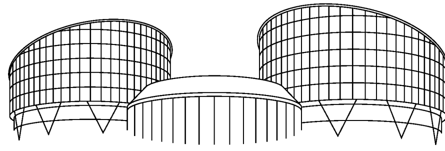

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF MOREIRA FERREIRA v. PORTUGAL (No. 2)

(Application no. 19867/12)

JUDGMENT

STRASBOURG

11 July 2017

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Moreira Ferreira v. Portugal (no. 2),

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

Guido Raimondi, *president,*
Işıl Karakaş,
Angelika Nußberger,
Luis López Guerra,
András Sajó,
Mirjana Lazarova Trajkovska,
Nona Tsotsoria,
Vincent A. De Gaetano,
Paulo Pinto de Albuquerque,
Helen Keller,
Paul Mahoney,
Krzysztof Wojtyczek,
Faris Vehabović,
Egidijus Kūris,
Jon Fridrik Kjølbro,
Síofra O'Leary,
Marko Bošnjak, *judges,*
and Françoise Elens-Passos, *Deputy Registrar*,

Having deliberated in private on 1 June 2016 and 5 April 2017,

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

PROCEDURE

1. The case originated in an application (no. 19867/12) against the Portuguese Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Portuguese national, Ms Francelina Moreira Ferreira ("the applicant"), on 30 March 2012.

2. The applicant, who had been granted legal aid, was represented by Mr J.J. F. Alves, a lawyer practising in Matosinhos. The Portuguese Government ("the Government") were represented by their Agent, Ms Maria de Fátima da Graça Carvalho.

3. Relying in particular on Articles 6 and 46 of the Convention, the applicant complained of the dismissal of her application for a review of a criminal judgment delivered against her.

4. The application was assigned to the First Section of the Court (Rule 52 § 1 of the Rules of Court). On 1 April 2014 the Section President decided, pursuant to Rule 54 § 2 (b), to give notice of the aforementioned

complaints to the respondent Government. The remainder of the application was declared inadmissible in accordance with Rule 54 § 3.

5. Following a change in the composition of the Sections of the Court (Rule 25 § 1), the case was assigned to the Fourth Section (Rule 52 § 1).

6. On 12 January 2016 a Chamber of that Section, composed of András Sajó, President, Vincent A. De Gaetano, Boštjan M. Zupančič, Nona Tsotsoria, Paulo Pinto de Albuquerque, Krzysztof Wojtyczek, Egidijus Kūris, judges, and Fatoş Aracı, Deputy Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected (Article 30 of the Convention and Rule 72).

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

8. The applicant and the Government each filed written observations on the admissibility and the merits of the case.

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 1 June 2016 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Ms M. de Fátima da Graça Carvalho, *Agent*,
Mr J. Conde Correia,
Ms A. Garcia Marques, *Advisers*;

(b) *for the applicant*
Mr J.J.F. Alves, *Counsel*.

The Court heard addresses by Ms da Graça Carvalho and Mr Alves, and also their replies to questions put by the judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant was born in 1961 and lives in Matosinhos.

A. Factual background

11. Following an altercation with other persons, the applicant was prosecuted by the public prosecutor at the Matosinhos District Court for threatening conduct. An expert report was produced during the

investigation, stating that the applicant had limited intellectual and cognitive capacities but that she should be held criminally responsible for her acts.

12. In a judgment of 23 March 2007 the Matosinhos District Court dismissed the applicant's defence of diminished criminal responsibility and sentenced her to 320 day-fines, amounting to a total of 640 euros (EUR), for threatening and insulting conduct, as well as ordering her to pay damages to the victims.

13. On 13 April 2007 the applicant appealed to the Oporto Court of Appeal ("the Court of Appeal") against the judgment. She repeated that she had been unaware of the unlawfulness of her acts and sought an acknowledgment of her lack of criminal responsibility owing to the psychiatric disorders from which she claimed to suffer. Consequently, she asked for a fresh assessment of the facts and the opportunity to state her case at a hearing.

14. On 12 December 2007 the Court of Appeal held a hearing attended by the public prosecutor and counsel for the applicant. However, no examination of the applicant herself took place.

15. In a final judgment of 19 December 2007 the Court of Appeal upheld the applicant's conviction for threatening and insulting conduct, but reduced the sentence to 265 day-fines, amounting to a total of EUR 530. It held that there was no need for a fresh assessment of the facts because the applicant had not succeeded in challenging the validity of the assessment conducted by the court of first instance.

16. The applicant paid the fine in several instalments.

17. During the hearing before the Court it was pointed out that in January 2016, five years after the fine had been paid in full, the entry concerning the applicant's conviction had been deleted from her criminal record.

B. Application no. 19808/08 and the judgment delivered by the Court on 5 July 2011

18. On 15 April 2008 the applicant lodged an application with the Court complaining that she had not been heard in person by the Court of Appeal, and that this violated Article 6 § 1 of the Convention.

19. In a judgment of 5 July 2011 the Court declared admissible the complaint under Article 6 § 1 of the Convention and found a violation of that provision, holding as follows:

> "...
>
> 33. The Court notes that in the present case the Court of Appeal was invited to determine several questions relating to the facts of the case and to the person of the applicant. As before the court of first instance, the applicant raised, in particular, the question whether her criminal responsibility should have been deemed diminished, which might have had a major impact on the determination of the sentence.

> 34. The Court takes the view that that question could not have been settled by the Court of Appeal without a direct assessment of the applicant's personal testimony, particularly since the judgment of the Matosinhos District Court had departed slightly from the conclusions of the psychiatric report without setting out the reasons for such a departure, as required under domestic law ... The Court of Appeal's re-examination of that question should therefore have comprised a full rehearing of the applicant ...
>
> 35. Those factors are sufficient for the Court to conclude that in the instant case a public hearing should have been held before the appellate court. There has therefore been a violation of Article 6 § 1 of the Convention."

20. As regards the claims in respect of pecuniary and non-pecuniary damage under Article 41 of the Convention, the Court stated the following:

> "41. The Court firstly considers that when, as in the instant case, an individual has been convicted after proceedings that have entailed breaches of the requirements of Article 6 of the Convention, a retrial or the reopening of the case, if requested, represents in principle an appropriate way of redressing the violation. In that regard, it notes that Article 449 of the Portuguese Code of Criminal Procedure permits the reopening of proceedings at domestic level where the Court has found a violation of a person's fundamental rights and freedoms. However, the specific remedial measures, if any, required of a respondent State in order to discharge its obligations under the Convention must depend on the particular circumstances of the individual case and be determined in the light of the terms of the Court's judgment in that case (see *Öcalan v. Turkey* [GC], no. 46221/99, § 210, ECHR 2005-IV, and *Panasenko v. Portugal*, no. 10418/03, § 78, 22 July 2008). In the present case, the only point at issue is the fact that the applicant was not given a hearing by the Court of Appeal.
>
> 42. Secondly, the Court notes that in the present case the only applicable basis for an award of just satisfaction lies in the fact that the applicant was not afforded the safeguards of Article 6. In that regard, it does not discern any causal link between the violation found and the pecuniary damage alleged, and rejects this claim. The Court cannot speculate as to what the outcome of the proceedings before the Court of Appeal would have been if it had examined the applicant at a public hearing (see *Igual Coll v. Spain*, no. 37496/04, § 51, 10 March 2009). On the other hand, it considers it appropriate to award the applicant EUR 2,400 in respect of non-pecuniary damage."

C. Procedure before the Committee of Ministers for the execution of the judgment of 5 July 2011

21. On 5 July 2012 the Portuguese Government submitted an action plan to the Committee of Ministers concerning the execution of the Court's judgment of 5 July 2011. They confirmed that the amount awarded to the applicant had been paid to her on 14 December 2011. As regards the general measures, the Government pointed out that the Prime Minister's Office had proposed amending the Code of Criminal Procedure to allow hearings to be held in any court of appeal determining the issue of guilt or the sentence in respect of an accused person.

22. At the hearing before the Court it was pointed out that the aforementioned proposal had not been approved and had therefore not in

fact been included in the final version of the revised Code of Criminal Procedure.

23. At the time of adoption of the present judgment no plans to reform the Code of Criminal Procedure were on the domestic authorities' agenda. The procedure for supervising the execution of the judgment of 5 July 2011 was still pending before the Committee of Ministers.

D. The applicant's application for review

24. Concurrently, on 18 October 2011, relying on Article 449 § 1 (g) of the Code of Criminal Procedure, the applicant lodged an application for review with the Supreme Court. She submitted that the Court of Appeal's judgment of 19 December 2007 was incompatible with the Court's judgment of 5 July 2011.

25. The prosecution submitted that the application should be allowed on the grounds that serious doubts could legitimately be raised about the conviction, particularly as regards the sentencing.

26. In a judgment of 21 March 2012 the Supreme Court refused to grant a review. It held that there was no cause for a review because the judgment delivered by the Court of Appeal was not incompatible with the Court's judgment. It considered that the lack of a hearing for the applicant in the Court of Appeal had constituted a procedural irregularity that was not amenable to review, and held as follows:

> "... under domestic law, an application for review can be submitted solely in respect of judgments (in particular, convictions), and not in respect of orders concerning the conduct of proceedings, it being understood that ... 'judgment' denotes any judicial decision on a case or on a procedural application (see Article 156 § 2 of the Code of Civil Procedure).
>
> In the light of domestic law, however, a review of the judgment in the present case cannot be allowed on the basis invoked by the applicant, because the conviction is not incompatible with the European Court's judgment (Article 449 § 1 (g) of the Code of Criminal Procedure). On the other hand, the procedure followed by the Court of Appeal in holding the hearing at the close of which the appeal was determined was incompatible with what the European Court has deemed vital in order to guarantee the rights of the defence.
>
> Under domestic law, where the accused is legally required to appear in court, his or her absence entails an irremediable nullity (Article 119 (c) of the Code of Criminal Procedure).
>
> However, even where a nullity is irremediable, it cannot give rise to an extraordinary application for review of the judgment ...
>
> Furthermore, as noted by the European Court, it is impossible to speculate about the decision which the Court of Appeal might have taken if the convicted person had been examined at the hearing which led to the decision on her appeal, and, in particular, about whether or not the sentence would have been the same.

The European Court thus precluded from the outset any possibility that its decision might raise serious doubts about the conviction, regardless of the sentence actually imposed.

In short, the conviction is not incompatible with the European Court's binding decision, and no serious doubts arise as to its validity.

For that reason, being aware that it is not always possible to secure a retrial or the reopening of proceedings under the applicable domestic law, as in the present case, the European Court decided to require the Portuguese State to compensate the applicant in respect of non-pecuniary damage, and thus to afford redress not for the unfairness of the conviction, which has not been established, but for a serious defect in the conduct of the proceedings which infringed the applicant's defence rights ...

For the above reasons, the applicant's argument in support of her application to be granted a review is not substantiated.

Consequently, the judges of the Criminal Division of the Supreme Court decide not to grant a review."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Application for review

27. Article 449 § 1 (g) of Law no. 48/2007 of 29 August 2007 amending the Code of Criminal Procedure established a new ground for an application for review of a final judgment. The Article in question is worded as follows:

Article 449 (grounds for an application for review)

"1. A judgment which has become final may be reviewed on the following grounds:

(a) a final judgment has established that the evidence on which the conviction was based was invalid;

(b) one of the judges or jurors who took part in the proceedings that led to the final judgment has been convicted with final effect of an offence linked to the performance of his or her duties;

(c) the facts giving rise to the conviction are incompatible with the facts established in another judgment, where such discrepancy casts serious doubt on the validity of the conviction;

(d) after delivery of the final judgment, fresh evidence has been discovered casting serious doubt on the validity of the conviction;

(e) the conviction was based on unlawfully obtained evidence;

(f) the Constitutional Court has declared unconstitutional one of the provisions on which the conviction was based;

(g) the conviction is irreconcilable with a judgment binding on the Portuguese State that has been delivered by an international authority, or such a judgment casts serious doubt on the validity of the conviction in question.

2. For the purposes of the previous paragraph, any decision discontinuing criminal proceedings shall be treated as a judgment.

3. For the purposes of paragraph 1 (d), an application for review shall be inadmissible where its sole aim is to secure a different sentence.

4. An application for review may be admissible even where proceedings have been discontinued, the sentence has been fully served or the time-limit for its enforcement has expired."

28. In a judgment of 27 May 2009 (domestic proceedings no. 55/01.OTBEPS-A.S1), the Supreme Court held that the new ground, as set out in Article 449 § 1 (g) of the Code of Criminal Procedure, for review of a final judgment had to be interpreted restrictively. In the light of Recommendation No. R (2000) 2 of the Committee of Ministers, it held that the reopening of proceedings was necessary "where a decision of the European Court of Human Rights had concluded that a domestic judgment was contrary to the Convention or where there had been procedural errors or shortcomings of such gravity as to cast serious doubt on the decision (*fortes dúvidas sobre a decisão*) adopted at the close of the proceedings, and, simultaneously, where the injured party continued to suffer very serious adverse effects as a result of the national decision, those effects could not be remedied by the just satisfaction awarded by the Court and *restitutio in integrum* could only be achieved by means of a retrial or the reopening of the proceedings".

In a separate opinion, one of the three judges on the bench that had examined the application for review, while concurring with the decision, expressed the view that the Supreme Court's interpretation of Article 449 § 1 (g) had been overly restrictive. The judge stated the following:

"In my view, the new sub-paragraph (g) of Article 449 § 1 of the Code of Criminal Procedure has introduced a mechanism for the execution of judgments delivered by international courts and recognised by the Portuguese State as binding; where it is called upon to consider an application for review, the Supreme Court must confine itself to ascertaining whether the formal condition referred to [in Article 449 § 1 (g)] is satisfied, namely the existence of a judgment delivered by an international authority and binding on the Portuguese State that is irreconcilable with the conviction or casts serious doubt on its validity. At this stage of the proceedings, the Supreme Court's sole task – I repeat – is to determine whether this formal condition for granting a review is present. It will be for the body conducting the review to deliver a new judgment (Articles 460 et seq. of the Code of Criminal Procedure) entailing the execution of the decision of the European Court of Human Rights."

29. In the judgment in question, the Supreme Court allowed an application for the reopening of criminal proceedings in which a journalist had been convicted of a breach of judicial confidentiality (*segredo de justiça*), having regard to the European Court's finding in *Campos Dâmaso v. Portugal* (no. 17107/05, 24 April 2008) that the conviction had infringed the applicant's right under Article 10 of the Convention.

30. The Supreme Court has allowed three applications for review under Article 449 § 1 (g) of the Code of Criminal Procedure concerning

convictions for defamation which the European Court had deemed incompatible with Article 10 of the Convention:

(a) in its judgment of 23 April 2009 (domestic proceedings no. 104/02.5TACTB-A.S1) concerning the criminal conviction of the author of a book for defamation, the Supreme Court found that the conviction was incompatible with the European Court's judgment in *Azevedo v. Portugal* (no. 20620/04, 27 March 2008);

(b) in its judgment of 15 November 2012 (domestic proceedings no. 23/04.0GDSCD-B.S1) concerning a conviction for defamation, the Supreme Court found that the conviction was incompatible with the European Court's judgment in *Alves da Silva v. Portugal* (no. 41665/07, 20 October 2009); and

(c) in its judgment of 26 March 2014 (domestic proceedings no. 5918/06.4TDPRT.P1) concerning the reopening of criminal proceedings in which the author of a book had been convicted of defamation and fined, the Supreme Court found that the conviction was incompatible with the European Court's judgment in *Sampaio e Paiva de Melo v. Portugal* (no. 33287/10, 23 July 2013). It held, in particular, that the reopening procedure was not intended to re-examine a judgment that had already been delivered but rather to secure a fresh decision following a retrial on the basis of new evidence.

B. Other relevant provisions

31. The other relevant provisions of the Code of Criminal Procedure at the material time read as follows:

Article 119 (irremediable nullity)

"The following shall constitute grounds of irremediable nullity (*nulidades insanáveis*), which must be raised *proprio motu* at any stage of the proceedings, in addition to those provided for in other statutory provisions:

(a) a breach of the statutory provisions governing the composition of the court;

(b) a breach of the statutory provisions governing the role of the public prosecutor's office during the prosecution stage;

(c) the absence of the defendant or counsel for the defence in circumstances where they are required by law to appear;

(d) the absence of compulsory steps in the conduct of the proceedings;

(e) a breach of the rules concerning the court's jurisdiction ...;

(f) the conduct of proceedings in accordance with inappropriate procedures."

Article 122 (effects of nullity)

"1. The act found to constitute a nullity, together with all other acts resulting from it, shall be deemed invalid.

2. The court that establishes the existence of a nullity shall determine which act is to be deemed invalid and shall order, wherever necessary and possible, that the act be repeated. Any associated costs shall be borne by the party responsible for the act that has been deemed invalid.

3. The court that deems an act invalid shall confirm, where possible, that the other steps in the proceedings remain valid."

Article 450 (*locus standi*)

"A review of a judgment may be requested by:

(a) the Attorney General;

...

(c) the convicted person."

Article 457 (granting of a review)

"1. Where a review is granted, the Supreme Court shall refer the case to the nearest possible court in the same category and with the same composition as the court that gave the decision being reviewed.

2. If the convicted person is serving a term of imprisonment or is subject to a security measure, the Supreme Court shall decide, having regard to the seriousness of the doubts concerning the conviction, whether the execution of the sentence or measure should be suspended.

3. If such suspension is ordered or the convicted person has not yet started serving the sentence, the Supreme Court may order a preventive measure."

Article 458 (quashing of incompatible judgments)

"1. If a review is granted under Article 449 § 1 (c) on account of the existence of incompatible judgments resulting in the conviction of different individuals for the same acts, the Supreme Court shall quash the judgments, order a retrial of all the individuals concerned and remit the case to the competent court.

2. Where a retrial is held, the cases shall be joined.

3. The quashing of the judgment shall bring its execution to an end. The Supreme Court may, however, order preventive measures in respect of the individuals being retried."

Article 460 (retrial)

"1. Once the case has been prepared for trial, a date shall be set for the hearing and the ordinary rules of procedure shall be followed.

2. If the review has been granted on the basis of Article 449 § 1 (a) or (b), individuals who have been convicted or prosecuted for acts which were decisive for the outcome of the proceedings being reopened shall not be permitted to take part in the retrial."

III. RECOMMENDATION No. R (2000) 2 OF THE COMMITTEE OF MINISTERS

32. In its Recommendation No. R (2000) 2, adopted on 19 January 2000 at the 694th meeting of the Ministers' Deputies, the Committee of Ministers stated that its practice in supervising the execution of the Court's judgments showed that in exceptional circumstances the re-examination of a case or the reopening of proceedings had proved the most efficient, if not the only, means of achieving *restitutio in integrum*. It therefore invited States to introduce mechanisms for re-examining cases in which the Court had found a violation of the Convention, especially where:

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

33. The explanatory memorandum sets out more general comments on issues not explicitly addressed in the Recommendation. As regards cases corresponding to the above-mentioned criteria, it notes the following:

> "12. Sub-paragraph (ii) is intended to indicate ... the kind of violations in which re-examination of the case or reopening of the proceedings will be of particular importance. Examples of situations aimed at under item (a) are criminal convictions violating Article 10 because the statements characterised as criminal by the national authorities constitute legitimate exercise of the injured party's freedom of expression or violating Article 9 because the behaviour characterised as criminal is a legitimate exercise of freedom of religion. Examples of situations aimed at under item (b) are where the injured party did not have the time and facilities to prepare his or her defence in criminal proceedings, where the conviction was based on statements extracted under torture or on material which the injured party had no possibility of verifying, or where in civil proceedings the parties were not treated with due respect for the principle of equality of arms. Any such shortcomings must, as appears from the text of the recommendation itself, be of such gravity that serious doubt is cast on the outcome of the domestic proceedings."

IV. LAW AND PRACTICE IN THE MEMBER STATES OF THE COUNCIL OF EUROPE

34. A comparative study of legislation and practice in forty-three member States of the Council of Europe shows that many of those States have introduced domestic machinery for requesting, on the basis of a finding by the Court of a violation of the Convention, the re-examination or

reopening of a criminal case which has been the subject of a final judicial decision.

35. In particular, in a substantial number of those States the domestic Code of Criminal Procedure expressly authorises any individual in respect of whom the Court has delivered a judgment finding a violation of the Convention in a criminal case to request the re-examination or reopening of the case on the basis of that finding. Among the member States in question are: Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Estonia, France, Georgia, Germany, Greece, Hungary, Latvia, Lithuania, Luxembourg, the former Yugoslav Republic of Macedonia, Moldova, Monaco, Montenegro, the Netherlands, Norway, Poland, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Switzerland, Turkey and Ukraine.

36. In most of those States, the application for re-examination or reopening must be lodged with a court, but the level of jurisdiction varies from one State to another. In some States the individuals concerned must apply to the highest court, that is to say the Supreme Court (Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bulgaria, Estonia, Greece, Hungary, Lithuania, Luxembourg, Moldova, Monaco, the Netherlands, Poland, Russia, Spain and Switzerland) or the Constitutional Court (the Czech Republic). In others, the application for re-examination or reopening of the case must be lodged with the court which gave the decision complained of (Croatia, the former Yugoslav Republic of Macedonia, Slovenia, Turkey and Ukraine).

37. In some member States the application for re-examination or reopening of the case must be submitted to non-judicial bodies such as independent administrative or quasi-judicial commissions (Iceland, Norway and the United Kingdom), the Minister of Justice (Luxembourg), the Prime Minister, who has discretion to refer the case to the Court of Criminal Appeal (Malta), or the public prosecutor (Latvia).

38. The re-examination or reopening of a case is not normally granted automatically, and the application must satisfy admissibility criteria such as compliance with deadlines and procedural formalities. In some States, national legislation lays down further conditions: for instance, applicants must provide a legal ground in support of their application (Germany, the former Yugoslav Republic of Macedonia and Turkey), rely on a new circumstance (Armenia) or present sufficient facts and evidence to substantiate the application (Italy and the former Yugoslav Republic of Macedonia).

39. Lastly, in other member States the re-examination or reopening of criminal cases on the basis of the Court's finding of a violation of the Convention is currently not expressly provided for in domestic law (this is the case, for example, in Albania, Denmark, Iceland, Italy, Malta, Sweden and the United Kingdom). In some of these States, however, this option is

possible by means of an extensive interpretation of the general provisions on the reopening of proceedings (for example, in Albania, Denmark, Italy and Sweden). In only one member State, Liechtenstein, there is no possibility of re-examining or reopening a criminal case on the basis of a judgment delivered by the European Court of Human Rights.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

40. The applicant complained that the Supreme Court had dismissed her application for a review of the criminal judgment delivered against her. She submitted that the Supreme Court's judgment amounted to a "denial of justice", because that court had incorrectly interpreted and applied the relevant provisions of the Code of Criminal Procedure and the conclusions of the Court's 2011 judgment, thus depriving her of the right to have her conviction reviewed. She alleged a violation of Article 6 § 1 of the Convention, the relevant parts of which provide:

> "In the determination of ... any criminal charge against him ... everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal ..."

A. Admissibility

1. The parties' submissions

41. The Government objected that the Court lacked jurisdiction *ratione materiae* to rule on the merits of the complaint raised by the applicant under Article 6 of the Convention.

42. They contended, firstly, that the new application did not include any new facts as compared with the previous one. It was solely concerned with the execution of the Court's 2011 judgment, and therefore Article 46 prevented the Court from examining it.

43. The Government submitted, secondly, that Article 6 of the Convention was not applicable to the proceedings before the Supreme Court for granting a review of the Court of Appeal's judgment of 19 December 2007 and that the present case involved no factual or legal issues liable to trigger a fresh examination by the Court under Article 6 of the Convention.

In the Government's view, the applicant could not assert any right to have a final criminal conviction reviewed. The extraordinary application for review laid down in Article 449 of the Code of Criminal Procedure differed in its nature, scope and specific features from the other ordinary remedies available in Portuguese law (appeals, in which the whole case was referred

to the appellate court for adjudication, and *revista* appeals, which concerned points of law and, in exceptional cases, serious factual irregularities). According to the Portuguese rules on criminal procedure, the Supreme Court's jurisdiction was limited to granting or refusing the reopening of proceedings, and any decision to allow such an application resulted in the case being remitted to the court of first instance.

44. In the present case, the Supreme Court had confined itself to determining, in the light of domestic law and the European Court's conclusions, whether the conditions for reopening of proceedings were satisfied. To that end, it had compared the judgment delivered by the Court of Appeal on 19 December 2007 with that delivered by the Court on 5 July 2011 for the sole purpose of establishing whether they were compatible and whether the Court's judgment had given rise to any serious doubts as to the validity of the applicant's conviction.

45. The applicant, on the other hand, contended that the Supreme Court's judgment of 21 March 2012 constituted new information and that Article 6 of the Convention had been applicable to the proceedings concerning her application for a review.

2. *The Court's assessment*

46. In examining the admissibility of the present application, the Court must first of all ascertain whether it has jurisdiction to consider the applicant's complaint without encroaching on the prerogatives of the respondent State and the Committee of Ministers under Article 46 of the Convention, and if so, whether the safeguards of Article 6 of the Convention were applicable to the proceedings in question.

(a) Whether Article 46 of the Convention precludes the examination by the Court of the complaint under Article 6 of the Convention

(i) General principles

47. The Court observes that in its judgments in *Bochan v. Ukraine (no. 2)* ([GC], no. 22251/08, ECHR 2015) and *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* ([GC], no. 32772/02, ECHR 2009) and its decision in *Egmez v. Cyprus* ((dec.), no. 12214/07, §§ 48-56, 18 September 2012) it considered the issue of its jurisdiction in relation to the prerogatives of the respondent State and of the Committee of Ministers under Article 46 of the Convention. The principles set out by the Court in those judgments and that decision may be summarised as follows:

(a) Findings of a violation in its judgments are essentially declaratory and, by Article 46 of the Convention, the High Contracting Parties undertook to abide by the final judgments of the Court in any case to which they were parties, execution being supervised by the Committee of

Ministers (see *Verein gegen Tierfabriken Schweiz (VgT) (no. 2)*, cited above, § 61).

(b) The Committee of Ministers' role in this sphere does not mean, however, that measures taken by a respondent State to remedy a violation found by the Court cannot raise a new issue undecided by the judgment and, as such, form the subject of a new application that may be dealt with by the Court. In other words, the Court may entertain a complaint that a retrial at domestic level by way of implementation of one of its judgments gave rise to a new breach of the Convention (*ibid,* § 62; see also *Bochan (no. 2)*, cited above, § 33, and *Egmez*, cited above, § 51).

(c) On that basis, the Court has found that it had the competence to entertain complaints in a number of follow-up cases, for example where the domestic authorities had carried out a fresh examination of the case by way of implementation of one of the Court's judgments, whether by reopening the proceedings or by initiating an entirely new set of proceedings (see *Egmez*, cited above, § 52, and the references therein).

(d) It transpires from the Court's case-law that the determination of the existence of a "new issue" very much depends on the specific circumstances of a given case and that distinctions between cases are not always clear-cut (see *Bochan (no. 2)*, cited above, § 34, and, for an examination of that case-law, *Egmez*, cited above, § 54). The powers assigned to the Committee of Ministers by Article 46 to supervise the execution of the Court's judgments and assess the implementation of measures adopted by States under that Article are not encroached on where the Court has to deal with relevant new information in the context of a fresh application (see *Verein gegen Tierfabriken Schweiz (VgT) (no. 2)*, cited above, § 67).

48. The Court reiterates that it does not have jurisdiction to order, in particular, the reopening of proceedings (*ibid*., § 89). Nevertheless, as stated in Recommendation No. R (2000)2 of the Committee of Ministers, the practice of the Committee of Ministers in supervising the execution of the Court's judgments shows that in exceptional circumstances the re-examination of a case or the reopening of proceedings has proved the most efficient, if not the only, means of achieving *restitutio in integrum*, that is to say ensuring that the injured party is restored, as far as possible, to the situation which he or she enjoyed prior to the violation of the Convention. Among the cases in which the Court finds a violation, re-examination or reopening will be of particular importance in the field of criminal law, according to the explanatory memorandum to the Recommendation (see paragraphs 32 and 33 above).

49. It is therefore clear, as regards the reopening of proceedings, that the Court does not have jurisdiction to order such a measure. However, where an individual has been convicted following proceedings that have entailed breaches of the requirements of Article 6 of the Convention, the Court may

indicate that a retrial or the reopening of the case, if requested, represents in principle an appropriate way of redressing the violation (see *Verein gegen Tierfabriken Schweiz (VgT) (no. 2)*, cited above, § 89). For example, in the specific context of cases concerning the independence and impartiality of the Turkish national security courts, the Court has held that, in principle, the most appropriate form of redress would be for the applicant to be given a retrial by an independent and impartial tribunal (see *Gençel v. Turkey*, no. 53431/99, § 27, 23 October 2003).

50. That approach was confirmed in *Öcalan v. Turkey* ([GC], no. 46221/99, § 210, ECHR 2005-IV) and *Sejdovic v. Italy* ([GC], no. 56581/00, ECHR 2006-II). In the latter judgment the Court set out general principles (§§ 126 and 127) which may be summarised as follows:

(a) Where an individual has been convicted following proceedings that have entailed breaches of the requirements of Article 6 of the Convention, a retrial or the reopening of the case, if requested, represents in principle an appropriate way of redressing the violation. However, the specific remedial measures, if any, required of a respondent State in order for it to discharge its obligations under the Convention must depend on the particular circumstances of the individual case and be determined in the light of the Court's judgment in that case, and with due regard to the Court's case-law.

(b) In particular, it is not for the Court to indicate how any new trial is to proceed and what form it is to take. The respondent State remains free to choose the means by which it will discharge its obligation to put the applicant, as far as possible, in the position he would have been in had the requirements of the Convention not been disregarded, provided that such means are compatible with the conclusions set out in the Court's judgment and with the rights of the defence.

51. In exceptional cases, the very nature of the violation found may be such as to leave no real choice as to the measures required to remedy it, and this will prompt the Court to indicate only one such measure (see, for example, *Assanidze v. Georgia* [GC], no. 71503/01, §§ 202 and 203, ECHR 2004-II, and *Del Río Prada v. Spain* [GC], no. 42750/09, §§ 138 and 139, ECHR 2013). On the other hand, in some of its judgments the Court has itself explicitly ruled out the reopening, following a finding of a violation of Article 6 of the Convention, of proceedings concluded by final judicial decisions (see, for example, *Henryk Urban and Ryszard Urban v. Poland*, no. 23614/08, § 66, 30 November 2010).

(ii) Application of the above principles in the present case

52. The aforementioned general principles indicate that a finding by the Court of a violation of Article 6 of the Convention does not automatically require the reopening of the domestic criminal proceedings. Nevertheless,

this is, in principle, an appropriate, and often the most appropriate, way of putting an end to the violation and affording redress for its effects.

53. This position is supported by the wide range of remedies in Europe enabling individuals to apply, following a finding by the Court of a violation of the Convention, for the reopening of a criminal case which has been concluded by a final judgment. In that connection, the Court notes that there is no uniform approach among the Contracting States as regards the right to apply for the reopening of proceedings that have been closed. It also observes that in most of those States the reopening of proceedings is not automatic and is subject to admissibility criteria, whose observance is supervised by the domestic courts, which have a broader margin of appreciation in that sphere (see paragraphs 34 et seq. above).

54. In the instant case, the Court notes that although the proceedings adjudicated by the Supreme Court incontrovertibly concerned the execution of the Court's 2011 judgment, they were new in relation to the domestic proceedings forming the subject of that judgment, and were subsequent to them. As for the applicant's complaint, the Court notes that it relates to the reasons given by the Supreme Court for dismissing the application for review. That being so, the question whether the procedure for considering the application for review was compatible with the fair-trial standards deriving from Article 6 of the Convention can be examined separately from the aspects relating to the execution of the judgment delivered by the Court in 2011 (see, *mutatis mutandis*, *Bochan (no. 2)*, cited above, § 37).

55. The Court thus notes that in examining the application for review, the Supreme Court dealt with a new issue, that is to say the validity of the applicant's conviction in the light of the finding of a violation of the right to a fair trial. In rejecting the applicant's argument that her conviction was incompatible with the Court's 2011 judgment, the Supreme Court carried out its own interpretation of the Court's judgment, finding that the Court's conclusions were in fact compatible with the judgment of the Court of Appeal. It accordingly ruled that the argument put forward in support of the application for review, based on Article 449 § 1 (g) – an Article which the Court had expressly mentioned as permitting the reopening of the proceedings – was unsubstantiated.

56. In the light of the foregoing, the Court considers that the alleged lack of fairness of the procedure followed in examining the application for review, and more specifically the errors which the applicant claimed had vitiated the reasoning of the Supreme Court, constitute new information in relation to the Court's previous judgment.

57. The Court further notes that a supervision procedure in respect of the execution of the judgment is still pending before the Committee of Ministers (see paragraph 23 above), although that does not prevent the Court from considering a new application in so far as it includes new aspects which were not determined in the initial judgment.

58. The Court therefore finds that Article 46 of the Convention does not preclude its examination of the new complaint under Article 6 of the Convention.

59. Having concluded that it has jurisdiction to examine the applicant's complaint, the Court will now consider whether Article 6 of the Convention applies to the proceedings in question.

(b) Whether the applicant's new complaint is compatible *ratione materiae* with Article 6 § 1 of the Convention

(i) General principles

60. The Court reiterates that in *Bochan (no. 2)* (cited above) it considered the issue of the applicability of Article 6 to remedies concerning the reopening of civil proceedings which had been concluded by final judicial decisions. The principles set out by the Court in that case may be summarised as follows:

(a) According to long-standing and established case-law, the Convention does not guarantee a right to have a terminated case reopened. Extraordinary remedies by which the reopening of terminated judicial proceedings may be sought do not normally involve the determination of "civil rights and obligations" or of "any criminal charge" and therefore Article 6 is deemed inapplicable to them. This approach has also been followed in cases where the reopening of terminated domestic judicial proceedings has been sought on the ground of a finding by the Court of a violation of the Convention (*ibid.*, §§ 44-45, with the references therein).

(b) However, should an extraordinary remedy lead automatically or in the specific circumstances to a full reconsideration of the case, Article 6 applies in the usual way to the "reconsideration" proceedings. Moreover, Article 6 has also been found to be applicable in certain instances where the proceedings, although characterised as "extraordinary" or "exceptional" in domestic law, were deemed to be similar in nature and scope to ordinary appeal proceedings, the national characterisation of the proceedings not being regarded as decisive for the issue of applicability (*ibid.*, §§ 46-47).

(c) In sum, while Article 6 § 1 is not normally applicable to extraordinary remedies by which the reopening of terminated judicial proceedings may be sought, the nature, scope and specific features of the relevant procedure in the legal system concerned may be such as to bring the procedure within the ambit of Article 6 § 1 and of the safeguards of a fair trial which that provision affords to litigants (*ibid.*, § 50).

61. As regards criminal proceedings, the Court has found that Article 6 is not applicable to applications for their reopening, given that a person who, having been convicted with final effect, submits such an application is

not “charged with a criminal offence” within the meaning of that Article. Likewise, Article 6 is not applicable to a plea of nullity for the preservation of the law, brought with the aim of quashing a final conviction following a finding by the Court of a violation, as the person concerned is likewise not “charged with a criminal offence” in such proceedings (see, for example, *Fischer v. Austria* (dec.), no. 27569/02, ECHR 2003-VI, and *Öcalan v. Turkey* (dec.), no. 5980/07, 6 July 2010).

62. Still in the criminal-law sphere, the Court has held that the requirements of legal certainty are not absolute. Considerations such as the emergence of new facts, the discovery of a fundamental defect in the previous proceedings that could affect the outcome of the case, or the need to afford redress, particularly in the context of the execution of the Court’s judgments, all militate in favour of the reopening of proceedings. Accordingly, the Court has held that the mere possibility of reopening a criminal case is prima facie compatible with the Convention (see *Nikitin v. Russia*, no. 50178/99, §§ 55-57, ECHR 2004-VIII). However, it has emphasised that higher courts’ power of review should only be exercised to correct judicial errors and miscarriages of justice, and not to carry out a fresh examination. The review should not be treated as an appeal in disguise, and the mere possibility of there being two views on the subject is not a ground for re-examination. A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character (see *Bujniţa v. Moldova*, no. 36492/02, § 20, 16 January 2007, and *Bota v. Romania*, no. 16382/03, §§ 33 and 34, 4 November 2008).

63. The Court has thus held that a conviction ignoring key evidence constitutes a miscarriage of criminal justice, and that leaving such errors uncorrected may seriously affect the fairness, integrity and public reputation of judicial proceedings (see *Lenskaya v. Russia*, no. 28730/03, §§ 39 and 40, 29 January 2009, and *Giuran v. Romania*, no. 24360/04, § 39, ECHR 2011 (extracts)). Similarly, the Court has found that the upholding, after review proceedings, of a conviction which breached the right to a fair trial amounted to an error of assessment which perpetuated that breach (see *Yaremenko v. Ukraine (no. 2)*, no. 66338/09, §§ 52-56 and 64-67, 30 April 2015). On the other hand, the arbitrary reopening of criminal proceedings, in particular to the detriment of a convicted person, infringes the right to a fair trial (see *Savinskiy v. Ukraine*, no. 6965/02, § 25, 28 February 2006; *Radchikov v. Russia*, no. 65582/01, § 48, 24 May 2007; and *Ştefan v. Romania*, no. 28319/03, § 18, 6 April 2010).

64. The Court has also considered other stages in criminal proceedings where the applicants were no longer “persons charged with a criminal offence” but persons “convicted” as a result of judicial decisions deemed final under domestic law. Given that “criminal charge” is an autonomous notion and having regard to the impact which the procedure for examining an appeal on points of law may have upon the determination of a

criminal charge, including the possibility of correcting errors of law, the Court has found that such a procedure is covered by the safeguards of Article 6 (see *Meftah and Others v. France* [GC], nos. 32911/96, 35237/97 and 34595/97, § 40, ECHR 2002-VII), even where it is treated as an extraordinary remedy in domestic law and concerns a judgment against which no ordinary appeal lies. By the same token, the Court has held that the safeguards of Article 6 are applicable to criminal proceedings in which the competent court began by examining the admissibility of an application for leave to appeal with a view to having a conviction quashed (see *Monnell and Morris v. the United Kingdom*, 2 March 1987, § 54, Series A no. 115).

65. It transpires from the general principles expounded above that Article 6 of the Convention is applicable, in its criminal aspect, to criminal proceedings concerning remedies classified as extraordinary in domestic law where the domestic court is called upon to determine the charge. The Court therefore examines the issue of the applicability of Article 6 to extraordinary remedies by seeking to establish whether, during the consideration of the remedy in question, the domestic court was required to determine the criminal charge.

66. The Court emphasises that its assessment of the *Bochan (no. 2)* case (cited above) focused on issues relating to the civil aspect of Article 6 of the Convention. However, there are significant differences between civil and criminal proceedings.

67. The Court considers that the rights of persons accused of or charged with a criminal offence require greater protection than the rights of parties to civil proceedings. The principles and standards applicable to criminal proceedings must therefore be laid down with particular clarity and precision. Lastly, whereas in civil proceedings the rights of one party may conflict with the rights of the other party, no such considerations stand in the way of measures taken in favour of persons who have been accused, charged or convicted, notwithstanding the rights which the victims of offences might seek to uphold before the domestic courts.

(ii) Application of the above principles in the present case

68. In applying the above principles in the present case, the Court would emphasise that it takes into consideration the domestic law as interpreted by the courts in the respondent State. In the present case, it notes that domestic law, in particular Article 449 § 1 (g) of the Code of Criminal Procedure, provided the applicant with a remedy entailing the possibility of a review, in adversarial proceedings, of the compatibility of her conviction by the Court of Appeal with the Court's findings in its 2011 judgment (compare *Bochan (no. 2)*, cited above, § 54).

69. The Court observes that the Supreme Court has no discretion in determining the grounds for a review, as those grounds are exhaustively listed in Article 449 § 1 of the Code of Criminal Procedure (see

paragraph 27 above). They relate either to the emergence of new material or to breaches of substantive or procedural rules. In the latter eventuality, the Supreme Court must adjudicate on the conformity with substantive law of the decision delivered or on the lawfulness of the procedure followed, and decide whether or not the defects noted justify reopening the proceedings.

In particular, in the context of the examination provided for in Article 449 § 1 (g) of the Code of Criminal Procedure, the Supreme Court's task is to consider the conduct and the outcome of the terminated domestic proceedings in relation to the findings of the Court or of another international authority and, where appropriate, order the re-examination of the case with a view to securing a fresh determination of the criminal charge against the injured party. Furthermore, under Article 457 of the Code of Criminal Procedure, the Supreme Court may, if it decides to grant a review, suspend the execution of the sentence or security measure should it deem this necessary.

The Court therefore notes that the legislative framework requires the Supreme Court to compare the conviction in question with the grounds on which the Court based its finding of a violation of the Convention. The examination on the basis of Article 449 § 1 (g) of the Code of Criminal Procedure is therefore likely to be decisive for the determination of a criminal charge, and in that respect has some features in common with an appeal on points of law (compare *Maresti v. Croatia*, no. 55759/07, §§ 25 and 28, 25 June 2009).

70. As regards the scrutiny performed by the Supreme Court in the present case, the Court notes that although that court's task was to adjudicate on the application for the granting of a review, it nonetheless carried out a re-examination on the merits of a number of aspects of the disputed issue of the applicant's absence from the hearing on her appeal and the consequences of her absence for the validity of her conviction and sentence.

71. The Supreme Court thus found that the judgment of the Court of Appeal had not been incompatible with the European Court's judgment. It supported that finding with its own interpretation of the Court's judgment, holding that the Court had "precluded from the outset any possibility that its decision might raise serious doubts about the conviction". Even though it accepted that the applicant's absence from the hearing on her appeal had infringed her defence rights, the Supreme Court ruled that the Court had fully and sufficiently remedied that defect by awarding the applicant a sum of money in respect of just satisfaction. Having concluded that the validity of the conviction was not subject to any serious doubts, it was bound to uphold the conviction and sentence imposed by the Court of Appeal.

72. Given the scope of the Supreme Court's scrutiny, the Court considers that that scrutiny should be regarded as an extension of the proceedings concluded by the judgment of 19 December 2007. The

Supreme Court once again focused on the determination, within the meaning of Article 6 § 1 of the Convention, of the criminal charge against the applicant. Consequently, the safeguards of Article 6 § 1 of the Convention were applicable to the proceedings before the Supreme Court.

(c) Conclusion

73. The Government's objection that the Court lacks jurisdiction *ratione materiae* to examine the merits of the complaint raised by the applicant under Article 6 of the Convention must be dismissed.

74. Furthermore, the Court finds that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that it is not inadmissible on any other grounds. It therefore declares the complaint admissible.

75. The Court will now seek to establish whether the requirements of Article 6 § 1 of the Convention were complied with in the instant case.

B. Merits

1. *The parties' submissions*

(a) The applicant

76. The applicant contended that the Court's findings in its judgment of 5 July 2011 had raised serious doubts about the outcome of the domestic proceedings which had led to her conviction.

77. She submitted that by dismissing her application for review, the Supreme Court had committed a serious error in the interpretation and application of Article 449 § 1 (g) of the Code of Criminal Procedure. She maintained that her application for review should have been allowed, particularly since the prosecution had submitted that a review should be granted on the grounds that serious doubts could legitimately have been raised about her conviction, particularly as regards the sentence.

(b) The Government

78. The Government submitted that the Supreme Court had merely compared the judgment delivered by the Court of Appeal on 19 December 2007 with the Court's judgment in order to establish whether they were compatible and whether the latter judgment had prompted any serious doubts regarding the applicant's conviction.

79. With reference to the Supreme Court's case-law concerning applications for review, they observed that under Portuguese law the right to the reopening of terminated criminal proceedings was neither absolute nor automatic.

80. The Government submitted that unlike in cases concerning a violation of the right to freedom of expression in which the incompatibility of the conviction had been manifest, the Supreme Court had held that a procedural defect could not give rise, without undermining the *res judicata* principle, to a review of a criminal conviction unless the defect was one of exceptional gravity. A mere doubt as to the validity of a conviction, or a simple procedural irregularity, was therefore an insufficient ground for granting a review, and only defects which had tainted the decision to such an extent as to make it intolerable to society in general could justify reopening the proceedings.

81. That had not been the situation in the present case. The only points at issue had been the extent of the applicant's criminal responsibility and the possible consequences in terms of sentencing. Since the fine imposed as the penalty had been paid, it had been unnecessary in substantive and procedural terms to reopen the proceedings.

82. In conclusion, the Government stated that the procedure followed by the Supreme Court and the conclusion which it had reached had fully complied with the requirements of a fair trial. In accordance with the subsidiarity principle, the Supreme Court had had a broad margin of appreciation in interpreting and applying domestic law, and this margin had to be respected.

2. *The Court's assessment*

(a) General principles

83. The Court reiterates that in its *Bochan (no. 2)* judgment (cited above) it considered, under the civil head of Article 6 of the Convention, the issue of unfairness resulting from the reasoning adopted by the domestic courts. The principles set forth by the Court in that case may be summarised as follows.

(a) It is not for the Court to deal with alleged errors of law or fact committed by the national courts unless and in so far as they may have infringed rights and freedoms protected by the Convention, for instance where, in exceptional cases, such errors may be said to constitute "unfairness" incompatible with Article 6 of the Convention (ibid., § 61).

(b) Article 6 § 1 of the Convention does not lay down any rules on the admissibility of evidence or the way in which evidence should be assessed, these being primarily matters for regulation by national law and the national courts. Normally, issues such as the weight attached by the national courts to particular items of evidence or to findings or assessments submitted to them for consideration are not for the Court to review. The Court should not act as a fourth-instance body and will therefore not question under Article 6 § 1 the national courts' assessment, unless their findings can be regarded as arbitrary or

manifestly unreasonable (ibid., § 61; see also the cases cited therein: *Dulaurans v. France*, no. 34553/97, §§ 33-34 and 38, 21 March 2000; *Khamidov v. Russia*, no. 72118/01, § 170, 15 November 2007; and *Anđelković v. Serbia*, no. 1401/08, § 24, 9 April 2013; as well as the application of this case-law in more recent judgments: *Pavlović and Others v. Croatia*, no. 13274/11, § 49, 2 April 2015; *Yaremenko (no. 2)*, cited above, §§ 64-67; and *Tsanova-Gecheva v. Bulgaria*, no. 43800/12, § 91, 15 September 2015).

84. The Court also reiterates that according to its established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case (see *García Ruiz v. Spain* [GC], no. 30544/96, § 26, ECHR 1999-I). Without requiring a detailed answer to every argument advanced by the complainant, this obligation presupposes that parties to judicial proceedings can expect to receive a specific and explicit reply to the arguments which are decisive for the outcome of those proceedings (see, among other authorities, *Ruiz Torija v. Spain*, 9 December 1994, §§ 29-30, Series A no. 303-A, and *Higgins and Others v. France*, 19 February 1998, §§ 42-43, *Reports of Judgments and Decisions* 1998-I). Moreover, in cases relating to interference with rights secured under the Convention, the Court seeks to establish whether the reasons provided for decisions given by the domestic courts are automatic or stereotypical (see, *mutatis mutandis*, *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, § 210, ECHR 2017). Furthermore, the Convention does not require jurors to give reasons for their decision and Article 6 does not preclude a defendant from being tried by a lay jury even where reasons are not given for the verdict. Nevertheless, for the requirements of a fair trial to be satisfied, the public, and above all the accused, must be able to understand the verdict that has been given (see *Lhermitte v. Belgium* [GC], no. 34238/09, §§ 66 and 67, ECHR 2016).

(b) Application of the aforementioned principles in the present case

85. It transpires from the above-mentioned case-law that a domestic judicial decision cannot be qualified as arbitrary to the point of prejudicing the fairness of proceedings unless no reasons are provided for it or if the reasons given are based on a manifest factual or legal error committed by the domestic court, resulting in a “denial of justice”.

86. The question in the instant case is whether the reasons provided for the judicial decision given by the Supreme Court complied with the standards of the Convention.

87. The Court notes that neither Article 6 nor any other Article of the Convention lays down a general obligation to give reasons for all decisions declaring extraordinary remedies inadmissible. Domestic law may exempt such decisions from providing any reasons. Nevertheless, where, in its examination of an extraordinary remedy, a domestic court determines a criminal charge and gives reasons for its decision, those reasons must satisfy the requirements of Article 6 regarding the provision of reasons for judicial decisions.

88. In the present case, the Court notes that in its judgment of 21 March 2012 the Supreme Court held that in the light of Article 449 § 1 (g) of the Code of Criminal Procedure, a review of the Court of Appeal's judgment could not be granted on the ground relied upon by the applicant. The Supreme Court considered that although the procedural irregularity noted by the European Court could have had an impact on the applicant's sentence, it had not been serious enough for the conviction to be considered incompatible with the Court's judgment.

89. The Court observes that the reasons given for the judicial decision in question addressed the main arguments put forward by the applicant. According to the Supreme Court's interpretation of Article 449 § 1 (g) of the Code of Criminal Procedure, procedural irregularities of the type found in the instant case do not give rise to any automatic right to the reopening of proceedings.

90. The Court considers that this interpretation of the applicable Portuguese law, which has the effect of limiting the situations that may give rise to the reopening of criminal proceedings that have been terminated with final effect, or at least making them subject to criteria to be assessed by the domestic courts, does not appear to be arbitrary.

91. The Court notes that that interpretation is supported by its settled case-law to the effect that the Convention does not guarantee the right to the reopening of proceedings or to any other types of remedy by which final judicial decisions may be quashed or reviewed, and by the lack of a uniform approach among the member States as to the operational procedures of any existing reopening mechanisms. Moreover, the Court reiterates that a finding of a violation of Article 6 of the Convention does not generally create an continuing situation and does not impose on the respondent State a continuing procedural obligation (contrast *Jeronovičs v. Latvia* [GC], no. 44898/10, § 118, ECHR 2016).

92. As regards the Supreme Court's interpretation of the judgment delivered by the Court in 2011, the Grand Chamber emphasises that in that judgment the Chamber held that a retrial or reopening of the proceedings, if requested, represented "in principle an appropriate way of redressing the violation". A retrial or the reopening of the proceedings was thus described as an appropriate solution, but not a necessary or exclusive one. Furthermore, the use of the expression "in principle" narrows the scope of

the recommendation, suggesting that in some situations a retrial or the reopening of proceedings might not be an appropriate solution (see paragraph 20 above).

93. A reading of this part of the judgment, and particularly the words "in principle" and "however" (see paragraph 20 above), indicates that the Court refrained from giving binding indications on how to execute its judgment, and instead opted to afford the State an extensive margin of manoeuvre in that sphere. Moreover, the Court reiterates that it cannot prejudge the outcome of the domestic courts' assessment of whether it would be appropriate, in view of the specific circumstances of the case, to grant a retrial or the reopening of proceedings (see *Davydov v. Russia*, no. 18967/07, § 29, 30 October 2014).

94. Accordingly, the reopening of proceedings did not appear to be the only way to execute the Court's judgment of 5 July 2011; at best, it represented the most desirable option, the advisability of which was a matter for assessment by the domestic courts, having regard to Portuguese law and to the particular circumstances of the case.

95. The Supreme Court, in its reasoning in the judgment of 21 March 2012, analysed the content of the Court's judgment of 5 July 2011. It inferred from its reading of the latter judgment that the Court had "precluded from the outset any possibility that its decision might raise serious doubts about the conviction" (see paragraph 26 above) on account of the applicant's absence from the hearing on her appeal. That was the Supreme Court's own interpretation of the Court's judgment. In view of the margin of appreciation available to the domestic authorities in the interpretation of the Court's judgments, and in the light of the principles governing the execution of judgments (see, *mutatis mutandis*, *Emre v. Switzerland (no. 2)*, no. 5056/10, § 71, 11 October 2011), the Court considers it unnecessary to express a position on the validity of that interpretation.

96. Indeed, it is sufficient for the Court to satisfy itself that the judgment of 21 March 2012 was not arbitrary, that is to say that the judges of the Supreme Court did not distort or misrepresent the judgment delivered by the Court (compare with *Bochan (no. 2)*, cited above, §§ 63-65, and *Emre (no. 2)*, cited above, §§ 71-75).

97. The Court cannot conclude that the Supreme Court's reading of the Court's 2011 judgment was, viewed as a whole, the result of a manifest factual or legal error leading to a "denial of justice".

98. Having regard to the principle of subsidiarity and to the wording of the Court's 2011 judgment, the Court considers that the Supreme Court's refusal to reopen the proceedings as requested by the applicant was not arbitrary. The Supreme Court's judgment of 21 March 2012 provides a sufficient indication of the grounds on which it was based. Those grounds

fall within the domestic authorities' margin of appreciation and did not distort the findings of the Court's judgment.

99. The Court emphasises that the above considerations are not intended to detract from the importance of ensuring that domestic procedures are in place whereby a case may be re-examined in the light of a finding that Article 6 of the Convention has been violated. On the contrary, such procedures may be regarded as an important aspect of the execution of its judgments and their availability demonstrates a Contracting State's commitment to the Convention and to the Court's case-law (see *Lyons and Others v. the United Kingdom* (dec.), no. 15227/03, ECHR 2003-IX).

100. Having regard to the foregoing, the Court concludes that there has been no violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 46 OF THE CONVENTION

101. The applicant further submitted that the Supreme Court's dismissal of her application for review was also in breach of Article 46 of the Convention on account of a failure to implement individual measures in executing the Court's 2011 judgment.

102. The Court reiterates that the question of compliance by the High Contracting Parties with its judgments falls outside its jurisdiction if it is not raised in the context of the "infringement procedure" provided for in Article 46 §§ 4 and 5 of the Convention (see *Bochan (no. 2)*, cited above, § 33).

103. Accordingly, in so far as the applicant has complained of a failure to remedy the violation of Article 6 § 1 found by the Court in its 2011 judgment, the Court does not have jurisdiction *ratione materiae* to deal with this complaint.

FOR THESE REASONS, THE COURT

1. *Declares*, by a majority, the complaint under Article 6 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds*, by nine votes to eight, that there has been no violation of Article 6 § 1 of the Convention.

Done in French and in English, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 11 July 2017.

Françoise Elens-Passos
Registrar

Guido Raimondi
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 dissenting opinion of Judges Raimondi, Nußberger, De Gaetano, Keller, Mahoney, Kjølbro and O'Leary (*partial translation*);
(b) dissenting opinion of Judge Pinto de Albuquerque joined by Judges Karakaş, Sajó, Lazarova Trajkovska, Tsotsoria, Vehabović and Kūris;
(c) dissenting opinion of Judge Kūris, joined by Judges Sajó, Tsotsoria and Vehabović;
(d) dissenting opinion of Judge Bošnjak.

G.R.
F.E.P.

JOINT DISSENTING OPINION OF JUDGES RAIMONDI, NUßBERGER, DE GAETANO, KELLER, MAHONEY, KJØLBRO AND O'LEARY

(Partial translation)

1. Having taken note of the majority's opinion, we have decided not to subscribe to it, for the reasons set out below. We shall first of all examine Article 46 of the Convention in order to appraise its scope in relation to the specific facts of the case (I). We shall then proceed to consider Article 6 § 1 of the Convention – which is central to the applicant's arguments – whose applicability to the reopening of criminal proceedings is, according to well-established case-law, open to question, subject to serious qualification (II). Finally, we shall end our demonstration with a conclusion (III).

I. Inadmissibility on grounds of the competence of the Committee of Ministers

2. A brief recapitulation of the facts of the case: after an initial judgment delivered by the Court in 2011 finding a violation of Article 6 § 1 of the Convention by Portugal, the applicant applied to the Supreme Court for a review of the first judgment delivered by the Oporto Court of Appeal on the grounds that it had been incompatible with the Court's judgment. By judgment of 21 March 2012, that application was dismissed by the Supreme Court. On the basis of that refusal to reopen the criminal proceedings, the applicant is now lodging a second application with the Court relying on Article 46 of the Convention and alleging a new violation of Article 6 § 1 of the Convention.

3. In our view, the crucial issue raised in this case is closely bound up with the distribution of powers between the Court and the Committee of Ministers, and therefore indisputably calls for a ruling regarding the institutional legal framework of the Convention. On its facts, the application against the Portuguese State clearly lies outside the Court's competence; it should consequently have been declared inadmissible.

4. The wording of the cardinal provision in this regard – namely Article 46 - provides in its paragraph 2 that "the final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution". From this it unequivocally follows that the wording of Article 46 makes the Committee of Ministers, as a political organ, the sole depositary of competence in terms of executing the Court's judgments, being explicitly authorised by the 1950 text to ensure the appropriate

implementation of all judgments delivered[1]. Accordingly, and conversely, the Court is invested with no competence, of any kind, in the field of the execution of judgments[2]. The foregoing arguments set out above concerning the issue of the applicability of Article 46 of the Convention lend further support to those in the dissenting opinion of Judge Malinverni appended to the judgment in the case of *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* ([GC], 30 June 2009, no. 32772/02, ECHR 2009), to which we unreservedly subscribe. Judge Malinverni pointed out that Article 46 § 2 of the Convention conferred competence to supervise the execution of the Court's judgments solely on the Committee of Ministers. The Court was empowered to intervene only where the presence of new facts was established. A refusal to reopen proceedings was not, in itself, a new fact.

5. We do not wish to overlook a number of recent developments which have affected relations between the Committee of Ministers and the Court; nor are we unaware that the Court is playing an increasingly active part in the procedure for the execution of judgments[3]. Moreover, the new wording of Article 46 as introduced in Protocol no. 14, which came into force on 1 June 2010, would tend to corroborate our interpretation.

6. The distribution of powers between the Committee of Ministers and the Court allows for one exception: in accordance with the *VgT (no. 2)* judgment cited above, our Court can legitimately examine a new application relating to measures taken by the respondent State in execution of one of its judgments "if that application comprises new relevant facts affecting questions undecided by the initial judgment" (see §§ 61-63). The Court's competence is therefore conditional upon the requirement of there being new facts.

7. However, in the light of the principles flowing from the judgements in the cases of *VgT (no. 2)* and *Emre v. Switzerland (no. 2)* (11 October 2011,

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[1] Regarding the nature of the requisite measures to execute judgments finding a violation of the Convention and the European Court's current practice in that sphere, see Alastair MOWBRAY, *An Examination of the European Court of Human Rights; Indication of Remedial Measures*, Human Rights Law Review, not yet published.

[2] This interpretation is in complete conformity with the Explanatory Report to Protocol no. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms amending the supervisory system of the Convention, 13 May 2004, Strasbourg, pp. 18 and 19.

[3] As stated in the Sixth Annual Rapport of the Committee of Ministers 2012, entitled "Supervision of the execution of judgments and decisions of the European Court of Human Rights", Council of Europe, April 2013, which mentions "increased interaction between the European Court and the Committee of Ministers" (p. 28), and the statement by Judge Linos-Alexandre Sicilianos entitled "The role of the Court in the implementation of its judgments, powers and limits" in the framework of the "Dialogue between Judges, European Court of Human Rights, Council of Europe, 2014", pointing out that "[o]ver the past decade the Court has … delivered some 150 judgments referring to Article 46 of the Convention and concerning the execution process" (p. 19).

no. 5056/10) – which have drawn criticism[4] – the complaint on which the Court is called upon to adjudicate in the present case is essentially identical to that mentioned in the previous application lodged by the same applicant and leading to the *Moreira Ferreira v. Portugal* judgment of 5 July 2011, no. 19808/08. It is not possible, on the face of it, to identify any fact in the second application to differentiate it from the first application, on which the applicant could reasonably have based her allegations. In particular, it transpires from well-established case-law that a refusal by the domestic authorities to reopen proceedings following a judgment finding a violation of Article 6 § 1 as delivered by the Court cannot be described as a new fact (see *Lyons and Others v. the United Kingdom* (dec.), 8 August 2003, no. 15227/03, ECHR 2003-IX). We venture, in view of the circumstances of the case, as to doubt whether the judgment delivered by the Portuguese Supreme Court dismissing the applicant's request for a reopening of proceedings can be regarded as constituting any kind of *new fact* for the purposes of the aforementioned case-law.

8. There exists a further two-pronged argument militating against competence on the part of the Court and, most appositely, in favour of competence on the part of the Committee of Ministers. Firstly, the supervision of the execution of the *Moreira Ferreira v. Portugal* judgment was pending at the time of lodging of the present application, on 30 March 2012. And above all, the procedure for the supervision of the execution of the Court's judgment of 5 July 2011 is currently still pending before the Committee of Ministers (the procedure was still pending at 22 May 2017). What makes it evident that the legal issue raised lies outside the supervision of the Court is that it is in the first place for the Committee of Ministers itself to bring the procedure before it to a close.

II. Inadmissibility *ratione materiae*

9. If, despite the foregoing arguments as to the implications of Article 46 of the Convention, the Court is to be declared competent to entertain the present application, it would then be possible to proceed to a consideration of Article 6 § 1. Our view is that that provision cannot properly be considered as being applicable to the reopening of criminal proceedings.

10. To begin with, no right to have terminated judicial proceedings reopened is guaranteed by the Convention, whether the proceedings be civil or criminal, as the Court has on many occasions been careful to point out

[4] Re. the *VgT (no. 2)* and *Emre (no. 2)* judgments cited above, see Maya HERTIG RANDALL/Xavier-Baptiste RUEDIN, "Judicial activism and Implementation of the Judgments of the European Court of Human Rights", *Revue trimestrielle des droits de l'homme* 2010, no. 82, pp. 421-443; Maya HERTIG RANDALL, Commentary on the *Emre (no. 2)* judgment of 11 October 2011 of the European Court of Human Rights, *Pratique juridique actuelle* 2012, no. 4, pp. 567-573, respectively.

(see, most recently, *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, § 44, ECHR 2015). More importantly, as is recognised in the survey of general principles in paragraphs 60 and 61 of the present judgment, there is also well-established case-law, likewise confirmed as recently as 2015 in the Grand Chamber judgment in *Bochan (no. 2)* (at §§ 44-45), to the effect that extraordinary remedies seeking to reopen terminated judicial proceedings, criminal as well as civil, normally fall outside the ambit of Article 6 § 1. As far as criminal proceedings are concerned, this is because, as paragraph 61 of the judgment expresses it, "Article 6 is not applicable to applications to reopen proceedings, given that a person who, having been convicted with final effect, submits such an application is not 'charged with a criminal offence' within the meaning of that Article". However, the application of Article 6 and its guarantees of a fair trial in civil and criminal matters may exceptionally be attracted if, by virtue of the specific features of the national legal system concerned, the ruling on the extraordinary request to reopen the proceedings can be said to involve "a full reconsideration of the case" (see paragraph 60 (b) and (c) of the judgment).

11. In our view, the present judgment goes against the principles that it itself asserts in its paragraphs 60 and 61. It does this by assimilating (i) a ruling on the safety of the conviction after the conviction has become final (the kind of ruling which a national court typically gives in the framework of extraordinary remedies seeking the reopening of terminated criminal proceedings) with (ii) "the determination" of the original "criminal charge" against the defendant (the subject-matter of Article 6 § 1). This is to confuse two different things. It is this confusion that is at the root of the majority's conclusion that Article 6 § 1 was applicable to the reopening proceedings brought before the Portuguese Supreme Court by the present applicant.

12. Thus, the judgment (in paragraph 69, final sub-paragraph) places reliance on the fact that the domestic law (namely Article 449 § 1 (g) of the Portuguese Code of Criminal Procedure – "CCP") offered the applicant a remedy enabling the national courts to assess the compatibility of her conviction with this Court's findings in its judgment of 2011 on the earlier application brought by her. This is, of course, true, but will always be the case when a national court is hearing an extraordinary application seeking the reopening of terminated criminal proceedings on the ground of a judgment delivered by this Court. That cannot of itself mean that the original "criminal charge" brought against the person concerned is, exceptionally, at the same time being subject to a fresh "determination" on its merits (*"le bien fondé*, to use the language of the French version of Article 6 § 1). Yet that is what the majority of our colleagues are suggesting in this part of their reasoning.

13. The majority themselves explain that "the Supreme Court's task is to consider the conduct and the outcome of the terminated domestic proceedings in relation to the findings of the Court or another international

authority and, where appropriate, order the re-examination of the case with a view to securing a fresh determination of the criminal charge against the injured party" (see paragraph 69, second sub-paragraph, of the judgment). As we understand it, what the Portuguese Supreme Court was doing when hearing the applicant's extraordinary "application for review" under Article 449 § 1 (g) CCP was examining whether the "validity" of her conviction - to use the actual words of the Supreme Court's ruling (see paragraph 26 of the judgment) - had been so adversely affected by the procedural defects identified by this Court in its 2011 judgment that the conviction should be overturned and a retrial by a lower court ordered. It would have been after a positive reopening decision by the Supreme Court, in the framework of the retrial so ordered, that the determination of the original criminal charge would in its turn have been revived and thus the applicability of Article 6 § 1 attracted.

14. By treating a ruling on the safety or "validity" of the conviction as being equivalent to a determination of the original criminal charge, the majority has in effect overturned, without acknowledging so, the previous long-standing corpus of case-law reviewed at length and confirmed by the Grand Chamber only two years ago in *Bochan (no. 2)*. Talking of "the determination"/"*le bien fondé*" of the conviction - that is to say, using the language that Article 6 § 1 uses in its English and French versions when referring to the ruling on the original "criminal charge"- does not suffice to remove the confusion of logic (between safety of the conviction and determination of the criminal charge) on which the majority's conclusion is based. To use the language of *Fischer v. Austria* ((dec.), no. 27569/02, ECHR 2003-VI), proceedings before the Portuguese Supreme Court under Article 449 § 1 (g) CCP "are brought by a person whose conviction has become final and do not concern the 'determination of a criminal charge' but the question whether the conditions for granting a retrial are met".

15. None of the case-law referred to in paragraphs 62 to 64 of the judgment casts doubt either on the normal rule, set out earlier in paragraphs 60 and 61, of non-applicability of Article 6 § 1 to extraordinary appeals or on the many precedents cited in *Bochan (no. 2)* as authority for that normal rule.

16. Thus, the *Nikitin v. Russia* judgment (no. 50178/99, ECHR 2004-VIII, §§ 55-57 – cited in paragraph 62 of the judgment) addressed the quite different situation of the possible reopening, to the detriment of the accused, of criminal proceedings that have terminated with an acquittal. The judgment ends with the following statement (at § 60):

> "... according to the established case-law of the Convention organs, Article 6 does not apply to proceedings concerning a failed request to reopen a case. Only the new proceedings after the reopening has been granted can be regarded as concerning the determination of a criminal charge ..."

As explained above (see paragraph 13 of this separate opinion), this coincides with how we, unlike the majority, would analyse the working of the extraordinary "application for review" before the Portuguese Supreme Court in the present case.

17. Similarly to *Nikitin v. Russia,* the cases of *Bujnita v. Moldova* (no. 36492/02, 16 January 2007, § 20) and *Bota v. Romania* (no. 16382/03, 4 November 2008, §§ 33-34), also cited in paragraph 62 of the judgment, concerned the unjustified reopening of criminal proceedings where the reopening court had ordered that a conviction be substituted for the original verdict of acquittal of the applicant defendant. No explanation is given by the majority as to how such cases show any departure from the normal rule governing the applicability of Article 6 § 1 to extraordinary applications in which a convicted defendant seeks the reopening of terminated criminal proceedings (whether or not on the basis of a judgment by this Court).

18. The applicant in *Lenskaya v. Russia* (no. 28730/03, 29 January 2009, §§ 39-40 – cited in paragraph 63 of the judgment) had allegedly been assaulted by her husband. She was claiming to be the victim of a violation of her own right under Article 6 § 1 (under its civil, not its criminal, head), by reason of the fact that her husband's conviction for assault had been overturned and converted into an acquittal, thereby entailing the dismissal of her claim for compensation. The Court found it "established that the interests of justice required the reopening and the quashing of the judgment [convicting the husband and awarding the wife compensation]" (§ 42). Again, the issue posed (whether, as a result of her husband's successful recourse to the extraordinary criminal review procedure in question, the applicant had been deprived of her "right to a court" under the civil head of Article 6 § 1 in connection with her civil claim for compensation for assault) is quite different from the issue of applicability of Article 6 § 1 in the present case. It is difficult to understand how the reasoning on this point in the *Lenskaya* judgment in any way alters the normal rule of non-applicability of Article 6 § 1 to extraordinary applications by which convicted persons are seeking the reopening of terminated criminal proceedings. This comment also applies to the judgment in *Giuran v. Romania* (no. 24360/04, 21 June 2011, § 39 – extracts reported in ECHR 2011-III) (also cited in paragraph 63 of the judgment), where the relevant factual situation and Convention issue were similar to those in *Lenskaya*.

19. The cases of *Lenskaya* and *Giuran* confirm that "the Convention in principle permits the reopening of final judgments to correct miscarriages of justice" (see *Giuran,* § 39), even though "one of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, among other things, that where courts have finally determined an issue their ruling should not be called in question" (see *Giuran,* § 28). In that latter connection, the precept that the abusive reopening of terminated criminal proceedings, to the detriment of a convicted as well as an acquitted person,

infringes the rule-of-law requirements inherent in the right to a fair trial (notably as regards the finality of the verdict in the original trial) is illustrated not only by the cases of *Nikitin, Bujnita* and *Bota*, referred to above, but also by the cases cited at the end of paragraph 63 of the judgment (*Savinkiy v. Ukraine, no. 6965/02*, 28 February 2006, § 25 – where the applicant had been convicted on one of the charges against him but acquitted on others; *Radchikov v. Russia*, no. 65582/01, 24 May 2007, §§ 45-53 – which concerned the quashing of an acquittal; and *Stefan v. Romania*, no. 28319/03, 6 April 2010, § 18 – where the applicant had been convicted, but with attenuating circumstances in his favour).

These two strands of case-law develop criteria for when it may, exceptionally, be necessary to depart from the principle of legal certainty inherent in the right to a fair trial under Article 6 by reopening a terminated criminal trial in order to correct a miscarriage of justice. But what is their relevance for the applicability, or not, of Article 6 to the conduct of the "application for review" in the present case, whereby the applicant was seeking but did not obtain the reopening of the terminated criminal proceedings against her?

20. On the other hand, the case of *Yaremenko v. Ukraine (no. 2)* (no. 66338/09, 30 April 2015, §§ 52-56 and 64-67 – also cited in paragraph 63 of the judgment) does have some similarities with the present case, in that the applicant was a convicted person seeking the reopening of terminated criminal proceedings on the basis of a judgment of this Court finding a violation of Article 6 in relation to the original criminal trial. The Court, applying the principles stated a few months earlier in the Grand Chamber judgment in *Bochan (no. 2)*, confirmed its adhesion to the normal rule of exclusion of extraordinary review procedures from the ambit of Article 6, but noted that "new proceedings, *after the reopening has been ordered*, can be regarded as concerning the determination of a criminal charge" (§ 56 – emphasis added). The Ukrainian Supreme Court, by allowing the requests for review submitted by the applicant (in part) and the prosecutor (in full), and by excluding some evidence and then carrying out its own assessment of the remaining evidence, was considered by this Court to have been engaging in a full re-examination of the applicant's case, as in *Bochan (no. 2)*, so as to lead to a new decision on the merits. Article 6 was held to be applicable by virtue of this fresh "determination" of the applicant's guilt on the basis of the evidence adduced (§§ 55 and 56). One could re-phrase this finding by saying that, in accordance with the relevant domestic legislation, a retrial of the criminal case was carried out by the Ukrainian Supreme Court when adjudicating on the extraordinary appeal available to the applicant. The present judgment (at paragraph 63) is misleading insofar as it may be read as suggesting that it was "the upholding, after review proceedings, of a conviction which breached the right to a fair trial" that made Article 6 applicable.

21. In the present case, in contrast, it cannot be said that the review proceedings before the Portuguese Supreme Court constituted a retrial of the criminal case or a fresh "determination" of the original "criminal charge" against the applicant, as in the *Yaremenko (no. 2)* case, where the role assigned to the reopening court was somewhat different under the applicable domestic legislative framework. We would again refer to the role of the Portuguese Supreme Court in this connection, as it is summarised in paragraph 69, second sub-paragraph, of the judgment (quoted above in paragraph 13 of this separate opinion). The "re-examination of the case with a view to arriving at a fresh determination of the criminal charge against the injured party" is to be carried out, not by the Supreme Court itself in the extraordinary "application for review" before it, but, subsequently, by another, lower court. The procedural guarantees of Article 6 will then be applicable to that subsequent retrial and fresh "determination of the criminal charge" against the defendant who has been successful in his or her extraordinary "application for review". In short, the Portuguese Supreme Court may order, but does not itself carry out, the kind of "re-examination" capable of attracting the application of Article 6.

22. Finally, the reading given (in paragraph 64 of the judgment) to the cases of *Meftah and Others v. France* ([GC], nos. 32911/96, 35237/97 and 34595/97, ECHR 2002-VII, § 40) and *Morrell and Morris v. the United Kingdom* (2 March 1987, Series A no. 115, § 54) is rather strained. It has never been seriously doubted, despite the vain argument of the respondent Government in *Meftah*, that criminal cassation appeals of the kind found in continental legal systems and criminal appeals on points of law in common law systems are covered by Article 6, given that they are clearly normal facets (part and parcel, one might say) of the ordinary criminal process. The *Meftah* and *Monnell and Morris* judgments put courts of cassation on the same level as ordinary courts of appeal when it comes to the applicability of Article 6 (see §§ 41 and 54, respectively), although the manner of application of Article 6 to these two kinds of court depends on their special features (see §§ 41 and 56, respectively). Indeed, as early as 1970 it was stated in *Delcourt v. Belgium* (17 January 1970, Series A no. 11, § 25):

> "The Convention does not ... compel the Contracting States to set up courts of appeal or cassation. Nevertheless, a State which does institute such courts is required to ensure that persons amenable to the law shall enjoy before these courts the fundamental guarantees enshrined in Article 6."

The Grand Chamber in *Bochan (no. 2)* (at §§ 47-49), when discussing the "extraordinary" proceedings that had been the subject of examination in *San Leonard Boat Club v. Malta* (no. 77562/01, ECHR 2004-IX, §§ 41-48) and *Maresti v. Croatia* (no. 55759/07, 25 June 2009), referred to appeals on points of law before a court of cassation in Malta and appeals on points of law in civil cases in Croatia as "ordinary appeal proceedings" for the purposes of the applicability of Article 6.

23. It therefore appears rather artificial, and indicative of the weakness of the reasoning on the applicability of Article 6 in the present case, to compare ordinary criminal cassation appeals and criminal appeals on points of law to the extraordinary "application for review" under Portuguese law (see, for example, paragraph 69, final sub-paragraph of the judgment). For cassation appeals and appeals on points of law in criminal matters the Court's case-law has been clear since at least 1970 that they are to be considered a normal part of the criminal process and covered by Article 6; whereas the normal rule is that extraordinary review procedures (post *res judicata)* – as exemplified by the Portuguese "application for review" -, on the contrary, fall outside the ambit of Article 6.

24. Thus, when analysed, the case-law referred to in paragraphs 62 to 64 of the judgment does not lend any support to the idea that the basic rule (of the non-applicability of Article 6 § 1 to extraordinary appeals) has somehow evolved in a sense in favour of applicability whenever it can be said that the extraordinary appeal involves a ruling on the safety, the validity or the merits (*le bien fondé,* in French) of the conviction (as opposed to a fresh determination of the original criminal charge).

25. In sum, the majority's assertion (in paragraph 69, final sub-paragraph, of the judgment) that the Supreme Court's examination of the applicant's "application for review" under Article 449 § 1 (g) CCP was susceptible of "determining" the original criminal charge against her (in French: being decisive for *"le bien fondé"* of that charge) is hardly supported either by the content of the applicable Portuguese legislative provisions or by the previous case-law of this Court. The argument that Article 449 § 1 (g) has some traits in common with ordinary cassation appeals is not only exaggerated, but would apply generally to extraordinary review procedures in most countries empowering convicted defendants to seek the reopening of terminated criminal proceedings – thereby overturning by stealth the well-established existing case-law on this point. That is hardly a very judicial way for the Court to proceed only two years after the delivery of the Grand Chamber judgment in *Bochan (no. 2).*

26. For the foregoing reasons, we are therefore led to the conclusion that, even assuming that the Court could be regarded as having competence to entertain the application in the first place, Article 6 of the Convention was not applicable to the extraordinary criminal review proceedings at issue in the present case, with the consequence that the application should be declared inadmissible *ratione materiae*.

III. Conclusion

27. On the basis of all the foregoing considerations, we voted against the admissibility of the complaint under Article 6 of the Convention and consequently for no violation of that provision.

28. The case-law in relation to applications involving Article 46 calls for some elucidation, given its ambiguous and partly contradictory character. The Committee of Ministers would not appear to have exploited the full potential of Article 46 § 3 as amended by Protocol no. 14. This updated version of the Article is aimed at clarifying the distribution of powers between the two institutions concerned (the Court and the Committee of Ministers).

29. What remains unchanged is that an individual application grounded on non-compliance of domestic judgments with a European Court judgment finding a violation is to be declared inadmissible *ipso facto* by reason of the Court's lack of competence in this domain. At the same time, it is clear that the preeminent role of the Committee of Ministers in the sphere of executing the Court's judgments in no way bars the Court from considering a complaint directed against the measures adopted by a respondent State to comply with a judgment delivered against it, provided that such a complaint contains new and relevant information[5]. As has been shown, the impugned request does not concern any new fact, but rather relates to the execution *per se* of the Court's judgments, which matter does not, in general, lie within the competence of the Court.

30. To conclude, notwithstanding this limitation, it would appear justified for the Court to seek to exert a degree of influence in the sphere of execution of its judgments. The Court can legitimately do so when a new application is lodged which, from the substantive angle, involves new facts that have not yet been addressed, or else where the respondent State is found to have committed a fresh violation. On the other hand, it is equally necessary to ensure that the Court does not disperse its efforts or expand the reach of its already numerous activities. A balance must be maintained in this sphere, which necessitates compliance with the distribution of powers under the Convention. As is well recognised, the protection of human rights must be both practical and effective, that is to say neither theoretical nor illusory.

[5] See the concurring opinion of Judge Keller on the *Sidabras and Others v. Lituanie* judgment (23 June 2015, nos. 50421/08 and 56213/08).

DISSENTING OPINION OF JUDGE PINTO DE ALBUQUERQUE JOINED BY JUDGES KARAKAŞ, SAJÓ, LAZAROVA TRAJKOVSKA, TSOTSORIA, VEHABOVIĆ AND KŪRIS

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I. Introduction (§ 1)

1. *Moreira Ferreira (no. 2)* concerns the competence of the European Court of Human Rights (the Court) to impose individual measures, namely the retrial, review, re-examination or reopening of criminal proceedings[1], in order to redress a violation of the European Convention on Human Rights

[1] In this opinion, these words are used interchangeably.

(the Convention), and the legal force of those measures. This complicated issue is dealt with in the further complicating context of the non-execution of a Court's judgment which included a retrial clause. In the case at hand, the retrial clause included in *Moreira Ferreira*[2] was not implemented by the domestic authorities in the subsequent domestic extraordinary appeal procedure (*recurso extraordinário*) initiated by the victim of the Convention violation. The applicant had to come to this Court a second time to plead for justice. Unfortunately, the majority of the Grand Chamber denied her precisely that.

First Part (§§ 2-34)

II. The Court's competence to impose individual measures (§§ 2-18)

a. The retrial clause (§§ 2-7)

2. While assessing whether Article 46 of the Convention precludes the examination by the Court of the complaint under Article 6 of the Convention, the majority of the Grand Chamber reiterate that the Court does not have jurisdiction to order the reopening of proceedings, but they also admit that, in certain exceptional circumstances, the reopening of the case represents an appropriate, or the most appropriate, form of redress of the Convention violation[3]. As will be demonstrated below, this is an understatement of the Court's rich case-law on individual measures of redress of a Convention violation.

3. The Court has affirmed time and again that its judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order in order to discharge its obligation under Article 46 of the Convention[4]. When the respondent State's legal order cannot provide for reparation, or can only provide for partial reparation, to be made for a declared Convention violation[5], the Court may afford just satisfaction to the injured party. The principle underlying the provision of just satisfaction for a Convention breach is that the applicant should as far as possible be put in the position he would have enjoyed had the violation not occurred (*restitutio in integrum*)[6],

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[2] See *Moreira Ferreira v. Portugal*, no. 19808/08, 5 July 2011.

[3] See paragraph 48 of the judgment.

[4] For an early example, *Marckx v. Belgium*, 13 June 1979, § 58, Series A no. 31.

[5] For some early examples of full reparation see *Neumeister v. Austria* (Article 50), no. 1936/63, §§ 40- 41, 7 May 1974, and for partial reparation see *Van Mechelen and Others v. The Netherlands* (Article 50), nos. 21363/93, 21364/93, 21427/93, § 16, 30 October 1997.

[6] See *Piersack v. Belgium* (Article 50), judgment of 26 October 1984, Series A no. 85, §§ 11-12. The Court chose the wider concept of *restitutio in integrum*, which requires the

provided that such means are compatible with the conclusions set out in the Court's judgment and with the rights of the defence[7]. Payment of compensation is compatible with other general or individual measures necessary to put an end to the violation found by the Court[8].

4. Yet the Court has also acknowledged that the nature of the violation found may be such as to leave no real choice as to the measures required to remedy it, and the Court may decide to impose only one such measure, such as, for example, the return of an expropriated piece of land[9], the return of a building[10], the release of a person[11], the redress of any past or future, negative consequences derived from a disciplinary punishment[12], the discontinuation of detention on remand and its replacement by another reasonable and less stringent, measure of restraint, or with a combination of

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hypothetical inquiry into what the situation would have been if the wrongful act had not been committed. The less demanding concept of restitution, which aims at the establishment of the situation that existed prior to the occurrence of the wrongful act, was rejected (see the commentary on Article 35 of the Draft Articles of the International Law Commission on Responsibility of States for Internationally Wrongful Acts (DARSIWA), paragraph 2). It should be added that the commentary of Article 36 of the DARSIWA, paragraph 19, states that "the decisions of human rights bodies on compensation draw on principles of reparation under general international law." Hence, the DARSIWA doctrine on reparation and especially of its Articles 34-37 must be taken into consideration in the interpretation of the Convention.

[7] See *Lyons and Others v. the United Kingdom* (dec.), no. 15227/03, ECHR 2003-IX.

[8] See *Scozzari and Giunta v. Italy [GC]*, nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII, and *Christine Goodwin v. the United Kingdom [GC]*, no. 28957/95, § 120, ECHR 2002-VI.

[9] See *Papamichalopoulos v. Greece (Article 50)*, no. 14556/89, § 38, 31 October 1995. The operative part replicated the obligation included in the reasoning. Failing such restitution, the respondent State was ordered to pay a certain amount to the applicant. See also *Ramadhi and Others v. Albania*, no. 38222/02, § 102, 13 November 2007.

[10] See *Brumarescu v. Romania (Article 41)*, no. 28342/95, § 22, 23 January 2001; *Hirschhorn v. Romania*, no. 29294/02, § 114, 26 July 2007; and *Katz v. Romania*, no. 29739/03, § 42, 20 January 2009. In all these cases the operative part replicated the obligation included in the reasoning of the judgment under Article 41. Failing such restitution, the respondent State was ordered to pay a certain amount to the applicant.

[11] See *Assanidze v. Georgia [GC]*, no. 71503/01, § 203, ECHR 2004-II. The language used was imperative ("must secure…at the earliest possible date") and the obligation imposed under Article 41 was repeated in point 14 (a) of the operative part of the judgment. See also *Ilaşcu v. Moldova and Russia (GC)*, no. 48787/99, § 490, ECHR 2004-VII, and point 22 of the operative part of the judgment; *Fatullayev v. Azerbaijan*, no. 40984/07, § 177, 22 April 2010, and point 6 of the operative part; and *Del Rio Prada v. Spain [GC]*, no. 42750/09, § 138, ECHR 2013, and point 3 of the operative part. In the latter two cases, the order was imposed under Article 46.

[12] See *Maestri v. Italy*, no. 39748/98, § 47, 17 February 2004. In spite of the language used ("it is for the respondent State to take appropriate measures to redress the effects of any past or future damage to the applicant's career"), no reference was made in the operative part to the obligation imposed in the reasoning of the judgment under Article 41.

such measures[13], the replacement of a life sentence by a Convention-compatible penalty not exceeding 30 years of imprisonment[14], the opening of a new criminal investigation[15] or the closing of a pending investigation[16], the obtaining of assurances from the Libyan authorities that the applicants will not be subjected to treatment incompatible with Article 3 of the Convention or arbitrarily repatriated[17], and the reinstatement of a person in a State function[18].

5. The retrial clause was first formulated in the specific context of cases against Turkey concerning the independence and impartiality of the national security courts. The Court indicated under Article 41 of the Convention that, "in principle, the most appropriate form of redress would be for the applicant to be given a retrial without delay"[19]. This was known as the *Gençel* clause. A similar stance was adopted under Article 41 in a case against Italy where the finding of a breach of the fairness guarantees contained in Article 6 was not related to the lack of independence or impartiality of the domestic courts, but to the infringement of his right to participate in his trial[20]. Subsequently, the retrial clause was named as the *Gençel-Somogyi* clause. It is important to note that in both cases the finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant. No reference was made in the operative part to the retrial or reopening of the case.

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[13] See *Aleksanyan v. Russia*, no. 46468/06, § 239, 22 December 2008. The language used was imperative ("must replace") and the obligation imposed in the reasoning section under Article 46 was included in point 9 of the operative part of the judgment.

[14] See *Scoppola v. Italy (no. 2) (GC)*, no. 10249/03, § 154, 17 September 2009. The language used was imperative ("is responsible for ensuring that") and the obligation imposed under Article 46 was repeated in point 6 (a) of the operative part of the judgment.

[15] See *Abuyeva and Others v. Russia*, no. 27065/05, § 243, 2 December 2010. In spite of the language used ("it considers it inevitable that … must be determined"), the operative part of the judgment did not refer to the obligation imposed in the reasoning of the judgment under Article 46. See also *Benzer and Others v. Turkey*, no. 23502/06, § 219, 12 November 2013.

[16] See *Nihayet Arıcı and Others v. Turkey*, 24604/04 and 16855/05, § 176, 23 October 2012. The language was imperative ("*doit mettre en oeuvre...dans les plus brefs délais*"), but the operative part of the judgment did not refer to the obligation imposed in the reasoning of the judgment under Article 41.

[17] See *Hirsi Jamaa and Others v. Italy (GC)*, no. 27765/09, § 211, ECHR 2012-II. In spite of the language used ("must take"), the operative part of the judgment did not refer to the obligation imposed in the reasoning of the judgment under Article 46.

[18] See *Oleksandr Volkov v. Ukraine*, no. 21722/11, § 208, ECHR 2013-I. The language used was imperative ("shall secure … at the earliest possible date") and the obligation imposed in the reasoning of the judgment under Articles 41 and 46 was repeated in point 9 of the operative part. Yet the Court did not follow this case-law in *Kulykov and Others v. Ukraine*, nos. 5114/09 and 17 others, § 148, 19 January 2017.

[19] See *Gençel v. Turkey*, no. 53431/99, § 27, 23 October 2003.

[20] See *Somogyi v. Italy*, no. 67972/01, § 86, ECHR 2004-IV.

6. In *Öçalan v. Turkey*[21], the Grand Chamber endorsed the general approach adopted in the above-mentioned case-law, but with a different terminology and within a different normative framework. It considered under Article 46 of the Convention that where an individual, as in the instant case, had been convicted by a court that did not meet the Convention requirements of independence and impartiality, "a retrial or a reopening of the case, if requested, represents in principle an appropriate way of redressing the violation" (the so-called *Oçalan* clause)[22]. However, it added that the specific remedial measures, if any, required of a respondent State in order to discharge its obligations under Article 46 of the Convention must depend on the particular circumstances of the individual case and be determined in the light of the terms of the Court's judgment in that case, and with due regard to the above case-law of the Court. The Court also held that its findings of a violation of Articles 3, 5 and 6 of the Convention constituted in themselves sufficient just satisfaction for any damage sustained by the applicant[23].

7. In *Verein gegen Tierfabriken VgT (No. 2)*, the Grand Chamber explained the meaning of the *Oçalan* clause in detail. The cornerstone of the Grand Chamber's judgment is the idea that a reopening of domestic proceedings is a "key means" for the proper execution of the Court's judgments and should take place in accordance with "the conclusions and the spirit of the Court judgment being executed" [24]. The Court assumed its inherent (implied) competence to examine the domestic authorities' conduct after the first *Verein gegen Tierfabriken* judgment, with the argument that if the Court were unable to examine it, it would escape all scrutiny under the Convention. Thus, the Court's competence covers, according to the rationale of *Verein gegen Tierfabriken Schweiz (VgT) (no. 2)*, not only the actions of national authorities that conflict with the reopening clause, but *a fortiori* also their omission to reopen the domestic proceedings[25].

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[21] See *Öcalan v. Turkey [GC]*, no. 46221/99, § 210 in fine, ECHR 2005-IV.

[22] This clause is also known as the *Oçalan-Sejdovic* clause since it was confirmed and further developed in *Sejdovic v. Italy [GC]*, no. 56581/00, § 86, ECHR 2006-II. See also *Abbasov v. Azerbaijan*, no. 24271/05, § 42, 17 January 2008, and *Laska and Lika v. Albania*, nos. 12315/04 and 17605/04, § 76, 20 April 2010.

[23] In spite of the Grand Chamber's intervention in *Öçalan v. Turkey* and two years later in *Sejdovic v. Italy*, the practice of the Court remained uncertain as it is evidenced by the fact that several chambers retained the former *Gençel* clause, as it will be shown below. To aggravate this uncertainty, the Grand Chamber went back again to the *Gençel* clause under Article 41 of the Convention in *Salduz v. Turkey (GC)*, no. 36391/02, § 72, 27 November 2008, and in *Sakhnovskiy v. Russia [GC]*, no. 21272/03, § 112, 2 November 2010, it used the *Gençel* clause, but wrongly cited the *Oçalan* precedent.

[24] See *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2) [GC]*, no. 32772/02, § 90, ECHR 2009.

[25] See also *Wasserman v. Russia (no. 2)*, no. 21071/05, § 37, 10 April, 2008, and *Ivanţoc and Others v. Moldova and Russia*, no. 23687/05, §§ 86 and 95-96, 15 November 2011.

b. The development of other individual measures (§§ 8-18)

8. The Court's case-law evolved rapidly, encompassing other subject matters and fields of law. The result is that the Court's competence to order a retrial or reopening of a case is now well-established. In fact, the retrial clause has been applied following a finding of a breach of Article 6 on account of infringements of the right of access to court[26], the right to be tried by a court established by law[27], the principle of impartiality or independence of the court[28], the right to participate in the trial[29], the right to question witnesses[30], the right to be heard in person[31], the right to be

[26] Following a finding of a breach of the right of access to court, the *Oçalan-Sejdovic* clause was used in *Perlala v. Greece*, no. 17721/04, § 36, 22 February 2007, but the *Gençel-Somogyi* clause was used in *Kostadin Mihaylov v. Bulgaria*, no. 17868/07, § 60, 27 March 2008, and in *Demerdžieva and Others v. the former Yugoslav Republic of Macedonia*, no. 19315/06, § 34, 10 June 2010. In a case with the same subject matter where the annulation of the trial had been requested, the Court did not order the retrial (see *De la Fuente Ariza v. Spain*, no. 3321/04, § 31, 8 November 2007).

[27] The *Gençel-Somogyi* formula was used *mutatis mutandis* in *Claes and Others v. Belgium*, nos. 46825/99, 47132/99, 47502/99, 49010/99, 49104/99, 49195/99 and 49716/99, § 53, 2 June 2005, *Lungoci v. Romania*, no. 62710/00, 26 January 2006, and *Ilatovskiy v. Russia*, no. 6945/04, § 49, 9 September 2009 (wrongly cites the *Oçalan* case).

[28] Other than the Turkish State Security Court cases, the *Oçalan-Sejdovic* clause appeared in cases referring to the conviction of a civilian by a military jurisdiction following the leading case *Ergin v. Turkey (no. 6)*, no. 47533/99, ECHR 2006, § 61. But in some other cases, referring to the same subject matter, the Court did not apply the retrial clause (see *Karatepe v. Turkey*, no. 41551/98, § 37, 31 July 2007, *Hûseyin Simsek v. Turkey*, no. 68881/01, § 83, 20 May 2008). In these cases, the applicant had benefitted from conditional release before the adoption of the Court's judgment. Nonetheless, release of the applicant cannot be considered a ground for not applying the retrial clause, because the Court has also applied the retrial clause in cases where the imprisonment sentence had being suspended (see *Kenar v. Turkey*, no. 67215/01, § 50, 13 December 2007, and *Zekeriya Sezer v. Turkey*, no. 63306/00, § 32, 29 November 2007).

[29] Following a finding of a breach of the right to participate in the trial, the *Gençel-Somogyi* clause was used in *R.R. v. Italy*, no. 42191/02, § 76, 9 June 2005, but later abandoned in favour of the *Oçalan-Sejdovic* clause in *Hu v. Italy*, no. 5941/04, § 71, 28 November 2006, *Csikos v. Hungary*, no. 37251/04, § 26, 5 December 2006, *Kollcaku v. Italy*, no. 25701/03, § 81, 8 February 2007, *Pititto v. Italy*, no. 19321/03, § 79, 12 June 2007, *Kunov v. Bulgaria*, no. 24379/02, § 59, 23 May 2008, and *Georghe Gaga v. Romania*, no. 1562/02, § 68, 25 March 2008. In a case with the same subject matter the Court did not apply the retrial clause at all (*Da Luz Domingues Ferreira v. Belgium*, no. 50049/99, 24 May 2007).

[30] Following a finding of a breach of the right to question witnesses, the *Oçalan* clause was used in *Bracci v. Italy*, no. 36822/02, § 75, 13 October 2005, *Vaturi v. France*, no. 75699/01, § 63, 13 April 2006, *Zentar v. France*, no. 17902/02, § 35, 13 April 2006, *Balšán v. the Czech Republic*, no. 1993/02, § 40, 18 July 2006 (wrongly cites the *Somogyi* case), *Reiner and Others v. Romania*, no. 1505/02, § 93, 27 September 2007 (wrongly cites the *Gençel* case), but the *Gençel* clause was used in *Majadallah v. Italy*, no. 62094/00, § 49, 19 October 2006, *Popov v. Russia*, no. 26853/04, § 263, 13 July 2006 (wrongly cites the *Oçalan* case), *Sakhnovskiy v. Russia [GC]*, no. 21272/03, § 112, 2 November 2010 (wrongly cites the *Oçalan* case), and *Duško Ivanovski v. the Former Yugoslav Republic of Macedonia*, no. 10718/05, § 64, 24 April 2014.

informed in a detailed manner of the accusation[32], the right to have time and facilities for the preparation of one's defence[33], the principle of adversarial proceedings and equality of arms[34], the right to legal assistance[35], the principle of a fair trial, including the prohibition of police entrapment[36], and the right to a motivated judgment[37].

Other than Article 6 cases, the clause has been used in Article 2[38] and Article 7[39] cases. Additionally, the clause has been extended to civil, administrative and tax cases[40]. The criteria of application of the retrial clause in non-criminal cases are not always clear, the Court having refused sometimes to apply it in spite of the applicant's explicit request[41]. As a result, applicants have no choice but again to seek relief through money and time-consuming international litigation before the Court when the respondent states do not comply with the initial findings of the Court.

9. In view of the above, to state, as the majority do in the present judgment, that these are exceptional cases is an understatement of the Court's rich case-law. Furthermore, the majority do not fully assess the nature, scope and effect of the retrial clause. Paragraphs 49 to 51 of the

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[31] See *Spinu v. Romania*, no. 32030/02, § 82, 29 April 2008.

[32] See *Miraux v. France*, no. 73529/01, § 42, 26 September 2006, and *Drassich v. Italy*, no. 25575/04, § 46, 11 December 2007.

[33] See *Mattei v. France*, no. 34043/02, § 51, 19 December 2006.

[34] See *Ünel v. Turkey*, no. 35686/02, § 55, 27 May 2008. Other than the refusal of questioning of certain witnesses, the applicant complained of lack of access to certain items of evidence, like an audio record of his detention.

[35] The *Oçalan-Sejdovic* clause was used in *Sannino v.Italy*, no. 30961/03, § 70, 27 April 2006, *Kemal Kahraman and Ali Kahraman v. Turkey*, no. 42104/02, § 44, 26 April 2017, and *Sacettin Yildiz v. Turkey*, no. 38419/02, § 55, 5 June 2007, but the *Gençel-Somogyi* clause was used in *Salduz v. Turkey (GC)*, no. 36391/02, § 72, 27 November 2008, and *Shulepov v. Russia*, no. 15435/03, § 46, 26 June 2008.

[36] See *Malininas v. Lithuania*, no. 10071/04, § 43, 1 July 2008.

[37] See *Huseyn and Others v. Azerbaijan*, nos. 35485/05, 45553/05, 35680/05 and 36085/05, 4§ 213 and 262, 26 July 2011.

[38] See *Abuyeva and Others*, cited above.

[39] See *Dragotoniu and Militaru-Pidhorni v. Romania*, no. 77193/01 and 77196/01, § 55, 24 May 2007, which also refers to Article 408 of the criminal procedure code.

[40] See *Yanakiev v. Bulgaria*, no. 40476/98, § 90, 10 August 2006, *Paulik v. Slovakia*, no. 10699/05, § 72, 10 October 2006, *Mehmet et Suna Yigit v. Turkey*, No. 52658/99, § 47, 17 July 2007, *CF Mrebeti v. Georgia*, no. 38736/04, § 61, 31 July 2007, *Paykar Yev Haghtanak v. Armenia*, no. 21638/03, § 58, 20 December 2007, *Cudak v. Lithuania (GC)*, no. 15869/02, § 79, 23 March 2010, *Kostadin Mihailov v. Bulgaria*, no. 17868/07, § 60, 27 March 2008, *Vusic v. Croatia*, no. 48101/07, § 58, 1 July 2010, *Bulfracht Ltd v. Croatia*, no. 53261/08, § 46, 21 June 2011, and *Vojtěchová v. Slovakia*, no. 59102/08, §§ 27 and 48, 25 September 2012.

[41] *Freitag v. Germany*, no. No. 71440/01, § 61, 19 July 2007. The case cites *Sejdovic*, cited above, § 119, and *Monnat v. Switzerland*, no. 73604/01, § 84, ECHR 2006, in which the Court had refused to lift a ban on the sale of the report in issue which had been found in breach of Article 10 of the Convention.

judgment simply omit such assessment, limiting themselves to a repetitive and partial overview of the Court's case-law.

10. Normally, the Court refers to the retrial clause as a matter of "principle", but in some occasions it mentions it as a "rule"[42], equating legal principles and rules. The retrial or reopening of the proceedings has also been described without any mention to a "principle" or a "rule", since it "constitutes the most appropriate redress in the circumstances of the case"[43].

11. Contrary to the initial judgments, the *Oçalan* clause has been used under Article 41[44] and the *Gençel* clause under Article 46[45]. In some less frequent cases a specific retrial clause is inserted in the operative part of the judgment itself. For example, in *Lungoci*, the Court ordered in the operative part that that the respondent State reopened the domestic proceedings within six months of the date on which the judgment becomes final, if the applicant so requested[46]. In *Maksimov*, the Court held in the operative part that "the respondent State must take all measures to reopen the cassation appeal proceedings provided by the Transitional law"[47] In other cases, the Court ordered in the operative part not the reopening of the case, but already the legal effect intended as "the most appropriate form of redress", like for example the full restitution of the applicant's title to the flat and the annulment of her eviction order[48]. In this type of cases, the Court imposed under Article 41 the revocation of the domestic courts' eviction order in conjunction with the award of damages. If the flat is no longer the State's property, or if it has been otherwise alienated, the respondent State should ensure that the applicant receives an "equivalent flat"[49]. In some other cases, the Court determined, in the operative part of the judgment that, in

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[42] See *Yanakiev v. Bulgaria*, no. 40476/98, § 90, 10 August 2006; *Lesjak v. Croatia*, no. 25904/06, § 54, 18 February 2010; *Putter v. Bulgaria*, no. 38780/02, § 62, 2 December 2010; and *Kardoš v. Croatia*, no. 25782/11, § 67, 26 April 2016.

[43] See *Vojtěchová v. Slovakia*, no. 59102/08, §§ 27 and 48, 25 September 2012; *Harabin v. Slovakia*, no. 58688/11, §§ 60 and 178, 20 November 2012; and *Zachar and Čierny v. Slovakia*, nos. 29376/12 and 29384/12, § 85, 21 July 2015.

[44] See, for example, *Hu*, cited above, § 71, or *Sacettin Yildiz*, cited above, § 55, and *Flueraş v. Romania*, no. no 17520/04, 9 April 2013 (wrongly cites the *Gençel* case).

[45] See, for example, *Karelin*, cited above, § 97, *Scoppola*, cited above, § 154, and *Oleksandr Volkov*, cited above, § 206.

[46] See *Lungoci v. Romania*, no. 62710/00, 26 January 2006. The same occurred in *Ajdarić v. Croatia*, no. 20883/09, 13 December 2011.

[47] See *Maksimov v. Azerbaijan*, no. 38228/05, 8 October 2009, and *Claes and Others*, cited above.

[48] See *Gladysheva v. Russia*, no. 7097/10, § 106, 6 December 2011, and *Anna Popova v. Russia*, no. 59391/12, § 48, 4 October 2016.

[49] See *Ponyayeva and Others v. Russia*, no. 63508/11, § 66, 17 November 2016; *Alentseva v. Russia*, no. 31788/06, § 86, 17 November 2016; and *Pchelintseva and others v. Russia*, no. 47724/07, § 110, 17 November 2016.

accumulation with the Court's award of just satisfaction, a domestic judicial decision be implemented and produce its real effect[50].

12. In *Laska and Lika*, the Court went a step further and considered under Article 46 that there was a positive obligation incumbent on the respondent State to "remove any obstacles in its domestic legal system that might prevent the applicants' situation from being adequately redressed (...) or introduce a new remedy" for the reopening of the cases in view of the lack of such remedy in national law[51]. To be more precise, the Court did not refrain from recalling that the Contracting States are under a duty to organise their judicial systems in such a way as to enable their courts to meet the requirements of the Convention, but adduced, innovatively, that this principle also applies to the reopening of proceedings and the re-examination of the applicants' case. Yet such imposition was not repeated in the operative part which referred to the award of non-pecuniary damage, but not to the reopening of the case[52].

13. In *M.S.S.*, having regard to the particular circumstances of the case and the urgent need to put a stop to these violations of Articles 13 and 3 of the Convention, the Court considered "it incumbent on Greece, without delay, to proceed with an examination of the merits of the applicant's asylum request that meets the requirements of the Convention and, pending the outcome of that examination, to refrain from deporting the applicant"[53]. Yet none of these individual measures indicated under Article 46 were inserted into the operative part of the judgment.

14. The case-law is also changeable with regard to the accumulation of just satisfaction and the retrial clause. In spite of the fact that neither the *Gençel* nor the *Oçalan* judgments accorded just satisfaction, the Court imposes cumulatively just satisfaction and the retrial clause in the vast majority of cases[54]. Less frequently, it dismisses the claim for just

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[50] See *Gluhaković v. Croatia*, no. 21188/09, § 89, 12 April 2011, *Plotnikovy v. Russia*, no. 43883/02, § 33, 24 February 2005, and *Makarova and others v. Russia*, no. 7023/03, § 37, 24 February 2005. Yet in the exact similar situation in *OOO Rusatommet v. Russia*, no. 61651/00, § 33, 14 June 2005, the Court refrained from doing the same.

[51] See *Laska and Lika v. Albania*, nos. 12315/04 and 17605/04, § 76, 20 April 2010. Confronted with a similar systemic problem in *Karelin v. Russia*, no. 926/08, 20 September 2016, the Court did not follow the same approach.

[52] This case is different from *Klaus and Iouri Kiladzé v. Georgia*, no. 7975/06, §§ 85 and 90, 2 February 2010, which established compensation as an alternative to the adoption of general measures. In *Ürper and Others v. Turkey*, nos. 14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 50371/07, 50372/07 et 54637/07, § 52, 20 October 2009, and *Gözel and Öser v. Turkey*, nos. 43453/04 and 31098/05, § 76, 6 July 2010, the Court ordered the introduction of legislative, ie, general measures, in addition to compensation.

[53] See *M.S.S. v. Belgium and Greece [GC]*, no. 30696/09, § 402, ECHR 2011.

[54] This was the Court's position even when it used to distinguish the decision on the merits and the decision on just satisfaction (see *Barberà, Messegué and Jabardo v. Spain* judgment of 13 June 1994, Series A no. 285-C, p. 56, para. 15, and *Schuler-Zgraggen v. Switzerland (Article 50)*, no. 14518/89, §§ 14 and 15, 31 January 1995). At present, just

satisfaction in view of the retrial clause[55] or imposes them alternatively[56]. The grounds for such a choice are not obvious.

15. Occasionally, the Court merely refers to the existence of a national mechanism for the review of the domestic judgment, sometimes in addition to the award of just satisfaction[57], at other times in its absence[58].

16. Summing up, individual measures may be imposed by the Court according to one of the following three types of solutions:

A. Obligations imposed in the operative part:

1. The obligation to produce a specific real effect "at the earliest possible date" or "immediately" (the *Assanidze* solution)
2. The obligation to revoke a domestic judicial decision and produce a specific legal effect which is "the most appropriate form of redress" within a certain deadline, like three months from the date on which the judgment becomes final (the *Gladysheva* solution)
3. The obligation to implement a domestic judicial decision and produce its real effect without any specific deadline (the *Plotnikovy-Gluhaković* solution)

B. Obligations included only in the reasoning part:

1. The obligation to produce "without delay" a domestic judicial decision "that meets the requirements of the Convention" and to refrain from any action until its delivery (the *M.S.S.* solution)
2. The obligation to take the specific individual measure which is "inevitable" and "must be determined" according to certain requirements set out in the Court judgment (the *Abuyeva* solution)
3. The obligation to take the specific individual measure in conjunction with the general measures necessary to implement it without any deadline (the *Laska and Lika* solution)

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satisfaction has been accorded even when a retrial clause has been included in the operative part of the judgment (see *Lungoci*, cited above).

[55] See *Bocos-Cuesta v. the Netherlands*, no. 54789/00, § 82, 10 November 2005; *Kaste and Mathisen v. Norway*, no. nos. 18885/04 and 21166/04, § 61, 9 November 2006; *Vusic v. Croatia*, no. 48101/07, § 58, 1 July 2010; and *Bulfracht Ltd v. Croatia*, no. 53261/08, § 47, 21 June 2011.

[56] See *Caes and Others*, cited above.

[57] See *Taxquet v. Belgium (GC)*, no. 926/05, § 107, 16 November 2010; *Delespesse v. Belgium*, no. 12949/05, § 44, 27 March 2008; *Nikolitsas v. Greece*, no 63117/09, § 47, 3 July 2014; and *Mitrov v. v. the former Yugoslav Republic of Macedonia,* no. 25703/11, § 64, 2 June 2016.

[58] See *Dvorski v. Croatia (GC)*, no. 25703/11, § 117, 20 October 2015.

4. The obligation to take the specific individual measure which “constitutes the most appropriate redress in the circumstances of the case” (the *Vojtěchová solution*)
5. The obligation to take the specific individual measure which is “in principle, the most appropriate form of redress” (the *Gençel-Somogyi* solution)
6. The obligation to take the specific individual measure which, “if requested, represents in principle an appropriate way of redressing the violation” (the *Oçalan-Sejdovic* solution)

C. Other individual measures included in the reasoning:

1. The obligation to take (unspecified) “all possible measures” to redress the effects of any past or future damage resulting from the Convention violation (the *Maestri* solution)
2. The obligation (of means) to take “all steps” to obtain a guarantee from a third party to the Convention (the *Hirsi* solution)
3. The (implicit) possibility of making use of the domestic review remedies mentioned in the reasoning.

17. In the light of the foregoing considerations, it is undeniable that, in the long-standing practice of the Court, obligations imposed in the operative part and those included only in the reasoning part of the judgment have the same legal force, in spite of the different formulation given to them. The reopening clause is a key means for the execution of the Court’s judgments whose legal force does not depend on whether it is inserted in the reasoning or the operative part of the judgment. To conclude otherwise would mean either that the judgments’ language is dictated by whimsical changes of mood or, even worse, by political considerations. The choice of the formula in the Court judgments is neither a matter of taste of the drafter nor of chamber politics determined by the need to confer a more or less emphatic tone to the individual measure in view of the respondent State’s expected reluctance or abeyance to follow suit.

18. In sum, Article 46 of the Convention does provide, when appropriate, for imperative, individual legal effects of the Court’s judgments in the domestic legal order of the respondent state, including an order for retrial, re-examination or reopening of a criminal case. The *Oçalan* clause must be read coherently and consistently in the light of the Court’s evolving case-law. As it will be demonstrated, the variety of formulae present in the case-law not only raises an issue of lack of readability of the judgment and consequently of legal certainty, but also undermines the full and effective enforcement of the Court’s judgments. Unfortunately, the present judgment does not provide the much needed guidance in this ambit, in terms of putting into perspective the *Oçalan* clause against the background picture of

the Court's rich case-law on individual measures of redress of a Convention violation and of restating their legal force.

III. The right to reopen a criminal case after a Court finding of a Convention violation (§§ 19-34)

a. The strict standard of Committee of Ministers Recommendation (2000) 2 (§§ 19-27)

19. The majority of the Grand Chamber deny the right to reopen a criminal case after a Court's finding of a violation on the basis of the lack of a "uniform approach among the contracting States". In their assessment of the implementation of Recommendation (2000) 2 on re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights (hereinafter "the Recommendation"), the majority conclude that "in most of those States the reopening of proceedings is not automatic and is subject to admissibility criteria"[59]. In its leading judgment of 27 May 2009, the Supreme Court also interpreted, by a majority of two to one, Article 449 (1) (g) of the Code of Criminal Procedure in the light of and with the same exact content of the Committee of Ministers Recommendation No. R (2000) 2[60].

Since both the majority of the Grand Chamber and the majority of the Supreme Court in its 27 May 2009 judgment rely on the standards of the Committee of Ministers Recommendation (2000) 2 as the point of departure for their own reasoning, it is necessary to analyse that Recommendation and its implementation by the Contracting Parties to the Convention.

20. The Committee of Ministers Recommendation states that "in exceptional circumstances the re-examination of a case or a re-opening of proceedings has proved the most efficient, if not the only, means of achieving *restitutio in integrum*." Moreover, the Committee of Ministers encourages the Contracting parties to the Convention to provide for the reopening of domestic proceedings in the case of a substantive or a procedural violation of the Convention. In both cases, the victim of the human rights violation must still be suffering its very serious negative consequences at the time the Court establishes the violation and these consequences can only be remedied by reopening the proceedings. When a procedural error or shortcoming has been established by a judgment of the Court, a reopening of the case is also dependent on the gravity of the error or shortcoming and the seriousness of the issuing doubt on the outcome of the domestic proceedings.

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[59] See paragraph 53 of the judgment.

[60] See paragraph 28 of the judgment.

21. The difference of regime between substantive and procedural Convention violations for the purposes of reopening domestic proceedings creates an undesirable uncertainty. Considering the fact that the Court does not always distinguish between substantive and procedural violations, preferring to find a global violation, it will not be always clear which criteria to apply: the more stringent criteria for a reopening following a finding of a procedural violation, or the less stringent criteria for a reopening following a finding of a substantive violation.

22. Moreover, the reopening of the case shall only be authorised when two cumulative conditions obtain: the continuing suffering of very serious negative consequences and the impossibility of remedying those consequences by way of just satisfaction. Neither of these conditions is present in Article 4 (2) of Protocol 7. It is difficult to understand why a reopening following the finding of a Convention violation in a Court judgment should be subject to stricter conditions than those laid down in Article 4 (2) of Protocol 7 for any other domestic reopening procedure.

23. Furthermore, the requirement that the negative consequences of a Convention violation "are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening" establishes a relationship of subsidiarity between reopening the domestic proceedings and just satisfaction. Accordingly, whenever possible, preference must be given to just satisfaction over reopening the domestic proceedings. This rule of subsidiarity of reopening contradicts Article 41 of the Convention itself. According to this provision, the respondent State should do its best to provide full reparation (and not "partial reparation") for a declared Convention violation, preferably by way of *restitutio in integrum*, which means wiping out the legal and material consequences of its wrongful act by re-establishing the situation that would exist if that act had not been committed, and for that purpose by reopening the domestic proceedings that led to the wrongful act[61]. Compensation can certainly be added to restitution insofar as damage is not made good by restitution[62], but not set as an alternative to it, and even less as a preferable alternative. To put it in logical terms, the Recommendation reverses the logical order of preference established by Article 41 of the Convention. Ultimately, the very strict terms of the Recommendation are not in line with the principles of international law whereby a State responsible for a wrongful act is under an

[61] The logical and ontological link between *restitutio in integrum* and reopening of criminal proceedings was already established in *Piersack v. Belgium (Article 50),* cited above, § 11. It is noteworthy that in this case reopening led to a sentence identical to that originally imposed. Nonetheless, the Court found that the second domestic proceedings "brought about a result as close to *restitutio in integrum* as was possible in the nature of things", since the new trial before the assize court was attended by all the guarantees laid down by the Convention.

[62] In this sense, see Article 34 of DARSIWA and the respective Commentary, paragraph 2.

obligation to make restitution as far as possible and that compensation can be considered only after concluding that, for one reason or another, restitution could not be effected[63].

24. Worse still, the underlying assumption of the Recommendation conditions is that human rights violations can be "bought". Governments may avoid the reopening of domestic proceedings by paying up for a Convention violation established by a final Court judgment, regardless of the nature of the Convention right or freedom violated.

25. In addition, the requirement of the "continuing suffering" contradicts the rationale of the extraordinary appeal for the purpose of reopening of domestic proceedings. In the vast majority of member States, reopening of a case is allowed even when the penalty had already been served or the convicted person had already died.

26. Furthermore, the requirement of "continuing suffering" is highly restrictive, because it warrants "a direct causal link between the violation found and the continuing suffering of the injured party"[64] and "very serious negative consequences because of the outcome of the domestic decision at issue". It is doubtful that these "very serious negative consequences" include the entry of a conviction in the convicted person's criminal record[65], the payment of a fine in instalments[66] or the submission to limitations to the convicted person's social and professional life imposed by a suspended sentence, parole or conditional release. When the Convention violation is committed in criminal proceedings, it may impact on the conviction or the sentencing. Restoring the applicant in the position he would have enjoyed had the violation not occurred may warrant the review of both the conviction and the sentence or just the sentence, whatever the latter's gravity might be.

b. The broad European consensus in the implementation of the Recommendation (§§ 28-34)

28. In the vast majority of member States, domestic legislation explicitly provides for the right to request the review or the reopening of criminal proceedings on the basis of a finding of a violation by the Court or of a judgment by an international court, which covers the Court[67]. This is the

[63] In this precise sense, see the commentary to Article 35 of the DARSIWA, paragraph 3.
[64] See the Explanatory Report to the Recommendation.
[65] See paragraph 16 of the judgment.
[66] See paragraph 17 of the judgment.
[67] For the purposes of this opinion , I have consulted all legislations of the member States of the Council of Europe and double-checked the information with the "Compilation of written contributions on the provision in the domestic legal order for re-examination or reopening of cases following judgments of the Court" of 31 March 2016 (DH-GDR(2015)002REV), prepared by the Steering Committee for Human Rights (CDDH) and

case in Article 30*bis* of the Andorran Transitional Act on Judicial Proceedings and Article 19*bis* of the Justice Act[68], Articles 363 (a) to 363 (c) of the Austrian Code of Criminal Procedure[69], Articles 442 *bis* and 442 *quinquies* of the Belgium *Code d'instruction criminelle* and Article 116 of the Law of 5 February 2016[70], Article 327 § 1 (f) of the Code of Criminal Procedure of Bosnia and Herzegovina[71], Article 422 § 1 (4) of the Bulgarian Code of Criminal Procedure, Article 502 of the Croatian Code of Criminal Procedure[72], section 119 of the Act on the Constitutional Court of the Czech Republic[73], the Cypriot Law no. 23(I)/2015 of 25 February 2015[74], Article 457 § 1 (b) of the Dutch Code of Criminal Procedure[75], Article 367 § 7 of the Estonian Code of Criminal Procedure, Article 622-1 of the French Code of Criminal Procedure[76], Article 310 (e) of the Georgian Code of Criminal Procedure[77], section 359 § 6 of the German Code of Criminal Procedure[78],

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Committee of Experts on the Reform of the Court (DH-GDR), as well as the materials available before the Grand Chamber.

[68] Having been introduced by Law no. 16/2014, of 27 July 2014, these provisions have not been applied to date.

[69] Remarkably, in its judgment of 1 August 2007 the Austrian Supreme Court expanded its power to reopen criminal proceedings. In this case, the Supreme Court applies the admissibility criteria of Articles 34 and 35 of the Convention analogously.

[70] See among others the Belgium Court of Cassation decision P.08.05 F, 9 April 2008.

[71] In addition, lower levels of government in Bosnia and Herzegovina also provide for the right to reopening where the European Court of Human Rights found a violation of human rights and where the domestic court judgment was based on that violation (Criminal Procedure Code of the Federation of BiH, Article 343 § 1 (f); Criminal Procedure Code of the Republika Srpska, Article 342 § 1 (đ); Criminal Procedure Code of Brčko District, Article 327 § 1 (f). Following the Court's judgment in *Maktouf and Damjanovic*, the respective criminal proceedings were reopened.

[72] See the Croatian Constitutional Court decision no. U-III -3304/2011 of 23 January 2013, which set out the criteria for the assessment of a request for reopening of the proceedings on the basis of a finding of a violation of the Convention by the Court.

[73] In the Czech Republic, the reopening of proceedings after the judgment of the Court is available in cases in which the Constitutional Court has given its decision. Under section 119 of the Act on the Constitutional Court (no. 182/1993), the applicant can request a reopening of the proceedings before the Constitutional Court if the Court considered that his or her rights have been violated. On the domestic case-law see Compilation, cited above, p. 15.

[74] There have been no requests to the Supreme Court under this law thus far. The law was enacted for complying with the Court's judgments in two instances (see *Kyprianou v. Cyprus* and *Panovitz v. Cyprus*).

[75] On the domestic case-law see Compilation, cited above, p. 67.

[76] On the domestic case-law see Compilation, cited above, pp. 37-42.

[77] See the reopening of proceedings following the leading case *Taktakishvili v. Georgia* (dec.), no. 46055/06, 16 October 2012, and *Sulkan Molashvili v. Georgia* (dec.), no. 39726/04, 30 September 2014.

[78] There is no legal presumption of a causal connection between a violation of basic procedural rights guaranteed by the Convention and a final judgment (see the Federal Constitutional Court decision of 12 January 2000). For example, in the *Gäfgen* case, the Higher Regional Court of Frankfurt rejected the reopening of the proceedings, because, in

Article 525 § 1 (e) of the Greek Code of Criminal Procedure[79], Article 416 § 1 (g) of the Hungarian Code of Criminal Procedure[80], Article 655 § 2 (5) of the Latvian Law on criminal procedure[81], Article 456 of the Lithuanian Code of Criminal Procedure[82], Article 443 § 5 of the Luxembourg Code of Criminal Procedure[83], section 449 § 1 (6) of the Macedonian Criminal Proceedings Act, Article 508 § 4 of the Monaco Code of Criminal Procedure, Article 464 of the Moldovan Code of Criminal Procedure[84], Article 424 § 6 of the Montenegro Code of Criminal Procedure, section 391 § 2 of the Norwegian Criminal Procedure Act[85], Article 540 § 3 of the Polish Code of Criminal Procedure[86], Article 449 § 1 g) of the Portuguese Code of Criminal Procedure, Article 465 of the Romanian Code of Criminal Procedure[87], Article 200 of the San Marino Code of Criminal Procedure[88], section 394 §§ 1-3 of the Slovakian Criminal Procedure Code[89], Article 954 § 3 of the Spanish Code of Criminal Procedure[90], Article 122 of Federal Law of 17 June 2005 on the Swiss Federal Court[91], Article 311 (f) of the

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its view, the violation of the Convention in course of investigation proceedings had no impact on the final conviction by the contested judgment, since the domestic conviction had been based on the confession of the accused during the trial (Frankfurt Higher Regional Court, decision of 29 June 2012).

[79] On domestic case-law, see the Greek Supreme Court judgments nos. 159/2005, 2214/2005, 1566/2010 and 1613/2010.

[80] See, for example, the Supreme Court judgments of reopening of domestic proceedings in *Vajnai v. Hungary, Fratanolo v. Hungary* and *Magyar v. Hungary* cases.

[81] On the domestic case-law see Compilation, cited above, pp. 55-56.

[82] On the domestic case-law see Compilation, cited above, p. 60.

[83] See for example the judgment of the Court of Cassation of 9 June 2016 (n° 26/16 pén., n° 3742).

[84] On the domestic case-law see Compilation, cited above, p. 64.

[85] See for example the Supreme Court judgment of 7 September 2016 following the *Kristiansen v. Norway* judgment.

[86] See the Polish Supreme Court interpretative resolution of 26 June 2014 and other case-law in Compilation, cited above, pp. 71-72.

[87] On the domestic case-law see Compilation, cited above, pp. 80-82.

[88] As amended by the Law of 24 February 2000, no. 20, and subsequently by the Law of 27 June 2003, no. 89. There has been only one case where reopening was ordered, following the *Tierce v. San Marino* judgment.

[89] See for example the successful reopening following the *Zachar and Čierny* judgment (CM/ResDH(2016)294).

[90] On the domestic case-law see Compilation, cited above, p. 107, and especially the Constitutional Court leading judgment no. 245/1991, 16 December 1991, following the *Barberà, Messegué and Jabardo v. Spain* judgment. See also the Supreme Court non-jurisdictional agreement of 21 October 2014 and its judgments no. 145/2015, 12 March 2015, following the *Almenara Alvarez v. Spain* judgment.

[91] On the domestic case-law see Compilation, cited above, p. 116, and especially the Swiss Federal Court judgment no. 6S.362/2006 of 3 November 2006.

Turkish Code on Criminal Procedure[92] and Article 445 of the Ukrainian Code of Criminal Procedure[93].

In only two member States, Azerbaijan[94] and Russia[95], the existence of explicit provisions on reopening of criminal proceedings on the basis of a Court judgment does not correlate to an individual right of the convicted person to reopening.

29. In some member States the absence of an explicit provision for the reopening of criminal proceedings on the basis of a final judgment of the Court has been overcome by a dynamic interpretation of the general provisions on review under the Code of Criminal Procedure or procedural law. This is the case in Albania[96], Denmark[97], Finland[98], Iceland[99], Ireland[100], Italy[101], Sweden[102] and the United Kingdom[103].

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[92] See for example *Oçalan v. Turkey* (dec.), no. 5980/07, 6 July 2010, and *Erdemli v. Turkey* (dec.), no. 33412/03, 5 February 2004.

[93] See for example *Yaremenko v. Ukraine (no. 2)*, no. 66338/09, 30 April 2015, and the reopening procedure following the *Zhyzitskyy v. Ukraine* judgment.

[94] See Article 456 of the Code of Criminal Procedure of the Republic of Azerbaijan. The Government have discretion in requesting reopening, the Plenum of the Supreme Court being obliged to reopen a case within three month after it receives the relevant copy of the final judgment of the Court. The victim of the human rights violation has no right to request reopening.

[95] On the domestic case-law see Compilation, cited above, pp. 86-87. The Plenum of the Supreme Court, in its ruling No. 21 of 27 June 2013, underlined that, when considering whether it is necessary to re-examine a judgment, the causal link between the established violation of the Convention and the continuous adverse consequences suffered by the applicant should be taken into account. In its decision of 6 December 2013, the Constitutional Court of Russia emphasised that "a court of general jurisdiction cannot refuse to reopen a judicial decision, which has become final, as a procedural stage due to a judgment of the European Court of Human Rights." More recently, the Constitutional Court of Russia decision of 14 January 2016 dictated that "If [the Court] has found a violation of the Convention, in particular, because a final criminal judgment was unfair as a result of a substantial judge's mistake that affects the essence of the judgment, and thus this judgment should be re-examined, the President of the Supreme Court is under obligation to lodge a correspondent application [for re-examination]." The victim of the human rights violation has no right to request reopening.

[96] In Albania, the Constitutional Court has recognised, on the basis of the interpretation of Articles 10 and 450 of the Code of Criminal Procedure, the power of the Supreme Court to order re-examination of final decisions which are based on the Court's findings. On the domestic case-law see Compilation, cited above, pp. 3-4.

[97] Under section 977 (1), of the Danish Administration of Justice Act a convicted person can request a reopening of criminal proceedings if special circumstances strongly indicate that evidence has not been rightly judged. In fact, the *Jersild* judgment of the Court led to the reopening of proceedings by virtue of being considered a "special circumstance" (see Resolution DH (95) 212)). The practice has been restrictive, since reopening in these circumstances was ordered only in another case.

[98] Chapter 31, section 1, sub-section 1, sub-paragraph 4, and section 8 and section 8 (a) of the Finish Code of Judicial Procedure. The Supreme Court practice has been varied, but the leading decision of the Supreme Court of 24 May 2012 referred to Recommendation 2000 (2) (see Compilation, cited above, pp. 27-29).

In Malta, it would be possible to request a reopening on the basis of Article 6 of the European Convention Act, according to which any judgment of the Court to which a declaration made by the Government of Malta in accordance with Article 46 of the Convention applies may be enforced by the Constitutional Court. Furthermore, the Prime Minister may, *ex officio* or upon request of a person convicted "on indictment", refer a case to the Court of Criminal Appeal. In that event, the case shall be treated as an appeal to that court by the person convicted, and presumably, that court could have regard to any finding of a violation of the Convention by the Court when deciding whether to quash the conviction and order a retrial. However, neither of these two mechanisms (enforcement by the Constitutional Court and referral of the case by the Prime Minister to the Court of Criminal Appeal) has ever been used[104].

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[99] Reopening can be requested if there have been material defects in the proceedings that have affected the outcome of the case. The criteria for reopening criminal proceedings are governed by the Act on Criminal Procedure (sections 211 and 215), namely new evidence has come into light that would have been considered to have great importance for the outcome of the case if they would have been available before the final judgment was delivered. For example, domestic proceedings were reopened following the *Arnarsson v. Iceland* judgment.

[100] In Ireland, any applicant who has obtained a finding of a violation of Article 6 falls within the provisions of section 2 of the Criminal Procedure Act 1993, which allows a convicted person who alleges a new or newly-discovered fact shows that there has been a miscarriage of justice to apply to the Court of Criminal Appeal for an order quashing his or her conviction. In fact, following the Court judgment in *Quinn v. Ireland*, the High Court quashed the conviction on that basis. This is the sole such example.

[101] In its judgment no. 113 of 4 April 2011, the Italian Constitutional Court established that Article 630 of the Code of Criminal Procedure was illegitimate, insofar as it did not include, among the cases of revision of a judgment or of a decree, the reopening of the criminal proceedings subsequent to a finding of a violation of the Convention by a final judgment of the Court. But before this judgment, the Supreme Court had already admitted the re-examination or reopening of criminal proceedings following Court judgments, namely on the basis of Article 670 of the Code of Criminal Procedure. See as examples the Court of Cassation judgments no. 2800/2006, in the *Dorigo* case, and no. 4463/2011, in the *Labita* case, the former before the Constitutional Court intervention and the latter after it.

[102] The Swedish Supreme Court has found, in its judgment of 13 July 2013, that reopening could be granted in certain situations based on Article 13 of the Convention and Swedish procedural law. This could be the case in situations where re-opening is considered a substantially more adequate measure of just satisfaction than other available measures, provided that the violation in question is of a serious nature.

[103] Under section 13 of the Criminal Appeal Act 1995, the Criminal Cases Review Commission will refer the case to the Court of Appeal when Commission considers "that there is a real possibility that the conviction would not be upheld were the reference to be made". After the *Salduz* ruling, the criteria for a reference by the Scottish Criminal Cases Review Commission were changed (section 194 C (2) of the Criminal Procedure (Scotland) Act 1995 as amended).

[104] Nevertheless, in its 2008 report the CDDH also included Malta, Ireland and the United Kingdom among the member States where the reopening of criminal proceedings was possible (CDDH(2008)008 Add. I, § 8).

In Serbia, Article 473 of the new Code of Criminal Procedure could provide the grounds for the reopening of criminal proceedings based on the court's judgments if these were in the future to be interpreted as "new facts" or "new evidence", but this has not been the case yet[105]. The same could be said for Armenia[106] and Slovenia[107].

30. Finally, Liechtenstein is the sole member State where the reopening or review of criminal convictions on the grounds of a judgment by the Court is not possible. The absence of this right is justified by the legal concept of *res judicata* and legal certainty[108].

31. Reopening is sometimes subject to specific conditions in conformity with the criteria enumerated in the Recommendation (2000) 2 of the Committee of Ministers (II [i] and [ii]). Some member States provide that the convicted person must continue to suffer the negative consequences of the violation found by the Court or the effects of the conviction (Belgium, France, the Republic of Moldova, Monaco, Portugal[109], Romania, the Russian Federation[110], San Marino, Slovakia, Spain and Sweden[111]). In some other member States, there is no requirement of effective causality between the violation and a damage caused by the domestic judgment, since potential causality suffices. For example, some States additionally require for reopening that the impugned domestic judgment must be "based" on the violation found by the Court (Bosnia and Herzegovina, Germany and Montenegro) or that the violation is of "essential importance for the case" (Bulgaria) or that and it must be assumed that a new hearing should lead to a different decision (Norway). Others appear to have a lower threshold,

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[105] In the past, under the previous Code of Criminal Procedure, there have been only two cases of reopening of criminal proceedings following the Court's judgments in *Stanimirovic v. Serbia* and *Hajnal v. Serbia*.

[106] See Article 408 of the Armenian Code of Criminal Procedure.

[107] See Article 416 of the Slovenian Code of Criminal Procedure. There was no practice of reopening criminal proceedings following a Court judgment until recently (Compilation, cited above, p. 96), but see the Slovenian Constitutional Court decision no. U-I-223/09, Up-140/02 of 14 April 2001, on reopening of civil proceedings.

[108] Committee of Experts on the reform of the Court (DH-GDR): Overview of the exchange of views held at the 8th meeting of DH-GDR on the provision in the domestic legal order for re-examination or reopening of cases following judgments of the Court, p. 4, para. 8. After the judgment *Steck-Risch and others v. Liechtenstein*, no. 63151/00, the applicants asked for a reopening of the national proceedings. The domestic courts refused to grant that, which led to *Steck-Risch v. Liechtenstein (No. 2)*. This application was declared inadmissible.

[109] See the Supreme Court's interpretation of Article 449 § 1 g) in its leading judgment of 27 May 2009.

[110] As a circumstance which should be taken into account when considering whether it is necessary to re-examine a judgment, according to ruling no. 21 of 27 June 2013 of the Plenum of the Russian Supreme Court.

[111] One of the possible grounds for reopening according to Swedish case-law is that the measure is necessary to discontinue a deprivation of liberty that amounts to a violation of the individual's rights. See decision of the Supreme Court of 13 July 2013.

requiring only that it could not be ruled out that the violation might have affected the content of the domestic decision in a manner detrimental to the person concerned (Austria) or that the finding of a violation may have affected the outcome of the case (Estonia). With regard to violations of the Convention in the course of domestic proceedings, in some of the States reopening is only allowed where the procedural shortcomings cast a doubt on the outcome of the impugned proceedings (Belgium, Lithuania, Norway and Poland). In the United Kingdom, the Criminal Cases Review Commission will refer the case to the Court of Appeal when it considers "that there is a real possibility that the conviction would not be upheld were the reference to be made" (i.e. a real possibility that the conviction would be quashed by the Court of Appeal). In Malta, if a criminal case is referred by the Prime Minister to the Court of Criminal Appeal, the latter may order a retrial on the grounds of an irregularity during the proceedings, or a wrong interpretation or application of the law, which could have had a bearing on the initial verdict, "if it appears to the court that the interests of justice so require".

The legislations of other member States require that the effects of the violation found can only be rectified by re-examination or reopening, that review or reopening is necessary to remedy those effects, or that they cannot be remedied by compensation or just satisfaction (Andorra, Belgium, Estonia, France, Italy, Lithuania, the Republic of Moldova, Monaco, the Netherlands, Norway, Portugal[112], Romania, San Marino, Slovakia, Spain and Switzerland). In Montenegro, it is sufficient if the reopening of the proceedings can remedy the violation found by the Court. In Sweden, domestic case-law established that reopening may be ordered where it is considered a more adequate measure than other available measures.

In some of the member States, legislation provides for both types of conditions (reopening as the only means of remedying the effects of the violation and the continuing existence of negative consequences of the violation) to be met cumulatively (Belgium, France, the Republic of Moldova, Monaco, Portugal, Romania, San Marino, Slovakia and Spain).

32. As regards the type of violation found by the Court, the vast majority of member States do not distinguish between cases in which the proceedings at issue were unfair (violation of Article 6) and cases where it was their outcome or decision which was on the merits contrary to the Convention (for instance, to Article 10). Some legislations explicitly refer to both types of violations, in line with the Recommendation (2000)2 of the Committee of Ministers (Belgium, Greece, Hungary, Norway and Poland), but only three of them provide for different rules according to the nature of the violation (Belgium, Norway and Poland).

[112] See the Supreme Court's leading judgment of 27 May 2009.

33. Successful cases of reopening are known in a number of domestic jurisdictions. In cases in which the Court had found Article 6 violations they led to the annulment of the initial domestic judgments and the re-examination of the case, resulting in the rectification of the shortcomings identified by the Court with the same (conviction) or a different outcome (e.g. acquittal). These cases refer to different types of Article 6 violations, including violations of the principle of legal certainty[113], of the right to have a reasoned judgment[114], of the right to a public hearing and to have the evidence directly assessed by the convicting court[115], of defence rights under Article 6 § 3 (d)[116], of the right to a fair trial in cases of police entrapment[117] and of the right to be presumed innocent[118], among others.

A worrying signal of the indifference of national courts to judgments of the Court finding a Convention violation is the lack or scarcity of a judicial practice of reopening criminal proceedings on the basis of the Court's judgments in some judicial systems, as in Armenia, Denmark, Ireland, Malta, San Marino and Serbia. Even more serious is the situation in Russia and Azerbaijan, where victims of human rights violations do not even have a right to the reopening of proceedings. This situation contrasts with the openness to the Court's judgments of other judicial systems, as in Albania, Austria, Belgium, France, Georgia, Greece, Lithuania and Moldova.

34. Summing up, there is a European consensus on the individual right to a reopening of criminal proceedings on the basis of a finding of a violation by the Court, with only three States departing from this solution[119]. Furthermore, a small minority of the European States provide that the effects of the violation found can only be rectified by reopening, and an even smaller minority lay down that the convicted person must continue to suffer the negative consequences of the violation found by the Court. Only nine States lay down both material admissibility criteria.

Accordingly, the comparative-law conclusions of the majority, as expressed in paragraphs 34 to 39 of the judgment, do not reflect the situation on the ground. The majority's deficient comparative-law method, based on a strictly descriptive approach, can be criticised for two main reasons: first, it did not properly identify the aim of the comparison (why to compare, for what purpose) and consequently it failed to determine the proper sources and level of the comparison (what to compare or how to

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[113] Reopening following the judgment *Xheraj v. Albania,* 29 July 2008.
[114] Reopening following the judgment *Fraumens v. France,* 10 January 2013.
[115] Reopening following the judgments *Popovici v. Moldova,* 27 November 2007, and *Almenara Alvarez v. Spain,* 25 October 2011.
[116] Reopening following the judgment *Taal v. Estonia,*22 November 2005.
[117] Reopening following the judgment *Lalas v. Lithuania,* 1 March 2011.
[118] Reopening following the judgment *A.P., M.P. and T.P. v. Switzerland,* 29 August 1997.
[119] Lichtenstein has no possibility of reopening criminal proceedings on the basis of a Court judgment, and Azerbaijan and Russia have such a possibility, but no individual right on the part of the victims of human rights violation to a reopening of proceedings.

compare). The thoroughness of the comparison also leaves much to be desired, the majority opting for a purely descriptive-quantitative approach to the materials available, without any analysis of the differences and specificities of the national legal systems, including the case-law of the competent domestic courts and the practice of other competent political and administrative authorities. Such a methodologically incorrect comparative method could not but lead to a misevaluation of the European consensus.

Second Part (§§ 35-56)

IV. The applicability of Article 6 to the extraordinary appeal to reopen a criminal case (§§ 35-44)

a. The majority's evolutive reading of the Court's case-law (§§ 35-39)

35. In accordance with the traditional view that Article 6 § 1 of the Convention does not guarantee a right to the reopening of proceedings[120], it has been the Court's position that it does not have competence *ratione materiae* over complaints related to extraordinary remedies for the reopening of a criminal case, because they pertain to a stage of the proceedings where the offender can no longer be considered as "charged of a criminal offence".

36. In 2015, the Court made a step forward in the field of civil law, admitting that Article 6 is not normally applicable to extraordinary appeals seeking the reopening of terminated judicial proceedings, unless the nature, scope and specific features of the proceedings on a given extraordinary appeal in the particular legal system concerned may be such as to bring the proceedings on that kind of appeal within the ambit of Article 6 § 1 and of the safeguards of a fair trial that it affords to litigants[121]. This Grand Chamber case-law was applied that same year of 2015 in a criminal law case [122], in which the Court found that the Supreme Court, by excluding the confession made by the applicant in the absence of his lawyer from the body of evidence following the Court's previous judgment and reassessing the remainder of evidence to conclude that the applicant's conviction could stand, had undertaken a re-examination of the applicant's case. The Court equated the legal situation in which the applicant found himself to that of the applicant in the case of *Bochan (no. 2)*. The Court concluded therein that Article 6 applied given that the Supreme Court had conducted a

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[120] See, *inter alia*, *Zawadzki v. Poland* (dec.), no. 34158/96, 6 July 1999, and *Sablon v. Belgium*, no. 36445/97, § 86, 10 April 2001.
[121] See *Bochan v. Ukraine (no. 2) [GC]*, no. 22251/08, § 50, 5 February 2015.
[122] See *Yaremenko v. Ukraine (no. 2)*, cited above.

"reconsideration" of the applicant's claim on new and fresh grounds linked to its interpretation of the Court's judgment, albeit deciding not to change the outcome of the case. Thus, the proceedings at issue concerned the determination of the applicant's guilt of a criminal offence within the meaning of Article 6 of the Convention. Such a re-examination constituted relevant new information in the context of a fresh application which the Court can deal with.

37. According to the present judgment, Article 6 of the Convention is applicable to extraordinary remedies for the reopening of a criminal case whenever the appellate court is called upon to determine a criminal charge[123]. Ultimately, this evolutive interpretation of Article 6 equates ordinary appeals and extraordinary appeals for reopening of proceedings by transforming the latter into an "extension" of the former[124]. To put it in crystal-clear terms, this is the final step in the process of recognising the full applicability of Article 6 to extraordinary appeals for the reopening of a criminal case, and it is also the added value of this judgment[125].

38. This bold and laudable development of the case-law is accompanied by the no less remarkable acknowledgment of the Court's competence over the non-execution of its judgments, namely when the domestic courts refuse to reopen the criminal case following a finding of a Convention violation. Here again, the Court is consolidating its own case-law. The role of the Committee of Ministers, under Article 46 § 2 of the Convention, in supervising the execution of the Court's judgments does not mean that measures taken by a respondent State to implement a judgment delivered by the Court cannot raise a new issue under the Convention and thus form the subject of a new application that may be dealt with by the Court[126].

39. *Emre (no. 2)*[127] put the final touch to this line of case-law. In *Emre*[128], the Chamber criticised a measure of indefinite removal. In *Emre (no. 2)*, another Chamber acknowledged the Court's competence over the execution of its judgments in spite of the fact that the Swiss Federal Court had upheld the request for a reopening of the case and replaced the measure of removal banning the applicant from Switzerland for an indefinite duration by removal with a ban of ten years from 2 June 2003. The Chamber found that there had been a violation of Article 8, in conjunction with Article 46,

[123] See paragraph 65 of the judgment.
[124] See paragraph 72 of the judgment.
[125] This is in line with the position of the Committee of Ministers Resolution DH (2004) 31 in the case *Sadak, Zana, Dogan and Dicle v. Turkey*, according to which States have to guarantee the principle of the presumption of innocence and the principles concerning provisional detention during the reopening procedure. In other words, Article 5 and 6 of the Convention apply after the decision to reopen a criminal procedure.
[126] See, inter alia, *Mehemi v. France (no. 2)*, no. 53470/99, § 43, ECHR 2003-IV, and *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2) [GC]*, cited above, § 62.
[127] See *Emre v. Switzerland (no. 2)*, no. 5056/10, 11 October 2011.
[128] See *Emre v. Switzerland*, no. 42034/04, 22 May 2008.

because the Federal Court had wrongly implemented the Court's first *Emre* judgment[129]. With the present judgment, the Grand Chamber lends its authority to the *Emre (no. 2)* judgment's hands-on approach on the issue of non-existent or deficient implementation of the Court's judgments.

b. The majority's misreading of Portuguese law (§§ 40-44)

40. The majority's commendable leap forward in terms of the applicability of Article 6 of the Convention to extraordinary remedies concerning the reopening of criminal proceedings is even more significant in view of the fact that it is based on an erroneous interpretation of national law. The majority misread the national legal framework on extraordinary remedies in criminal procedure with a view to reaching the conclusion that the extraordinary appeal for reopening a case lodged before the Supreme Court in accordance with Article 449 of the Code of Criminal Procedure "determines a criminal charge" and therefore comes within the scope of Article 6 of the Convention[130]. Such a misreading of national law fittingly tailors the instant case to the majority's extension of the *Bochan (no. 2)* rationale to criminal cases, in so far as the latter required that the extraordinary appeal for the reopening of proceedings be "similar in nature and scope to ordinary appeal proceedings"[131] in order for the guarantees of Article 6 of the Convention to apply to the extraordinary appeal in question.

41. The point warrants dwelling further on the intricacies of national law. As a matter of law, it is erroneous to argue that in Portuguese law the extraordinary appeal for the reopening of a criminal case has "some features in common with an appeal on points of law"[132]. They differ in terms of the admissibility requirements, *locus standi*, time-limits, formalities, the competent court, the remit of the court and the appellant's procedural guarantees, as the Government themselves rightly pointed out[133]. Ordinary appeals (*recursos ordinários*) and extraordinary appeals (*recursos extraordinários*) are regulated, respectively, in Title I and II of Book IX of the Criminal Procedure Code. There are common provisions applicable to both ordinary appeals to the court of appeal and ordinary appeals to the Supreme Court (Articles 399 to 426-A), but there are no common provisions applicable to both ordinary appeals and extraordinary appeals. They are regulated separately, in different Titles of the Code. Article 448 foresees the subsidiary application of the provisions on ordinary appeals to the appeal for the uniformity of the case-law, but there is no equivalent norm for an appeal to reopen a case. Thus, it is wrong to maintain that in

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[129] See *Emre v. Switzerland (no. 2)*, cited above, § 75.
[130] See paragraph 70 of the judgment.
[131] See paragraph 60 (b) of the judgment.
[132] See paragraph 69 of the judgment.
[133] See paragraph 43 of the judgment.

Portuguese law the extraordinary remedy of Article 449 of the Code of Criminal Procedure is an "extension" of the previous proceedings concluded by the judgment of 19 December 2007[134]. The Supreme Court itself has always held that the extraordinary remedy for the reopening of a case is not an "appeal in disguise" or a "substitute of the ordinary appeals" and therefore it should not be "permissive to the extent of trivialising and consequently underestimating reopening" as if it were a mere extension of the previous proceedings[135].

42. In sum, the Supreme Court is not called upon to "determine a criminal charge"[136] when it performs its powers under Article 449 of the Code of Criminal Procedure. The Supreme Court only reviews the admissibility criteria of the reopening request and, if the request is admitted, the fresh determination of the criminal charge is performed by another court in accordance with Article 457[137].

43. The majority's conclusion that "the Supreme Court once again focused on the determination, within the meaning of Article 6 § 1 of the Convention, of the criminal charge against the applicant" stretches the autonomous concept of "determination of the criminal charge" to its limits. If nothing prevents the Court from establishing an autonomous understanding of the concept of "determination of criminal charge" for the purposes of the applicability of Article 6 to extraordinary remedies for the reopening of criminal proceedings, this exercise should not be conducted on the basis of an interpretation of national law that distorts the meaning of extraordinary appeals in the Portuguese Code of Criminal Procedure.

44. Not only is the majority's conclusion legally unfounded, but it also raises another serious issue related to the exhaustion of domestic remedies. The majority´s silence on this point allows the highly problematic inference that an application for a reopening of proceedings or the use of similar remedies must, as a general rule, be taken into account for the purposes of Article 35 §1 of the Convention[138]. This would be a regrettable case-law development.

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[134] See paragraph 72 of the judgment.

[135] See for example, Supreme Court judgments of 17 June 2015, domestic proceedings no. 157/05.4JELSB-O.01, and of 26 March 2014, domestic proceedings no. 5918/06.4TDPRT.P1.

[136] See paragraph 72 of the judgment.

[137] The argumentation of the majority in paragraphs 69 and 72 is a textbook example of the "slippery-slope" line of argumentation. The majority initially interpret the Supreme Court's task in accordance with Article 449 § 1 (g) of the Code of Criminal Procedure as "ordering" the re-examination, go on to admit that the Supreme Court decision "is likely to be decisive" for the new determination of the criminal charge and reach the conclusion that the Supreme Court "focused on the determination".

[138] By so doing, the majority contradict the established case-law (*Jeronovics v. Latvia (GC)*, no. 44898/10, § 120, ECHR 2016).

V. The application of Article 6 in the present case (§§ 45-56)

a. The Supreme Court's interpretation of Article 449 § 1 g) of the Code of Criminal Procedure (§§ 45-50)

45. In its judgment of 21 March 2012, the Supreme Court concluded that the applicant's conviction was not incompatible with the *Moreira Ferreira* judgment and excluded from the scope of Article 449 § 1 (g) of the Code of Criminal Procedure certain procedural violations, such as the absence of the defendant from proceedings, because they were not serious enough for the conviction to be considered incompatible with the *Moreira Ferreira* judgment. In other words, the Supreme Court applied, in substance, the position of the majority of the Supreme Court's judgment of 27 May 2009. The Supreme Court also argued that the procedural vice detected by the Court judgment of 5 July 2011 corresponded to an irremediable nullity (*nulidade insanável*) which could not, in and of itself, trigger a reopening of the proceedings according to Article 449.

46. This interpretation is problematic for three reasons. Firstly, Article 449 § 1 (g) does not draw a difference between substantive and procedural violations. Secondly, this restrictive interpretation departed from a series of judgments previously delivered by the Supreme Court on the basis of that same article[139]. Thirdly, the argument concerning irremediable nullity is aimed at invoking a legal impediment to the execution of the Court's judgment within the domestic legal framework. The counter-argument is obvious: national law cannot be invoked to oppose *restitutio in integrum* in the form of the reopening of domestic proceedings[140].

47. Yet the majority of the Grand Chamber accept that the Supreme Court interpretation of Article 449 § 1 (g) did not "appear to be arbitrary"[141], because it was supposedly in line with the Court's case-law to the effect that the Convention does not guarantee the right to a reopening of proceedings[142]. It has been demonstrated above that this statement does not correspond to the full picture of the Court's case-law.

48. Furthermore, the majority find no "uniform approach among the contracting States as regards the right to apply for the reopening of

[139] See paragraphs 29 and 30 of the judgment.

[140] Commentary to Article 35 of DARSIWA, paragraph 8: "restitution is not impossible merely on grounds of legal or practical difficulties, even though the responsible State may have to make special efforts to overcome these. Under Article 32 (of DARSIWA) the wrong-doing State may not invoke the provisions of its national law as justification for failure to provide full reparation".

[141] Paragraph 90 of the judgment.

[142] In the assessment of the Court's own case-law, the majority of the Grand Chamber do not distinguish between the right to a reopening in general and the right to a reopening following a Court's finding of a Convention violation.

proceedings that have been closed"[143]. The argument advanced by the majority that "in most of those States the reopening of proceedings is not automatic and is subject to admissibility criteria"[144] simply misses the point. The point is not whether the reopening is automatic or not. In fact, reopening is never automatic, as the comparative-law review conclusively demonstrates. There are always formal admissibility criteria, like those pertaining to *locus standi*. But this is not the point. The point is whether there are material admissibility criteria or not.

Likewise, the argument that there is a "lack of a uniform approach among the member States as to the operational procedures of any existing reopening mechanisms"[145] does not address the issue at stake in the present case. The issue is not "the operational procedures of any existing reopening mechanisms", but the existence of material admissibility criteria that give the domestic court a margin of discretion in assessing the request to reopen a criminal case which was concluded by a final judgment, following a finding by the Court of a violation of the Convention.

49. As demonstrated above, there is a clear European consensus among member States regarding the individual right to re-examination of the case, including reopening or retrial of proceedings, in instances where the Court has found a violation of the Convention. Only a minority of States set out material admissibility criteria for determining whether the reopening should be granted in the form of either of the Committee of Ministers' criteria (continuing suffering of negative consequences, or the violation and effects can only be rectified by reopening) and an even smaller minority require both criteria. In the light of this European consensus, one cannot but agree with the judge writing separately in the Supreme Court's judgment of 27 May 2009. His interpretation of Portugal's international obligation to reopen the criminal case after a Court's finding of a Convention violation, without any discretion on the part of the Supreme Court, corresponds to the European consensus. Justice Maia Costa was indeed right.

50. Under the combined effect of an misevaluation of the existing European consensus on the reopening of criminal cases following a Court's finding of a Convention violation and the respondent State's margin of appreciation available to domestic authorities in the interpretation of the Court's judgments, the majority of the Grand Chamber have chosen a minimalist approach that weakens the Court's authority and is hardly likely to enlighten the domestic courts. The majority take the unfortunate step of applying a particularly high threshold to the European consensus, thus potentially extending the States' margin of appreciation beyond its limits. Without providing any reason for it, the majority set the bar for the

[143] See paragraph 53 of the judgment.
[144] See paragraph 53 of the judgment.
[145] See paragraph 91 of the judgment.

consensus on the highest possible level of a "uniform"[146] regulation of the institute of extraordinary appeal for reopening of criminal cases. The majority's contradictory approach to the determinative value of the European consensus and to the objective indicia used to determine consensus are pushed to their limit here, engendering great legal uncertainty.

b. The Supreme Court's interpretation of the *Moreira Ferreira* judgment (§§ 51-56)

51. In its judgment of 21 March 2012, the Supreme Court assumed that the Court had precluded from the outset any possibility that its decision might raise serious doubts about the conviction, regardless of the sentence imposed. It added that the court had provided sufficient redress for the procedural violation found by making an award to the applicant by way of just satisfaction. The prosecutor in the Supreme Court defended the opposite position, considering that serious doubts could legitimately be raised about the applicant's conviction. Consequently, he asked for the extraordinary appeal to be admitted.

52. In the case at hand, the refusal of the Supreme Court to implement the 2011 Court judgment does not provide any new information on the facts or the legal aspects of the case. It adds literally nothing to the substance of the applicant's initial criminal case. The Supreme Court did not put forward any relevant and sufficient reasons for finding that the 19 December 2007 judgment of the Oporto Court of Appeal was compatible with the Court's judgment of 5 July 2011. In other words, in *Moreira Ferreira (no. 2)* the Grand Chamber is confronted with the pure and simple non-execution of the *Moreira Ferreira* judgment and not with a new determination of the criminal charge.

53. The majority of the Grand Chamber find that the Supreme Court interpretation of the *Moreira Ferreira* judgment was not "arbitrary"[147]. On the basis of an underestimation of the binding meaning of the *Oçalan* clause, which does not tally with the history of that clause, as I have demonstrated above, the majority assume that in *Moreira Ferreira* the Chamber accorded to the respondent State "an extensive margin of manoeuvre"[148]. Thus, in the majority´s view, the Supreme Court's interpretation of the Chamber judgment was within the "margin of interpretation available to the domestic authorities in the interpretation of the Court's judgments"[149].

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[146] See paragraphs 53 and 91 of the judgment.
[147] See paragraph 96 of the judgment.
[148] See paragraph 93 of the judgment.
[149] See paragraphs 95 and 98 of the judgment. It could be discussed here if the margin of appreciation is even applicable to the reopening of criminal proceedings, since this issue is

54. This is the most unfortunate point made by the majority in the entire judgment, on both domestic and Convention law grounds. At this juncture, it should be noted that the majority of the Grand Chamber omit to provide the correct interpretation of the *Moreira Ferreira* judgment, but at the same time condone the domestic judgment of 21 March 2012 as not distorting the meaning of the previous Chamber judgment of 5 July 2011. As the public prosecutor in the Supreme Court quite rightly pointed out, the correct interpretation of the *Moreira Ferreira* judgment points in the opposite direction.

In *Moreira Ferreira*, the Court held that the issue of the applicant's criminal liability was so important for the outcome of the case that the Court of Appeal should not have adjudicated on the appeal without first carrying out a full rehearing of the applicant. Hence, the Court found a serious procedural violation which could impact on the outcome of the applicant's criminal proceedings, namely on the degree of imputability of criminal liability to the applicant and her sentencing[150], and therefore the *Oçalan* clause should be followed by a reopening of the applicant's case.

In its judgment of 5 July 2011, the Court did not, and did not have to, assess whether the conviction was doubtful or not. Thus, it did not preclude from the outset any possibility that the impugned domestic judgment of 19 December 2007 might raise serious doubts about the conviction. The Court's statement that it could not "speculate as to what the outcome of the proceedings before the court of appeal would have been if it had examined the applicant at a public hearing" must be interpreted not as a confirmation of the validity of the conviction but as an expression of the principle of subsidiarity. Consequently, the Supreme Court's refusal to reopen the applicant's case was based on an *ultra vires* and non-purposeful reading of the *Moreira Ferreira* judgment which failed to take into account the latter's object and purpose, in other words, "the conclusions and the spirit of the Court judgment being executed"[151], rendering illusory the principle of *restitutio in integrum* and impairing the very essence of the applicant's right to appear before a court determining a criminal charge against her, namely the Oporto Court of Appeal[152].

Finally, the Supreme Court rejection is untenable even in the light of the standards set out in its leading judgment of 27 May 2009. At the time of the

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regulated by a non-derogable provision (Article 3 Protocol 7 (3)). In a wholly contradictory manner, this lack of any discretion in interpreting Article 449 was actually acknowledged by the majority of the Grand Chamber (see paragraph 69 of the judgment).

[150] See *Moreira Ferreira*, cited above, § 33.

[151] See *Verein gegen Tierfabriken Schweiz (VgT) (no. 2)*, cited above, § 90.

[152] It should be noted in this connection that the Spanish Supreme Court, in its judgment no. 145/2015, cited above, took a very different, more human rights-friendly position in a similar set of circumstances by ordering a reopening of the domestic proceedings after a finding in *Almenara Alvarez v. Spain* of a violation of Article 6 of the Convention for the lack of a public hearing before the second-instance court which convicted the applicant.

delivery of the Supreme Court's judgment on the applicant's request for reopening (21 March 2012), the consequences of the impugned domestic judgment of 19 December 2007 (fine paid in several instalments and conviction entered in the applicant´s criminal record[153]) had not disappeared as a result of the Court's judgment in *Moreira Ferreira* and therefore the applicant was still suffering from the negative effects resulting from the domestic judgment[154].

55. The frustration could not be greater. The majority's promised human rights-friendly approach at the admissibility stage is frustrated at the merits stage. Strangely enough, the arbitrariness test is used in the merits part for assessing the domestic authorities' interpretation of Court's judgments and their interpretation of national law[155]. The majority of the Grand Chamber equate the interpretation of Court's judgments by the domestic authorities with the interpretation of national law by the domestic authorities, as if the Court's judgments and national law were at the same level. The majority rely entirely on the domestic court's own interpretation of the Court's judgments, ascribing to the Court no special expertise to interpret its own judgments. In practice, the arbitrariness test is a blank check for the domestic courts, since the majority's evaluation of the Supreme Court's refusal is limited to the formalistic verification that "the Supreme Court provides a sufficient indication of the grounds on which it was based"[156]. The majority's position dispensing themselves of any substantive assessment of the Supreme Court's interpretation of the *Moreira Ferreira* judgment means that the Court yields its own competence to interpret its judgments, now explicitly enshrined in Article 46 § 3 of the Convention. To put it differently, this self-imposed limitation of the interpretative powers of the Court is at odds with the Convention itself and with the explicit will of the Contracting Parties as expressed in the Protocol 14 reform of Article 46 § 3 of the Convention.

56. In so doing, the majority are envisaging the Court as a mere advisory body to the Supreme Court which is ultimately free to interpret the Court's judgments as the Supreme Court pleases as long as the latter sets out some grounds, any grounds for its interpretation, regardless of the content of those grounds. Applying to the Court its own case-law, namely the seminal case

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[153] See paragraphs 16 and 17 of the judgment.

[154] The Government argued before the Court that reopening would in the instant case have no practical consequences, since the sentence had already been served and, for that reason, was extinguished. This argument cannot be upheld. Article 449 § 4 of the Code of criminal procedure specifically allows for reopening even if the sentence has already been served in full. The Government also informed the Committee of Ministers that they had approved a proposal for a reform of the Portuguese Code of criminal procedure in order to redress the type of shortcomings identified in *Moreira Ferreira*. In fact, that proposal was never presented to Parliament (see paragraph 22 of the judgment).

[155] See paragraphs 90 and 96 of the judgment.

[156] See paragraph 98 of the judgment.

Benthem v. the Netherlands,[157] one would have to conclude that, according to the majority, the Court is not a judicial body, because it does not even have competence to order an individual measure to redress a Convention violation, such as reopening the domestic proceedings, and to interpret its own judgment when a new application is lodged on the basis that the Court's order has not been complied with.

VI. Conclusion (§§ 57-60)

57. The judgments of the Court are not merely declaratory. The case-law on Article 46 of the Convention did not remain fossilised in the past, providing today, when appropriate, for the imperative, individual legal effects of the Court's judgments in the domestic legal order of the respondent state, including an order for re-examination, retrial or reopening of a criminal case. The *Oçalan* clause must be read in the light of this evolving case-law.

58. The very strict terms of the Committee of Ministers Recommendation No. R (2000) 2 raise an issue with Article 4 (2) Protocol 7. Furthermore, both the *rationale* of the institute of reopening of criminal proceedings and the principles of international law on reparation warrant a more generous understanding of the right to reopen a criminal case following a Court finding of a Convention violation. In actual fact, the Recommendation's implementation went well beyond the letter of the text. There is today a European consensus on the individual right of reopening of criminal proceedings on the basis of a finding of a violation by the Court, with no discretion on the part of the competent domestic authorities to reject it on the basis of material admissibility criteria.

59. In the light of the foregoing considerations, Article 6 of the Convention is applicable to extraordinary remedies for the reopening of a criminal case. In view of the autonomous nature of the Court's interpretation of the Convention, the majority's commendable step of acknowledging the principle of the applicability of Article 6 of the Convention to extraordinary remedies concerning the reopening of criminal proceedings is not prejudiced by the fact that it is based on a wrong interpretation of national law.

60. On the basis of an underestimation of the legal meaning of the *Oçalan* clause, which does not accord with the history of that clause, the majority wrongly assumed that the Chamber had in 2011 afforded the respondent State "an extensive margin of manoeuvre". Like the public prosecutor at the Supreme Court, I conclude that the Supreme Court should

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[157] See *Benthem v. the Netherlands*, no. 8848/80, § 40, 23 October 1985, where the Court stated that "a power of decision is inherent in the very notion of 'tribunal' within the meaning of the Convention".

have reopened the applicant's case, and its refusal to do so failed to take into account the *Moreira Ferreira* judgment's object and purpose. Hence, Article 6 has been violated.

DISSENTING OPINION OF JUDGE KŪRIS, JOINED BY JUDGES SAJÓ, TSOTSORIA AND VEHABOVIĆ

1. I could not vote for a finding of no violation of Article 6 § 1 of the Convention (point 2 of the operative part of the judgment) for reasons largely corresponding to those expounded in Judge Pinto de Albuquerque's dissenting opinion. I would like to emphasise the importance of a more nuanced approach to the difference between the Court's straightforward "orders" to reopen the proceedings, actually issued to the domestic judicial authorities, and its less assertive suggestions that such reopening might be the (most) appropriate or even the only form of redress of the Convention violation (see, e.g., §§ 2, 8, 18 and 57 of Judge Pinto de Albuquerque's opinion), which, not amounting to "orders" in the proper sense of the word, only indirectly compel the domestic judicial authorities to reopen the proceedings in order to meet, at last, the requirements of the Convention. Nevertheless, this difference in our approaches as to the Court's "dictating" and "engineering" is not really relevant to the present case. Even if *not all* Court's "recommendations" (abundant and diverse as they are) to reopen the proceedings or apply other individual measures may be read as direct "orders", I agree with the overall thrust of Judge Pinto de Albuquerque's reasoning as to how *this particular case* had to be decided.

There are, however, some points which I want to underscore, or in some cases to complement the considerations of my distinguished colleague. I address these points in this additional dissenting opinion, working on the basis of the majority finding (and, in the end, I allowed myself to be convinced) that Article 46 does not preclude the applicant's complaint from examination under Article 6.

2. The language used by the Court throughout its case-law "recommending" that respondent States, after the Court has found a violation of Article 6, conduct a retrial or to reopen proceedings has often been too tentative and therefore somewhat uneven, confusing and inconsistent with the substance of the message it wished to convey to the States concerned.[1] The Court's stance which that language reveals, or sometimes effectively conceals, may also be seen as confusing, at least in some cases.

This judgment had made the situation not less, but perhaps even *more, confusing*.

3. However, this general inconsistency (which is not so overwhelming, so this quality should not be exaggerated) of the "recommendations" in

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[1] As one see, *inter alia*, from the "Compilation of written contributions on the provision in the domestic legal order for re-examination or reopening of cases following judgments of the Court" of 31 March 2016, prepared by Steering Committee for Human Rights and Committee of Experts on the Reform of the Court, extensively cited in Judge Pinto de Albuquerque's dissenting opinion.

question is *immaterial* to the present case. That is because the Court's stance on the reopening of proceedings examined in the judgment of 5 July 2011 is *unambiguous*, or rather *was* unambiguous until the present judgment was adopted. It would not be easy, if in fact possible, to discern anything in paragraph 41 of the Court's judgment of 5 July 2011 which would have permitted the Portuguese Supreme Court to refrain from reopening the applicant's case.

4. Should the Court have stated more explicitly in 2011 that the proceedings in the applicant's case *had* to be reopened? With hindsight, one might think so. Such explicitness would have saved it from the major embarrassment which the present judgment entails.

5. At all events, even in the absence of such explicitness, the message which is contained in the last sentence of paragraph 41 of the Court's judgment of 5 July 2011 was very clear. *Very, very* clear. The Court stated that "the applicant was *not given a hearing* by the [Oporto] Court of Appeal" (my emphasis).

In other words, the Court then concluded that what was given to the applicant by the Oporto Court of Appeal was *not a hearing*, because a hearing requires, as a minimum, that a person accused of a criminal activity be *heard*.

The applicant was *not heard*. The judicial procedure in question was *anything but a hearing*.

6. This fundamental finding, plain as it is, could not and should not be overshadowed by considerations as to the "particular circumstances of the individual case" (see paragraphs 20, 93 and 94 of the judgment).

Regrettably, it was.

7. This message also could not and should not be camouflaged – but, alas, was so camouflaged – by the Court's admission of "satisfaction" that the Supreme Court of the respondent State, Portugal, displayed no arbitrariness in the treatment of the applicant's case, because, in the majority's opinion, it did not "distort or misrepresent the judgment delivered by the Court" (see paragraph 96 of the judgment).

As a matter of fact, *it did*.

8. There is no doubt that the Portuguese Supreme Court was right to conclude from the Court's case-law, in its entirety, that a retrial or reopening of proceedings may not always be indispensable. The Court itself confirmed such a reading of its case-law by acknowledging, in the present judgment, that "a retrial or reopening of the proceedings, if requested, represented 'in principle an appropriate way of redressing the violation'" and that "the State[s are granted] an extensive margin of manoeuvre in that sphere" (see paragraphs 92 and 93 of the judgment). However, the Supreme Court misread, *not the Court's case-law in its entirety*, but *the judgment of 5 July 2011*, particularly the last sentence of paragraph 41 (in the context of a more general representation of "recommendations" contained in other

sentences of that paragraph, where the Court referred to and cited its earlier case-law), concluding that a retrial or reopening of proceedings was unnecessary, not in general, but *in the applicant's case*.

9. In terms of the science of logic, this is *the fallacy of inference by induction*. Inductive inferences, unlike deductive ones, are never certain: they are – at best – only probable and have to be supported by additional evidence or arguments.

Coming to the issue under consideration, a retrial or reopening of proceedings, in general, may indeed not be necessary in each and every case.

It may – again in general – even be "exceptional", to quote Recommendation No. R (2000) 2 of 19 January 2000 (see paragraph 32 of the judgment).

That, however, does not mean that it is also unnecessary *in a case where no hearing took place at all*.

10. This fallacy, banal as it is, is less visible in the reasoning of the Portuguese Supreme Court, because the latter explicitly dealt with the Court's case-law in its entirety only incidentally. The Supreme Court was preoccupied, first and foremost, with the application of Portuguese domestic law pertaining to (non-)retrial or (non-)reopening of proceedings, rather than with the overall assessment or detailed analysis of the Court's case-law more or less magisterially "recommending" a retrial or reopening of proceedings.[2]

But this fallacy is straightforward, palpable, even glaringly *exposed* in the present judgment of the Grand Chamber. To wit, having admitted that "a retrial or reopening of the proceedings, if requested, represented "*in principle* an appropriate way of redressing the violation"" and that "the State[s are granted] *an extensive margin of manoeuvre* in that sphere" (see paragraphs 92 and 93 of the judgment), the majority proceed to conclude that, "*[a]ccordingly*, the reopening of proceedings did not appear to be the only way to execute *the Court's judgment of July 2011*" (see paragraph 94; my emphasis).

"Accordingly"?!

This is induction *par excellence* – in its most perverse and flaw-ridden manifestation.

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[2] I do not wish to enter here into analysis of the Supreme Court's interpretation of domestic legislative provisions and the Court's assessment of that interpretation. Still, I must say, albeit incidentally, that I am sceptical about the conclusion that these provisions indeed allowed for the non-reopening of proceedings. In my opinion, the provisions, taken together with the Court's judgment of 5 July 2011 (especially paragraph 41 thereof) and Recommendation No. R (2000) 2 (as well as the explanatory memorandum thereto, with its strong emphasis on the principle of equality of arms; see paragraph 33 of the judgment), required the proceedings to be reopened.

11. The majority gives great prominence to the words "however" and "in principle", uttered in paragraph 41 of the Court's judgment of 5 July 2011 (see paragraph 92 of the judgment).

This proves little, if anything at all, and not only because these words, unlike the last sentence of the said paragraph, which indeed pertains to the situation under examination, migrated – as is typical of the Court's case-law – to that judgment from the Court's earlier case-law, and have not been "adapted" to the circumstances of the applicant's case.

It would hardly be possible to disagree with the majority that "the use of the expression 'in principle' narrows the scope of the recommendation, suggesting that in some situations a retrial or the reopening of proceedings might not be an appropriate solution" (*ibid.*). But does the majority prove in any way that *this recommendation was not to be followed, precisely, in the applicant's situation*?

Most regrettably, no.

12. It is most distressing to discover such pronounced logical (would "illogical" be a better term?) fallacies in the *explicit* reasoning of the Grand Chamber. But the readership is compelled to read what has been written, even if what has been written runs counter to the laws of logic. Now these illogicalities are carved in the stone of the law of the Convention, as interpreted and applied by the Court.

13. Article 6 § 1 explicitly speaks of a "fair and public hearing", which is the essence of the right to a fair trial.

A *hearing*, no less.

Would it still be football if there were no ball on the field?

Would it still be a swimming competition if there were no water in the pool?

For a trial to be "fair" (or "unfair"), first of all, *there must be an actual hearing of the accused*.

A zero, a vacuum, a nonentity, a nothingness, something that has never taken place, never existed and continues not to exist cannot be "fair" or "unfair".

In its judgment of 5 July 2011, the Court itself stated that there was *no hearing* at all in the applicant's case. So, there is nothing left which could be "fair".

And nothing to comply with Article 6 § 1 – not only in its procedural limb (to which the Portuguese Supreme Court limited its misrepresentation and misinterpretation of the Court's judgment of 5 July 2011), but also, and first and foremost (!), in its *substantive* limb.

14. Has anything changed in this respect since 5 July 2011 – in law or in reality?

Not really. There was no hearing *then*, and no hearing took place *after that date* – in the *same* criminal case.

Six years ago, the fact of not holding a hearing in a criminal case was considered, by the Court, unanimously, to have been contrary to Article 6 § 1. Today, however, the *continuous* absence of a hearing in the *same* criminal case is considered not to be contrary to Article 6 § 1.

15. The Portuguese Supreme Court and the majority of the Grand Chamber simply (?!) overlooked the fact that "the applicant was *not given a hearing*" in the criminal case against her. If – as the majority so uncritically accept – the respondent State, Portugal, did indeed enjoy, not only in general, but also *in this particular applicant's case*, an "extensive margin of manoeuvre" in "redressing the violation" found by the Court's judgment of 5 July 2011, it would have been highly felicitous for the majority to have mentioned examples of one or two possible "manoeuvres" from their "extensive" spectrum that would not amount to "not giving a hearing to the applicant", especially after having stated that a reopening of proceedings – presumably in such a way that the accused person is *heard* – would have been only "the most desirable option" (*ibid*.).

No such examples are to be found in the judgment.

No wonder.

It is not found in the judgment because, as a matter of principle, it *cannot* be worded in any satisfactory way.

And it cannot be worded in any satisfactory way because the redress for "not giving a hearing" can only be *giving a hearing* (at last!) to a person to whom it was denied.

16. So what was so "satisfactory", for the majority, in the Portuguese Supreme Court's treatment of the case? *What was it*, given that the reasons for such a treatment were based on cold-shouldering the Court's explicit finding that the applicant was denied a hearing in her criminal case – which cold-shouldering effectively amounts to a *misreading* of the Court's judgment of 5 July 2011?

17. The answer from the majority is bewildering. They are satisfied that "the Supreme Court's reading of the Court's 2011 judgment..., *viewed as a whole*, [was not] the result of a manifest factual or legal error leading to a '*denial of justice*'" (see paragraph 97 of the judgment; my emphasis).

To put it bluntly, henceforth, proceedings leading to a person's conviction may be justified from Article 6 perspective "as a whole" *even when that "whole" does not encompass a hearing*. A conviction without a hearing is acceptable from the perspective of the Convention! For the Court, holding no hearing in a criminal case but nevertheless convicting a person *is not a denial of justice*!

What then does constitute such a denial?

To continue, justice in a criminal case *now* can be done without a hearing.

A rhetorical question: what would be the *value* of such "justice"?

18. For the applicant in the instant case this judgment means the following: (i) she was not granted a hearing in her criminal case; (ii) the Court found this to be not in line with the Convention (iii) then she was repeatedly denied such a hearing; (iv) the Court found that *now* this denial of a hearing was in line with the Convention.

19. It seems that the majority of the Grand Chamber is of the opinion that that hearing, which was never granted to the applicant, *was not necessary anyway*. So the applicant's conviction stands, despite having been adopted outside the hearing procedure. The Portuguese Supreme Court found that her "conviction [was] not incompatible with the European Court's binding decision, and no serious doubts [arose] as to its validity" (see paragraph 26 of the judgment), and the "European Court" upheld this fundamentally erroneous assessment, even though, previously, the same Court had found that that conviction of the applicant was adopted outside the hearing procedure.

Does this not amount to an effective – although indirect and implicit – overruling of the Chamber judgment of 5 July 2011 – many years later? A virtual overruling, in which something which was earlier considered to have been a fundamental, essential *substantive* defect in the judicial process under examination has been downgraded to a minor, insignificant *procedural* error.

20. The Portuguese Supreme Court erred in holding that "[t]he European Court ... precluded from the outset any possibility that its decision might raise serious doubts about the conviction, regardless of the sentence actually imposed" (see paragraph 26 of the judgment).

But it *did* raise doubts – and serious ones! – both then and now, although those doubts *could* be dispelled by granting the applicant a hearing. (I myself would have been ready to accept that that they *had* been dispelled if the applicant had been heard in her criminal case.) However, these doubts have been dispelled not one jot by this judgment, which, by the way, was adopted by a slim majority of only one vote (9 votes to 8, whereby one of the judges who actually voted *for* the operative part of the judgment of 5 July 2011 is with the majority and two are with the minority).

21. What is more, not only has this judgment not at all clarified the Court's case-law pertaining to a retrial or the reopening of proceedings after a finding by the Court of a violation of Article 6, but also it has produced *new doubts*. Below I shall name but a few of those doubts (one pertains to the applicant's conviction, one is of a hypothetical nature, and one is of a more general character).

22. With regard to the applicant's situation, there is a doubt as to the legitimacy (as a category in its widest non-legalistic sense, juxtaposed and at times even opposed to formal legality) of her conviction without a hearing, indeed in the context of an explicit denial of a hearing. Can this

conviction be regarded as meeting the standards of Article 6 § 1 with its emphasis on "hearing"?

The Court has found that it can. Nevertheless, one may, and probably should, ask: how *legitimate* is this finding in the eyes not (only) of the law but (also) of fundamental justice, for the fulfilment of which law it is (or should be) merely a means to an end rather than an end in itself?

23. The hypothetical doubt is as follows: if *the same* applicant ever finds herself in a situation similar to the one dealt with by the Matosinhos District Court and the Oporto Court of Appeal, can they *again* dispense with a hearing and convict her?

I am afraid that the Court has held that they can. Or, rather, they could not *prior* to the adoption of this judgment, but *now* they can.

24. However, the present judgment also raises a more general question of principle, that is to say, a disturbing question as to the spectrum, or variety, of "manoeuvres" which member States are allowed to entertain in convicting persons without holding a hearing[3] and still to be "covered" by the "margin of manoeuvre" so generously granted to them by the Court? How wide is this spectrum? How many *other* "non-hearing" situations might potentially fall within this gamut and thus be considered not to have occasioned a denial of justice?

25. In this context, the caveat set out in paragraph 99 of the judgment serves little practical purpose and gives little comfort to those who are still waiting for the Strasbourg Court to do justice in the cases which it decides. In that paragraph, the Court reiterates, for the umpteenth time in its case-law, the "importance of ensuring that domestic procedures are in place whereby a case *may be* re-examined in the light of a finding that Article 6 of the Convention has been violated" and that "such procedures *may be* regarded as an important aspect of the execution of its judgments and their availability demonstrates a Contracting State's commitment to the Convention and to the Court's case-law" (my emphasis). Since not only the "putting in place" of the said procedures, but also the (mis)interpretation of the meaning of the Court's "recommendations" fully depends on the will of the authorities of the Contracting States, even where that will is *not to reopen the proceedings*, and the Court tends to limit its role to merely approving this will, this caveat is but an edentate, pussycat-like reminder of what the Convention was meant for but what it sometimes – as in the instant case – fails to accomplish.

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[3] Or even without a court procedure at all, that is to say, by a legislative, i.e. political, act? See, for example, the recent judgment in *Béres and Others v. Hungary* (nos. 59588/12, 59632/12 and 59865/12, 17 January 2017).

DISSENTING OPINION OF JUDGE BOŠNJAK

1. I unfortunately cannot agree with the majority that there has been no violation of the Article 6 § 1 of the Convention in the present case.

2. In my opinion, the majority correctly considers that Article 46 of the Convention does not preclude the examination by the Court of the applicant's complaint under Article 6 of the Convention. Although possibly related to the issue of execution of the Court's judgment delivered on 5 July 2011 on the applicant's first application, the present complaint focuses on the approach taken by the Supreme Court of Portugal (hereinafter "the Supreme Court") when examining the applicant's request for a reopening of criminal proceedings. Equally, I consider that the majority is right in its conclusions regarding the applicability of Article 6 § 1 of the Convention. Apart from the reasons given in this respect in the judgment of the Court, I believe that in the present case, the examination of the request for a reopening of criminal proceedings cannot be entirely separated from the assessment of the law and facts applicable to the initial determination of a criminal charge against the applicant. In this context, the Supreme Court was expected to re-evaluate the findings of fact and the application of the relevant law in the initial criminal proceedings in the light of the Court's judgment. The Supreme Court considered that the applicant's conviction was not irreconcilable with the judgment of the Court and that no serious doubts could be raised regarding the applicant's condemnation. Therefore, I find no obstacles regarding the applicability of Article 6 § 1 of the Convention in the present case.

3. When assessing the approach of the Supreme Court in examining the applicant's request for a reopening of criminal proceedings, the majority finds this approach to be compatible with Article 6 § 1 of the Convention. I cannot share that view.

4. The Supreme Court did not provide any substantive reasoning as to why, in its view, the applicant's conviction was not irreconcilable with the judgment of the Court. This is in itself hardly compatible with the requirements of Article 6 § 1 of the Convention. Moreover, the Supreme Court relied on a reading of the Court's judgment of 5 July 2011 which is manifestly inconsistent with its real meaning. While the Court indicated that it could not "speculate as to what the outcome of the proceedings before the (Oporto) Court of Appeal would have been if it had examined the applicant at a public hearing", the Supreme Court interpreted this indication as meaning that the Court's judgment could not raise any doubts regarding the applicant's conviction.

5. This interpretation is all the more unacceptable in the light of the main arguments advanced by the Court in its judgment. The Court in fact noted that the Court of Appeal was called on to examine several questions relating to facts as well as to the applicant's personal characteristics, and in

particular the issue of her asserted diminished capacity, which in turn could have had a decisive influence on the determination of the sanction. In the Court's view, this question could not be resolved without direct examination of the applicant's testimony (see paragraphs 33 and 34 of the judgment). In line with those arguments, it is clear that the violation in question could only be entirely set aside by reopening the proceedings before the Court of Appeal, which had to include a hearing of the applicant.

6. In his dissenting opinion, Judge Pinto de Albuquerque, joined by several other dissenters, analyses the Court's case-law to conclude, *inter alia*, that the Court holds the power to order a reopening of criminal proceedings in a particular case if a violation of Article 6 of the Convention is found. Be that as it may, it should be seen as undisputed that national authorities may not resort to a manifestly incorrect reading of the law, let alone of fundamental sources of human rights law such as this Court's judgments. Since in the present case the Supreme Court did just that, the violation of Article 6 § 1 of the Convention is evident.