of terrorism

50. The relevant part of section 44 of Law no. 535/2004 on the prevention and combating of terrorism, as in force at the material time, was drafted as follows:

"1. In the case of foreign nationals or stateless persons concerning whom there is data or strong indications (*indicii temeinice*) [showing] that they intend to carry out terrorist acts or to aid and abet terrorism, they shall be declared as undesirable persons in Romania and may have their leave to remain withdrawn, unless they have been prohibited from leaving the country ..."

5. Law no. 182/2002 on the protection of secret information

51. The relevant provisions of Law no. 182/2002 on the protection of secret information read as follows:

Section 15

"The following terms shall be defined as follows, within the meaning hereof:

...

(b) classified information: any information, data, documents having a national security interest, which, in view of their level of importance and any consequences they may have on account of their unauthorised disclosure and dissemination, must be protected;

(c) the categories of classified documents are: State secrets (*secret de stat*) and service secrets;

(d) information [constituting] State secrets: information related to national security, the disclosure of which may harm national security and the defence of the nation;

...

(f) the following levels of classification (*de secretizare*) are attributed to classified information within the category of State secret:

– top secret (*strict secret de importanță deosebită*): information of which unauthorised disclosure is capable of causing harm of exceptional seriousness to national security;

– secret (*strict secrete*): information of which unauthorised disclosure is capable of causing serious harm to national security;

– confidential (*secrete*): information of which unauthorised disclosure is capable of causing harm to national security; ..."

Section 17

"(1) Information classified as a State secret (*secret de stat*) shall include information concerning:

...

(f) the intelligence gathering activity of the public authorities established by law for the defence of the nation and national security;

(g) any resources, methods, techniques or working equipment, or specific sources of information used by public authorities engaging in intelligence activities;

..."

Section 21

"(1) The Office of the national register of State secret information shall be a subordinate body (*în subordinea*) directly reporting to the Government.

(2) The Office of the national register of State secret information shall keep a record of the lists and information belonging to this category, of the time-frame within which a certain level of classification is maintained, of the staff vetted and approved to work with State secret information, and of the authorisation registers ..."

Section 24

"(4) Classified information under section 15 (f) hereof may be declassified by order of the Government upon a reasoned request of the competent [body].

...

(10) Declassification or relegation to a lower level of classification shall be carried out by individuals or public authorities with power to approve the classification and level of classification of the information at issue."

Section 28

"(1) Access to State secret classified information shall be possible only by written authorisation of the director of the legal entity which holds the information, after giving prior notice to the Office of the national register of State secret information.

(2) Authorisation shall be given depending on the levels of classification provided for in section 15 (f), after vetting of the person concerned, with his or prior written consent. Legal persons, ... shall inform the Office of the national register of State secret information of the issuance of access authorisation.

...

(4) The validity of the authorisation shall last for four years; during that period, vetting may be resumed at any time.

...".

Section 36

"(1) Persons to whom classified information is entrusted shall ensure its protection in accordance with the law and shall comply with the provisions of schemes for the prevention of leaks of classified information.

..."

Section 37

"(1) Public authorities, together with other legal entities which are holders of information with the State secret or service secret classification or to which such information has been entrusted, shall provide the funds necessary to fulfil their obligations and shall take the necessary measures to protect the said information.

(2) Responsibility for the protection of classified information lies with the head of the authority or public institution or of the legal entity which holds the information, as the case may be."

Section 39

"(1) Any breach of the rules concerning the protection of classified information shall engage disciplinary, administrative, civil or criminal liability, as the case may be.

(2) Any individuals working in the sector of intelligence, in the security services or in the army, or for the department of foreign relations, or those persons who have been specially entrusted with the protection of State secret information, who are found guilty of wilful disclosure or acts of negligence giving rise to the disclosure or leaking of classified information, shall irrevocably be dismissed from their posts (*calitatea*)."

6. Government Ordinance no. 194/2002 on immigration status in Romania

52. The provisions relevant to the present case in OUG no. 194/2002 on immigration status in Romania, as in force at the material time, read as follows:

Article 85
Declaration of an alien as an undesirable person

"(1) The declaration [that an individual is] an undesirable person is a measure taken against an alien who has carried out or who carries out activities that are capable of endangering national security or public order, or [about whom] there are strong indications (*indicii temeinice*) [that he or she] intends to carry out such activities.

(2) The measure provided for in the previous paragraph shall be taken by the Bucharest Court of Appeal, on the proposal of the public prosecutor, ... who submits his application to that court, on the proposal of the competent institutions in the field of public order and national security which are in possession of such indications ...

(3) Any data or intelligence which form the basis of the proposal to declare an alien undesirable for national security reasons must be made available to the [Court of Appeal] under conditions that have been laid down by the normative instruments governing activities related to national security and the protection of classified information.

(4) The application provided for in the second paragraph shall be examined at a private hearing to which the parties are summoned. The Court of Appeal shall notify the alien of the facts underlying the application, in accordance with the provisions of the normative instruments governing activities related to national security and the protection of classified information.

(5) The Court of Appeal shall deliver a judgment containing reasons, within a period of ten days from the submission of the application formulated in accordance with paragraph 2 hereof. The court's decision shall be final. Where an alien is declared undesirable on national security grounds, the data and intelligence on which the decision is based shall not be mentioned in the text of that decision.

...

(9) An alien may be declared undesirable for a period of between five and fifteen years ..."

Article 86
Appeals against judgments delivered under Article 85 § 5

"The judgment provided for in Article 85 § 5 hereof may be challenged by an appeal before the High Court of Cassation and Justice within ten days from the date of its notification [to the person concerned]. The High Court shall give its decision within five days from the date on which the appeal is deposited."

7. Government Order no. 585/2002

53. The relevant provisions of the national standards of protection of classified information in Romania, as approved by Government Order no. 585/2002, read as follows:

Article 19

"Information [classified] as a State secret may be declassified by order of the Government, upon the reasoned request of the issuing [body]."

Article 20

"(1) [Classified] information shall be declassified where:

(a) the classification time-limit has expired;

(b) the disclosure of the information can no longer cause harm to national security ...;

(c) [the classification] had been carried out by a person without legal authorisation (*neîmputernicită*).

(2) Declassification or relegation to a lower level of classification of State secret [classified] information shall be decided by authorised persons or senior civil servants entitled by law to attribute different levels of classification, subject to the prior opinion of the institutions which coordinate activities concerning the protection of classified information and the supervision of related measures ..."

Article 26

"Classified information may be transmitted to individuals who hold security clearance certificates or access permits corresponding to the level of classification [of the information in question]."

Article 159

"The following situations attributable to an applicant [seeking access to classified information] ... shall represent situations of incompatibility with access to State secret [classified] information:

(a) if he or she has committed or intended to commit, acts of espionage, terrorism, treason or other offences against State security;

..."

8. The procedure for obtaining an ORNISS certificate

54. The situation since 2010 is that lawyers may ask to be granted a security clearance certificate or access permit delivered by the ORNISS ("the ORNISS certificate"), in order to gain access to classified documents. For that purpose the lawyer must submit his application to the Chair of the Bar of which he is a member, who forwards it to the National Union of Romanian Bars (the "UNBR"). The lawyer must attach to his application, among other documents, a copy of the authority form given to him by the client in order to represent him in a case and a note from the body that is dealing with his client's case which attests that classified material has been submitted in evidence and that, in order to have access to that material and prepare his client's defence, the lawyer needs that certificate. The UNBR then initiates the procedure, which involves the competent authority carrying out preliminary checks on the lawyer's situation. The duration of the vetting procedure for persons who have requested access to "secret" classified information is 60 working days (Article 148 of Government Order No. 585/2002). Following the checks, the competent vetting authority forwards its conclusions to the ORNISS, which will issue its opinion to be forwarded to the UNBR. The latter will then have five days within which to issue the decision on access to classified documents.

55. Upon receipt of the ORNISS certificate, the lawyer to whom it is issued must sign a confidentiality agreement for the protection of any classified information brought to his knowledge. Once issued, the ORNISS

certificate is valid for four years. During the period of validity, vetting of the lawyer may be resumed at any time.

56. On 10 October 2013 the Chair of the UNBR asked the ORNISS for its opinion on the possibility of publishing, on the websites of the various Bar Associations, the names of lawyers issued with documents giving them access to classified information. On 6 November 2013 the ORNISS stated its position that such publication would lead to the introduction of different categories of lawyers within the same system, and therefore to a situation of discrimination against lawyers who did not hold such documents. Under section 2 of Law No. 182/2002, access to classified information was not a right guaranteed by law to all citizens and was only allowed in the cases and under the conditions provided for by law. Therefore it could not be said that all lawyers registered with the Bar could obtain such access. It concluded that the idea of publishing the names of lawyers authorised to have access to classified information on the websites of the various Bar Associations or on that of the UNBR was not justified.

57. In the opinion of the UNBR, as indicated in a letter it sent to the Government in January 2018, the publication of a list of lawyers holding ORNISS certificates might breach Article 24 of the Constitution (right to be represented by a lawyer of one's choosing). In a letter of 19 April 2019, in reply to a request from the applicants, the UNBR indicated that any lawyer who was chosen or appointed to represent a person concerned by classified material or to provide that person with legal assistance was entitled to apply for an ORNISS certificate, and therefore there was no "list of lawyers holding an ORNISS certificate"; moreover, the compilation and use of such a list would be at odds with Article 24 of the Constitution.

58. The Government indicated, based on information provided to them by the national authorities, that in December 2012 eight lawyers held an ORNISS certificate, and that from 2011 until the date on which they submitted their observations to the Grand Chamber, thirty-three lawyers had been granted access to classified information.

B. Relevant domestic case-law

59. The parties submitted examples of domestic case-law concerning proceedings brought by aliens against decisions declaring them undesirable or challenged refusals by the Romanian Immigration Office (ORI) to grant them permanent leave to remain in Romania.

60. In a series of decisions (28 January 2011, 18 October 2011, 14 March 2012, 9 July 2012, 26 October 2012, 9 November 2012, 20 December 2012, 22 August 2013, 7 November 2013 and 2 April 2015) the Court of Appeal found that the aliens concerned had received sufficient information to enable them to prepare their defence, based on the submissions initiating the proceedings, which had mentioned that they stood

accused of activities related to terrorism as defined by section 3 points (i) and (l) of Law no. 51/1991.

61. In other cases, in addition to the reference to section 3 points (i) and (l) of Law No. 51/1991, the Court of Appeal indicated more specific factual details, for example: that the alien was suspected of intent to engage in "subversive activities" in favour of a terrorist organisation (judgments of 24 August 2012, 10 June 2015 and 30 August 2016) or of supporting these organisations financially or through propaganda (judgments of 6 February 2013, 19 July 2017, 2 August 2017, 13 December 2017, 7 March 2019, 26 March 2019 and 3 April 2019); that the alien was accused of spying for foreign organisations, had made contact with terrorist organisations via the Internet, or had shown a willingness to commit acts of violence in the name of a terrorist ideology (for example, judgments of 17 May 2012, 23 April 2013, 31 March 2015, 29 December 2015, 14 June 2016, 1 September 2016, 1 March 2017, 14 November 2017, 4 April 2018 and 20 June 2018).

62. It appears from the examples of case-law adduced by the Government that in two cases, having considered all of the evidence before it and its credibility, the Court of Appeal had only partly accepted the prosecutor's request to declare the aliens undesirable (judgments of 31 March 2015 and 19 July 2017).

63. In some cases the aliens had challenged refusals by the ORI to grant them permanent leave to remain in Romania, on the ground that it was clear from the classified evidence that the alien was engaging in activities likely to undermine public order or national security. In a number of those cases the competent domestic courts (Court of Appeal and High Court) upheld their appeals on the ground that the ORI's refusal was not justified by any objective elements or the classified documents in the file (see the final judgments of the High Court of 28 September 2010, 22 February 2011, 24 March 2011, 16 September 2011, 8 March 2012, 29 May 2014 and 25 September 2018). On other occasions, the High Court dismissed the aliens' appeals, finding that the ORI's denial of leave to remain was well-founded (see the final judgments of the High Court of 16 June 2011, 19 June 2012 and 28 February 2014).

64. According to some examples of case-law adduced by the Government, national courts did not inform those concerned of the possibility of being assisted by a lawyer (Court of Appeal judgments of 24 August 2012, 26 October 2012 and 7 March 2019). In other cases, the Court of Appeal notified the aliens that only persons with special authorisation could have access to the classified documents in the file, without however identifying the lawyers who held such a certificate (judgments of 7 November 2013, 2 April 2015 and 1 September 2016).

65. A number of decisions show that, where the aliens requested the adjournment of the case in order to find a lawyer, the Court of Appeal did not grant their requests, on the grounds that such proceedings were required

by law to be expedited and the alien would still be able to appeal (judgments of 9 July 2012, 7 November 2013, 10 June 2015, 14 June 2016 and 30 August 2016; see also the High Court judgment of 8 January 2016 finding that the statutory time-limit for a decision on such an appeal was strict).

66. In other cases the domestic courts granted the alien's request to adjourn the proceedings in order to find a lawyer, while indicating that the chosen lawyer already had to hold an ORNISS certificate (Court of Appeal case no. 2138/2/2018 and the High Court's interlocutory judgment of 11 July 2016) as it was impossible for a lawyer to obtain the certificate during the proceedings on account of the statutory time-limit. However, in two immigration cases (one from 2017 the other from 2019) the domestic courts adjourned the proceedings several times, even beyond the statutory time-limit, so that the alien's lawyer could take the necessary steps to obtain an ORNISS certificate.

II. COUNCIL OF EUROPE DOCUMENTS

A. Protocol No. 7 to the Convention, Explanatory Report

67. The Explanatory Report in respect of Protocol No. 7 was drafted by the Steering Committee on Human Rights and submitted to the Council of Europe Committee of Ministers. It explains at the outset that the text of the report itself "does not constitute an instrument providing an authoritative interpretation of the text of the Protocol, although it might be of such a nature as to facilitate the understanding of the provisions contained therein".

68. The relevant parts of the Explanatory Report read as follows:

"Article 1

6. In line with the general remark made in the introduction (see above, paragraph 4), it is stressed that an alien lawfully in the territory of a member State of the Council of Europe already benefits from certain guarantees when a measure of expulsion is taken against him, notably those which are afforded by Articles 3 (prohibition of inhuman or degrading treatment) and 8 (right to respect for private and family life), in connection with Article 13 (right to an effective remedy before a national authority) of the European Convention on Human Rights, as interpreted by the European Commission and Court of Human Rights and – in those States which are parties – by the European Convention on Establishment of 1955 (Article 3), the European Social Charter of 1961 (Article 19, paragraph 8), the Treaty establishing the European Economic Community of 1957 (Article 48), the Geneva Convention relating to the status of refugees of 1951 (Articles 32 and 33) and the United Nations Covenant on Civil and Political Rights of 1966 (Article 13).

7. Account being taken of the rights which are thus recognised in favour of aliens, the present article has been added to the European Convention on Human Rights in order to afford minimum guarantees to such persons in the event of expulsion from the territory of a Contracting Party. The addition of this article enables protection to be granted in those cases which are not covered by other international instruments and

allows such protection to be brought within the purview of the system of control provided for in the European Convention on Human Rights.

...

11. Paragraph 1 of this article provides first that the person concerned may be expelled only 'in pursuance of a decision reached in accordance with law'. No exceptions may be made to this rule. However, again, 'law' refers to the domestic law of the State concerned. The decision must therefore be taken by the competent authority in accordance with the provisions of substantive law and with the relevant procedural rules.

12. Sub-paragraphs a, b and c of this same paragraph go on to set out three guarantees. Unlike the wording of Article 13 of the United Nations Covenant, the three guarantees have been clearly distinguished in three separate sub-paragraphs.

13.1. The first guarantee is the right of the person concerned to submit reasons against his expulsion. The conditions governing the exercise of this right are a matter for domestic legislation. By including this guarantee in a separate sub-paragraph, the intention is to indicate clearly that an alien can exercise it even before being able to have his case reviewed.

13.2. The second guarantee is the right of the person concerned to have his case reviewed. This does not necessarily require a two-stage procedure before different authorities, but only that the competent authority should review the case in the light of the reasons against expulsion submitted by the person concerned. Subject to this and to sub-paragraph *c*, the form which the review should take is left to domestic law. In some States, an alien has the possibility of introducing an appeal against the decision taken following the review of his case. The present article does not relate to that stage of proceedings and does not therefore require that the person concerned should be permitted to remain in the territory of the State pending the outcome of the appeal introduced against the decision taken following the review of his case.

13.3. Sub-paragraph c requires that the person concerned shall have the right to have his case presented on his behalf to the competent authority or a person or persons designated by that authority. The 'competent authority' may be administrative or judicial. Moreover, the 'competent authority' for the purpose of reviewing the case need not be the authority with whom the final decision on the question of expulsion rests. Thus, a procedure under which a court, which had reviewed the case in accordance with sub-paragraph b, made a recommendation of expulsion to an administrative authority with whom the final decision lay would satisfy the article. Nor would it be inconsistent with the requirements of this article or of Article 14 of the Convention for the domestic law to establish different procedures and designate different authorities for certain categories of cases, provided that the guarantees contained in the article are otherwise respected.

...

16. The European Commission of Human Rights has held in the case of Application No. 7729/76 that a decision to deport a person does 'not involve a determination of his civil rights and obligations or of any criminal charge against him' within the meaning of Article 6 of the Convention. The present article does not affect this interpretation of Article 6. ..."

B. European Convention on the Legal Status of Migrant Workers

69. Article 9 § 5 of the European Convention on the Legal Status of Migrant Workers signed in Strasbourg on 24 November 1977 reads as follows:

> "The residence permit, issued in accordance with the provisions of paragraphs 1 to 3 of this article, may be withdrawn:
>
> a) for reasons of national security, public policy or morals;
>
> b) if the holder refuses, after having been duly informed of the consequences of such refusal, to comply with the measures prescribed for him by an official medical authority with a view to the protection of public health;
>
> c) if a condition essential to its issue or validity is not fulfilled.
>
> Each Contracting Party nevertheless undertakes to grant to migrant workers whose residence permits have been withdrawn, an effective right to appeal, in accordance with the procedure for which provision is made in its legislation, to a judicial or administrative authority."

C. European Convention on Establishment

70. Article 3 § 2 of the European Convention on Establishment signed in Paris on 13 December 1955 reads as follows:

> "Except where imperative considerations of national security otherwise require, a national of any Contracting Party who has been so lawfully residing for more than two years in the territory of any other Party shall not be expelled without first being allowed to submit reasons against his expulsion and to appeal to, and be represented for the purpose before, a competent authority or a person or persons specially designated by the competent authority."

III. EUROPEAN UNION LAW AND CASE-LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

71. Article 12 (1) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, reads as follows:

> "Return decisions and, if issued, entry-ban decisions and decisions on removal shall be issued in writing and give reasons in fact and in law as well as information about available legal remedies.
>
> The information on reasons in fact may be limited where national law allows for the right to information to be restricted, in particular in order to safeguard national security, defence, public security and for the prevention, investigation, detection and prosecution of criminal offences."

72. The relevant Articles of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of

the Union and their family members to move and reside freely within the territory of the Member States, read as follows:

Article 28
Protection against expulsion

"1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.

2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.

3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:

(a) have resided in the host Member State for the previous ten years; or

(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989."

Article 31
Procedural safeguards

"1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.

2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:

- where the expulsion decision is based on a previous judicial decision; or

- where the persons concerned have had previous access to judicial review; or

- where the expulsion decision is based on imperative grounds of public security under Article 28(3).

3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.

4. Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory."

73. In the decision denying a citizen of the European Union admission to an European Union member State on public security grounds, and thus involving the citizenship and free movement rights of persons under European Union law, the Court of Justice of the European Union (CJEU) has found in the preliminary ruling in *ZZ v. the United Kingdom* (case C-300/11, 4 June 2013) as follows:

> "65. In this connection, first, in the light of the need to comply with Article 47 of the Charter, that procedure must ensure, to the greatest possible extent, that the adversarial principle is complied with, in order to enable the person concerned to contest the grounds on which the decision in question is based and to make submissions on the evidence relating to the decision and, therefore, to put forward an effective defence. In particular, the person concerned must be informed, in any event, of the essence of the grounds on which a decision refusing entry ... is based, as the necessary protection of State security cannot have the effect of denying the person concerned his right to be heard and, therefore, of rendering his right of redress ... ineffective.
>
> 66. Second, the weighing up of the right to effective judicial protection against the necessity to protect the security of the Member State concerned – upon which the conclusion set out in the preceding paragraph of the present judgment is founded – is not applicable in the same way to the evidence underlying the grounds that is adduced before the national court with jurisdiction. In certain cases, disclosure of that evidence is liable to compromise State security in a direct and specific manner, in that it may, in particular, endanger the life, health or freedom of persons or reveal the methods of investigation specifically used by the national security authorities and thus seriously impede, or even prevent, future performance of the tasks of those authorities.
>
> 67. In that context, the national court with jurisdiction has the task of assessing whether and to what extent the restrictions on the rights of the defence arising in particular from a failure to disclose the evidence and the precise and full grounds on which the decision ... is based are such as to affect the evidential value of the confidential evidence.
>
> 68. Accordingly, it is incumbent upon the national court with jurisdiction, first, to ensure that the person concerned is informed of the essence of the grounds which constitute the basis of the decision in question in a manner which takes due account of the necessary confidentiality of the evidence and, second, to draw, pursuant to national law, the appropriate conclusions from any failure to comply with that obligation to inform him."

IV. OTHER INTERNATIONAL MATERIALS

A. International Covenant on Civil and Political Rights

74. Article 13 of the International Covenant on Civil and Political Rights ("the Covenant"), to which Romania has been a party since its entry into force on 23 March 1976, reads as follows:

> "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed

by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

B. Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live

75. Article 7 of the Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live, annexed to General Assembly resolution 40/144 of 13 December 1985, provides that:

> "An alien lawfully in the territory of a State may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons why he or she should not be expelled and to have the case reviewed by, and be represented for the purpose before, the competent authority or a person or persons specially designated by the competent authority. Individual or collective expulsion of such aliens on grounds of race, colour, religion, culture, descent or national or ethnic origin is prohibited."

C. The General Recommendation No. 30 (2004) of the Committee on the Elimination of Racial Discrimination

76. In its General Recommendation No. 30 (2004) on discrimination against non-citizens, the Committee on the Elimination of Racial Discrimination recommended that States parties to the International Convention on the Elimination of All Forms of Racial Discrimination should:

> "25. Ensure that ... non-citizens have equal access to effective remedies, including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies."

D. International Law Commission's Draft Articles on the Expulsion of Aliens

77. At its sixty-sixth session, in 2014, the International Law Commission adopted a set of Draft Articles on the Expulsion of Aliens. The text, of which the United Nations General Assembly took note (Resolution A/RES/69/119 of 10 December 2014), includes the following provisions:

Article 26
Procedural rights of aliens subject to expulsion

> "1. An alien subject to expulsion enjoys the following procedural rights:
>
> (a) the right to receive notice of the expulsion decision;
>
> (b) the right to challenge the expulsion decision, except where compelling reasons of national security otherwise require;
>
> (c) the right to be heard by a competent authority;

(d) the right of access to effective remedies to challenge the expulsion decision;

(e) the right to be represented before the competent authority; and

(f) the right to have the free assistance of an interpreter if he or she cannot understand or speak the language used by the competent authority."

Commentary

"(1) Draft article 26, paragraph 1, sets out a list of procedural rights from which any alien subject to expulsion must benefit, irrespective of whether that person is lawfully or unlawfully present in the territory of the expelling State. The sole exception — to which reference is made in paragraph 4 of the draft article — is that of aliens who have been unlawfully present in the territory of that State for a brief duration.

(2) Paragraph 1 (a) sets forth the right to receive notice of the expulsion decision. The expelling State's respect for this essential guarantee is a *conditio sine qua non* for the exercise by an alien subject to expulsion of all of his or her procedural rights. This condition was explicitly embodied in article 22, paragraph 3, of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which stipulates that the expulsion decision "shall be communicated to them in a language they understand". In 1892 the Institute of International Law already expressed the view that "l'acte ordonnant l'expulsion est notifié à l'expulsé" [the expulsion order shall be notified to the expellee] and also that "si l'expulsé a la faculté de recourir à une haute cour judiciaire ou administrative, il doit être informé, par l'acte même, et de cette circonstance et du délai à observer" [if the expellee is entitled to appeal to a high judicial or administrative court, the expulsion order must indicate this and state the deadline for filing the appeal]. The legislation of several States contains a requirement that an expulsion decision must be notified to the alien concerned.

(3) Paragraph 1 (b) sets out the right to challenge the expulsion decision, a right well established in international law. At the universal level, article 13 of the International Covenant on Civil and Political Rights provides the individual facing expulsion with the right to submit the reasons against his or her expulsion, except where "compelling reasons of national security otherwise require"... The same right is to be found in article 7 of the Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live, annexed to General Assembly resolution 40/144 of 13 December 1985, which provides that "[a]n alien lawfully in the territory of a State ... shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons why he or she should not be expelled". At the regional level, article 1, paragraph 1 (a) of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms provides that an alien lawfully resident in the territory of a State and subject to an expulsion order shall be allowed "to submit reasons against his expulsion". Article 3, paragraph 2, of the European Convention on Establishment offers the same safeguard by providing that "[e]xcept where imperative considerations of national security otherwise require, a national of any Contracting Party who has been so lawfully residing for more than two years in the territory of any other Party shall not be expelled without first being allowed to submit reasons against his expulsion". Lastly, the right of an alien to contest his or her expulsion is also embodied in internal law.

(4) The right to be heard by a competent authority, set out in paragraph 1 (c), is essential for the exercise of the right to challenge an expulsion decision, which forms the subject of paragraph 1 (b). Although article 13 of the International Covenant on Civil and Political Rights does not expressly grant the alien the right to be heard, the

Human Rights Committee has taken the view that an expulsion decision adopted without the alien having been given an opportunity to be heard may raise questions under article 13 of the Covenant:

...

Article 83 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; article 32, paragraph 2, of the Convention relating to the Status of Refugees; article 31, paragraph 2, of the Convention relating to the Status of Stateless Persons; article 9, paragraph 5, of the European Convention on the Legal Status of Migrant Workers; and article 26, paragraph 2, of the Arab Charter on Human Rights also require that there be a possibility of appealing against an expulsion decision. This right to a review procedure has also been recognized, in terms which are identical to those of article 13 of the International Covenant on Civil and Political Rights, by the General Assembly in article 7 of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, annexed to General Assembly resolution 40/144.

...

(5) Paragraph 1 (d) sets out the right of access to effective remedies to challenge the expulsion decision. While article 13 of the International Covenant on Civil and Political Rights entitles an alien lawfully present in the expelling State to a review of the expulsion decision, it does not specify the type of authority which should undertake the review...

The Human Rights Committee has drawn attention to the fact that the right to a review, as well as the other guarantees provided in article 13, may be departed from only if "compelling reasons of national security" so require. The Committee has also stressed that the remedy at the disposal of the alien expelled must be an effective one:

...

(6) Paragraph 1 (e), the content of which is based on article 13 of the International Covenant on Civil and Political Rights, gives an alien subject to expulsion the right to be represented before the competent authority. From the standpoint of international law, this right does not necessarily encompass the right to be represented by a lawyer during expulsion proceedings. In any case, it does not encompass an obligation on the expelling State to pay the cost of representation.

(7) The right of an alien to the free assistance of an interpreter if he or she cannot understand or speak the language used by the competent authority, which is set out in paragraph 1 (f) and recognized in the legislation of a number of States, is an essential element of the right to be heard, which is set out in paragraph 1 (c). It is also of some relevance to the right to be notified of the expulsion decision and theright to challenge that decision, to which paragraphs 1 (a) and (b) of this draft article refer... ."

E. Judgment of the International Court of Justice (ICJ) of 30 November 2010 in the case of *Ahmadou Sadio Diallo*

78. On 30 November 2010 the International Court of Justice (ICJ) delivered a judgment in the case concerning *Ahmadou Sadio Diallo* ((*Republic of Guinea v. Democratic Republic of the Congo*), *Merits, Judgment, ICJ Reports 2010*, p.639). The ICJ considered Guinea's claim

that Mr. Diallo's expulsion had been in breach of Article 13 of the Covenant and Article 12 § 4 of the African Charter on Human and Peoples' Rights (the "African Charter"). The Court observed that, in order to comply with these provisions, the expulsion of an alien lawfully in the territory of a State which was a party to these instruments could be decided in accordance with the domestic law applicable in that respect — which itself had to be compatible with the other requirements of the Covenant and the African Charter — and must not be arbitrary in nature. The ICJ took the view that the expulsion decree had not complied with the provisions of Congolese law for two reasons: it had not been preceded by consultation of the national competent authority and it was not "reasoned", as required by the national law. It followed that in these two respects the expulsion had not been decided "in accordance with law" and was in violation of Article 13 of the Covenant and Article 12 § 4 of the African Charter. The ICJ further considered that Guinea was justified in contending that the right afforded by Article 13 of the Covenant to an alien who was subject to an expulsion measure to "submit the reasons against his expulsion and to have his case reviewed by the competent authority" had not been respected in the case of Mr. Diallo. The ICJ also noted that the Democratic Republic of the Congo had failed to demonstrate the "compelling reasons of national security" which supposedly justified Mr. Diallo being denied the right to submit the reasons against his expulsion and to have his case reviewed by the competent authority. The ICJ concluded that, on these grounds too, Article 13 of the Covenant had been violated in respect of the circumstances of Mr. Diallo's expulsion.

V. COMPARATIVE LAW MATERIAL

79. In the light of the comparative law material available to the Court concerning forty Council of Europe member States, the legislation in the vast majority of those States permits limitations on the right of access to classified documents and confidential information that have been submitted in support of an expulsion on national security grounds, including in the course of the judicial proceedings.

80. As to the extent of the factual information notified to the aliens in the context of expulsion proceedings on national security grounds, in six of the member States studied the aliens are in general fully informed of the case against them, although access to classified information may be restricted. In thirteen member States the aliens are informed in general terms of the facts on which the expulsion decision is based, but the national security issues underlying the decision are not fully disclosed. In seventeen member States, aliens are informed of the case against them in general terms but no information is given about classified evidence.

81. In Armenia there are no limitations on access to classified documents in the context of expulsion proceedings on national security grounds. In eleven of the member States the courts decide whether and to what extent the alien should have access to classified evidence. In twelve other States the alien in principle has no access to classified evidence. In some of those twelve States a court or another competent authority can nevertheless grant the alien access to classified information in specific circumstances. In seven of the member States studied, access to classified documents can be limited by the national authorities. In two States neither the alien nor his/her representative have access to this type of document.

82. In twenty-four member States, when access to classified documents is denied and the alien is not informed of the accusations against him, the courts must weigh up the various interests at stake. In the United Kingdom the special advocate analyses these interests when examining the relevance of the case submitted by the Secretary of State for the non-disclosure of classified documents. In four other member States, the courts may weigh up the interests at stake. In a fifth State there have been some cases where the courts did weigh up the interests and other cases where they did not.

83. In thirteen member States the courts can verify whether the classification of documents is properly justified by reasons of national security, while in sixteen other States they do not have the power to do so.

84. In Finland the courts can themselves declassify documents should they deem it necessary. In seven other member States the courts can request declassification of confidential information or documents, but they cannot declassify such information themselves. In fifteen member States the courts have no power to request declassification or to declassify documents themselves.

85. In twenty-two member States, domestic courts can verify the accuracy and relevance of the information in classified documents submitted to them. In eight other States, the domestic courts have no such power.

86. In seventeen member States, lawyers representing the alien can have access to classified material. In fifteen others the lawyers have no such access. In some of those fifteen, a lawyer may be able to gain access to classified documents after obtaining the necessary security clearance. The institution of a "special advocate" exists in Norway and the United Kingdom.

87. In Iceland there is no legal basis for the removal of lawfully resident aliens on national security grounds and in Liechtenstein such removal relates only to criminal cases.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 7 TO THE CONVENTION

88. Relying on Article 1 § 1 of Protocol No. 7 and Article 13 of the Convention, the applicants complained that they had not been afforded sufficient procedural safeguards and therefore had not been able to defend themselves effectively in the proceedings initiated by the application to have them declared undesirable persons in Romania on national security grounds. More specifically they alleged that they had not been notified of the actual accusations against them, whilst they did not have access to the documents in the file.

89. The Government contested the applicants' arguments.

90. The Court, being master of the characterisation to be given in law to the facts of the case (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, §§ 113-15 and § 126, 20 March 2018), finds it appropriate to examine the applicants' allegations solely under Article 1 of Protocol No. 7 to the Convention, of which the relevant part reads as follows:

> "1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
>
> (a) to submit reasons against his expulsion,
>
> (b) to have his case reviewed, and
>
> (c) to be represented for these purposes before the competent authority or a person or persons designated by that authority."

A. Admissibility

91. The Court reiterates that the safeguards provided for by Article 1 of Protocol No. 7 apply only to aliens who are "lawfully resident" in the territory of a State which has ratified this Protocol (see *Georgia v. Russia (I)* [GC], no. 13255/07, § 228, ECHR 2014, and *Sejdovic* and *Sulejmanovic v. Italy* (dec.), no. 57575/00, 14 March 2002). In the present case the applicants arrived in Romania to continue their university studies and had obtained long-stay visas for that purpose (see paragraphs 9 and 10 above). They were thus "lawfully resident" in Romania when the expulsion proceedings were initiated against them. Consequently, given that they were facing expulsion at a time when they were aliens lawfully residing in Romania, Article 1 of Protocol No. 7 is *ratione materiae* applicable in the present case.

92. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes

that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. *The parties' submissions and observations of the third-party interveners*

(a) The applicants

93. The applicants complained that the principle of the equality of arms had been breached, on the grounds that neither they nor their lawyers were able to take cognisance of the actual accusations against them, as the proceedings were based on documents classified as "secret".

94. They alleged that neither the administrative nor the judicial authorities had informed them of the acts of which they stood accused. In their submission, the fact of being informed before the Court of Appeal, by an interpreter, about the proposed measure against them and the corresponding provisions of Romanian law did not amount to the "communication" of the application initiating the proceedings. They added that, in any event, the application itself did not contain any indication of the content of the accusations against them.

95. The conditions imposed by the various applicable legal provisions in order to ensure the protection of classified information (see paragraphs 43 and 51 above) had prevented the national courts from informing them of any specific accusations.

96. The applicants further pointed out that the SRI press release of 6 December 2012 (see paragraph 30 above) had made public some more detailed information on the activities of which they were accused. Such a difference of approach between the Court of Appeal and the SRI as to the extent of the information that could be disclosed to the public called into question, in the applicants' view, the need for that information to be classified.

97. The applicants added that there was nothing in the case file to suggest that the documents, which were presented as falling under the "secret" category, had to be classified. The domestic courts were not required by law to verify whether the classification of the information by the SRI was justified or to analyse the reasons given by the latter for its refusal to transmit the classified documents to those concerned. Similarly, the law did not allow the domestic courts themselves to declassify any classified documents or information (see paragraph 51 above).

98. They further stated that Romanian law did not impose, in this type of case, any obligation on the judicial authorities to ensure that those concerned were assisted by a lawyer or to inform them of such a possibility, or to point out that some lawyers held an ORNISS certificate. They

admitted that in accordance with the statutory provisions governing civil procedure they could theoretically have been assisted before the Court of Appeal by a lawyer of their choosing. However, given the speed with which the proceedings were held and the distance they had to travel for the hearing before the Court of Appeal, they had not had enough time to find a lawyer.

99. As to the possibility for the lawyers who represented them in the High Court to obtain an ORNISS certificate, they alleged that the length of the procedure for that purpose was much longer than the procedure under Romanian law for the purposes of declaring a person undesirable (see paragraphs 35 and 54 above). As regards the possibility of being represented from the start of the proceedings by a lawyer who held an ORNISS certificate, the applicants stated that, according to their research, the website of the Bucharest Bar contained no information to enable them to identify an authorised lawyer. They referred to a letter of the National Union of Romanian Bars (UNBR), which explained that there was no list of the lawyers who held an ORNISS certificate (see paragraph 58 above). They argued that, in any event, having regard to the applicable domestic rules (see paragraphs 43 and 51 above), even a lawyer holding an ORNISS certificate would not have been able to disclose the classified information to them.

100. They explained that, even though it was not prohibited under the statutory provisions applicable to this type of procedure for the court to verify the information submitted to it by the SRI and the public prosecutor, including by the taking of evidence of its own motion, they had doubts about the extent of the review by the national courts as to the well-foundedness of the measure against them. In this context they pointed to the refusal by the High Court, without giving any reasoning, to grant their request to obtain, by official means, certain bank information concerning them. They took the view that the proceedings had been a mere formality and that the court simply assumed that the SRI's request and the public prosecutor's application initiating the proceedings had been well-founded.

101. Lastly, the applicants alleged that they had sustained damage as a result of their expulsion, entailing their inability to pursue their university studies and their social isolation, including from their families, and since their reputations had been tarnished on account of the serious accusations against them. They alleged that after returning to Pakistan they had been subjected to an investigation in order to verify the accusations of terrorist acts but it had not yielded any results.

(b) The Government

102. The Government stated that preventing and combating threats to national security were priority tasks for the national security authorities. The SRI was the legally established national authority responsible for preventing and combating terrorism, and as such it was competent to request the limitation of certain rights of aliens in Romania. Similarly, in order to

prevent terrorist acts, in cooperation with other authorities acting in the field of national security, the SRI was competent to collect, verify and use, through special techniques, the information necessary for the prevention of terrorism. In accordance with the relevant legal provisions (see paragraph 51 above), the information thus obtained by the SRI, together with the means and equipment used to obtain it, was classified as "State secret" information.

103. The Government explained that the exclusion and expulsion of an alien were administrative measures to prevent or combat terrorism. As to the conduct of this procedure, they stated first of all that it was the SRI which transmitted to the public prosecutor's office at the Bucharest Court of Appeal the intelligence that it regarded as justifying an application to have an alien declared undesirable in Romania. If, after an assessment of that intelligence, the public prosecutor considered the SRI's request to be well-founded, he would refer the matter to the Bucharest Court of Appeal. The application initiating the court proceedings, which contained the legal characterisation of the accusations against the alien and sometimes certain specific factual material, was notified to the person concerned.

104. The Government explained that, under domestic law, the national courts competent to deal with such cases, and of which they emphasised the independence and impartiality, had access to all classified documents on which the prosecution's application was based. Even if those courts were not themselves competent to declassify the classified data and information made available to them, they could ask the competent authority to analyse the desirability of declassifying or reclassifying the documents for the purpose of placing them on file for consultation by the interested party. Moreover, there was no statutory provision allowing national courts to examine of their own motion whether the classification of the information in question was justified. However, where the legality of the classification of documents was challenged in the context of the appeal, the competent court might review the matter within the confines of the law.

105. Referring to the examples of case-law they had submitted (see paragraphs 60 to 61 above), the Government further indicated that, as a general rule, after having first examined the classified documents forwarded by the public prosecutor's office, the Court of Appeal would notify the person concerned of the information it considered sufficient to enable him or her, with the help of an interpreter, to understand the essence of the facts underlying the proceedings. However, they pointed out that the court would not disclose data which, in its opinion, might have a bearing on national security. They argued that, in order to fulfil their obligation to inform aliens of the accusations against them, Romanian courts were required to strike a fair balance between the competing interests at stake: on the one hand, to provide aliens with sufficient information to enable them to defend

themselves and, on the other, to comply with the legal provisions governing the confidentiality of classified information.

106. The Government submitted that the practice of Romanian courts to inform aliens of the essence of the accusations against them was in line with both the case-law of the European Court of Justice (CJEU judgment of 10 September 2014 in *Ben Alaya v. Bundesrepublik Deutschland*, C-491/13, EU:C:2014:2187, § 33, and CJEU judgment of 4 June 2013 in *ZZ v. Secretary of State for the Home Department*, C-300/11, ECLI:EU:C:2013:363) and of the Court (*Regner v. the Czech Republic* [GC], no. 35289/11, 19 September 2017). They noted that, while the practice of domestic courts fluctuated until 2015 or 2016 as to the extent of the factual information to be disclosed to aliens in this type of proceedings, after that period the case-law had become consolidated in the sense of providing specific information to those concerned. In the present case they argued that, even assuming, as the applicants claimed, that the Court of Appeal had not provided them with sufficient factual information about the suspicions against them, they had at least taken cognisance of those suspicions as a result of the SRI press release of 6 December 2012. They explained in this regard that the SRI would inform the public, through press releases, about information of public interest, but never disclosed classified information.

107. The Government emphasised, referring to the examples of case-law they had provided to the Court (see paragraphs 62 and 63 above) that, when national courts made their examination of the need to declare an alien undesirable, they would take into account not only classified documents but also any other evidence or information brought to their attention by the person concerned, also having regard to the potential consequences for national security of the activities of which the aliens were suspected if they were not removed from the country. Where the decision to declare a person undesirable was based on classified data or information related to national security, the law expressly prohibited any mention of such classified material in the text of the decision.

108. Lastly, the Government stated that, under domestic law, an alien who was the subject of proceedings to have him or her declared undesirable was not allowed to consult classified documents. However, he or she could be represented by a lawyer holding an ORNISS certificate and the lawyer would have such access. If the lawyer chosen by the alien concerned did not hold such a certificate, that lawyer could request the adjournment of the proceedings in order to take the necessary steps to obtain one or to contact a lawyer already holding such a certificate. In the Government's view, even though the lawyer holding an ORNISS certificate had to comply with the legal provisions concerning the protection of the classified documents that he consulted, he would nevertheless be able to prepare the alien's defence accordingly and seek evidence to counter the information contained in the

classified documents. The Government added that in the present case the lawyers chosen by the applicants had not held an ORNISS certificate and that they had not made a request for adjournment of the proceedings for the purpose of taking steps to obtain such a certificate or of seeking replacement by other lawyers so authorised.

109. The Government concluded that, in the present case, the applicants had enjoyed sufficient safeguards to meet the requirements of Article 1 of Protocol No. 7 and the Court's case-law in such matters. Even though the applicants' right of access to classified data and information had been limited, they had received sufficient information to prepare their defence. The decision against them had been rendered in compliance with the applicable legal provisions. Their case had effectively been examined by two independent and impartial courts which had access to all the documents and had established the need to protect national security by removing them from Romania. They had appeared in person and were represented by lawyers at the hearings of those courts.

(c) Third-party interveners

(i) Helsinki Foundation for Human Rights and the Association for Legal Intervention

110. The Helsinki Foundation for Human Rights and the Association for Legal Intervention (*Stowarzyszenie Interwencji Prawnej*) took the view that, irrespective of whether or not the court taking the decision had access to the classified documents, the minimum procedural safeguards imposed by Article 1 of Protocol No. 7 could not be guaranteed unless the aliens being deported were informed of the main grounds on which the decision against them was based. The aliens, or if appropriate their representative, had to be made aware of the factual reasons underlying the expulsion, in order for the proceedings to be consistent with the relevant case-law of the CJEU, with EU legislation and with United Nations standards in matters of expulsion of aliens.

(ii) Amnesty International

111. Amnesty International was of the view that the safeguards inherent in the right to a fair trial could be transposed to the subject-matter of Article 1 of Protocol No. 7. Thus the principle of adversarial proceedings and the equality of arms, the obligation of the courts to provide reasons for their decisions and the protection against arbitrariness should preclude the use in judicial proceedings of classified documents to which the individual or his legal representative had no access and in the absence of which the individual could not usefully prepare his or her defence. The use of such documents would be all the more problematic where the person concerned

alleged that, in the event of expulsion, he or she would be exposed to treatment prohibited by Article 3 of the Convention.

(iii) The United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

112. The United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism ("the Special Rapporteur") stated that the use of classified evidence, whether the proceedings were criminal, civil or migration-related, must remain exceptional because it ran counter to the principle of free access to a court, the adversarial principle and the equality of arms. The Special Rapporteur took the view that the concept of "national security" must be defined precisely in order to avoid its improper use and that the authorities had a duty to prove that a case fell within national security. The use of classified evidence, which was often not properly regulated by domestic law, had to remain exceptional and be subjected to a very stringent admissibility test. She drew attention to the fact that deportation proceedings might have a significant impact on an individual, where the classified information indicated that he or she could be involved in terrorist activity or linked to a terrorist group, on account of the practical consequences that such a characterisation might have for the person concerned.

2. The Court's assessment

113. The Court notes that the applicants relied on the right to be informed, during the proceedings initiated by the application to have them declared undesirable, of the specific factual reasons underlying that application. They also submitted that the refusal to allow them to consult the classified documents submitted by the public prosecutor's office to the Court of Appeal in support of the application for their expulsion had breached their right of access to the case file.

(a) General principles

(i) The Court's case-law

114. The Court reiterates that, as a matter of well-established international law and subject to their treaty obligations, the States have the right to control the entry, residence and expulsion of aliens. The Convention does not guarantee the right of an alien to enter or to reside in a particular country (see, among many other authorities, *De Souza Ribeiro v. France* [GC], no. 22689/07, § 77, ECHR 2012, and *Ilias and Ahmed v. Hungary* [GC], no. 47287/15, § 125, 21 November 2019).

115. Administrative proceedings concerning the expulsion of an alien do not pertain to the determination of a civil right or obligation, or of a criminal

charge, for the purposes of Article 6 § 1 (see *Maaouia v. France* [GC], no. 39652/98, § 38, ECHR 2000-X). The States, being aware that Article 6 of the Convention did not apply to procedures for the expulsion of aliens, wished to take special measures in that sphere and thus adopted Article 1 of Protocol No. 7, which defines the procedural safeguards applicable to this type of procedure (ibid., § 36; see also points 6, 7 and 16 of the Explanatory Report in respect of Protocol No. 7 cited in paragraph 68 above).

116. Article 1 § 1 of Protocol No. 7 refers expressly to aliens "lawfully resident in the territory of a State" (see *Georgia v. Russia (I)*, cited above, § 228) and who, in the event of expulsion, enjoy the specific safeguards provided for by this provision (see *C.G. and Others v. Bulgaria*, no. 1365/07, § 70, 24 April 2008, and *Ljatifi v. "the former Yugoslav Republic of Macedonia"*, no. 19017/16, § 32, 17 May 2018). Article 1 § 2 of Protocol No. 7 provides for an exception, enabling States to expel an alien who is lawfully resident on its territory even before he or she has exercised the rights afforded under Article 1 § 1, in cases where such expulsion is necessary in the interests of public order or for reasons of national security.

117. According to the Explanatory Report on Protocol No. 7, in adopting Article 1 of Protocol No. 7 the States agreed to "minimum" procedural safeguards in the event of expulsion (see point 7 of that report quoted in paragraph 68 above).

118. Article 1 § 1 of Protocol No. 7 establishes as the first basic safeguard that the person concerned may be expelled only "in pursuance of a decision reached in accordance with law". This phrase has a similar meaning throughout the Convention and its Protocols (see *C.G. and Others*, cited above, § 73). It concerns not only the existence of a legal basis in domestic law, but also the quality of the law in question: it must be accessible and foreseeable and must also afford a measure of protection against arbitrary interference by the public authorities with the Convention rights (see *Lupsa v. Romania*, no. 10337/04, § 55, ECHR 2006-VII, and *Baltaji v. Bulgaria*, no. 12919/04, § 55, 12 July 2011). This equally applies to Convention provisions which lay down procedural rights, as does Article 1 of Protocol No. 7, for it is well established case-law that the rule of law, which is expressly mentioned in the Preamble to the Convention, is inherent in all the Articles of the Convention (see *Baka v. Hungary* [GC], no. 20261/12, § 117, 23 June 2016). Arbitrariness entails a negation of the rule of law (see *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, § 145, 21 June 2016) and could not be more tolerated in respect of procedural rights than it is in respect of substantive rights.

119. In addition to the general condition of legality, Article 1 § 1 of Protocol No. 7 provides for three specific procedural safeguards: aliens must be able to submit reasons against their expulsion, to have their case reviewed and, lastly, to be represented for these purposes before the

competent authority (see point 12 of the Explanatory Report cited in paragraph 68 above).

120. In certain cases, the Court has had occasion to examine, besides the quality of the domestic law, the safeguards enumerated in Article 1 § 1 of Protocol No. 7. In order to ascertain whether these safeguards were afforded in the relevant cases, it took account of the following circumstances: the order initiating the proceedings had not been notified to the alien (see *Lupsa*, cited above, § 59); the courts had refused to examine on the merits an appeal against the expulsion decision and no independent or impartial authority had examined that decision (see *Baltaji*, cited above, § 57); the applicant had not been able, at any stage in the proceedings, to ascertain even the slightest factual reasons for his expulsion, so that he was unable to submit reasons against that decision (*Lupsa*, cited above, § 59; *Ahmed v. Romania*, no. 34621/03, § 53, 13 July 2010; *Geleri v. Romania*, no. 33118/05, § 46, 15 February 2011; and *Baltaji*, cited above, § 58); the competent court had rejected any request for adjournment, thus preventing the applicant's lawyer from studying the order against him (see *Lupsa*, cited above, § 59); and the review by the domestic courts had been a mere formality (see *C.G. and Others*, cited above, §§ 73 and 74; *Kaushal and Others v. Bulgaria*, no. 1537/08, § 49, 2 September 2010; *Geleri*, cited above, § 48; and *Takush v. Greece*, no. 2853/09, §§ 60-63, 17 January 2012).

121. More recently, in the case of *Ljatifi v. "the former Yugoslav Republic of Macedonia"* (cited above), in examining the compatibility with Article 1 § 1 (a) and (b) of Protocol No. 7 of an expulsion decision on national security grounds, the Court summed up the applicable principles as follows:

> "35. In so far as the impugned order was based on national security considerations, the Court has held that the requirement of foreseeability does not go so far as to compel States to enact legal provisions listing in detail all conduct that may prompt a decision to expel an individual on national security grounds. However, even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that deportation measures affecting fundamental human rights be subject to some form of adversarial proceedings before an independent authority or a court competent to effectively scrutinise the reasons for them and review the relevant evidence, if need be with appropriate procedural limitations on the use of classified information. The individual must be able to challenge the executive's assertion that national security is at stake. While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority or court must be able to react in cases where the invocation of this concept has no reasonable basis in the facts or reveals an interpretation of 'national security' that is unlawful or contrary to common sense and arbitrary (see *C.G. and Others,* cited above, § 40)."

122. In the context of Article 1 of Protocol No. 7 the Court has taken into account the fact that the object and purpose of the Convention, as an instrument of human rights protection, call for an understanding and

application of its provisions such as to render its requirements practical and effective, not theoretical and illusory (see *Geleri*, cited above, § 48, and *Takush*, cited above, § 63). This is a general principle of interpretation of all the provisions of the Convention and the Protocols thereto (see, for example, *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37; *Soering v. the United Kingdom*, 7 July 1989, § 87, Series A no. 161; and *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 121, 8 November 2016).

123. It follows from the foregoing that in cases concerning Article 1 § 1 of Protocol No. 7 the Court has always sought to ensure that the expulsion decision was not arbitrary (see paragraphs 116 and 121 above) and that the alien was able to exercise effectively the rights enumerated in that first paragraph (see paragraphs 119 and 121 above).

124. The Court will examine successively, in the light of the above case-law, whether, and if so, to what extent the rights asserted by the applicants are protected by Article 1 of Protocol No. 7 *(ii)*, the possibility of restricting them *(iii)*, and the criteria to be taken into account in determining the compatibility of a limitation of those rights with Article 1 of Protocol No. 7 *(iv)*.

(ii) Whether, and if so, to what extent the rights asserted by the applicants are protected by Article 1 of Protocol No. 7

125. The Court observes that the rights asserted by the applicants, namely the right to be informed of the reasons for their expulsion and the right to have access to the documents in the case file, are not expressly mentioned in the text of Article 1 of Protocol No. 7. It is thus for the Court to determine, bearing in mind that the Convention secures rights which are "practical and effective", whether and, if so, to what extent those rights may be regarded as required by the first paragraph of that Article.

126. The Court reiterates that the condition laid down in Article 1 § 1 of Protocol No. 7, namely that an alien cannot be expelled except in pursuance of a decision reached "in accordance with law" implies, as mentioned above, that the law in question satisfies the quality criteria required by the Court's case-law in such matters, including the quality of ensuring protection against arbitrariness on the part of the authorities (see paragraph 118 above). In addition, Article 1 § 1 (a) of Protocol No. 7 expressly guarantees the right for the alien to submit reasons against his expulsion. In the Court's opinion, an alien cannot meaningfully challenge the authorities' allegations to the effect that national security is at stake, or reasonably submit reasons against his expulsion without being aware of the relevant factual elements which have led the domestic authorities to believe that the alien represents a threat to national security. Such information is essential in order to ensure the effective exercise by the alien of the right enshrined in Article 1 § 1 (a) of Protocol No. 7.

127. In the cases previously examined by the Court under Article 1 of Protocol No. 7, the applicants had not been informed of the specific accusations against them, or even of the general context on which the expulsion was based, as the submissions initiating the proceedings had merely referred to intelligence to the effect that they had engaged in activities capable of endangering national security (see, for example, *Lupsa*, cited above, § 10; *Kaushal and Others*, cited above, § 6; *Baltaji*, cited above, § 9; and *Ljatifi*, cited above, § 7). In those cases the Court required that at least an "independent body or tribunal" should be informed of the "grounds for the decision and the relevant evidence", but without addressing the question whether it was also necessary for those grounds to be disclosed to the person concerned. However, the Court has found that Article 1 of Protocol No. 7 enshrines a right for the alien to be notified of the accusations against him (see *Lupsa*, cited above, § 59) and it has always found fault with a failure to provide any information to those concerned about the reasons underlying an expulsion decision (see *Lupsa*, cited above, §§ 40 and 56; *Ahmed*, cited above, § 53; *Kaushal and Others*, cited above, §§ 30 and 48; *Baltaji*, cited above, § 58; and *Ljatifi*, cited above, §§ 36-39).

128. As to the right of access to the documents in the file, this has not so far been enshrined as such in the Court's case-law under Article 1 of Protocol No. 7. The Court has nevertheless had occasion to state, even where national security was at stake, that deportation measures must be subject to some form of adversarial proceedings, if need be with appropriate procedural limitations as to the use of classified information (see *Ljatifi*, cited above, § 35). In the Court's opinion, this implies that, under Article 1 of Protocol No. 7, a right is secured to the alien to be informed, preferably in writing and in any event in a way allowing an effective defence, of the content of the documents and the information relied upon by the competent national authority which is deciding on the alien's expulsion, without prejudice to the possibility of imposing duly justified limitations on such information if necessary.

129. Having regard to the foregoing, the Court finds that Article 1 § 1 of Protocol No. 7 requires in principle that the aliens concerned be informed of the relevant factual elements which have led the competent domestic authorities to consider that they represent a threat to national security and that they be given access to the content of the documents and the information in the case file on which those authorities relied when deciding on their expulsion.

(iii) Permissible limitations of both the right to be informed of relevant factual elements underlying the expulsion decision and the right of access to the content of the documents and the information relied upon by the competent national authority

130. Nevertheless, these rights are not absolute. As in certain criminal proceedings, administrative expulsion proceedings may also be characterised by the presence of competing interests – such as national security, the need to protect witnesses at risk of reprisals or the requisite secrecy of police investigation methods – which must be weighed in the balance against the rights of the alien (see, among many other authorities, *Jasper v. the United Kingdom* [GC], no. 27052/95, § 52, 16 February 2000, for an example of criminal proceedings; and *Regner*, cited above, § 148, for administrative proceedings). The Court has also found that Contracting States enjoy a certain margin of appreciation in such matters (see *Regner*, cited above, § 147).

131. The Court has also accepted limitations of an applicant's rights to access the file and to be informed of the accusations in cases concerning expulsion proceedings where national security was invoked (see, among other authorities, *Al-Nashif v. Bulgaria*, no. 50963/99, § 137, 20 June 2002, concerning Articles 8 and 13 of the Convention, and *Ljatifi*, cited above, § 35 concerning Article 1 of Protocol No. 7). Moreover, the Court finds that, as regards the possibility of limiting the procedural rights of aliens facing expulsion, the vast majority of member States expressly provide in their domestic legislation for the possibility of such limitations where national security is at stake (see paragraph 79 above).

132. The Court reiterates that it is acutely conscious of the extent of the danger represented by terrorism and the threat it poses to society, and consequently of the importance of counter-terrorism considerations. It is also aware of the considerable difficulties currently faced by States in protecting their populations against terrorist violence (see, among other authorities, *Öcalan v. Turkey* [GC], no. 46221/99, § 179, ECHR 2005-IV; *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 126, ECHR 2009; and *A. v. the Netherlands*, no. 4900/06, § 143, 20 July 2010). Accordingly, Article 1 of Protocol No. 7 should not be applied in such a manner as to put disproportionate difficulties in the way of the competent authorities in taking effective measures to counter terrorism and other serious crimes, in the discharge of their duty under Article 2, Article 3 and Article 5 § 1 of the Convention to protect the right to life and the right to bodily security of members of the public (see, *mutatis mutandis*, *Sher and Others v. United Kingdom*, no. 5201/11, § 149, ECHR 2015 (extracts), and *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 252, 13 September 2016).

133. Nevertheless, any limitations of the rights in question must not negate the procedural protection guaranteed by Article 1 of Protocol No. 7

by impairing the very essence of the safeguards enshrined in this provision (see, *mutatis mutandis*, *Regner*, cited above, § 148). Even in the event of limitations, the alien must be offered an effective opportunity to submit reasons against his expulsion and be protected against any arbitrariness. The Court will therefore first ascertain whether the limitations of the alien's procedural rights have been found to be duly justified by the competent independent authority in the light of the particular circumstances of the case. The Court will then examine whether the difficulties resulting from these limitations for the alien concerned were sufficiently compensated for by counterbalancing factors. Thus, only limitations which, in the circumstances of each case, are duly justified and sufficiently counterbalanced will be permissible in the context of Article 1 of Protocol No. 7.

(iv) Criteria used to determine whether limitations imposed on the right to be informed of the relevant factual elements underlying the expulsion decision and the right of access to the content of the documents and the information relied upon by the competent national authority are compatible with Article 1 § 1 of Protocol No. 7

134. The Court observes that it has previously found, under Article 6 of the Convention, that even where national security or public order interests were involved, only those limitations of procedural rights which did not impair the very essence of those rights would be legitimate (see, for example, *Regner*, cited above, § 148; and, *mutatis mutandis*, *Fayed v. the United Kingdom*, 21 September 1994, § 54, Series A no. 294-B, and *Omar v. France*, 29 July 1998, § 34, *Reports of Judgments and Decisions* 1998-V). When confronted with limitations on certain procedural rights, it has frequently taken the view that the effects of such limitations on the situation of those concerned must be sufficiently counterbalanced by the procedures followed by the national authorities (see, for example, *Jasper*, cited above, § 52; *Fitt v. the United Kingdom* [GC], no. 29777/96, § 45 with other references, ECHR 2000-II; and *Schatschaschwili v. Germany* [GC], no. 9154/10, § 107, ECHR 2015 concerning Article 6 of the Convention, and *A. and Others*, cited above, § 218, concerning Article 5 § 4 of the Convention).

135. While it cannot be inferred from the above references to the case-law under Articles 5 and 6 of the Convention that the extent of the procedural safeguards should necessarily be the same under Article 1 § 1 of Protocol No. 7, this case-law nevertheless provides useful indications as the methodology to be followed in assessing limitations of the rights guaranteed by Article 1 of Protocol No. 7.

136. Thus, the Court will now determine under what circumstances limitations of the right to be informed of the factual elements underlying the expulsion decision and/or limitations of the right of access to the content of the documents and the information relied on by the national authority

competent to decide on the expulsion are compatible with Article 1 § 1 of Protocol No. 7. For the sake of convenience, those rights will be referred to below as the alien's "procedural rights".

137. For this purpose, the Court considers that it must first ascertain whether the restrictions in question were duly justified in the circumstances of the case and subsequently assess whether those limitations were sufficiently counterbalanced, in particular by procedural safeguards, such as to preserve the very essence of the relevant rights (see paragraph 133 above).

138. The Court will carry out its examination having regard to the circumstances of a given case, taking into account the proceedings as a whole. This approach is consistent with the role of the Court, whose task is not to review the relevant law and practice *in abstracto*, but to determine whether the manner in which they affected the applicant gave rise to a violation of the Convention (see, *mutatis mutandis, N.C. v. Italy* [GC], no. 24952/94, § 56, ECHR 2002-X).

(α) Whether the limitation on the aliens' "procedural rights" was duly justified

139. The Court accepts that there may be duly justified reasons, such as the need to protect national security, for limitations to be imposed on the alien's procedural rights. In accordance with the principle of subsidiarity, it falls primarily to the national authorities to assess whether limitations on an alien's procedural rights are needed in a given case and are duly justified (see, *mutatis mutandis*, *Schatschaschwili*, cited above, § 119). The Court shall therefore examine the decision-making procedure in which the limitation of the alien's procedural rights was imposed. In this connection, the Court reiterates that, in a democratic society governed by the rule of law, this assessment of the necessity of the limitation of an alien's procedural rights should be surrounded by safeguards against arbitrariness (see paragraph 118 above). Requirements to that end include the need for the decision imposing such restrictions to be duly reasoned and, particularly in the event that those reasons are not disclosed to the person concerned, a procedure allowing for these reasons to be properly scrutinised.

140. In order for such scrutiny to be in accordance with the rule of law, which opposes legal discretion being granted to the executive in terms of an unfettered power (see, *mutatis mutandis*, *Amann v. Switzerland* [GC], no. 27798/95, § 56, ECHR 2000-II), it should be entrusted to an authority, judicial or not, which is independent from the executive body seeking to impose the limitation (see, *mutatis mutandis*, *Klass and Others v. Germany*, 6 September 1978, §§ 55-56, Series A no. 28, and *Roman Zakharov v. Russia* [GC], no. 47143/06, § 233, ECHR 2015). In this connection, it is recalled that in the context of examining the compatibility with Article 1 § 1 (a) and (b) of Protocol No. 7 of an expulsion decision taken on national

security grounds, the Court has stressed the need for independent scrutiny in respect of an assessment of those grounds (see *Ljatifi*, cited above, § 35).

141. The question whether an independent national authority has examined the need for limitations on the alien's procedural rights is thus the first criterion to be applied in the Court's examination under Article 1 of Protocol No. 7. In that context, the Court will attach weight to the scope of the remit of that national authority, and in particular consider whether it is entitled to review the need to maintain the confidentiality of the classified information (see, *mutatis mutandis*, *Regner*, cited above, § 152).

142. The Court will then also have to examine the powers vested in the independent authority, depending on its findings in a given case as to the need to limit an alien's procedural rights. More specifically, it should ascertain, in cases where the independent authority found that national security did not justify the refusal to disclose to the alien concerned the content of the documents and of the information relied upon by the authority having decided on the expulsion, whether that independent authority was entitled to ask the competent body in matters of national security to review the classification of the documents or whether it was itself able to declassify them (see, *mutatis mutandis*, *Regner*, cited above, § 152), so that they could be transmitted to the alien, or at least so that the latter could be notified of their content.

143. By contrast, where it was found by the independent authority that the protection of national security did preclude the disclosure to the alien of the content of the classified documents, the Court must determine whether, in reaching that conclusion, the authority duly identified the interests at stake and weighed up the national security interests against the alien's interests.

144. However, should the national authorities have failed to examine – or have insufficiently examined and justified – the need for limitations on the alien's procedural rights, this will not suffice in itself to entail a violation of Article 1 § 1 of Protocol No. 7. In any event, the Court will also ascertain whether any counterbalancing measures have been applied in the case at hand and, if so, whether they were sufficient to mitigate the limitations of the alien's procedural rights, such as to preserve the very essence of those rights.

145. As regards the examination by the national authorities of the need to place limitations on the alien's procedural rights, the less stringent the examination, the stricter the Court's scrutiny of the counterbalancing factors will have to be (see, for the methodology, *mutatis mutandis*, *Ibrahim and Others*, cited above, § 265; see paragraph 133 above). To be precise, an excessively cursory examination at national level of the need to limit the rights in question will call for the implementation of enhanced counterbalancing factors in order to ensure the preservation, depending on

the circumstances of the case, of the very essence of the rights secured by Article 1 § 1 of Protocol No. 7 (see paragraph 133 above).

146. In its assessment, the Court will be guided by two basic principles: first, the more the information available to the alien is limited, the more the safeguards will be important, in order to counterbalance the limitation of his or her procedural rights; secondly, where the circumstances of a case reveal particularly significant repercussions for the alien's situation, the counterbalancing safeguards must be strengthened accordingly.

(β) Whether the limitations on the alien's "procedural rights" were sufficiently compensated for by counterbalancing factors

147. In the second stage of its examination (see paragraph 136 above), the Court will ascertain whether the limitations on the alien's procedural rights have been counterbalanced by appropriate and adequate safeguards.

148. In this connection the Court notes that it cannot be seen from the information at its disposal that there is a European consensus as to the types of factors that would be capable of counterbalancing the limitations of aliens' procedural rights or as to the scope of such factors. Limitations on the right of access to classified documents and on the disclosure of the reasons underlying the expulsion decision may be mitigated through mechanisms which vary according to the specificities of the legislation or procedure put in place in a given country (see paragraphs 82-86 above).

149. The Court infers from the above that under Article 1 of Protocol No. 7 the States should be afforded a certain margin of appreciation in the choice of factors to be put in place in order to counterbalance any limitation of procedural rights. This margin of appreciation nevertheless goes hand in hand with a European supervision and in such cases the Court's task is to ensure that the procedural protection guaranteed by Article 1 of Protocol No. 1 is not negated (see paragraph 133 above).

150. Where expulsion proceedings are examined as a whole, such as to assess the consequences of certain limitations on the effective exercise by aliens of their procedural rights, the following factors, enumerated non-exhaustively and based on the Court's case-law and on the comparative analysis (see paragraphs 80-86 above), should be taken into account (see also, *mutatis mutandis*, *Ibrahim and Others*, cited above, § 274, and *Beuze v. Belgium* [GC], no. 71409/10, § 150, 9 November 2018).

– *The relevance of the information disclosed to the alien as to the grounds for his expulsion and the access provided to the content of the documents relied upon*

151. The Court's case-law does not set *in abstracto* the volume of information to be provided to aliens, as this will vary depending on the circumstances of each case. The Court will therefore, in each case, take account of the relevance of the information actually disclosed to the alien

with regard both to the factual elements underlying the expulsion decision and the access to the content of the documents and information relied upon by the authority making that decision. It will ascertain whether the national authorities have, to the extent compatible with maintaining the confidentiality and proper conduct of investigations, informed the alien concerned, in the proceedings, of the substance of the accusations against him or her (see, in the same vein, *Lupsa*, cited above, § 59, *Ljatifi*, cited above, § 39, and, *mutatis mutandis*, *Regner*, cited above, § 153).

152. A further question of importance is whether it falls upon a judicial or other independent authority to determine, in a given case, after examining all the classified evidence, which factual information may be disclosed to the alien concerned without endangering national security, provided it is disclosed at a stage of the proceedings when the alien is still able meaningfully to challenge that information.

– *Disclosure to the alien of information as to the conduct of the proceedings and the domestic mechanisms in place to counterbalance the limitation of his or her rights*

153. The Court further takes the view that the provision to those concerned of minimum but adequate information as to their rights under domestic law constitutes an inherent prerequisite to ensure the effective exercise of those rights (see, *mutatis mutandis*, *Ibrahim and Others*, cited above, § 272, and *Beuze*, cited above, § 129). In this type of case, the Court will ascertain whether the domestic authorities have provided the requisite information to the alien, at least at key stages in the proceedings. Such information will particularly be useful where aliens are not represented by a lawyer and where a lack of relevant information may result in their failure to exercise rights available to them in domestic law. Lastly, this obligation to provide information will be all the more important in cases where the rules of domestic procedure impose a certain expedition in the examination of the case.

– *Whether the alien was represented*

154. As indicated by Article 1 § 1 (c) of Protocol No. 7, aliens must be able to obtain representation before the competent authority for the purposes of the decision on their expulsion. This implies first that provisions of domestic law afford an effective possibility of representation in such cases. The possibility for an alien to be represented by a lawyer, or even by a specialised lawyer who holds the relevant authorisations to access classified documents in the case file which are not accessible to the alien, therefore constitutes a significant counterbalancing factor. The Court will further consider whether it was possible in practice for the alien to have effective access to such representation in the course of the proceedings in question.

155. The Court will regard the rights enjoyed by the alien's representative in a given case as a further significant safeguard. On that basis it will examine, for example, the extent to which access to the documents in the case file, including classified documents not accessible to the alien, was provided to the alien's representative. It will further consider whether or not the representative's communication with his or her client was restricted once the access to the classified material had been obtained (see, *mutatis mutandis*, *A. and Others*, cited above, § 220).

– *Whether an independent authority was involved in the proceedings*

156. Article 1 § 1 (a) and (b) of Protocol No. 7 provides that the alien concerned has the right to "submit reasons against his expulsion" and to "have his case reviewed". In the Court's opinion, the following aspects could be taken into account when assessing compliance with those provisions:

(i) Whether one or more independent authorities, either administrative or judicial, were involved in the proceedings, either to adopt the expulsion measure directly or to review its legality, or even its merits (see, among many other authorities, *Al-Nashif*, cited above, § 137; *Lupsa*, cited above, § 56; and *Ljatifi*, cited above, § 32); and where that authority is a court, the question of its level in the hierarchy of the national legal system. In this connection, judicial scrutiny of the expulsion measure will have in principle a greater counterbalancing effect than an administrative form of scrutiny.

(ii) Whether the applicant was able to challenge, in an effective manner and before an independent authority, the allegations against him according to which he represented a danger for national security (see *Ljatifi*, cited above, § 35).

(iii) Whether the independent authority had the power to effectively examine the grounds underlying the expulsion application or decision, as the case may be, and the supporting evidence adduced, and if so, whether it duly exercised that power in the case at hand (see *C.G. and Others*, cited above, §§ 73 and 74; *Geleri*, cited above, § 48; and *Ljatifi*, cited above, § 35). On this point, the Court will take account of whether, to perform its task in that regard, that authority had access to the totality of the file constituted by the relevant national security body in order to make its case against the alien, including to the classified documents (see *Ljatifi*, cited above, § 32). Another major factor will be the power of that authority to verify the authenticity of the documents in the file, together with the credibility and veracity of the classified information adduced in support of the expulsion application or decision, as the case may be (see *C.G. and Others*, cited above, §§ 73-74; *Kaushal and Others,* cited above, § 49; and, *mutatis mutandis*, *Regner*, § 152). In this connection, there is no presumption that the State security grounds invoked by the competent national security body exist and are valid: the independent authority should

be able to verify the facts in the light of the evidence submitted (see *Kaushal and Others*, cited above, §§ 31-32 and 49).

(iv) Whether the independent authority called upon to review an expulsion decision, had the power to annul or amend that decision if it found, in the light of the file, that the invoking of national security was devoid of any reasonable and adequate factual basis.

(v) Whether the necessity of the expulsion was sufficiently plausible in the light of the circumstances of the case and the reasoning provided by the independent authority to justify its decision. In this context the Court will ascertain whether the nature and the degree of the scrutiny applied by the national authority in respect of the case against the alien concerned transpire, at least summarily, from the reasoning of their decision.

157. In respect of that list of questions, the Court wishes to point out that compliance with Article 1 § 1 of Protocol No. 7 does not necessarily require that they should all be answered cumulatively in the affirmative. The above list only contains examples of factors that would be capable of appropriately counterbalancing any limitation of the rights enjoyed by aliens under Article 1 § 1 of Protocol No. 7, and it should be borne in mind that the assessment of the nature and extent of the counterbalancing factors to be implemented may vary depending on the circumstances of a given case (see, *mutatis mutandis*, *Ibrahim and Others*, cited above, § 274, and *Beuze*, cited above, § 150). In each case the Court will be required, in the light of the proceedings as a whole, to determine whether the very essence of the rights secured to the alien by Article 1 § 1 of Protocol No. 7 has been preserved (see paragraph 133 above).

(b) Application of those principles to the present case

(i) The limitation on the applicants' procedural rights

158. With regard to the applicants' right to be informed of the factual elements underlying the expulsion decision, it should be noted that, under Article 85 §§ 3 and 4 of OUG no. 194/2002, as then in force, the Court of Appeal was required to inform aliens of the facts on which the application to declare them undesirable was based, "in accordance with the provisions of the normative instruments governing activities related to national security and the protection of classified information". Under Article 85 § 5 of OUG no. 194/2002, where the decision to declare an alien undesirable was based on national security grounds, the data and information together with the factual reasons (*motivele de fapt*) having formed the opinion of the judges could not be mentioned in the ensuing judgment. In addition, the relevant provisions of Law no. 182/2002 (see paragraphs 51 and 53 above) precluded the disclosure of classified information to persons who did not hold a certificate authorising them to access this type of document. Based on a combined application of these legal provisions, the national courts found in

the present case that they were required by law to refrain from providing the applicants with specific information as to the facts and grounds underlying the expulsion application.

159. As regards the applicants' right to be informed of the content of the documents and the information in the case file on which the case against them was based, the Court notes that, from the outset of the proceedings, in applying the relevant legal provisions, the domestic courts found that the applicants were not entitled to access the documents in the file as they were classified (see paragraph 21 above).

160. This entailed a significant limitation of the applicants' right to be informed of the factual elements and the content of the documents underlying both the application for their expulsion submitted by the public prosecutor's office and the domestic courts' decision to order their removal from Romania.

161. The Court will now examine whether the limitations of the applicants' procedural rights were necessary (see paragraphs 139-143 above) and whether counterbalancing measures were put in place by the national authorities to mitigate those limitations (paragraphs 144-156 above), before assessing the concrete impact of the limitations on the applicants' situation in the light of the proceedings as a whole (paragraphs 136 and 144 above). In this connection, the Court notes that the applicants' expulsion had the main effect of making it impossible for them to continue their university studies and of severing any social ties that they had established in Romania. In addition, the accusations against them were very serious, as they were suspected of intending to commit acts of terrorism in Romania, and thus impugned their reputation (see paragraph 101 above).

(ii) Whether the limitations of the applicants' procedural rights were duly justified

162. In the present case, the Court notes that the national courts, applying the relevant legal provisions (see paragraphs 51 and 53 above), ruled from the outset that the applicants could not have access to the file on the grounds that the documents were classified (see paragraph 158 above). Domestic law, moreover, did not allow the courts to examine of their own motion whether the preservation of national security required, in a given case, the non-disclosure of evidence in the file (see paragraphs 51 and 53 above; contrast *Regner*, cited above, § 152).

163. Nor can it be seen from the judgments of the national courts in the present case that they carried out any examination of the need to limit the applicants' procedural rights and to refrain from disclosing confidential information to them. The actual national security reasons which, in the authorities' opinion, precluded the disclosure of the classified evidence and intelligence concerning the applicants, were not clarified by the national

courts. Moreover, when the applicants argued before the High Court that they had doubts as to the level of classification applied in the present case, no clarification was provided on this point by the High Court (see paragraph 33 above).

164. Lastly, in the Court's view, the fact that the press release published by the SRI on the day after the Court of Appeal's judgment contained more detailed factual information than that provided to the applicants in the application initiating the proceedings or in the first-instance proceedings contradicts the need to deprive the applicants of specific information as to the factual reasons submitted in support of their expulsion.

165. Consequently, in the absence of any examination by the courts hearing the case of the need to limit the applicants' procedural rights, the Court must exercise strict scrutiny in order to establish whether the counterbalancing factors put in place were capable of effectively mitigating the limitations of the applicants' procedural rights in the present case. In this context, the Court will take account of its finding that the limitations at stake were significant (see paragraph 161 above).

(iii) The existence of counterbalancing factors in the present case

166. The Court notes that, according to the Government, a number of factors must be taken into consideration by the Court when it examines whether the applicants' rights were upheld in the present case. They pointed out in particular that in the proceedings and in the SRI press release (see paragraph 106 above) the applicants had nevertheless been informed of certain factual accusations against them, that they were entitled to be represented by a lawyer holding an ORNISS certificate (see paragraph 108 above) and above all that high-level impartial and independent courts had conducted the proceedings and decided on the necessity of the expulsion, in the light of the classified documents (see paragraphs 104 and 107 above).

167. The Court will now examine the concrete impact of each of the factors submitted by the Government in the present case. If appropriate, it will also take account of factors other than those mentioned by the Government, as identified above (see paragraphs 151-56 above).

(α) The extent of the information provided to the applicants as to the factual elements underlying their expulsion

168. As regards the extent of the information provided to the applicants concerning the factual elements underlying their expulsion, the Court notes that, at the hearing before the Court of Appeal on 5 December 2012, the applicants were notified, through an interpreter, of the application initiating the proceedings (see paragraph 20 above). Only the numbers of the legal provisions which, according to the public prosecutor's office, governed the alleged conduct were referred to in that document, without any mention of the conduct itself. No specific accusations against the applicants were

stated. It is true that an interpreter assisted the applicants in translating the public prosecutor's application. However, in the Court's opinion, a mere enumeration of the numbers of legal provisions cannot suffice, not even *a minima*, to constitute adequate information about the accusations (see, for example, *mutatis mutandis*, *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, § 41, Series A no. 182, and *Kerr v. the United Kingdom* (dec.), no. 40451/98, 7 December 1999). The Court would conclude that in the course of the proceedings before the Court of Appeal no information as to the factual reasons for the expulsion was provided to the applicants.

169. It should now be ascertained whether a greater amount of information was received by the applicants during the High Court proceedings.

170. In this connection, and with regard first to the information that the applicants might have gleaned from the Court of Appeal's judgment, the Court observes that it merely reproduced the parts of section 3 of Law no. 51/1991 which it considered relevant, thus circumscribing the legal framework of the accusations against the applicants, namely an intention to commit acts of terrorism, or the aiding and abetting of such acts by any means. Whilst the reference to section 3 points (i) and (l) of Law no. 51/1991 provided the applicants with general information about the acts constituting the relevant offences and their legal characterisation, no specific fact was mentioned in the Court of Appeal's judgment either.

171. The Court further notes that on the day after the delivery of the Court of Appeal's judgment and while the further proceedings were still pending before the High Court, the SRI issued a press release setting out some of the accusations against the applicants (see paragraph 30 above). However, it is not necessary to look further into the question whether the extent of the information given in the press release might have enabled the applicants to challenge their expulsion or whether that information could have been sufficient to meet the requirements of Article 1 § 1 of Protocol No. 7. Even assuming that the information contained in the press release was sufficient to enable the applicants to prepare their defence, the Court takes the view that in the present case the press release cannot be regarded as a valid source of information, for the following reasons.

172. First, it does not appear that the SRI press release was added to the case file before the High Court. Nor has it been established that the public prosecutor's office considered the facts stated in that press release to form the basis of its application, or that the High Court confirmed to the applicants that those were the facts which had given rise to the accusations against them.

173. Secondly, after taking cognisance of the acts of which they stood accused according to the press release, in their grounds of appeal before the High Court the applicants pleaded accordingly (see paragraph 38 above).

However, it cannot be seen from the file or from the wording of the High Court's final judgment that the court had relied on the press release or its content in its reasoning.

174. Thirdly and most importantly, a press release, even one disseminated through official channels, cannot be an appropriate means of providing parties to judicial proceedings with the information that they need to make their case before the competent authority. By its very nature, a press release, even when it concerns judicial proceedings, presents a content which is tailored to its aim of informing public opinion more generally. By contrast, the parties to a case who can be readily contacted by the authorities are entitled to receive official information with a level of specificity and precision that is adapted to the particular features of the dispute and to the scope of their procedural rights. In this respect the Court also notes that the SRI was not a party to the proceedings.

175. Consequently, in the High Court proceedings also, the applicants were not informed of the allegations against them such as to be able effectively to exercise their procedural rights under Article 1 of Protocol No. 7.

176. The Court takes note of the case-law examples submitted by the Government showing the developments in domestic case-law as to the extent of the information disclosed to those concerned in this type of procedure (see paragraph 61 above). However, the factual information disclosed must be examined on a case-by-case basis and in the context of the proceedings in question, such that these examples, however commendable, have no impact on the applicants' concrete situation. In addition, while these examples demonstrate that the national courts have the power to inform the aliens concerned of certain facts, they fail to explain why those courts chose not to use that power in the present case.

177. The Court thus finds that, as no specific information was provided to the applicants in the context of the proceedings by an independent authority, this is not a factor which is capable of counterbalancing the limitation of the applicants' procedural rights. The Court must therefore pursue its examination to ascertain whether any other safeguards were put in place for the benefit of the applicants. Moreover, the extensive restriction of specific information entails the need for strong counterbalancing safeguards (see paragraph 146 above).

(β) Whether the applicants were informed about the conduct of the domestic proceedings and about their procedural rights

178. The Court notes that, on the evening of 4 December 2012, the applicants were summoned to appear the following day, at 9 a.m., before the Bucharest Court of Appeal in proceedings instituted at the request of the public prosecutor's office, which sought to have them declared undesirable

persons (see paragraph 15 above). No documents or information concerning the conduct or purpose of the proceedings were attached to the summons.

179. Subsequently, at the hearing of 5 December 2012, the Court of Appeal ensured that the applicants were provided with the assistance of an interpreter for the translation of the application initiating the proceedings (see paragraphs 19 and 20 above). It also informed the applicants that the documents in the file were confidential and that only the court had access to them by virtue of the authorisation given to it (see paragraph 21 above). The Court of Appeal thus informed the applicants of the limitation of their right of access to the documents in the file and of the safeguard provided for under domestic law to counterbalance this lack of access, namely the court's access to those documents.

180. However, the Court of Appeal did not consider it necessary to make sure that the applicants – aliens, the first of whom had recently arrived in Romania and did not speak Romanian – were well informed about the conduct of the proceedings before it or about the existence in domestic law of other safeguards that could counterbalance the effects of the limitation on their procedural rights.

181. The Court of Appeal did not therefore verify whether the applicants knew that under Romanian law they had the possibility, if they so wished, of being represented by a lawyer or at what point in the proceedings an application for representation should be made. Similarly, while the Court of Appeal informed the applicants of the limitation of their right of access to the file, it provided no information to them about the existence of lawyers holding an ORNISS certificate who would be authorised to access the classified documents.

182. In the Court's view, this failure to provide the applicants with information about the conduct of the domestic proceedings in the Court of Appeal and the rights that they should have enjoyed, combined with the rapidity of the procedure, had the effect of negating the procedural safeguards to which the applicants were entitled before that court.

183. The Court further notes that in the High Court proceedings the applicants were assisted by two lawyers of their choosing. The Court leaves open the question whether the authorities were released from their obligation to inform the applicants of their rights and of the safeguards they could have enjoyed under domestic law by the fact that they were represented by two lawyers of their choosing before the High Court. In any event, it can be seen from the file that the High Court did not, of its own motion, inform them of the procedural safeguards under domestic law, with the result that this counterbalancing factor had no impact in the present case in mitigating the limitation of the applicants' procedural rights.

(γ) The applicants' representation in the proceedings

184. The Court first notes that under domestic law the national authorities had no obligation to ensure that the applicants were assisted by a representative in the proceedings. It was nevertheless open to the applicants, if they so wished, to be represented by a lawyer.

185. The Court further observes that the domestic authorities, both judicial and administrative, were not required under domestic law to inform the applicants that they were entitled to be represented by a lawyer holding an ORNISS certificate. It also notes that very few lawyers held such a certificate (see paragraph 58 above) and that the names of those lawyers were not published by the Bar (see paragraph 57 above).

186. The Court takes note of the Government's argument that the applicants' lawyers should have assisted them in finding a lawyer holding the ORNISS certificate (see paragraph 108 above). Even assuming that a lawyer of the alien's own choosing could be expected to assist him or her in finding another lawyer who holds the ORNISS certificate, the Court notes that the Government did not demonstrate the manner in which, at the material time, the lawyers would have had an effective and timely access to the list of names of the lawyers already holding such a certificate (paragraphs 57 and 58 above).

187. The Court takes the view that, in the above-mentioned context (see paragraphs 184 and 185 above) and having regard to the expeditious nature of the first-instance proceedings, the applicants were not afforded an effective possibility of obtaining representation by a lawyer, still less a lawyer holding an ORNISS certificate, before the Court of Appeal.

188. The Court further observes that before the High Court the applicants were represented by two lawyers whom they themselves had chosen and who did not hold an ORNISS certificate. It remains to be ascertained whether the assistance provided by those lawyers on the basis of the authority conferred on them under domestic law was sufficient to ensure the applicants' effective defence.

189. In this connection, the Court takes account of the fact that, as they did not hold an ORNISS certificate, the lawyers chosen by the applicants did not have access to the classified documents in the file. As regards the possibility for those lawyers to request the adjournment of the High Court proceedings in order to obtain such a certificate, the Court notes that the period imposed by domestic law for that purpose (see paragraph 52 above) exceeded the normal length of the proceedings to establish whether the alien should be declared undesirable (see paragraph 54 above). A request for adjournment would therefore, in principle, not have enabled the applicants' lawyers to obtain such a certificate for use in the appeal proceedings. The examples of case-law adduced by the parties confirm this finding (see paragraphs 65 and 66 above), as there is no example of practice dating back

to the relevant time to show that the proceedings could have been extended beyond the time-limit imposed under domestic law.

190. Moreover, according to the information provided by the parties, a lawyer who initiates the procedure to obtain that certificate has to present a copy of the authority form given by his client in order to represent him in the proceedings (see paragraphs 54 and 57 above). As a result, it is not certain that the applicants' lawyers could have sought such a certificate before being chosen by the applicants to represent them in the proceedings.

191. The Court thus takes the view that, in the present case, the presence of the applicants' lawyers before the High Court, without any possibility of ascertaining the accusations against their clients, was not capable of ensuring their effective defence.

192. In the light of the foregoing, the applicants' representation was not sufficiently effective to be able to counterbalance, in a significant manner, the limitations affecting the applicants in the exercise of their procedural rights.

(δ) Whether the expulsion decision was subjected to independent scrutiny

193. The Court observes at the outset that the proceedings under Romanian law with a view to declaring a person undesirable were of a judicial nature. The competent courts in such matters, namely the Court of Appeal and the High Court, enjoyed the requisite independence within the meaning of the Court's case-law, and this has not been questioned by the applicants (see *S.C. v. Romania*, no. 9356/11, § 73, 10 February 2015; see also, among many other authorities, for the definition of an independent tribunal, *Micallef v. Malta* [GC], no. 17056/06, § 93, ECHR 2009). The Court also attaches particular weight to the fact that the proceedings took place before the superior courts in the hierarchy of the Romanian legal system; the High Court is in fact the highest judicial authority. In the Court's view, these are significant safeguards to be taken into account in the assessment of the factors capable of mitigating the effects of the limitations imposed on the applicants' enjoyment of their procedural rights.

194. Before those courts, in view of the very limited and general information available to them, the applicants could only base their defence on suppositions and on general aspects of their student life or financial situation (see paragraphs 37 and 38 above), without being able specifically to challenge an accusation of conduct that allegedly endangered national security. In the Court's view, faced with a situation such as this, the extent of the scrutiny applied by the national courts as to the well-foundedness of the requested expulsion should be all the more comprehensive.

195. Under Romanian law, specifically Article 85 §§ 2 and 3 of OUG 194/2002, it was the Court of Appeal which decided whether the measure requested by the public prosecutor's office was necessary and justified. In the light of these legal provisions, the Court of Appeal and the High Court –

the latter by way of judicial review – should in principle have had access to all the classified documents on which the public prosecutor's application was based (contrast *Abou Amer v. Romania*, no. 14521/03, § 58, 24 May 2011, and *Ljatifi*, cited above, § 40). The judges were thus, in principle, supposed to be duly informed of the case against the applicants as contained in the classified information. It was for the domestic courts to verify on that basis whether the applicants genuinely represented a danger for national security.

196. Moreover, in ordering the expulsion, the Court of Appeal could confine itself, under Article 85 §§ 1 and 2 of OUG no. 194/2002, merely to verifying that there was "sufficient information" or "indications" that the alien in question intended to engage in activities which endangered national security. The Court would observe, however, that according to its case-law (see *C.G. and Others*, cited above, § 74, and *Kaushal and Others*, cited above, § 49), the national court which is competent to decide on an expulsion should verify whether the expulsion application under examination is substantiated by the supporting evidence submitted.

197. In the present case, the public prosecutor's office submitted in evidence before the Court of Appeal a "document" which, in the Government's submission, provided details of the applicants' alleged activities and referred to the specific data and intelligence obtained by the SRI concerning the involvement of the two applicants in activities which threatened national security (see paragraph 14 above). It is not clear whether the domestic courts actually had access to all the classified information underlying the expulsion application or only to that one "document". Even though they were invited to do so, the Government failed to clarify this point.

198. Moreover, when the applicants expressed their doubts before the High Court about the presence of classified documents in the file, that court did not provide any clarification on this point (see paragraph 33 above). In addition, the High Court refused to order the addition to the file of the only item of evidence that was requested by the applicants with the aim of rebutting the allegations that they had financed terrorist activities (see paragraphs 38 and 40 above). In other words, there is nothing in the file to suggest that any verification was actually carried out by the national courts as to the credibility and veracity of the facts submitted to them by the public prosecutor's office (see, *mutatis mutandis*, *Raza v. Bulgaria*, no. 31465/08, § 54, 11 February 2010).

199. Furthermore, the domestic courts gave very general responses in dismissing the applicants' pleas that they had not acted to the detriment of national security. They merely indicated that it could be seen from the evidence in the file that there were strong indications showing that the applicants intended to engage in activities capable of endangering natio nal

security, without any verification of the credibility of the document submitted to them by the public prosecutor's office.

200. The Court notes the efforts of the domestic courts to refer to its relevant case-law in such matters. In particular, it acknowledges the fact that the High Court referred in its judgment to case-law which indicated to the domestic authorities that they needed to provide for scrutiny by an independent authority as a safeguard against arbitrariness on the part of the executive (see paragraphs 44 and 45 above).

201. The Court thus accepts that the examination of the case by an independent judicial authority is a very weighty safeguard in terms of counterbalancing any limitation of an applicant's procedural rights. However, as in the present case, such a safeguard does not suffice in itself to compensate for the limitation of procedural rights if the nature and the degree of scrutiny applied by the independent authorities do not transpire, at least summarily, from the reasoning of their decisions (see paragraph 156 *in fine* above).

202. The Court further notes that some of the examples of case-law provided by the Government show that the Court of Appeal may, in the light of the classified documents at its disposal, verify the veracity and credibility of the information submitted to it (see paragraphs 62 and 63 above). However, there are few such examples dating back to the relevant time. In any event, the documents in the file do not show that in the present case the domestic courts effectively and adequately exercised the powers vested in them for such purpose.

(iv) Conclusion as to compliance with Article 1 of Protocol No. 7 in the present case

203. The Court reiterates that in the present case the applicants sustained significant limitations in the exercise of their right to be informed of the factual elements underlying the decision to deport them and their right to have access to the content of the documents and the information relied upon by the competent authority which made that decision (see paragraph 160 above). It does not appear from the file that the need for such limitations was examined and identified as duly justified by an independent authority at domestic level. The Court is therefore required to exercise strict scrutiny of the measures put in place in the proceedings against the applicants in order to counterbalance the effects of those limitations, for the purposes of preserving the very essence of their rights under Article 1 § 1 of Protocol No. 7 (see paragraphs 133, 144 and 145 above).

204. The Court would observe in that connection that the applicants received only very general information about the legal characterisation of the accusations against them, while none of their specific acts which allegedly endangered national security could be seen from the file. Nor were they provided with any information about the key stages in the proceedings

or about the possibility of accessing classified documents in the file through a lawyer holding an ORNISS certificate.

205. As to the extent of the scrutiny exercised by an independent authority, the Court takes the view that the mere fact that the expulsion decision was taken by independent judicial authorities at a high level, without it being possible to establish that they actually used the powers vested in them under Romanian law, does not suffice to counterbalance the limitations that the applicants sustained in the exercise of their procedural rights.

206. In conclusion, having regard to the proceedings as a whole and taking account of the margin of appreciation afforded to the States in such matters, the Court finds that the limitations imposed on the applicants' enjoyment of their rights under Article 1 of Protocol No. 7 were not counterbalanced in the domestic proceedings such as to preserve the very essence of those rights.

(c) General conclusion

207. Accordingly, there has been a violation of Article 1 of Protocol No. 7 to the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

208. 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

209. The applicants each claimed 104,000 euros (EUR) in respect of the pecuniary damage that they had allegedly sustained. They stated that this sum corresponded to the loss of any effective possibility for them to find employment for over two years, since their removal from Romania. They included in that sum the loss of opportunities in relation to the completion of their doctoral studies and their pursuit of an academic career. They also sought EUR 10,000 each in respect of alleged non-pecuniary damage.

210. As regards the sum requested by way of pecuniary damage, the Government indicated that there was no real link between the decision to remove the applicants from Romania and the alleged damage, and that the applicants had failed to show how they had calculated the amount claimed. As to the non-pecuniary damage, they asked the Court to indicate that a finding of a violation would constitute in itself sufficient redress, and in the

alternative, to take account of its case-law in dealing with the applicants' claim.

211. The Court observes that the only basis on which just satisfaction can be awarded, in the present case, lies in the fact that the applicants did not enjoy sufficient procedural safeguards in the proceedings leading to their removal from Romania. The Court cannot speculate as to any other outcome of the proceedings. In any event, it is of the view that the alleged pecuniary damage is not substantiated by the documents in the file. Consequently, the claim pertaining to pecuniary damage must be rejected.

212. The Court finds, however, that the applicants definitely sustained non-pecuniary damage and the finding of a violation cannot by itself constitute redress. In view of the nature of the violation, the Court, ruling on an equitable basis, awards each of the applicants EUR 10,000 in respect of non-pecuniary damage.

B. Costs and expenses

213. The applicants, who submitted their claim while the case was still pending before the Chamber, sought EUR 3,000 for costs and expenses in respect of their lawyer's fees incurred before the domestic courts and before the Court. The Government argued that the amount claimed for costs and expenses before the Chamber was not substantiated by sufficient and legible documents.

214. The applicants made a request for legal aid before the Grand Chamber and requested the reimbursement of the expenses incurred by their lawyers to assist them before the Grand Chamber and to attend the hearing, for which they submitted supporting documents. At the Grand Chamber hearing they requested the full reimbursement of the expenses they had incurred for their lawyers' participation in the hearing.

215. The Court notes that only the applicants' claim concerning the reimbursement of the costs relating to the attendance of their lawyers at the hearing is substantiated by relevant and legible documents. In view of the Court's case-law in such matters (see *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI) and the fact that the applicants received only a partial reimbursement of the travel expenses for the hearing, in the form of legal aid, the Court awards EUR 1,365 jointly to both applicants under that head.

C. Default interest

216. 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

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by fourteen votes to three, that there has been a violation of Article 1 of Protocol No. 7 to the Convention;

3. *Holds*, by fourteen votes to three,
   (a) that the respondent State is to pay the applicants, within three months, the following amounts:
      (i) EUR 10,000 (ten thousand euros) to each applicant, plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 1,365 (one thousand three hundred and sixty-five euros), jointly to both applicants, plus any tax that may be chargeable to them, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses*, unanimously, the remainder of the applicants' claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 15 October 2020.

Johan Callewaert	Robert Spano
Deputy to the Registrar	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 Nußberger, Lemmens and Koskelo;
(b) concurring opinion of Judge Pinto de Albuquerque, joined by Judge Elósegui;
(c) concurring opinion of Judge Serghides;
(d) concurring opinion of Judge Elósegui;
(e) joint dissenting opinion of Judges Yudkivska, Motoc and Paczolay.

R.S.O.
J.C.

JOINT CONCURRING OPINION OF JUDGES NUSSBERGER, LEMMENS AND KOSKELO

1. We concur with the majority in finding that in this case there has been a violation of Article 1 of Protocol No. 7 to the Convention.

However, we have methodological problems with the majority's approach in two respects. First, the specific provision on expulsions "grounded on reasons of national security" in Article 1 § 2 of Protocol No. 7 must not be ignored, as the text of the Convention itself always has to be the starting-point for any interpretation. Second, this Article differs from Article 6 of the Convention in that the analysis of the specific procedural safeguards cannot be replaced by an "overall fairness" assessment. Such an approach runs counter to the specificity of the guarantees in Article 1 of Protocol No. 7.

A. The structure of Article 1 of Protocol No. 7

2. Article 1 of Protocol No. 7 reads as follows:

> "1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
>
> (a) to submit reasons against his expulsion,
>
> (b) to have his case reviewed, and
>
> (c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.
>
> 2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security."

Article 1 thus contains a structure that is similar to that of many other substantive provisions of the Convention: paragraph 1 states the guarantees, and paragraph 2 states the conditions for restrictions of these guarantees.

3. Article 1 § 1 is intended to afford aliens "minimum guarantees" (see Explanatory Report to Protocol No. 7, § 7). The drafters of Protocol No. 7 were aware of the case-law excluding the applicability of Article 6 of the Convention to expulsion disputes, and they explicitly stated that Article 1 of Protocol No. 7 did "not affect this interpretation of Article 6" (ibid., § 16). While the guarantees afforded by Article 1 of Protocol No. 7 may correspond to some of the guarantees afforded by Article 6 of the Convention, it was clearly not the intention of the drafters of Protocol No. 7 to afford to aliens all of the guarantees that are implied in the notion of a "fair trial".

The guarantees enumerated in paragraph 1 are twofold.

First, any expulsion must be "in accordance with law" (see paragraph 118 of the judgment). This guarantee does not seem to be relevant in the present case and we will therefore not dwell on it.

Second, an alien who is facing expulsion enjoys three guarantees: he must be able (a) to submit reasons against his expulsion, (b) to have his case reviewed, and (c) to be represented before the competent authority (see paragraph 119 of the judgment). Unlike Article 13 of the Covenant on Civil and Political Rights, Protocol No. 7 "clearly [distinguishes]" these three guarantees in three separate sub-paragraphs (Explanatory Report, § 12). We fully agree with the characterisation by the majority that the guarantees are "specific" procedural safeguards (see paragraph 119 of the judgment).

4. Paragraph 2 "permits exceptions to be made" by providing for cases where the expulsion can be implemented "before the exercise of [the rights under sub-paragraphs a, b and c of paragraph 1]" (Explanatory Report, § 15).

An expulsion without the possibility for the alien to exercise these rights beforehand is possible in two situations. The first is "when such expulsion is necessary in the interests of public order". Implementation of an expulsion in such a situation is considered an "exceptional" measure, and the State must be able to show the necessity in the particular circumstances of the case (ibid.). The second situation is that of an expulsion that "is grounded on reasons of national security". We will come back to this second exception below (see paragraph 10).

No other exceptions are provided for in Article 1 of Protocol No. 7. Given the structure of Article 1, we consider that the exceptions of paragraph 2, like those in other Articles of the Convention, "must be interpreted restrictively" (see *Perinçek v. Switzerland* [GC], no. 27510/08, § 122, ECHR 2015 (extracts)). This means not only that they must be narrowly interpreted, but also that there is no room for other, implied limitations of the guarantees afforded by paragraph 1. Indeed, limitations can be permitted by implication only where there is no exhaustive list of explicitly provided exceptions (see *Sitaropoulos and Giakoumopoulos v. Greece* [GC], no. 42202/07, § 64, ECHR 2012).

B. The rights or guarantees at stake

5. The majority take the view that the applicants asserted two rights, namely "the right to be informed of the reasons for their expulsion" and "the right to have access to the documents in the case file" (see paragraph 125 of the judgment). They conclude that both these rights fall to be examined under Article 1 § 1 (a) of Protocol No. 7, which provides for an alien's right "to submit reasons against his expulsion".

We agree with this characterisation.

6. In our opinion, however, there are also other rights at stake in the present case.

Indeed, the applicants complained about "the extent of the review by the national courts as to the well-foundedness of the measure against them" (see paragraph 100 of the judgment). They argued that "the proceedings had been a mere formality" (ibid.). In our opinion, this is a complaint to be examined under Article 1 § 1 (b) of Protocol No. 7, which guarantees the right for the alien "to have his case reviewed". It entails an obligation for the competent authorities (in this case the Court of Appeal and, on appeal, the High Court of Cassation and Justice) to examine "the reasons against expulsion submitted by the person concerned" (Explanatory Report, § 13.2). The degree of seriousness with which the examination has taken place is obviously an element to be taken into account in the assessment of whether that right has been respected.

The applicants further complained about the practical impossibility for them to be assisted by a lawyer, "given the speed with which the proceedings were held and the distance they had to travel for the hearing before the Court of Appeal" (see paragraph 98 of the judgment). In this context they also specifically complained about the difficulties that had prevented them from being represented by a lawyer who held an ORNISS certificate (see paragraph 99 of the judgment). We consider that these complaints should be examined under Article 1 § 1 (c) of Protocol No. 7, which guarantees the right "to be represented ... before the competent authority ...".

We regret that the majority do not give an explicit answer to these complaints. They apparently consider that respect for the rights guaranteed under Article 1 § 1 (b) and (c) is just a counterbalancing factor that can compensate for limitations on the right guaranteed under Article 1 § 1 (a) (see paragraphs 154 and 156-57 of the judgment). This seems to us to do injustice to the autonomy of the rights under (b) and (c). Moreover, such reasoning tends to lead to a global approach based on the quality of the decision-making process. Indeed, the majority assert that they must examine the expulsion proceedings "as a whole" (see paragraphs 150, 157, 161 and 206 of the judgment). We believe that this approach overlooks the specific nature of the rights guaranteed by Article 1 § 1.

7. In sum, it is our view that the applicants complained about violations of each of the rights guaranteed by Article 1 § 1 (a), (b) and (c) of Protocol No. 7.

In our opinion, each of these complaints must be examined separately, taking account of the point that the rights concern "specific" and distinct guarantees (see paragraph 3 above). We do not think that Article 1 § 1 allows the Court to conclude, in the light of an assessment of the proceedings as a whole, that some or all of the provisions of that Article

were not complied with. This is, however, what the majority find (see the conclusion in paragraph 206 of the judgment).

C. The limitation of the applicants' rights

8. Having identified the rights complained of, it is necessary to examine whether the limitations of these rights could be justified in the present case.

The approach of the majority is to examine whether there were duly justified reasons, "such as" the need to protect national security (see paragraph 139 of the judgment), for the limitations, and whether these limitations were sufficiently counterbalanced, in particular by procedural safeguards (see paragraphs 133 and 137 of the judgment). This is an approach that seems to be heavily inspired by the approach in cases where rights guaranteed under Article 6 of the Convention have been restricted (compare paragraph 133 of the present judgment with *Regner v. the Czech Republic* ([GC], no. 35289/11, § 148, 19 September 2017, referred to in that paragraph).

With all due respect to the majority, we consider that the transposition of principles developed in the context of Article 6 of the Convention to an examination under Article 1 of Protocol No. 7 is not justified. On the one hand, as explained above (see paragraph 4), and unlike Article 6 of the Convention, Article 1 of Protocol No. 7 does not allow for implied limitations of procedural rights but itself sets the conditions for limitations of the rights that it guarantees. On the other hand, Article 1 of Protocol No. 7 does not guarantee a generally fair trial, or fair proceedings overall, but only respect for certain specific procedural rights (see paragraph 3 above).

We therefore feel bound to distance ourselves from the approach adopted by the majority in assessing whether the limitations placed on the applicants' procedural rights were compatible with Article 1 of Protocol No. 7 (see paragraphs 130-206 of the judgment).

9. In our opinion, there can be a justification for limitations of the applicants' rights only if they fit within the exceptions provided for under Article 1 § 2 of Protocol No. 7, a provision totally disregarded by the majority.

In *Ljatifi v. "the former Yugoslav Republic of Macedonia"* (no. 19017/16, § 41, 17 May 2018), it is stated that Article 1 § 2 "concerns situations in which an alien has been already expelled". This was also the position adopted by the High Court of Cassation and Justice in the applicants' case (see paragraph 44 of the present judgment). This is not, however, how we read that provision. Article 1 § 2 allows for the expulsion of an alien "before the exercise of his rights under paragraph 1 (a), (b) and (c)", but this does not mean that the guarantees only come into play

retrospectively when an expulsion has effectively taken place. Even during the expulsion proceedings, as in the case of the applicants, there can be limitations of the alien's rights, and it is only logical that they must be subject to the same conditions as those that "apply" in the hypothesis that the alien has already been expelled. We would add that it is precisely when the expulsion proceedings are still pending that the conditions for limitations of the procedural rights are relevant; once an alien has been expelled, it is less likely that he will still bother to invoke his rights under Article 1 of Protocol No. 7, since this would mean that he would have to bring proceedings from abroad to challenge his expulsion.

10. The limitations of the applicants' procedural rights, guaranteed by Article 1 § 1 (a), (b) and (c), were in the present case based on reasons of "national security".

In order for the Court to assess whether the limitations could be justified under the "national security" exception of Article 1 § 2, it is necessary in the first place to assess whether the applicants' expulsion was based on "genuine reasons" of national security (contrast *C.G. and Others v. Bulgaria*, no. 1365/07, § 77, 24 April 2008). Where the Government do "not submit any material or evidence capable of corroborating their claim that the interests of national security ... had been at stake", they cannot rely on the exception of Article 1 § 2 (*Nolan and K. v. Russia*, no. 2512/04, § 115, 12 February 2009).

As indicated by the majority, "the actual national security reasons which, in the authorities' opinion, precluded the disclosure of the classified evidence and intelligence concerning the applicants, were not clarified by the national courts" (see paragraph 163 of the judgment). It is true that some information was provided in the press release of the Romanian Intelligence Service (SRI) (see paragraph 30 of the judgment), but this information was too vague, in our opinion, to demonstrate that there were "genuine" national security reasons that could specifically be invoked against the applicants. We note that, before the Court, the Government did not provide any further information in this connection.

This lack of reasons is sufficient for us to conclude that the exception of Article 1 § 2 does not apply in the present case. We do not therefore need to additionally determine whether, if there had been genuine reasons of national security, this would have been sufficient to justify the limitations of the applicants' procedural rights (see the suggestion in the Explanatory Report to Protocol No. 7, § 15), or whether the Government would in addition have to demonstrate that the limitations were proportionate to the aim pursued (see *C.G. and Others*, cited above, § 77; see also Explanatory Report to Protocol No. 7, § 15).

D. Conclusion

11. To sum up, we are of the view that the applicants had to endure restrictions on their rights guaranteed by Article 1 § 1 (a), (b) and (c) of Protocol No. 7 and that those restrictions were not justified under Article 1 § 2.

We therefore conclude, with the majority, but on the basis of different reasoning, that there has been a violation of Article 1 of Protocol No. 7.

CONCURRING OPINION OF JUDGE PINTO DE ALBUQUERQUE, JOINED BY JUDGE ELÓSEGUI

Introduction

1. I agree with the Grand Chamber's finding of a violation, but I consider its reasoning to be defective on two crucial aspects. The Grand Chamber not only omits to state what is the essence of the right under Article 1 of Protocol No. 7, it also confuses the examination of that essence with the proportionality test. The purpose of this opinion is to justify these two assertions and subsequently to present my own reasons for finding a violation of that Article.

The protection of the essence of a right in national and international law

2. The guarantee of the protection of the essence of a right or freedom is no novelty in national law. The concept of the essence of a constitutional right or freedom is provided for in the constitutions and constitutional laws of Germany 1949 (Article 19-2), Portugal 1976 (Article 18-3), Spain 1978 (Article 53-1), Turkey 1982 (Article 13), Romania 1991 (Article 53-2), the Czech Republic 1991 (Article 4-4 of the Czech Charter of Fundamental Rights and Basic Freedoms, read in conjunction with Article 3 of the 1992 Constitution), Estonia 1992 (Article 11), Slovakia 1992 (Article 13-4), Georgia 1995 (Article 21-2), Poland 1997 (Article 31-3), Switzerland 1999 (Article 36-4), Serbia 2006 (Article 18-2) and Hungary 2011 (Article I-3), as well as in constitutional case-law in Italy[1] and Russia[2].

3. These provisions determine that any limitation on the exercise of a constitutional right or freedom must respect its essence. Particularly when a state of emergency is in force, the level of protection of constitutional rights and freedoms should not fall below a certain minimum threshold, which means that a derogation from a constitutional right or freedom for the sake of keeping public order or national security may not infringe its substance.

4. Likewise, the same concept is enshrined in European Union law. Article 52 § 1 of the Charter of Fundamental Rights accepts that limitations may be imposed on the exercise of rights as long as the limitations are provided for by law, respect the essence of those rights and freedoms, and,

[1] *Gatto v. Italy* (dec.), no. 19424/08, § 18, 8 March 2016, referring to judgment no. 231 of 1975 of the Italian Constitutional Court, which used the concept of "substance" of the defence right.

[2] *Kimlya and Others v. Russia*, no. 76836/01, § 59, 1 October 2009, referring to the Russian Constitutional Court decision no. 16-P of 23 November 1999, and *Zinovchik v. Russia*, no. 27217/06, § 34, 9 February 2016, referring to Russian Constitutional Court decisions no. 43-O of 14 January 2003 and no. 231-O of 20 June 2006.

subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others[3]. As the *Schrems*[4] judgment showed, a measure that affects the essence of a fundamental right is in and of itself inadmissible, without the need for an additional weighing up of the competing rights and interests. In other words, a measure that affects the essence of a fundamental right is automatically disproportionate. The reverse is not necessarily true. The fact that a measure respects the essence of a fundamental right does not automatically mean that it complies with the principle of proportionality, as the judgments in *Digital Rights Ireland*[5] and *Tele2 Sverige*[6] demonstrate.

5. The concept of the essence of a right has also been abundantly utilised in the ambit of the European Social Charter, distinguishing it from the principle of proportionality[7].

6. Courts and scholars have long discussed the content of the concept of the essence of a right or freedom[8]. The predominant view is that this

[3] See judgment of the Court of Justice of the European Union (CJEU) of 9 November 2010, *Volker und Markus Schecke* and *Eifert* (C-92/09 and C-93/09), § 65; CJEU judgment of 28 November 2013, *Council of the European Union v. Manufacturing Support & Procurement Kala Naft Co.* (C-348/12 P), §§ 65-73; judgment of the General Court of 2 April 2014, *Ben Ali v. Council* (T-133/12), §§ 76 and 80; CJEU judgment of 8 April 2014, *Digital Rights Ireland Ltd.* and *Seitlinger and Others* (joined cases C-293/12 and C-594/12), § 39; CJEU judgment of 27 May 2014, *Spasic* (C-129/14 PPU), §§ 55, 57-59, 62-65, 68, 73, 74; and CJEU judgment of 6 October 2015, *Schrems v. Data Protection Commissioner* (C-362/14), §§ 94 and 95.

[4] CJEU, *Schrems,* cited above.

[5] CJEU judgment of 8 April 2014, *Digital Rights Ireland Ltd.* and *Seitlinger and Others,* cited above.

[6] CJEU judgment of 21 December 2016, *Tele2 Sverige AB* and *Tom Watson and Others* (joined cases C-203/15 et C-698/15).

[7] European Committee on Social Rights, among others, *Confederation of Swedish Enterprise v. Sweden*, complaint no. 12/2002, § 30, 22 May 2003; *Centrale générale des services publics (CGSP) v. Belgium*, complaint no. 25/2004, § 41, 9 May 2005, *Federation of Finnish Enterprises v. Finland*, complaint no. 35/2006, §§ 29-30, 16 October 2007; *European Confederation of Police (EuroCOP) v. Ireland*, complaint no. 83/2012, § 212, 2 December 2013; *European Council of Police Trade Unions (CESP) v. France*, complaint no. 101/2013, § 134, 27 January 2016; *Bedriftsforbundet v. Norway*, complaint no. 103/2013, § 76, 17 May 2016; and *Confederazione Generale Italiana del Lavoro (CGIL) v. Italy*, complaint no. 140/2016, § 144, 22 January 2019.

[8] As an introduction to the scholarly discussion on this topic within the European Convention on Human Rights, see F. Sudre, "Droits intangibles et/ou droits fondamentaux : y a-t-il des droits prééminents dans la Convention européenne des droits de l'homme ?", in *Liber Amicorum Marc-André Eissen*, Brussels, Bruylant, 1995, pp. 381-398; O. de Frouville, *L'intangibilité des droits de l'homme en droit international. Régime conventionnel des droits de l'Homme et droits des traités*, Paris, Pedone, 2004; M. Afroukh, *La hiérarchie des droits et libertés dans la jurisprudence de la Cour européenne des droits de l'homme*, Brussels, Bruylant, 2011; Blanc-Fily, *Les valeurs dans la jurisprudence de la Cour européenne des droits de l'homme. Essai critique sur l'interprétation axiologique du juge européen*, Brussels, Bruylant, 2016; O. Rouziere-

concept presupposes that each constitutional right or freedom has core and secondary elements. By guaranteeing that the essence of a right or freedom must be respected whatever the historical circumstances, the constitutional legislator seeks to ensure the intangibility of these core elements, setting a non-negotiable, non-derogable limit to any State interference. Therefore, as put by Koen Lenaerts, "[i]n order for the concept of essence to function in a constitutionally meaningful way, both EU and national courts should apply the 'respect-for-the-essence test' before undertaking a proportionality assessment"[9].

The protection of the essence of a right in the Court's case-law

7. In the "Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium"[10], the European Court of Human rights ("the Court") mentioned for the first time the concept of the "substance of the right" as a limitation on State regulation of the right to education. This ground-breaking statement has been transposed to many other articles of the European Convention on Human Rights ("the Convention") and its Protocols, such as Article 5[11], Article 6[12], Article 8[13], Article 9[14], Article 10[15],

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Beaulieu, "La protection de la substance du droit par la Cour Européenne des Droits de l'Homme", *Thèse de doctorat*, University of Montpellier, 2017; and S. Van Droogenbroeck and C. Rizcallah, "The ECHR and the Essence of Fundamental Rights: Searching for Sugar in Hot Milk?", in *German Law Journal*, 2019, vol. 20, pp. 904–923.

[9] Koen Lenaerts, "Limits on Limitations: The Essence of Fundamental Rights in the EU", in *German Law Journal*, 2019, vol. 20, Special Issue 6, p. 779.

[10] *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*, nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, Law part, § 5, 23 July 1968.

[11] The first reference to the essence of Article 5 is *Winterwerp v. the Netherlands*, no. 6301/73, § 60, 24 October 1979, reiterated by the new Court in *Freimanis and Lidums v. Latvia*, no. 73443/01 and 74860/01, § 96, 9 February 2006, and *Koutalidis v. Greece*, no. 18785/13, § 40, 27 November 2014, and by the Grand Chamber in *Medvedyev and Others v. France* [GC], no. 3394/03, § 100, ECHR 2010, and *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 113, ECHR 2014.

[12] The first reference to the essence of Article 6 is in *Golder v. the United Kingdom*, 21 February 1975, § 38, Series A no. 18, followed by *Philis v. Greece (no. 1)*, 27 August 1991, § 65, Series A no. 209, and *Fayed v. the United Kingdom*, no. 17101/90, § 65, 21 September 1994, and many other cases (see footnote 78).

[13] The first reference to the essence of Article 8 is *Phinikaridou v. Cyprus,* no. 23890/02, § 65, 20 December 2007, restated in *Backlund v. Finland*, no. 36498/05, § 56, 6 July 2010, *Schüth v. Germany*, no. 1620/03, § 71, 23 September 2010, and finally by the Grand Chamber in *Fernández Martínez v. Spain* [GC], no. 56030/07, § 132, ECHR 2014.

[14] The first reference to the essence of Article 9 is in *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 62, ECHR 2000-XI, developed more recently in *Sinan Isik v. Turkey*, no. 21924/05, § 42, 2 February 2010.

[15] The first reference to the essence of Article 10 is in *Barthold v. Germany*, no. 8734/79, § 53, 25 March 1985, followed by the new Court in *Appleby and Others v. the United Kingdom,* no. 44306/98, § 47, 6 May 2003.

Article 11[16], Article 12[17], Article 34[18], Article 1 of Protocol No. 1[19], Article 2 of Protocol No. 1[20], Article 3 of Protocol No. 1[21], and Article 2 of Protocol No. 7[22].

8. The problematic nature of this legal concept is compounded by the uncertain, vague language utilised by the Court, which refers to the "substance"[23], the "very substance"[24], the "essence"[25], the "very essence"[26], the "heart"[27], "the very heart"[28], the "core"[29] and the "hard core"[30] interchangeably, as if all these concepts meant the same thing. Furthermore, two main methodological approaches can be identified in the Court's practice: a utilitarian and an essentialist approach.

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[16] The first reference to the essence of Article 11 is in *Young, James and Webster v. the United Kingdom*, 13 August 1981, §§ 52, 55 and 57, Series A no. 44, developed by the new Court in *Wilson, National Union of Journalists and Others v. the United Kingdom*, no. 30668/96, 30671/96 and 30678/96, § 46, ECHR 2002-V, and *Association Rhino and Others v. Switzerland*, no. 48848/07, § 66, 11 October 2011.

[17] The first reference to the essence of Article 12 is in *Rees v. the United Kingdom*, 17 October 1986, § 50, Series A no. 106, reiterated by the new Court in *I v. the United Kingdom* [GC], no. 25680/94, § 79, 11 July 2002.

[18] The first reference to the essence of Article 34 is in *Cruz Varas and Others v. Sweden,* 20 March 1991,§ 99, Series A no. 201, followed by the new Court in *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 132, ECHR 1999-IV.

[19] The first reference to the essence of Article 1 of Protocol No. 1 is in *Sporrong and Lönnroth v. Sweden*, 23 September 1982, §§ 60 and 63, Series A no. 52, restated in *Matos e Silva, Lda., and Others v. Portugal*, no. 15777/89, § 79, 16 September 1996.

[20] The first reference to the essence of Article 2 of Protocol No. 1 is in *Cyprus v. Turkey* [GC], no. 25781/94, § 278, ECHR 2001-IV, confirmed in *Leyla Sahin v. Turkey* [GC], no. 44774/98, § 154, ECHR 2005-XI.

[21] The first reference to the essence of Article 3 of Protocol No. 1 is in *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, § 52, Series A no. 113, reiterated by the new Court in *Matthews v. the United Kingdom* [GC], no. 24833/94, §§ 63 and 65, ECHR 1999-I.

[22] The first reference to the essence of Article 2 of Protocol No. 7 is in *Haser v. Switzerland* (dec.), no. 33050/96, 27 April 2000, repeated in *Krombach v. France*, no. 29731/96, § 96, 13 February 2001.

[23] *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*, cited above, Law part, § 5.

[24] *Young, James and Webster*, cited above, §§ 52, 55 and 57.

[25] *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 98, ECHR 2001-V (extracts).

[26] *Winterwerp*, cited above, § 60, and *Brogan and Others v. the United Kingdom,* 29 November 1988, §§ 59 and 62, Series A no. 145-B.

[27] *Görgülü v. Germany*, no. 74969/01, § 59, 26 February 2004; *Vasilakis v. Greece*, no. 25145/05, § 43, 17 January 2008; and *Garib v. the Netherlands* [GC], no. 43494/09, § 141, 6 November 2017.

[28] *Hasan and Chaush,* cited above, § 62, and *Schüth*, cited above, § 71.

[29] *National Federation of Sportspersons' Associations and Unions (FNASS) and Others v. France*, nos. 48151/11 and 77769/13, § 186, 18 January 2018.

[30] *Losonci Rose and Rose v. Switzerland*, no. 664/06, §§ 51 and 52, 9 November 2010 (author's translation of *noyau dur*).

The Court's utilitarian approach

9. In the vast majority of its judgments and decisions, the Court does not mention the essence of the right at stake, but instead resolves the problem by weighing in the balance the rights and interests that are relevant in the case at hand. When it does refer to the concept, the Court often assesses the proportionality of the contested State measure, finds it to be proportionate, and axiomatically concludes that the essence of the right was not impaired either[31]. Sometimes the Court changes this order of adjudication, addressing first whether the essence of the right was impaired and then assessing the proportionality of the State interference. In the ground-breaking case of *Young, James and Webster v. the United Kingdom*, the old Court held that "it [struck] at the very substance of ... Article [11] to exert pressure, of the kind applied to the applicants, in order to compel someone to join an association contrary to his convictions"[32]. In spite of the fact that the respondent Government had expressly stated that, should the Court find an interference with a right guaranteed by paragraph 1 of Article 11, they would not seek to argue that such interference was justified under paragraph 2, the Court nevertheless decided that it should examine this issue of its own motion and decided that the detriment suffered by Mr Young, Mr James and Mr Webster went further than was required to achieve a proper balance between the conflicting interests of those involved and could not be regarded as proportionate to the aims pursued. The Court later proceeded in exactly the same way in *Matos e Silva, Lda., and Others v. Portugal*, considering that the disputed measures not only affected the "very substance of ownership in that three of them recognise[d] in advance the lawfulness of an expropriation"[33], but also upset the balance which should be struck between the protection of the right of property and the requirements of the general interest. Likewise, in the recent case of *Centre for Democracy and the Rule of Law v. Ukraine,* the Court asserted that "by refusing to disclose to the applicant organisation the information on the top candidates' education and work history contained in their official CVs filed with the CEC within the framework of them standing as candidates for Parliament, the domestic authorities impaired its exercise of its freedom to receive and impart information, in a manner striking at the very substance of its Article 10 rights"[34], but went on to evaluate the legality, the legitimate

[31] *Platakou v. Greece*, no. 38460/97, § 49, 11 January 2001; *Nedzela v. France*, no. 73695/01, § 58, 27 July 2006; *Phinikaridou*, cited above, §§ 65 and 66; *Association Rhino and Others*, cited above, § 66; and *Wallishauser v. Austria*, no. 156/04, § 72, 17 July 2012.

[32] *Young, James and Webster*, cited above, § 57.

[33] *Matos e Silva, Lda., and Others*, cited above, § 79.

[34] *Centre for Democracy and the Rule of Law v. Ukraine,* no. 10090/16, § 102, 26 March 2020.

aim and the proportionality of the measure. It finally found a violation on the ground that the refusal in question was not necessary in a democratic society.

10. Nonetheless, a finding of a violation should not be taken for granted even when the essence of the right has been compromised. In *Sporrong and Lönnroth v. Sweden*, expropriation permits affected, according to the Court, "the very substance of ownership in that they recognised before the event that any expropriation would be lawful and authorised the City of Stockholm to expropriate whenever it found it expedient to do so"[35]. Remaining silent on the substance of the right to enjoyment of property, the Court proceeded to examine whether the limitation was justified in accordance with the balancing test. Surprisingly, the fact that the permits affected the "very substance of ownership" did not prevent the Court from finding that the limitation was admissible.

11. In sum, the concept of the essence of a Convention right or freedom raises no effective barrier to State interference, which will ultimately be dependent upon a balancing test.

12. A more nuanced utilitarian approach has been advanced by the Court to define the State's margin of appreciation. If it is not the core but a secondary or accessory aspect of the right that is affected, the State's margin of appreciation is wider and the interference is, by its very nature, more likely to be proportionate[36]. Implicitly the Court admits that the core itself of the Convention right may be interfered with, although that interference is less likely to be proportionate. From this perspective, the concept of the essence of the right may represent only a weak limitation of the State's margin of appreciation.

Critique of the Court's utilitarian approach

13. The Court's utilitarian approach calls for a fundamental critique, which will be summed up in three main arguments for the purposes of the present opinion. Firstly, as recalled by Judges Raimondi, Sicilianos, Spano, Ravarani, and Pastor Vilanova in *Regner v. the Czech Republic*[37], it is not reasonable to conclude that the essence of a right is not impaired in a given case without simultaneously identifying what this essence is about. The same critique could be repeated in the present case.

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[35] *Sporrong and Lönnroth*, cited above, §§ 60 and 63.

[36] *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, no. 31045/10, § 87, ECHR 2014, and *Tek Gida Is Sendikasi v. Turkey*, no. 35009/05, § 36, 4 April 2017.

[37] *Regner v. the Czech Republic* [GC], no. 35289/11, 19 September 2017. See also paragraph 8 of the opinion of Judge Wojtyczek in *Naït-Liman v. Switzerland* [GC], no. 51357/07, 15 March 2018.

14. Secondly, it is true that the majority in the present case admit that the alien's access to "relevant factual elements which led the domestic authorities to believe that the alien represent[ed] a threat to national security" is "essential in order to ensure the effective exercise by the alien of the right enshrined in Article 1 § 1 (a) of Protocol No. 7"[38]. Yet the same majority are ready to sacrifice this "essential" information when "competing interests", such as national security[39], should prevail. As a matter of principle, the majority even admit that there may be occasions where "those reasons are not disclosed to the person concerned"[40]. I do not understand how the alien's access to factual elements can be "essential" to guarantee the right enshrined in Article 1 § 1 (a) of Protocol No. 7, yet not be part of the essence of this right, and can even be disposed of to such an extent as to be nullified. The majority's contradictory stance obviously downgrades the essence of the Article 1 § 1 (a) right to a meaningless guarantee.

15. What really matters for the majority is "first [to] ascertain whether the limitations of the alien's procedural rights have been found to be duly justified by the competent independent authority in the light of the particular circumstances of the case", and "... then [to] examine whether the difficulties resulting from these limitations for the alien concerned were sufficiently compensated for by counterbalancing factors"[41]. Such counterbalancing factors are listed by the majority under the heading "Whether the limitations on the alien's 'procedural rights' were sufficiently compensated for by counterbalancing factors"[42]. But this listing is made without any regard for exhaustivity, since the factors are "enumerated non-exhaustively"[43], and without any order of prevalence or importance, in so far as none of the listed factors taken separately, or any of the aspects describing their content, can be regarded as mandatory, because the majority clearly point out that "compliance with Article 1 § 1 of Protocol No. 7 does not necessarily require that [the questions] should all be answered cumulatively in the affirmative"[44].

16. Thirdly, and more importantly, in the majority's view, the examination of the essence of the fair trial right overlaps with the analysis of the counterbalancing factors. To use the majority's own words:

> "In any event, the Court will also ascertain whether any counterbalancing measures have been applied in the case at hand and, if so, whether they were sufficient to

[38] § 126 of the present judgment.
[39] § 130 of the present judgment.
[40] § 139 of the present judgment.
[41] § 133 of the present judgment. Hence, there is no autonomous place in this two-stage adjudicatory method for the determination of the "very essence" of the right. This two-stage method is reiterated in paragraph 137 of the present judgment.
[42] §§ 147-157 of the present judgment.
[43] § 150 of the present judgment.
[44] § 157 of the present judgment.

> mitigate the limitations of the alien's procedural rights, *such as* to preserve the very essence of those rights."[45]

And again:

> "To be precise, an excessively cursory examination at national level of the need to limit the rights in question will call for the implementation of enhanced counterbalancing factors *in order to* ensure the preservation, depending on the circumstances of the case, of the very essence of the rights secured by Article 1 § 1 of Protocol No. 7 ..."[46]

And with even greater clarity:

> "The Court is therefore required to exercise strict scrutiny of the measures put in place in the proceedings against the applicants in order to counterbalance the effects of those limitations, *for the purposes of* preserving the very essence of their rights under Article 1 § 1 of Protocol No. 7 ..."[47]

17. This line of argument is logically and historically wrong. It is logically wrong because the question of proportionality (and its inherent balancing exercise) should only arise "as a subsidiary issue, in the event that the very essence of the right to a court has not been affected"[48]. It is illogical to claim that a limitation that affects the "very essence" of a right can be counterbalanced by subsequent procedures[49]. This is precisely what the majority wrong-headedly claim in the present judgment.

18. As demonstrated above, historically, the concept of the essence of a right or freedom was conceived in constitutional and international law as a non-negotiable, non-derogable limitation to any State interference. The majority's line of argument converts this concept into a rhetorical *carte blanche* for State interference. For example, the majority admit that "should the national authorities have failed to examine – or have insufficiently examined and justified – the need for limitations on the alien's procedural rights, this will not suffice in itself to entail a violation of Article 1 § 1 of Protocol No. 7."[50] In fact, the majority are also ready to accept "an

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[45] § 144 of the present judgment (my italics).
[46] § 145 of the present judgment (my italics).
[47] § 203 of the present judgment (my italics).
[48] Opinion of Judge Costa in *Prince Hans-Adam II of Liechtenstein v. Germany*, no. 42527/98, ECHR 2001-VIII, and along the same lines, opinion of Judge Ress, joined by Judge Zupančič, in the same case; opinion of Judges Russo and Spielmann in *Lithgow and Others v. the United Kingdom*, 8 July 1986, Series A no. 102; opinions of Judges Jambrek, Martens and Matscher in *Gustafsson v. Sweden* (revision), 30 July 1998, *Reports of Judgments and Decisions* 1998-VI; opinion of Judge Bonello, joined by Judges Zupančič and Gyulumyan, in *Kart v. Turkey* [GC], no. 8917/05, ECHR 2009; and opinion of Judge Serghides in *Regner*, cited above, § 44.
[49] Opinion of Judge Sajó in *Regner*, cited above, §§ 5 and 15. See also Van Droogenbroeck, *La proportionalité dans le droit de la Convention européenne des droits de l'homme. Prendre l'idée simple au sérieux*, Brussels, Bruylant, 2001, pp. 406 ff., and Muzny, *La technique de proportionalité et le juge de la Convention européenne des droits de l'homme. Essai sur un instrument nécessaire dans une société démocratique*, Aix-en-Provence, Presses universitaires, 2005, pp. 293 ff.

excessively cursory examination at national level of the need to limit the rights in question"[51], and even instances "where aliens are not represented by a lawyer and where a lack of relevant information may result in their failure to exercise rights available to them in domestic law"[52], if some counterbalancing factor can be identified, whatever it might be.

19. In sum, in the light of the casuistic reading of the Convention performed by the majority, the concept of the essence of a right turns out to be a malleable product of its environment[53]. This is blatantly evident when they attach this concept to the circumstances of the case ("depending on the circumstances of the case")[54]. More troublingly still, the majority adopt a menu *à la carte* of counterbalancing factors from which the national authorities may pick and choose in every single case at their discretion[55]. This casuistic judicial philosophy sets no clear guidance for the national authorities and fails to provide effective protection against arbitrariness[56].

20. At the end of the day, the majority reveal their unconfessed goal: to import the overall fairness test into the ambit of Article 1 of Protocol No. 7. They achieve this by means of three subtle references: "taking into account the proceedings as a whole"[57], "[w]here expulsion proceedings are examined as a whole"[58], and "in the light of the proceedings as a whole"[59]; together with the crucial *mutatis mutandis* reference to the most unfortunate paragraph 274 of *Ibrahim and Others v. the United Kingdom,* where the overall fairness test is explicitly enunciated[60]. The total dissolution of the

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[50] § 144 of the present judgment.
[51] § 145 of the present judgment.
[52] § 153 of the present judgment.
[53] Van Der Schyff, *Limitation of Rights: a study of the European Convention on Human Rights and the South African Bill of Rights*, Nijmegen, Wolf, 2005, p. 166.
[54] § 145 of the present judgment.
[55] Within a "certain margin of appreciation" (§ 149 of the present judgment), whatever that may mean.
[56] § 132 of the present judgment.
[57] § 137 of the present judgment.
[58] § 150 of the present judgment.
[59] § 157 of the present judgment.
[60] In paragraph 150 of the present judgment, the majority cite both *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 274, 13 September 2016, and *Beuze v. Belgium* [GC], No. 71409/10, § 150, 9 November 2018. In paragraph 153 of the present judgment, the majority again cite these authorities and in paragraph 168 of the judgment they cite other leading judgments delivered in criminal cases, reinforcing the overall impression that the majority now assimilate expulsion proceedings with criminal procedure. Would this mean that the majority are ready to overturn the unfortunate paragraph 38 of *Maaouia v. France* ([GC], no. 39652/98, 5 October 2000), in the near future, in spite of the pious statement to the contrary in paragraph 115 of the present judgment? For my part, I have already expressed my opinion that *Maaouia* was a wrongful decision which was not entirely cured by Article 1 of Protocol No. 7 (see my opinions in *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, ECHR 2012, opinion footnote 49, and *De Souza Ribeiro v. France* [GC], no. 22689/07, ECHR 2012, opinion footnote 38).

guarantee of the "very essence of the rights secured to the alien by Article 1 § 1 of Protocol No. 7" is acknowledged when the majority state that the Court will be required to determine whether that essence was preserved "in the light of the proceedings as a whole"[61]. Thus, the amalgam in the majority's conclusion, between the overall fairness test, the margin of appreciation, the examination of the counterbalancing factors and the essence of the fair trial right, comes as no surprise (paragraph 206):

> "... having regard to the proceedings as a whole and taking account of the margin of appreciation afforded to the States in such matters, the Court finds that the limitations imposed on the applicants' enjoyment of their rights under Article 1 of Protocol No. 7 were not counterbalanced in the domestic proceedings such as to preserve the very essence of those rights."

21. To put it differently, since the preservation of the essence of the Convention rights depends on the existence of counterbalancing factors and the States should be afforded a "certain margin of appreciation" in the choice of these counterbalancing factors[62], the "very essence" of the Convention right vanishes as an autonomous Convention concept, capable of setting an effective limit on State interference. Ultimately, the majority conceive the essence of a Convention right or freedom as a mere linguistic tool that does not curb the exercise of the State's margin of appreciation. Clothing an assertion as to the content of a Convention right with the apparel of essence/substance/core may well satisfy an ethical urge of judges, but it does not disguise the ideologically charged bargaining exercise performed in some Strasbourg judgments[63].

22. Worse still, the pervasive force of the "overall fairness" doctrine, conceived to release national authorities and the Court itself from the strict observance of Article 6 guarantees in criminal proceedings, has now surreptitiously seeped into expulsion proceedings. Although they had reiterated at the outset that Article 6 does not apply to expulsion proceedings[64], the majority contradict themselves by using a doctrine created precisely under that Article. The majority's message is clear: national authorities are to be entrusted in expulsion proceedings with the same unfettered discretion that they have gained in criminal proceedings with *Ibrahim and Others v. the United Kingdom* (cited above). In an environment of consistent expansion of State claim-making around national security, the majority's message provides a regulatory shortcut for pretentiously zealous governments to do whatever they want with alleged terrorists and the like, thereby downgrading the much needed "European

[61] § 157 of the present judgment.
[62] § 149 of the present judgment.
[63] I discussed this feature of Strasbourg case-law in my opinion appended to *Hutchinson v. the United Kingdom* [GC], no. 57592/08, 17 January 2017, and particularly in §§ 38-40 of that opinion.
[64] § 115 of the present judgment.

supervision"[65] to a mere rubber-stamping of national choices. Such unhesitating confidence in the national authorities' decision is a clear abdication of the Court's duty of review. Some executives in Europe will rejoice over this blank cheque given to them to preserve their political interests in expulsion proceedings.

23. I have already expressed my views on the "overall fairness" doctrine and the deleterious effect that it has had – and will continue to have – on the Court's case-law[66], as well as on the casuistic interpretation method inherent in this doctrine[67]. There is no need for me to repeat myself here. At this stage, I can only regret that my premonition in *Murtazaliyeva v. Russia* that this malign doctrine would pervade other areas of Strasbourg case-law has now been confirmed. By so doing, this doctrine will, under the cloak of apparent legality, rob the Convention rights little by little of their substance and the Court of its credibility.

24. Finally, I will not delve here into the deeper philosophical discussion of the foundations of the Court's utilitarian approach, perfectly reflected as it is in the conclusion that all limitations of Convention rights can be "compensated for by counterbalancing factors"[68]. I would simply point out here that the use of the verb "compensate" speaks volumes for the ideological basis of the utilitarian approach of the present judgment. For my part, I abhor the *Weltanschauung* inherent in this approach whereby every legal flaw can be traded off – meaning, in short, that there is always a price that can be paid for something.

The Court's essentialist approach

25. The examination of whether a Convention right's essence has been impaired must be the first step of the Court's adjudicatory methodology, before evaluating the legitimate aim and the proportionality of the contested State interference[69]. This is because no legitimate aim can justify the impairment of a Convention right's essence, be it in ordinary times or in troubled times like a state of emergency. The essence of any Convention right or freedom cannot be interfered with, neither under the derogation clause of Article 15 of the Convention, nor under any limitation clause, such as those provided in Articles 8-11[70]. Furthermore, Article 17 of the

[65] § 149 of the present judgment.

[66] See my opinions in *Murtazaliyeva v. Russia* [GC], no. 36658/05, 18 December 2018, and *Farrugia v. Malta,* no. 63041/13, 4 June 2019.

[67] To a casuistic reading of the Convention I oppose a principled interpretation; see my opinion in *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above.

[68] Retained in the crucial paragraphs 133 and 157 of the present judgment.

[69] This is also the methodological perspective of the CJEU (see Koen Laenarts, cited above, p. 787: "that court will first examine whether the measure in question respects the essence of the fundamental rights at stake and will only carry out a proportionality assessment if the answer to that first question is in the affirmative.")

Convention[71] clearly indicates the existence of an absolute limit to any State interference with Convention rights or freedoms, since the Contracting Parties may not engage in any activity or perform any act aimed at their destruction or at their limitation beyond the clauses of limitation foreseen in the Convention[72]. The logic underpinning Article 17 of the Convention is that each Convention right or freedom has some core elements that guarantee to the individual right-holder a sphere that must always remain free from any State interference. Thus it is fairly undisputed that, regarding the preservation of the essence of each Convention right, there is no margin of appreciation for the States[73]. This is not an extensive interpretation forcing new obligations on the Contracting States; it is based on the very terms of the Convention read in its context and having regard to its object and purpose as a "lawmaking treaty"[74] and to general principles of constitutional and international law.

26. Therefore the examination of the essence of the right and the proportionality test must be clearly distinguished. It is true that they may overlap in so far as where a measure violates the essence of a fundamental right, such a measure automatically constitutes a violation of the principle of proportionality. It is also true that where a measure complies with the principle of proportionality, it must respect the essence of the fundamental right in question. Yet a measure may respect the essence of a fundamental right and still violate the principle of proportionality.

27. This distinction has two major consequences regarding the right to a fair trial and defence rights: first, the impairment of the essence of the right to a fair trial is regarded as a "flagrant denial of justice" and, second, from the essence of the right to a fair trial, new implicit rights can and have already been derived, such as the right of access to a court[75], the right to remain silent[76] and the right to adversarial proceedings[77].

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[70] See my opinion in *Lopes de Sousa Fernandes v. Portugal* [GC], no. 56080/13, 19 December 2017, at § 71.

[71] As do Article 30 the Universal Declaration on Human Rights and Article 29 (a) of the American Convention on Human Rights.

[72] The point has been made by Judge Van Dijk in paragraph 8 of his opinion in *Sheffield and Horsham v. the United Kingdom*, 30 July 1998, *Reports* 1998-V; by Judges Pejchal, Dedov, Ravarani, Eicke and Paczolay in paragraphs 7-19 of their joint separate opinion in *Navalnyy v. Russia*, nos. 29580/12 and others, 15 November 2018; and by Judge Serghides in paragraphs 44 and 50 of his opinion in *Regner*, cited above; also by Frouville, cited above, pp. 236-237; Rouziere-Beaulieu, cited above, p. 92; and S. Van Droogenbroeck and C. Rizcallah, cited above, p. 908.

[73] Opinion of Judge De Meyer, § 2, in *Tinnelly & Sons Ltd. and Others v. the United Kingdom* and *McElduff and Others v. the United Kingdom*, 10 July 1998, *Reports* 1998-IV, and opinion of Judge Van Dijk, § 8, in *Sheffield and Horsham*, cited above.

[74] *Golder*, cited above, § 36.

[75] See *Golder*, cited above, § 38.

[76] See *Heaney and McGuinness v. Ireland*, no. 34720/97, § 58, ECHR 2000-XII, and *Serves v. France*, 20 October 1997,§ 47, *Reports* 1997-VI.

28. Regarding the limitations on the right of access to a court, the Court has quite rightly stated as follows:

> "Certainly, the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access 'by its very nature calls for regulation by the State ...' In laying down such regulation, the Contracting States enjoy a certain margin of appreciation. ...
>
> Nonetheless, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired ... *Furthermore*, a limitation will not be compatible with Article 6 para. 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved."[78]

This was the first formulation of the essentialist methodological approach. From this laudable legal perspective, the examination of the legitimate aim and the proportionality test are two additional guarantees ("Furthermore") in relation to the guarantee of the essence of the fair trial right. On the basis of this commendable line of the Court's case-law, with which I entirely agree[79], the latter guarantee does not overlap with the former. They are distinct, logically and axiologically. Furthermore, a flagrant denial of justice, in other words, a violation of the essence of the fair trial right, goes beyond mere irregularities in the pre-trial and trial procedures, it warrants a breach so fundamental as to amount to a nullification (or destruction[80]) of the right guaranteed by Article 6. These

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[77] See *Matelly v. France*, no. 10609/10, § 57, 2 October 2014; *Regner*, cited above, § 148; and *Ognevenko v. Russia*, no. 44873/09, § 59, 20 November 2018.

[78] See *Ashingdane v. the United Kingdom*, 28 May 1985, § 57, Series A no. 93 (my italics). See also *Lithgow and Others*, cited above, § 194; *Mathieu-Mohin and Clerfayt,* cited above, § 52; *Fayed*, cited above, § 65; *Bellet v. France*, ,4 December 1995, § 31, Series A no. 333-B; *Stubbings and Others v. the United Kingdom*, 22 October 1996, § 50, 52 and 56, *Reports* 1996-IV; *Tinnelly & Sons Ltd. and Others*, and *McElduff and Others,* cited above, § 72; *T.P. and K.M. v. the United Kingdom*, cited above, § 98; *Z and Others v. the United Kingdom* [GC]*,* no. 29392/95, § 93, ECHR 2001; *R.P. and Others v. the United Kingdom*, no. 38245/08, § 64, 9 October 2012; *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC]*,* no. 5809/08, § 129, 21 June 2016; *Lupeni Greek Catholic Parish and Others v. Romania* [GC]*,* no. 76943/11, § 89, 29 November 2016; *Naït-Liman*, cited above, §§ 114-15; *Zubac v. Croatia* [GC]*,* no. 40160/12, § 78, 5 April 2018; and *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, § 195, 25 June 2019.

[79] See my separate opinions appended to *Mouvement raëlien suisse v. Switzerland* [GC]*,* no. 16354/06, ECHR 2012, *Konstantin Markin v. Russia* [GC]*,* no. 30078/06, ECHR 2012, and *Lopes de Sousa Fernandes*, cited above.

[80] Usually, the Court associates the violation of the essence of the Convention right with a total deprivation of the possibility of exercising it, i.e., its destruction (*Heaney and McGuinness*, cited above, § 55; *Allan v. the United Kingdom*, no. 48539/99, § 44, ECHR 2002-IX: *Appleby and Others*, cited above, § 47; *Aziz v. Cyprus*, no. 69949/01, §§ 29 and 30, 22 June 2004; *Jalloh v. Germany* [GC]*,* no. 54810/00, § 101, ECHR 2006-IX; *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, § 260, ECHR 2012; *R.P. and Others v. the United Kingdom*, cited above, § 65; *Al-Dulimi and Montana Management Inc.,* cited above, § 129; *Magyar Helsinki Bizottság v. Hungary* [GC]*,* no. 18030/11, § 155, 8 November 2016; *Lupeni Greek Catholic Parish and Others,* cited above, § 99; and *Al*

are structural errors or omissions that cannot be cured because they cross the absolute red lines to which I and other dissenters drew the Court's attention in our separate opinion in the case of *Dvorski v. Croatia*[81]. Therefore, a finding of such a structural error or omission cannot be weighed against other interests, whatever their political relevance and social importance, such as the fight against terrorism[82].

29. There is no possible bargaining with flagrant denials of justice. For example, in *Baka v. Hungary*, the premature termination of the applicant's office as President of the Hungarian Kuria was not open to any judicial review, not even of the Constitutional Court, in view of the constitutional nature of the provision from which that termination had been derived. This sufficed for the Court to conclude that "the respondent State [had] impaired the very essence of the applicant's right of access to a court"[83]. Neither the aim nor the proportionality of the interference was subsequently assessed by the Court[84]. The same methodology can be found in cases related to other Convention and Protocol rights, such as the right to take part in elections[85].

Nashiri v. Romania, no. 33234/12, § 717, 31 May 2018). Occasionally the Court also refers to the actions of the national authorities as constituting a negation of the very essence of the right (e.g. in *Tanrıkulu,* cited above, § 132, and in *Brogan and Others*, cited above, § 59).

[81] See the partly dissenting opinion in *Dvorski v. Croatia* [GC], no. 25703/11, ECHR 2015, on the impact of structural errors on the fairness of criminal proceedings.

[82] In *Brogan and Others*, cited above, § 61, the Court acknowledged that "[t]he investigation of terrorist offences undoubtedly presents the authorities with special problems", but that assertion did not refrain it from concluding that "[t]o attach such importance to the special features of this case as to justify so lengthy a period of detention without appearance before a judge or other judicial officer would be an unacceptably wide interpretation of the plain meaning of the word 'promptly'. An interpretation to this effect would import into Article 5 para. 3 a serious weakening of a procedural guarantee to the detriment of the individual and would entail consequences impairing the very essence of the right protected by this provision." Even clearer, in *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, § 32, Series A no. 182: "the exigencies of dealing with terrorist crime cannot justify stretching the notion of 'reasonableness' to the point where the essence of the safeguard secured by Article 5 § 1 (c) is impaired." This is exactly the same stance as that of the European Court of Justice in the *Schrems* judgment, cited above (to quote Koen Lenaerts, cited above, p. 782: "First, it makes clear that a measure that compromises the essence of a fundamental right may not be justified on any ground, not even where the national security of a third country is at stake.")

[83] *Baka v. Hungary* [GC], no. 20261/12, §§ 120 and 121, 23 June 2016.

[84] Nonetheless, the Court's case-law is not always coherent. In *Károly Nagy v. Hungary*, an absolute prohibition of access to a court was not considered an attack on the essence of the Article 6 right (*Károly Nagy v. Hungary* [GC], no. 56665/09,14 September 2017). This inconsistency led me to dissent from the majority judgment in that case.

[85] *Mathieu-Mohin and Clerfayt*, cited above, § 52; *Matthews*, cited above, §§ 63 and 65, 18 February 1999; and *Aziz*, cited above, § 30.

The application of the essentialist approach to the case at hand

30. According to the Explanatory Report in respect of Protocol No. 7, Article 1 of the Protocol affords "minimum guarantees to such persons". Thus it is only logical that other implied rights may have to be acknowledged to ensure the effective protection of the rights enshrined in Article 1 of Protocol No. 7.

The majority argue that there is no European consensus as to the types of factors that would be capable of counterbalancing the limitations of aliens' procedural rights or as to the scope of such factors[86]. From this alleged lack of consensus the majority infer a "certain margin of appreciation in the choice of factors to be put in place in order to counterbalance any limitation of procedural rights"[87].

31. The obvious problem with this line of argument is that it not only ignores the historical meaning of the concept of the essence of a right, but also discards the immense contribution of international law in the setting of non-negotiable, basic procedural safeguards that should be acknowledged in expulsion procedures, including those based on national security grounds. This omission is all the more surprising as some of the relevant international law standards are cited in the judgment[88].

32. At this juncture I would like to recall what I have written about this subject[89]. For the sake of economy, I will only reiterate here that the right to submit reasons against the alien's expulsion (Article 1 § 1 (a) of Protocol No. 7) is based on the legal principle *audi alteram partem*, which implies logically and axiologically a right of access to the factual submissions, documents and information put forward by the opposite party. It is a principle of natural justice that the alien requires sufficient disclosure to be able to respond to the allegations against him[90]. When no such

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[86] § 148 of the present judgment.

[87] § 149 of the present judgment.

[88] §§ 71-78 of the present judgment.

[89] *S.J. v. Belgium* [GC], no. 70055/10, ECHR 2015, on the expulsion of a terminally ill alien; *De Souza Ribeiro*, cited above, on the expulsion of an undocumented alien; *Hirsi Jamaa and Others*, cited above, on the collective refoulement of asylum seekers on the high seas; *Zakharchuk v. Russia*, no. 2967/12, 17 December 2019, on the expulsion of a young alien convicted of grievous bodily harm; *M. A. v. Lithuania*, no. 59793/17, 11 December 2018, on refoulement of asylum seeker at the land border; *Vasquez v. Switzerland*, no. 1785/08, 26 November 2013, on the administrative expulsion of an alien convicted of a sexual offence, although the criminal court had suspended the expulsion penalty; *Kissiwa Koffi v. Switzerland,* no. 38005/07, 15 November 2012, on the expulsion of an alien convicted of drug trafficking; and *Shala v. Switzerland*, no. 52873/09, 15 November 2012, on the expulsion of an alien convicted of several minor offences.

[90] For a formulation of this requirement in the field of expulsion proceedings on State security grounds, see *Ljatifi v. "the Former Yugoslav Republic of Macedonia"*, no. 19017/16, § 35, 17 May 2018; CJEU judgment of 4 June 2013, *ZZ v. Secretary of State for the Home Department* (C-300/11), § 65; United Nations Human Rights Committee,

disclosure is forthcoming, the alien is not able to have his case genuinely heard and reviewed in the light of reasons militating against his expulsion (Article 1 § 1 (b) of Protocol No. 7)[91].

33. In the present case, the Romanian courts did not provide the applicants or their lawyers with any specific information on the factual grounds underlying the expulsion decision. Furthermore, no access whatsoever to the allegedly incriminating documents was given to the applicants or their lawyers during the entire expulsion procedure. These two structural deficiencies suffice to conclude that the essence of the right to submit reasons against the expulsion (Article 1 § 1 (a) of Protocol No. 7) was infringed. Case-law concerning Romania consistently confirms this view: in *Lupsa v. Romania* the Court found that the review before the court of appeal had been "purely formal" because the authorities had failed to provide the appellant with "the slightest indication of the offence of which he was suspected"[92]; in *Kaya v. Romania* the Court again concluded that the court of appeal's review had been "purely formal", because "the authorities [had] not provide[d] the applicant with the slightest indication of the accusations against him"[93]; in *Ahmed v. Romania* the Court decided that the communication made to the applicant had not contained "any reference to the accusations against him, being purely formal in nature"[94]; and in *Geleri v. Romania* the Court reiterated that the communication made to the applicant had not contained any "reference to the accusations against him" but had been "purely formal"[95]. In none of these cases did the Court engage in an additional evaluation of possible counterbalancing factors, in order to save the respondent Government from a straightforward finding of a violation[96]. Why do the majority engage in such a balancing exercise in the present case?

Ahani v. Canada, communication no. 1051/2002, §§ 10.5-10.8; and United Nations Committee against Torture, *Bachan Singh Sogi v. Canada*, communication no. 297/2006, §§ 10.4-10.5.

[91] *C.G. and Others v. Bulgaria*, no. 1365/07, § 74, 24 April 2008.

[92] *Lupsa v. Romania*, no. 10337/04, § 59, ECHR 2006-VII.

[93] *Kaya v. Romania*, no. 33970/05, § 59, 12 October 2006 ("*les autorités n'ont fourni au requérant le moindre indice concernant les faits qui lui étaient reprochés*").

[94] *Ahmed v. Romania*, no. 34621/03, § 53, 13 July 2010 ("*aucune référence aux faits reprochés, ayant un caractère purement formel*").

[95] *Geleri v. Romania*, no. 33118/05, § 46, 15 February 2011. This is not an exclusive problem of Romania. See for example *Baltaji v. Bulgaria*, no. 12914/04, § 58, 12 July 2011, in which the Court concluded that an appeal had been "*purement formel*" because the appellant had not been made aware of the factual reasons for his expulsion.

[96] Thus it is simply not correct to state that the Court, in its previous case-law, did not address "the question whether it was also necessary for those grounds to be disclosed to the person concerned", as the majority state in paragraph 127 of the present judgment. All the previous case-law concerning Romania cited above required disclosure of the factual grounds to the person concerned and, consequently, the Court found a violation of Article 1 of Protocol No. 7 where the Romanian authorities, including the national courts, had not

34. Accordingly, there is no need to consider other features of the present case, such as the fact that the national courts did not even assess whether the preservation of national security required the non-disclosure of evidence in the file and did not clarify whether the level of classification applied in the present case was correct[97]. Likewise, it is not necessary to ponder on the astonishing fact that the press release published by the SRI contained more detailed factual information than that provided to the applicants[98].

It is beyond my understanding why the majority see a need to discuss the possible existence of counterbalancing factors "in the absence of any examination by the courts hearing the case of the need to limit the applicants' procedural rights"[99] and in view of the majority's own conclusion that the press release "contradicts the need to deprive the applicants of specific information as to the factual reasons submitted in support of their expulsion"[100]; in other words, that the limitation of the applicants' procedural rights was unnecessary. The additional discussion of the counterbalancing factors in the present judgment can only be explained by an assumption that the majority would have been ready to find no violation of Article 1 of Protocol No. 7 despite the gravity of the structural deficiencies in the national procedure. This line of argument implies that the impairment of that Article's core could possibly have been regarded as justified in other circumstances.

35. In *Malone v. the United Kingdom*, the Court affirmed that "[e]specially where a power of the executive is exercised in secret, the risks of arbitrariness are evident"[101]. Any limitation of the principle *audi alteram partem* can easily lead judges – even in good faith – to uncritically validate the veracity of factual submissions or documents and other information put forward by a government, especially when judges deal on a routine basis with such submissions. This wise message of the Court seems to have been forgotten in the present judgment. The majority judgment rightly points the finger at the Romanian authorities, but at the same time leaves the door open to the discretionary mix, that is to say, sheer manipulation of the "counterbalancing factors" in expulsion procedures by national authorities, since there is no clear legal guidance by the Court regarding the interplay between the "counterbalancing factors" themselves or explaining how they are effectively limited by the "very essence" of the right enshrined in Article 1 of Protocol No. 7[102].

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disclosed the factual grounds for the expulsion decision to the applicant.

[97] §§ 162 and 163 of the present judgment.

[98] § 164 of the present judgment.

[99] § 165 of the present judgment.

[100] § 164 of the present judgment.

[101] See *Malone v. the United Kingdom*, 2 August 1984, § 67, Series A no. 82.

[102] Jonas Christoffersen, in *Fair Balance: Proportionality, Subsidiarity and Primarity in the*

Conclusion

36. The majority fail to identify the essence of the defence rights in expulsion procedures on national security grounds. In other words, they renounce their duty to give reasoning. In *Heaney and McGuinness v. Ireland*, the Court did not hesitate to state, in black and white terms, that security and public order concerns should not prevail over the essence of fair trial and defence rights[103]. In a sensitive area such as the protection of national security and the fight against terrorism, which has been so prone to State abuse and excessive zeal on the part of some executives, sometimes with the connivance of renowned Supreme and Constitutional Courts, it was expected that the Court would today remain the guardian of legal certainty and civil freedoms. That is not the case unfortunately. This is a very different Court from that of *Heaney and McGuinness.* My conscience dictates to me that I should stick to the traditional case-law of the Court. Nowadays, to be progressive in Strasbourg is to keep the tradition alive. Thus, I subscribe to the finding of a violation of Article 1 of Protocol No. 7, but on fundamentally different grounds.

European Convention on Human Rights (Leiden, 2009, p. 137), observes that "[i]n order to understand the proportionality principle, the crucial question is how the very essence is delimited, and how the means of delimitation interact with the other elements inherent in the proportionality assessment". There is no such delimitation of the concept of essence or demonstration of the said interaction in the present judgment.

[103] *Heaney and McGuinness,* cited above, § 58: "The Court, accordingly, finds that the security and public order concerns relied on by the Government cannot justify a provision which extinguishes the very essence of the applicants' rights to silence and against self-incrimination guaranteed by Article 6 § 1 of the Convention."

CONCURRING OPINION OF JUDGE SERGHIDES

Article 1 of Protocol No. 7 – an absolute right with all that it entails

(a) The complaint

1. The applicants' complaint is that, though they had been lawfully resident in Romania and studying there, they were not afforded the minimum procedural safeguards required by Article 1 § 1 of Protocol No. 7 to the Convention, and, therefore, had not been able to defend themselves effectively in the proceedings initiated by the application to have them declared undesirable persons in Romania, leading to their expulsion on national security grounds. In particular, they alleged that they had not been notified of the actual accusations against them and had not been given access to the documents in the file (see paragraph 88 of the judgment).

(b) The provisions of the Article

2. Article 1 of Protocol No. 7 is quoted in paragraph 90 of the judgment without, however, its second paragraph being included. Though paragraph 2 of this Article does not apply to the present case – since this provision applies only to the timing of the expulsion before the exercise of the minimum procedural rights under paragraph 1, one cannot properly interpret and apply paragraph 1 without looking at and interpreting Article 1 as a whole. For this reason but also for easy reference, I will quote Article 1 of Protocol No. 7, headed "Procedural safeguards relating to expulsion of aliens"[1], in its entirety:

> "1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
>
> (a) to submit reasons against his expulsion,
>
> (b) to have his case reviewed, and
>
> (c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.

[1] On this provision in general, see, *inter alia,* Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights,* 4th edn., Oxford, 2018, pp. 957-959; William A. Schabas, *The European Convention on Human Rights – A commentary*, Oxford, 2015, pp. 1125-1133; Kees Flinterman, "Procedural Safeguards Relating to Expulsion of Aliens" (chapter 25), in Pieter van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak (eds), *Theory and Practice of the European Convention on Human Rights*, Cambridge-Antwerp-Portland, 2018, pp. 965-969; and Juan Fernando Durán Alba, "Guarantees against Expulsion of Aliens under Article 1 of Protocol No. 7", in Javier Garcia Roca and Pablo Santolaya (eds), *Europe of Rights: A Compendium on the European Convention of Human Rights,* Leiden-Boston, 2012, pp. 635-640.

2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security."

(c) The judgment and the reasons for my disagreement

3. The judgment concludes that "having regard to the proceedings as a whole and taking account of the margin of appreciation afforded to the States in such matters, ... the limitations imposed on the applicants' enjoyment of their rights under Article 1 of Protocol No. 7 were not counterbalanced in the domestic proceedings such as to preserve the very essence of those rights" (paragraph 206), and that, "[a]ccordingly there has been a violation of Article 1 of Protocol No. 7 to the Convention" (paragraph 207).

4. Although I agree with the judgment in finding a violation of Article 1 of Protocol No. 7, I respectfully disagree with it in so far as it (a) considers the right guaranteed by this provision not to be an absolute right, thus allowing for limitations, and (b) accordingly assumes a need to establish counterbalancing factors, or safeguards to be weighed in the balance with such limitations, so as to "compensate for" any difficulties resulting from their imposition. Such an approach is a very complicated one and would surely not have been intended by the drafters of the provision when dealing with the minimum procedural safeguards of lawfully resident aliens. More importantly, however, in my humble view, this approach is not compatible with the letter and the object of the said provision and undermines the effective protection of the right guaranteed, as will be explained below.

5. The process of considering limitations and then counterbalancing factors, as undertaken in the judgment, may be relevant when it comes to examining potential violations of qualified rights. The present judgment, however, with all due respect, has erred in applying the same exercise to minimum procedural safeguards which are absolute in nature. Absolute rights do not allow limitations to be justified under any circumstances, hence there being no need for counterbalancing factors or for any proportionality test. If Article 1 § 1 of Protocol No. 7 enshrines an absolute right, then it automatically follows that the judgment has inappropriately accepted limitations of that right and has then needlessly engaged in a counterbalancing exercise.

(d) The right: its nature, content and substance

6. In my submission, despite the fact that Article 1 of Protocol No. 7 is headed "Procedural safeguards relating to expulsion of aliens", it enshrines a *single* compound right consisting of three individual procedural safeguards, or otherwise three procedural sub-rights. The compound right is the right of "an alien lawfully resident in the territory of a State" not to "be expelled therefrom", except (i) "in pursuance of a decision reached in

accordance with law", and (ii) where he or she has been afforded the three minimum procedural safeguards or sub-rights stated in subparagraphs (a), (b) and (c) of Article 1 § 1. The Preamble to Protocol No. 7 states that it makes provision for "certain rights and freedoms", so it is clear that each of the first five Articles of Protocol No. 7[2] at least deals with a right or a freedom. Paragraph 2 of Article 1 regards the minimum procedural safeguards of paragraph 1 as "rights". This strengthens the proposed view that Article 1 § 1 makes provision for a right consisting of three sub-rights[3].

7. To my mind, the right guaranteed in Article 1 § 1 of Protocol No. 7 is an absolute procedural right as regards its nature, content and substance, without allowing any limitations to be imposed upon it. This right can be invoked in any case of expulsion of an alien lawfully resident in the territory of a State, irrespective of whether the expulsion took place before or after the exercise of the right. Paragraph 2 of Article 1 of Protocol No. 7 provides for the possibility of the expulsion taking place before the exercise of the right under paragraph 1. This limitation as to when the right is exercised does not affect its nature, content or substance as an absolute right, it is merely a limitation or exception as to the time when the right is exercised and concerns the eventuality that the expulsion precedes the exercise of the right in certain circumstances. As a rule, under paragraph 1, the time when this right is exercised will be prior to the enforcement of the expulsion; exceptionally, however, in the two listed instances under paragraph 2 ("... the interests of public order or ... reasons of national security")[4], the right will have to be exercised after the alien has already been deported. The limitation under paragraph 2 of Article 1 is thus an exception to the general rule that the right should be exercised prior to the expulsion.

8. It must be emphasised that the two paragraphs of Article 1 deal with the *same* compound right, consisting, as has been said above, of the three minimum procedural safeguards or sub-rights set out in paragraph 1, which must be exercised irrespective of whether the expulsion follows or precedes the said exercise. This is clear from the wording of paragraph 2, namely "before the exercise of his rights under paragraph 1.a, b and c of this Article", which clearly shows that (a) the exercise of these three procedural rights must take place even if the expulsion has already taken place[5], and (b)

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[2] The remaining four Articles of the Protocol are not substantive in nature.

[3] William A. Schabas, cited above, at p. 1125 argues that the Preamble to Protocol No. 7, which "is succinct and quite perfunctory", "does not contribute in any significant way to its interpretation". He adds that "[i]t does not seem that [this Preamble] has ever been cited in case law of the Convention organs" (ibid). The point made in this opinion, however, shows that the Preamble may contribute to the interpretation of the Protocol and this opinion enables that Preamble at last to be cited in the case-law of the Court, albeit in a separate opinion.

[4] "These exceptions are to be applied taking into account the principle of proportionality as defined in the case-law of the [Court]." See paragraph 15 of the Explanatory Report to Protocol No. 7 (Strasbourg, 22.XI.1984).

these rights must in no way be limited or infringed. This is also clear from paragraph 15 of the Explanatory Report to Protocol No. 7 (Strasbourg, 22.XI.1984), which provides that in the exceptional cases under paragraph 2 "the person concerned should be entitled to exercise the rights specified in paragraph 1 after his expulsion." In this connection, the Court in *Nolan and K. v. Russia* (no. 2512/04, § 114, 12 February 2009), reiterated the following point:

> "[T]he High Contracting Parties have a discretionary power to decide whether to expel an alien present in their territory but this power must be exercised in such a way as not to infringe the rights under the Convention of the person concerned ... Paragraph 1 of this Article provides that an individual may be expelled only 'in pursuance of a decision reached in accordance with law' and subject to the exercise of certain procedural guarantees. Paragraph 2 allows the authorities to carry out an expulsion before the exercise of these guarantees only when such expulsion is necessary in the interests of public order or national security."

(e) Legal analysis supporting the absolute nature of the right

9. There are cogent arguments in favour of the view that the right safeguarded by Article 1 § 1 is an absolute right, thus leaving no doubt that it does not permit of any limitations or exceptions.

10. First, this is clear from the text of Article 1 § 1 itself:

(a) This provision contains no express or implied limitations of the right contained therein. Its wording makes it clear that the right cannot be subject to any limitations by stating that the alien "shall not" be expelled "except in pursuance of a decision reached in accordance with law" and guaranteeing the minimum procedural safeguards, which it subsequently lists, by using again the mandatory formulation "shall be allowed", to indicate that these are entitlements that must be secured to the alien without fail. The double repetition of the word "shall" in Article 1 § 1 of Protocol No. 7 reiterates the intention to lay down mandatory procedural safeguards. This kind of double mandatory formulation is unique in the Convention.

(b) The notion or nature of express minimum procedural safeguards is not compatible with any implied and vague limitations that may be imposed on them, especially so as these safeguards concern an alien lawfully residing in a State. Otherwise, the meaning of such safeguards would be redundant and nugatory. The effective operation of minimum safeguards dictates that these entitlements are so minimal that they cannot be diluted any further.

Accordingly, Article 1 § 1 does not give the State any option or leeway as to the granting of these procedural safeguards, and nor does it allow for any exception to this rule. Without the minimum procedural safeguards of Article 1 § 1 being absolute, there would be a Convention failure to protect

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[5] See on this point Harris, O'Boyle and Warbrick, cited above, at p. 958; Schabas, cited above, at pp. 1127, 1132; and Flinterman, cited above, at pp. 965, 968-9.

applicants against alleged abuse or arbitrariness on the part of the domestic authorities in such cases.

11. Second, the proposed view, namely that the right guaranteed in Article 1 § 1 is an absolute right, is supported by reading the provisions of Article 1 §§ 1 and 2 in harmony and as a whole, according to the principle of interpretation based on the internal harmony or coherence of the Convention provisions, a well-established principle in the case-law of the Court[6]. Reading Article 1 as a whole, one can argue that if its drafters had wished to make the minimum procedural safeguards or sub-rights of Article 1 § 1 of Protocol No. 7 subject to limitations, they would have expressed this within the provision, as they have done in the context of the second paragraph of that Article. The absence of any permitted limitations from Article 1 § 1 cannot be seen as a mere oversight, but instead must be interpreted in accordance with the absolute terms in which the Article is framed, thus showing that the Court cannot permit any limitation for the sake of other competing interests.

12. It is clear from the wording of Article 1 § 1, namely "and shall be allowed", that the three minimum procedural safeguards or sub-rights which follow, constitute an additional and independent requirement in relation to the condition previously provided therein, namely that of "a decision reached in accordance with law". Thus domestic legislation or case-law cannot in any way infringe, limit or disregard these minimum procedural safeguards or sub-rights on the pretext of, or for the sake of, regulating them. Stated otherwise, these sub-rights are expressly governed by Article 1 § 1 and are therefore above any further domestic regulation.

13. The list of the minimum procedural safeguards or sub-rights is meant to prevent the State from substituting one safeguard for another. For example, as is made clear in the Explanatory Report to Protocol No. 7 (see § 13 thereof), it is insufficient for the alien to have his or her case reviewed by an independent and competent authority, if he or she has not had the opportunity to submit reasons against the expulsion. In the present case, for example, the review of the evidence by the domestic courts is no substitute for the applicants' right to be informed of the case against them. The Article

[6] See, for instance, *Johnston and Others v. Ireland,* 18 December 1986, §§ 57-58, Series A no. 112. For more on this principle, see, *inter alia,* John G. Merrills, *The Development of International Law by the European Court of Human Rights,* 2nd edn., Manchester, 1993, at pp. 72 *et seq.*; Bernadette Rainey, Elizabeth Wicks, and Clare Ovey (eds), *Jacobs, White, and Ovey: The European Convention on Human Rights,* 7th edn., Oxford, 2017, at 69 *et seq.*; Daniel Rietiker, "'The Principle of Effectiveness' in the Recent Jurisprudence of the European Court of Human rights: its Different Dimensions and its Consistency with Public International Law – no Need for the Concept of Treaty *Sui Generis"*, *Nordic Journal of International Law,* 2010, 79, 245 at pp. 271 *et seq.*; Céline Brawmann and August Reinisch, "Effet Utile", in Joseph Klingler, Yuri Parkhomenko and Constantinos Salonidis (eds), *Between the Lines of the Vienna Convention? – Canons and Other Principles of Interpretation in Public International Law,* Alphen aan den Rijn, 2019, at 47 *et seq.*

does not permit trade-offs, and neither does it permit any limitations. The Article was intended to ensure an equality of arms in such proceedings, where an alien finds himself/herself in a vulnerable situation facing expulsion from the territory of a Contracting Party in which he or she has been lawfully residing. The outcome of these proceedings may have a catastrophic impact on the individual's circumstances and the life he or she has built in the host State – a life which he or she is no longer able to continue. Not only were the applicants in the present case unable to continue their studies, they also experienced hardship upon their return to their home State. With the considerable interests at stake, as determined by the outcome of the expulsion proceedings, it is of utmost important that States guarantee a minimum level of procedural protection to ensure that such decisions are made fairly – which is why the drafters entrenched these obligations within Article 1 § 1 of Protocol No. 7. A central feature of the effective exercise of the right for the alien to submit reasons against his or her expulsion is for him or her to know the case presented by the authorities. Nothing short of this can guarantee equality of arms in the proceedings.

14. In view of the above, it should be clarified that the minimum procedural safeguards set out in Article 1 § 1 operate as a shield for substantive fairness and are paramount to the principle of fairness inherent in the Convention. The interpretation of the Convention cannot be such as to permit unjust results and to compromise the effective protection of the most fundamental rights of every individual, especially when these rights are absolute. The Court, therefore, cannot allow States to place limitations on the minimum procedural safeguards of Article 1 § 1 of Protocol 7, without which fairness cannot be achieved. It is impossible to characterise proceedings where the individual is not informed of the case against him or her as "fair". In *Malone v. the United Kingdom* (2 August 1984, § 67, Series A no. 82), the Court rightly observed that "[e]specially where a power of the executive [was] exercised in secret, the risks of arbitrariness [were] evident ...". That was what happened, in my view, in the present case. The absolute refusal of the authorities to inform the applicants of the accusations against them was not only arbitrary, but also unjust, as it adversely affected their defence, also violating the principle of adversarial proceedings and the principle of equality of arms[7]. Such an absolute refusal, which is impermissible for qualified rights, is even worse when it comes to absolute rights which allow of no limitations.

[7] See paragraph 20 of the partly dissenting opinion of Judge Serghides in *Regner v. the Czech Republic* [GC], no. 35289/11, 19 September 2017.

(f) The right and the principle of effectiveness as a norm of international law and as a method of interpretation

15. The principle of effectiveness, as a norm of international law inherent in any Convention provision[8], pervades the whole of the text of Article 1 § 1 of Protocol No. 7, including the three minimum procedural safeguards or sub-rights set out in sub-paragraphs (a), (b) and (c). It is my submission that, in the light of the above, the principle of effectiveness requires that the right of a lawful resident in the territory of a State not to be expelled therefrom, except in pursuance of a decision reached in accordance with law and then only where the requisite procedural safeguards are afforded, must be effective and be treated as such.

In addition, I submit that the principle of effectiveness also acts as a method or tool of interpretation, assisting the same principle in its capacity as a norm of international law, for the purpose of interpreting Article 1 § 1 of Protocol No. 7 so as to ensure that the norm attains its due effectiveness in practice[9].

The principle of lawfulness[10] is also evident in Article 1 § 1, requiring as it does that an expulsion decision must be "reached in accordance with law". Inherent in this requirement is the standard of quality of the law. In other words the domestic law should be drafted in such a way as to prevent arbitrariness on the part of the competent authorities *vis-à-vis* the aliens concerned. As the judgment rightly puts it "[a]rbitrariness entails a negation of the rule of law" (see paragraph 118). Protection against arbitrariness is an aspect or element or function of the principle of effectiveness as a norm of international law. The principle of lawfulness in Article 1 § 1 is also to be found in the requirement of the alien's lawful residence in the territory of a State.

16. The judgment rightly observes that "[i]n the context of Article 1 of Protocol No. 7 the Court has taken into account the fact that the object and purpose of the Convention, as an instrument of human rights protection, call for an understanding and application of its provisions such as to render its requirements practical and effective, not theoretical and illusory" (see

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[8] On the capacity of the principle of effectiveness, not only as a method of interpretation but also as a norm of international law, see Georgios A. Serghides, "The Principle of Effectiveness in the European Convention on Human Rights, in Particular its Relationship to the Other Convention Principles", *Hague Yearbook of International Law*, 2017, vol. 30, pp. 1 *et seq*.; paragraphs 15 and 22 of the concurring opinion of Judge Serghides in *S.M. v. Croatia* [GC], no. 60561/14, 25 June 2020; paragraph 19 of the concurring opinion of Judge Serghides in *Obote v. Russia,* no. 58954/09, 19 November 2019; paragraphs 8-12 of the dissenting opinion of Judge Serghides in *Rashkin v. Russia*, no. 69575/10, 7 July 2020 (not yet final); and paragraph 6 of the concurring opinion of Judge Serghides in *OOO Regnum v. Russia*, no. 22649/08, 8 September 2020 (not yet final).

[9] See Georgios A. Serghides, "The Principle of Effectiveness ...", cited above, at pp. 5-6.

[10] In general on this principle, see, *inter alia,* Xavier Souvignet, *La prééminence du droit dans le droit de la Convention européenne des droits de l'homme,* Brussels, 2012.

paragraph 122). It continues by rightly describing this principle, namely, the principle of effectiveness, as "a general principle of interpretation of all the provisions of the Convention and the Protocols thereto" (paragraph 122). To my knowledge, this is the first time that the Court has expressly stated that the principle applies universally to all Convention provisions. The judgment subsequently observes that the Court has always sought to apply the principle in relation to Article 1 § 1 of Protocol No. 7 (see paragraph 123); yet, with all due respect, it proceeds to misapply it in the present case, because it considers the right guaranteed by this provision to be a qualified right. The judgment focuses on whether the very essence of the right has been preserved by the domestic authorities' balancing exercise, whereas, in fact, the effective protection of the right, in my opinion, requires no such balancing. Undoubtedly, giving the Contracting Parties any opportunity to impose and justify limitations on the right of an alien to submit reasons against his/her expulsion, which cannot be separated from the right to know the actual reasons for the expulsion, based on national security grounds, significantly dilutes the effective protection afforded. In this connection, it is to be noted that, regrettably, the applicants became aware of some details about the reasons for their expulsion from a Romanian Intelligence Service ("SRI") press release, which was relayed in two newspaper articles (see paragraphs 30-31), rather than from due notification by the competent authority. Based on this information in the public domain, the applicants tried to piece together the reasons for their expulsion and put forward evidence to refute the presumed accusations on appeal, for example by asking the High Court to contact their bank in order to obtain evidence of their financial situation which contradicted the case against them (paragraph 38). The public prosecutor's office then sought to dismiss this request by arguing that such bank evidence was irrelevant (paragraph 39). The inequality of knowledge between the prosecution and the applicants irreparably hindered their defence, and consequently perverted the course of justice. The principle of effectiveness would be profoundly impaired or negated if it were accepted that there could be circumstances in which the State is justified in not providing the reasons for an alien's expulsion. Without the absolute protection of the minimum procedural safeguards, the protection guaranteed by Article 1 of Protocol No. 7 would be futile. What happened to the applicants, as explained above, was the unavoidable consequence of the authorities' failure to regard the minimum procedural safeguards of Article 1 as absolute.

17. As has been said above, the principle of effectiveness as a method of interpretation assists the same principle in its capacity as a norm of international law inherent in a Convention provision. However, this assistance can only be useful if the norm of effectiveness in the provision, being associated with the nature of the protected right, i.e. whether it is absolute or qualified, is first correctly apprehended. The judgment does not

refer to the principle of effectiveness specifically as a norm of international law in Article 1 of Protocol No. 7. Furthermore, by erring as to the nature of the minimum procedural safeguards or sub-rights listed in Article 1 § 1 of Protocol No. 7 and by wrongly considering the single compound right guaranteed in that provision to be a qualified right, the judgment consequently misapprehends the very nature of the norm of effectiveness inherent in that provision, and, therefore, misinterprets and misapplies the said norm in the present case. In my humble view, the principle of effectiveness as a norm in Article 1 § 1 precludes any limitations of the right guaranteed therein, including all the minimum procedural safeguards or sub-rights, which must be applied cumulatively and without exception.

18. In the light of the above, it can rightly be argued that the principle of effectiveness as a method of interpretation would not fulfil its task if it were to be employed such as to assist in interpreting and applying a norm which was, in the first place, misconstrued as to its nature and content. The principle of effectiveness as a method must be based on the correct foundation – the correct norm. And this is so since the extent of protection of an absolute right is higher than that of a qualified right, which would have limitations. This unavoidably makes the content and nature of the norm of effectiveness in respect of absolute rights different from the norm as applied to qualified rights. That is why I firmly believe that in all cases where the Court refers to the principle of effectiveness it must expressly refer to both capacities of the principle, namely as a norm of international law and as a method of interpretation. It must also show their interrelationship and co-dependency and explain their application to the facts of the case before it. It is unfortunate that, to date, the capacity of the principle of effectiveness as a norm of international law has either been overlooked or merely implied by the Court in its case-law, without making an express reference to that capacity. It is well established, however, that the Convention is part of international law and that its provisions are rules of international law. Thus it should not be overlooked that the principle of effectiveness as a norm of international law is inherent in all Convention provisions. If the Court does not focus on both capacities of the principle and if it does not use them properly, it may find itself applying the principle as a method of interpretation on the basis of an erroneous norm of effectiveness, as I respectfully suggest that it has done in the present case. As observed by Ingo Venzke[11], "[t]he development of international norms in the practice of interpretation deserves special attention"[12]. Such special attention was called for in the present case but was not forthcoming.

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[11] See Ingo Venzke, *How Interpretation Makes International Law: on Semantic Change and Normative Twists,* Oxford, 2012.
[12] *Ibid.,* at p. 7.

(g) Conclusion

19. There cannot be any effective protection of an absolute right if it is to be treated as a qualified right, resulting in a needless attempt to protect its very essence by counterbalancing factors. This is where I respectfully disagree with the reasoning of the judgment. The right at stake here is, in my view an absolute right and must be treated as such, with all that this absolute nature entails.

CONCURRING OPINION OF JUDGE ELÓSEGUI

1. I would like to begin by indicating that I am completely in agreement with the conclusion of the Grand Chamber's judgment in the present case. The aim of this concurring opinion is merely to emphasise, as Judge Pinto de Albuquerque does in his concurring opinion as well, that the judgment could have been improved by making a clearer distinction between the test as to the essence of a right and the proportionality test (assessment of the counterbalancing factors). The two tests are totally different, as the UNCHR, the Inter-American Court and Commission of Human Rights, the German Federal Constitutional Court (BVerfG) and many other constitutional courts have explained. I would refer in this connection to Robert Alexy's work *A Theory of Constitutional Rights*[1].

2. The question that is addressed in *Muhammad and Muhammad v. Romania* is a crucial one at the present time, because of the danger of justifying a violation of the essence of fundamental rights by the excuse of terrorism prevention[2]. It is becoming quite common among jurists and academics to justify the use of torture in order to obtain information in the context of terrorism[3]. The European Court of Human Rights has been very clear in condemning the use of torture, considering it to constitute a violation of Article 3 of the Convention[4].

3. The present case concerns the applicants' allegation that, during the proceedings leading to their expulsion from Romania on the grounds of having links with terrorist activities, they were not informed of the specific accusations against them, an omission which in their view fell short of the procedural safeguards required by Article 1 of Protocol No. 7 to the Convention.

4. The main question before the Grand Chamber was that of the minimum level of procedural safeguards that should be afforded to the alien under Article 1 § 1 of Protocol No. 7 in the context of administrative expulsion proceedings where the alien's right to be informed of the reasons underlying the expulsion and the right of access to the file were restricted on national security grounds.

5. After a presentation of the case-law on Article 1 § 1 of Protocol No. 7, the Grand Chamber seeks to ascertain whether and to what extent the rights

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[1] Robert Alexy, *A Theory of Constitutional Rights*, Julian Rivers translation, Oxford: Oxford University Press, first published 1985 (second edn. 2002).

[2] See Richard Posner, "Torture, Terrorism and Interrogation", in Sanford Levinson (ed.), *Torture. A Collection*, Oxford, 2004, pp. 291-298.

[3] Elaine Scarry, "Five errors in the Reasoning of Alan Dershowitz", in Sanford Levinson (ed.), cited above, pp. 281-290. Against torture, see *Aksoy v. Turkey*, no. 21987/93, 18 December 1996.

[4] See *Al Nashiri v. Romania*, no. 33234/12, 31 May 2018; *Al Nashiri v. Poland*, no. 28761/11, 24 July 2014; and *Abu Zubaydah v. Lithuania*, no. 46454/11, 31 May 2018.

asserted by the applicants are protected by that Article (paragraphs 125-129). To do so it takes as its starting point the text of Article 1 § 1 of Protocol No. 7 and the relevant case-law of the Court in such matters. The judgment concludes that Article 1 § 1 of Protocol No. 7 requires in principle that the aliens concerned be informed of the relevant factual elements which have led the competent domestic authorities to consider that they represent a threat to national security and that they be given access to the content of the documents in the case file on which those authorities relied when deciding on their expulsion.

6. The judgment then seeks to establish a definition of the threshold that should be met in order to ensure that there is no breach of Article 1 of Protocol No. 7 even in cases where there is a limitation of the procedural rights guaranteed under that Article. In line with the precedent of *Regner v. the Czech Republic* ([GC], no. 35289/11, § 148, 19 September 2017), the Court takes the view that *the very essence* of the rights secured to the alien by Article 1 of Protocol No. 7 must be preserved.

7. The judgment also lays down the criteria to be taken into account in order to determine whether limitations imposed on the procedural rights are compatible with Article 1 of Protocol No. 7. The Court ascertains whether the limitations were necessary and whether the preservation of the very essence of the rights in question called for counterbalancing measures and, if so, which ones.

8. Two points should be highlighted. (1) Should the national authorities have failed to examine – or have insufficiently examined – the need for limitations on the alien's procedural rights, this will not suffice in itself to entail a violation of Article 1 § 1 of Protocol No. 7. In any event, the Court has considered whether any counterbalancing measures were applied in the case at hand. As regards the examination by the national authorities of the need to impose such limitations, the less stringent the examination, the stricter the Court's scrutiny of the counterbalancing factors will have to be. (2) Compliance with Article 1 § 1 of Protocol No. 7 does not necessarily mean that all the counterbalancing factors listed in the judgment should be put in place cumulatively. The list only contains examples of factors that would be capable of appropriately counterbalancing a limitation of procedural rights and it should also be borne in mind that the assessment of the nature and scope of those factors may vary depending on the circumstances of a given case (paragraph 150).

9. Lastly, in applying the above-mentioned criteria, the judgment seeks to establish whether, in the present case, the very essence of the applicants' rights under Article 1 of Protocol No. 7 has been preserved (paragraphs 158-206). After the analysis, it proposes the conclusion that there has been a violation of Article 1 of Protocol No. 7.

10. As Judge Pinto de Albuquerque deals in his opinion with the principle of the essence of rights, I would like to focus my own opinion on the proportionality test.

11. Starting from the idea that some rights can legitimately be restricted to guarantee the harmonious coexistence of all concurrent rights and interests, this opinion assumes that the principle of proportionality provides an argumentative structure by which to verify the legitimacy of the permitted restrictions of fundamental rights.

12. In different publications I have referred to the main current positions that have been developed in academia, especially in Europe, on the principle of proportionality, concluding that it is a tool which assists judges in structuring an orderly reasoning for the resolution of a case. I have affirmed that Robert Alexy's theory is useful when studying the manner in which the courts really argue[5]. I also agree with Carlos Bernal's thesis when he states that in the weighting exercise it is not possible to exclude the subjective assessments of the judge. But this is compatible with rationality if the judge applies and justifies each step of the proportionality test. Undoubtedly this idea can be inserted into a theoretical framework that starts from the theses of Robert Alexy and his disciples (Borowski[6], Bernal Pulido, Klatt[7], Möller), among whom I have the honour of finding myself. Professor Alexy participated in a seminar organised at the European Court of Human Rights in April 2019 and presented an analysis of the principle of proportionality as applied in the case of *Delfi AS v. Estonia* ([GC], no. 64569/09, ECHR 2015), the subject of an article to be published in the near future by Springer[8]. Among other disciples, for the purposes of this concurring

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[5] Robert Alexy, "On Balancing and Subsumption. A Structural Comparison", *Ratio Juris,* 10, 2003, 433-449. Robert Alexy, "Kollision und Abwägung als Grundprobleme der Grundrechtsdogmatik", *World Constitutional Law Review*, 6, 2002, 9-26. Robert Alexy, "Die Abwägung in der Rechtsanwendung", *Jahresbericht des Institutes für Rechtswissenschaften an der Meeij Gakuin Universität*, 2002, 17, 69-83. María Elósegui (coordinator), "El principio de proporcionalidad de Alexy y los acomodamientos razonables en el caso del TEDH *Eweida y otros c. Reino Unido* / Das Verhältnismässigen anpassungen in der Entscheidung des Europäischen Gerichtshofs für Menschenrechte (EGMR) im Fall *Eweida und Andere* gegen das Vereinigte Königreich"*, Los principios y la interpretación judicial de los Derechos Fundamentales. Homenaje a Robert Alexy en su 70 Aniversario*, Zaragoza, Giménez Abad Foundation, Alexander von Humboldt Stiftung and Marcial Pons, 2016. Alejandra Flores, María Elósegui and Enrique Uribe (eds), *El neoconstitucionalismo en la teoría de la argumentación de Robert Alexy. Homenaje en su 70 Aniversario*, Mexico, Editorial Porrúa and Autonomous University of the State of Mexico, 2015.

[6] Martin Borowski, *Grundrechte als Prinzipien*, 2nd edn., Baden-Baden: Nomos, 2007.

[7] Matthias Klatt and Moritz Meister share the same opinion in their work, *The Constitutional Structure of Proportionality*, Oxford University Press, 2012, at p.9: "Alexy's analysis of the proportionality test is as neatly in accordance with the jurisprudence of the ECtHR as possible".

[8] Robert Alexy, "The Responsibility of Internet Portal Providers for Readers' Comments. Argumentation and Balancing in the Case of *Delfi A.S. v. Estonia*", in María Elósegui,

opinion, I would highlight the publications of Professor Laura Clérico[9]. Other authors who have contributed with their writings to this position are several Belgian professors, including Eva Brems, Sébastien Van Drooghenbroeck, and François Tulkens, former judge of the Court. Further essential readings include the works of Barak[10], Bomhoff[11], Cohen-Eliya[12], Porat and Ducoulombier.

13. In relation to the principle that the restriction must be prescribed by law and must have a legitimate aim, the Court confines itself to verifying that the restrictive measure is intended to protect rights or interests that fall within its established criteria in order to authorise the restrictions.

14. In relation to the analysis of suitability, the Court carries out this test based on the necessity of the measure adopted, but not in a direct manner, as it is integrated into the examination of whether the end is legitimate or not. The Court first verifies whether the measure has been prescribed by law and, secondly, whether the purpose is legitimate. It does not apply an analysis of suitability in the manner proposed by the proportionality test according to German constitutional legal doctrine. In fact, it simply verifies that the restrictive measure has a normative origin without stopping to assess or express detailed justifications about the causal connection between measure and purpose. In other words, it does not verify whether the restrictive measure serves to promote the purpose pursued. The Court focuses on assessing the interference caused by the restriction. It is at this stage that the Court performs the weighting exercise.

15. In relation to the possible need for the measure, or for alternative means that are less restrictive, in general the Court does not engage in this type of reflection or does not always apply the test of the least restrictive measure. Its supervision is focused on examining whether the national authorities have complied with the permitted parameters to restrict fundamental rights as established by the Court itself. This examination is left to the domestic courts, respecting the margin of appreciation of the States. Therefore, in principle, the Court does not usually conduct a separate examination as to whether or not there are less harmful alternative measures, but includes this factor at the stage where it determines whether

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Alina Miron and Iulia Motoc (eds), *The Rule of Law in Europe*. *Recent Challenges and Judicial Responses*, Springer, 2021 (forthcoming).

[9] Laura Clérico, *El Examen de Proporcionalidad en el Derecho Constitucional*, Buenos Aires: Eudeba, 2009.

[10] Aharon Barak, *Proportionality: Constitutional Rights and their Limitations*, Cambridge University Press, 2012.

[11] Jacco Bomhoff, *Balancing Constitutional Rights: The Origins and Meaning of Postwar Legal Discourse* (Cambridge Studies in Constitutional Law), Cambridge University Press, 2015.

[12] Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture*, Cambridge University Press, 2013

such interference with a Convention right is necessary in a democratic society.

16. The key point is that the Court does not perform an analysis of proportionality *stricto sensu* with the three typical steps established in German constitutional legal doctrine. For my part, in relation to the *Voynov v. Russia* judgment[13], I drafted a concurring opinion precisely in an attempt to apply the principle of proportionality *stricto sensu*, attributing weight to the rights at stake and considering whether there was a less burdensome alternative for the plaintiff which would meet the objective pursued by the Government. In my reasoning, I applied Professor Alexy's formula to some extent[14].

17. Certainly, there is no detailed analysis, on the part of the Court, of the third step of the proportionality test in the strict sense. One of the main reasons is that the Court analyses whether the domestic courts have performed the balancing exercise properly. In principle, if they have not done so, the Court tries to indicate this, especially by referring to the criteria or principles that it has established in its leading cases, but does not substitute its own assessment for theirs. Undoubtedly, in the Court the idea of respecting the margin of appreciation of States has been enhanced, especially since the April 2012 Brighton Declaration on reforming the Convention system.

18. On the other hand, for the Court, its own judicial precedents acquire significant weight when applied to the specific case before it. This has led to the elaboration of principles that are established as results-based rules. Thus the Court carries out its proportionality test in the light of the general principles that it has established throughout its case-law.

[13] *Voynov v. Russia* (no. 39747/10, 3 July 2018); concurring opinion of Judge Elósegui.

[14] Robert Alexy, "Die Gewichtsformel", in J. Jickeli, P. Kreutz and D. Reuter (eds), *Gedächtnisschrift für Jürgen Sonnenschein*, Berlin: De Gruyter, 2003.

JOINT DISSENTING OPINION OF JUDGES YUDKIVSKA, MOTOC ET PACZOLAY

(Translation)

We are unable to support the majority in the present case on account of two essential considerations: in our view, the majority's judgment departs substantially from the *Regner v. the Czech Republic* ([GC], no. 35289/11, 19 September 2017) judgment, tending rather to follow the joint partly dissenting opinion of Judges Raimondi, Sicilianos, Spano, Ravarani and Pastor Vilanova annexed thereto, and it fails to take account of the possibility under Romanian law for lawyers who hold an ORNISS certificate to access sensitive information in the case file. Our main objection here relates to the higher degree of protection afforded under Article 1 of Protocol No. 7 compared to Article 6 – a situation that we find paradoxical. The preamble to the Explanatory Report in respect of Protocol No. 7 expressly states that in adopting Article 1 of that Protocol the States were agreeing to "minimum" procedural safeguards.

By way of reminder, the *Regner* judgment (cited above) concerned an administrative decision which terminated the security clearance that the applicant had needed as a prerequisite for high-level duties in the Ministry of Defence. Relying on Article 6 § 1 (right to a fair hearing) of the Convention, the applicant in that case complained that he had not been given access to decisive evidence, described as confidential information, during the proceedings in which he challenged the withdrawal of his security clearance. In its judgment the Court noted that those proceedings had been subjected to two limitations in relation to the ordinary rules guaranteeing a fair hearing: first, the classified documents and information had not been available either to him or to his lawyer; and secondly, since the withdrawal decision had been based on this written evidence, the grounds underlying the decision had not been disclosed to him.

In order to determine whether the essence of the applicant's right to a fair hearing had been impaired in that case, the Court took the view that it had to consider the proceedings as a whole and ascertain whether the limitations on the principles of adversarial proceedings and equality of arms, as applicable in civil procedure, had been sufficiently counterbalanced by other procedural safeguards. After examining the matter, the Court found, having regard to the proceedings as a whole, to the nature of the dispute and to the margin of appreciation afforded to the national authorities, that the restrictions curtailing the applicant's enjoyment of his rights, afforded to him in accordance with the principles of adversarial proceedings and equality of arms, had been sufficiently offset such that the fair balance

between the parties was not affected to such an extent as to impair the very essence of the applicant's right to a fair trial (*Regner*, cited above, § 161).

The case of *Muhammad and Muhammad v. Romania* clearly presents factual similarities with the *Regner* case: they both concern contentious administrative proceedings in which the litigants sustained a restriction of their procedural rights by being deprived of access to documents in the file. In both these cases the documents underlying the decisions of the national authorities were classified and the lawyers representing the applicants did not have access to them either. The domestic courts, by contrast, did have access to the entire content of the files, including the classified evidence.

While in *Regner* the Court examined the applicant's complaint under Article 6 of the Convention, it was called upon in the present case to examine similar allegations under Article 1 of Protocol No. 7. The Court notes from the outset that Article 6 of the Convention is not applicable (see paragraph 115). It further refers to the Explanatory Report, which expressly points out that in adopting Article 1 of Protocol No. 7 the States agreed to "minimum" procedural safeguards in expulsion cases (see paragraph 117).

Given that the Convention Articles respectively applicable to each of these cases both guarantee procedural rights but different ones, and especially in view of the fact that Article 1 of Protocol No. 7 guarantees "minimum" procedural safeguards, the respective procedural rights afforded to litigants by these two Articles should not carry the same weight. It is also quite natural that the procedural safeguards afforded under Article 1 of Protocol No. 7 should be less extensive than those provided for by Article 6 of the Convention.

Moreover, in the present judgment the Court is clearly aware of the distinction to be made between the respective scope of the rights guaranteed by these two Articles, and thus does not transpose to Article 1 of Protocol No. 7 the Article 6 rights. Accordingly, after recapitulating its case-law under Article 1 of Protocol No. 7, the Court circumscribes the scope of the rights guaranteed by that provision. While Article 6 of the Convention secures in principle the right to be informed of all the accusations and to have access to all the documents in the file, Article 1 of Protocol No. 7 "requires in principle that the aliens concerned be informed of the relevant factual elements which have led the competent domestic authorities to consider that they represent a threat to national security and that they be given access to the content of the documents and the information in the case file on which those authorities relied when deciding on their expulsion" (see paragraph 129).

In its examination of the possible limitations on the aliens' procedural rights and their compatibility with Article 1 of Protocol No. 7, the Court indicates that it is guided by the methodology used in previous cases to assess restrictions of procedural rights protected by the Convention, and more particularly those enshrined in Articles 5 and 6 (see paragraph 135).

We find it somewhat doubtful, however, that the assimilation of the safeguards under Article 1 of Protocol No. 7 with those of Articles 6 and 5 reflects the nature of the rights respectively at stake in these provisions: the safeguards applicable to detention and to criminal proceedings do not necessarily have to be identical when it comes to the mere return of an individual, without risk, to his or her country of origin.

The Court subsequently develops reasoning that it seeks to render compatible with the *Regner* judgment. Thus, in ruling on the compatibility with the Convention of the limitations imposed in the present case on the applicants' rights, the Court adopts the same criterion as that which it has applied under Article 6 of the Convention, namely that: "any limitations of the rights in question must not negate the procedural protection guaranteed by Article 1 of Protocol No. 7 by impairing the very essence of the safeguards enshrined in this provision (see, *mutatis mutandis*, *Regner*, cited above, § 148)" (see paragraph 133). It similarly finds that any difficulties resulting from these limitations for the alien concerned must be sufficiently compensated for (ibid. and *Regner*, cited above, § 148). As indicated in the *Regner* judgment (cited above, § 161) under Article 6, the compatibility of limitations with Article 1 of Protocol No. 7 must be examined in the light of the proceedings as a whole (see paragraph 157).

Whilst it is pertinent to take account of the Court's case-law in adopting the methodology to be followed when assessing limitations of procedural rights, it can nevertheless be said that, on closer examination, the enumeration of the criteria to be considered when analysing the compatibility of the limitations in the present case seems to be based on a transposition of those that were adopted by the Court in *Regner* and even to extend the Contracting States' obligations in the present field.

Accordingly, as regards the condition that a limitation must be duly justified, it is noteworthy that the Court looks at the powers of the domestic courts in relation to the classification of documents. Whilst in the *Regner* judgment the Court found it sufficient that the Czech courts had the power to assess whether the non-disclosure of classified documents was justified and to order the disclosure of those which did not warrant classification, it seems to consider it necessary in the present case to examine, first, whether an independent authority "is entitled to review the need to maintain the

confidentiality of the classified information"; and, secondly, where that independent authority found that the protection of national security did preclude the disclosure to the alien of the content of the classified documents, the Court will determine whether, in reaching that conclusion, the authority duly identified the interests at stake and weighed up the national security interests against the alien's interests (see paragraphs 141 and 143). This means that a competent authority not only has to review the need to classify certain documents, but must also provide a degree of justification for such a need, after weighing up the interests at stake. Such a requirement goes beyond the powers of the domestic courts that were deemed sufficient by the Court in the *Regner* case.

As regards the factors that are capable of sufficiently compensating for the restrictions of the procedural rights of the aliens concerned, the Court draws up a non-exhaustive list and identifies their content.

The first counterbalancing factor relates to the relevance of the information disclosed to aliens as to the reasons for their expulsion. Although the Court recognises that the extent of that information must be assessed on a case-by-case basis, it nevertheless considers it necessary to ascertain "whether the national authorities have, to the extent compatible with maintaining the confidentiality and proper conduct of investigations, informed the alien concerned, in the proceedings, of the substance of the accusations against him or her" (see paragraph 151); whilst in *Regner* the Court found that "Czech law could have made provision, to the extent compatible with maintaining the confidentiality and proper conduct of investigations regarding an individual, for him to be informed, at the very least summarily, in the proceedings, of the substance of the accusations against him" (see *Regner*, cited above, § 153).

A clear discrepancy can be seen here, between the two cases, as regards the content of the information that must be disclosed to those concerned, according to the Court. The fact that the Court has omitted the expression "at the very least summarily" in the present judgment reflects its view that the person concerned should be informed, under Article 1 of Protocol No. 7, of the substance of the accusations against him or her, but it does not considered it sufficient in this instance to provide the information summarily. It can thus be inferred that the *Muhammad and Muhammad* judgment imposes a discrete requirement in relation to that laid down in *Regner*. Can this be seen as an implicit reinforcement of the procedural safeguards that have to be afforded under Article 1 of Protocol No. 7 – an Article supposed to provide for "minimum" guarantees – over and above those required by Article 6 of the Convention?

It can thus be observed that the majority in the present case have developed procedural safeguards that not only were never intended by the "forefathers" of the Convention, they are not the subject of a European consensus either. In this connection it should be noted that the "founding States" of the Convention – the United Kingdom and the Netherlands, together with Germany, have never ratified Protocol No. 7, and that Switzerland has ratified it with a clear reservation: "When expulsion takes place in pursuance of a decision of the Federal Council ... on the grounds of a threat to the internal or external security of Switzerland, the person concerned does not enjoy the rights listed in paragraph 1 even after the execution of the expulsion".

As regards the representation of the aliens concerned, the Court did not examine in the *Regner* judgment whether the applicant's lawyer could have had access to the classified documents and, if so, under what conditions. In this connection it can be seen in the present case that the Romanian judicial system enabled aliens to be assisted by a lawyer holding an ORNISS certificate allowing access to classified documents. Such a safeguard may effectively compensate for the limitation of the alien's right of access to documents in the file. The applicants were represented throughout the appeal proceedings in question by two lawyers who could – and indeed should – have informed them of the possibility of representation by a lawyer with an ORNISS certificate, and even have helped them to find such a lawyer through the Bar.

Lastly, as to the counterbalancing factor consisting of the intervention in the proceedings of an independent authority, it should be noted that in *Muhammad and Muhammad* the Court defines it by taking account of the elements that it previously deemed relevant and sufficient in the *Regner* judgment in order to compensate for the limitation of the applicant's procedural rights: the competent authority must enjoy independence; it must have access to the classified documents underlying the expulsion request; it must be able to rule on the merits of the decision, or at least its legality, and find against any arbitrary decision; it must duly exercise its power of scrutiny in such proceedings and provide reasoning to justify its decision in the light of the concrete circumstances of the case.

A parallel reading of the present judgment and the *Regner* judgment thus reveals that after declaring that the safeguards afforded by Article 6 of the Convention could not be transposed to Article 1 of Protocol No. 7, the Court has nevertheless in the present case followed a line of reasoning which is based on the elements that it took into consideration in *Regner*.

Moreover, as indicated above, the Court lays down in the present judgment a requirement that is even more stringent in terms of the information to be provided to those concerned.

Even though the Court points out that compliance with Article 1 § 1 of Protocol No. 7 does not necessarily require that all the enumerated factors should be put in place cumulatively (see paragraph 157), it can nevertheless be said that the "minimum" safeguards afforded by this provision appear to be similar to those afforded by Article 6 of the Convention for the same type of limitation of procedural rights.

The aspects highlighted above lead us to conclude that in the present case the Court has departed from its own recent case-law, as set out in its *Regner* judgment, or that it has sought indirectly to circumvent the findings that it made in that judgment.