COLLOQUIUM ORGANISED BY THE SUPREME ADMINISTRATIVE COURT OF FINLAND

IN CO-OPERATION WITH ACA-EUROPE

HELSINKI 25–27 MAY 2025

DIALOGUE WITH THE EUROPEAN COURT OF HUMAN RIGHTS – ADVISORY OPINIONS UNDER PROTOCOL NO. 16 TO THE CONVENTION AND THE IMPACT OF THE COURT'S JUDGMENTS AT THE NATIONAL LEVEL

Questionnaire

The Finnish presidency of ACA-Europe during 2023-25, in close co-operation with Sweden, has focused on the dialogue between the national supreme administrative jurisdictions and the European Courts, i.e., the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). During the Finnish presidency, seminars have been organised on a variety of issues like the duty of the national courts to make a reference for a preliminary ruling to the CJEU (Stockholm, October 2023), mechanisms of counteracting conflicting rulings from the domestic courts and the CJEU and the ECtHR (Zagreb, February 2024) and the multilevel protection of fundamental and human rights in European administrative courts (Inari, May 2024).

In the upcoming Colloquium, which will be held in Helsinki 25-27 May 2025, the focus will be on the judicial dialogue between the national supreme administrative courts and the ECtHR. In this questionnaire, as well as in the Colloquium, this dialogue is approached from two different perspectives.

The first part of the questionnaire examines the procedure in which a national court can seek an opinion from the ECtHR in a case pending before it, namely the mechanism of advisory opinions under Protocol No. 16 to the European Convention on Human Rights and Fundamental Freedoms (ECHR). The aim is to find answers to such questions as: Is the mechanism of advisory opinions perceived as a useful tool? What are the experiences so far? Can we draw any lessons already at this stage? Having in mind that all the participating countries have not acceded to the advisory opinion system, the questions will be different for those States that have done this and the ones that have not.

The second part of the questionnaire will focus on the impact of the judgments of the ECtHR at the national level. While in certain fields of law the jurisprudence of the ECtHR has been well recognised and embedded in the legal orders of the Contracting States, in some other fields the case law has been more contested and even criticised. This may be the case, for example, when the ECtHR is faced with new topics and uses evolutive interpretation of the Convention and its Protocols, or when the judgments are closely linked to politically sensitive areas such as national security or issues that traditionally have belonged to the field of political deliberation. In this questionnaire, the impact of the ECtHR case law is approached from a point of view of two such distinct but similarly pressing issues, namely climate change litigation and summary return of aliens at the border.

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In section A of the second part of the questionnaire, we will explore the extremely topical issue of climate change litigation. Even though the ECHR does not contain any particular provisions on climate change or environmental matters, the ECtHR has been called upon to develop its case law in those issues as the exercise of certain Convention rights may be undermined by the serious adverse effects of climate change and the existence of harm to the environment.

In section B of the second part of the questionnaire, we will explore another contemporary issue linked to immigration law. As is well known, the ECtHR has a rich jurisprudence in this field where a wide variety of questions have been assessed under different Convention articles. In this questionnaire, the intention is to focus on a very specific and highly debated topic of summary returns of aliens at the border or shortly after entry into the territory (so called push-backs)[1]. The attention is specifically on those situations in which persons trying to enter a particular state have been denied entry at the border or in its close proximity, be it a land or sea border, and which have been assessed by the ECtHR especially against the prohibition of the collective expulsion of aliens.

In brief, the second part of the questionnaire aims at exploring the impact the case law of the ECtHR in the above-mentioned specific fields has had at the national level, both in terms of legislation and its interpretation by national courts. By looking at the national framework we are able to get a better understanding of how the rights protected by the Convention operate in the legal and political reality of the Contracting States, as the Convention is – as often repeated by the ECtHR − a living instrument anchored to the present-day conditions. Moreover, as novel issues of interpretation linked to changing and evolving challenges are first encountered at the level of the national courts, having a closer look at the national jurisprudence can serve to predict the questions to be raised before the ECtHR. This, for its part, underlines the two-way nature of the dialogue between European and national courts.

[1] For the definition and principles drawn from the current case law, see *ECHR-KS Key Theme – Summary returns of migrants and/or asylum-seekers ("push-backs") and related case scenarios (last updated 31/08/2024).*

BACKGROUND INFORMATION

High Administrative Court of the Republic of Croatia (Visoki upravni sud Republike Hrvatske – in Croatian)

I THE ADVISORY OPINION MECHANISM

In accordance with Protocol No. 16 to the ECHR, the highest national courts or tribunals may request the ECtHR to give an advisory opinion. These requests concern questions of principle relating to the interpretation or application of the rights and freedoms defined in the ECHR or its protocols. The requesting court or tribunal may seek an advisory opinion only in the context of a case pending before it. It must give reasons for its request and must provide the ECtHR with the relevant legal and factual background to the pending case. Protocol No. 16 came into force on 1 August 2018.

1. Has your country ratified Protocol No. 16?

☐ Yes. Please elaborate (e.g., the ratification year, which courts can make a request).
☒ No, our country has not ratified Protocol No. 16. Please continue to Question 11.

The following nine questions are addressed to states that have ratified Protocol No. 16:

2. Has your court or any court in your country requested an advisory opinion from the ECtHR? If yes, what was the case about?

☐ Yes. Please elaborate.
☐ No.

3. Has your court considered of its own motion in the context of a pending case whether an advisory opinion from the ECtHR could assist in resolving a particular question?

☐ Yes.
  ☐ A request was made.
  ☐ No request was made. Please elaborate on the reasons for deciding not to request an advisory opinion.
☐ No.

4. Has a party to the proceedings asked your court to request an advisory opinion from the ECtHR?

☐ Yes. Please elaborate whether the party's request was accepted or rejected and if rejected, did you give reasons for the refusal.
☐ No.

5. If your court decided to request an advisory opinion, did you give your view on the question(s) posed? If not, for what reasons?

☐ Yes. Please elaborate.
☐ No. Please elaborate.
☐ Not applicable because our court has not requested an advisory opinion.

6. If an advisory opinion was requested and delivered, was it useful when resolving the case?

☐ Yes. Please elaborate.
☐ No. Please elaborate.
☐ Not applicable because our court has not requested an advisory opinion.

7. Was the advisory opinion cited in the decision of your court? Did your court enter into a dialogue with the advisory opinion or did you simply state its findings?

☐ Yes, the advisory opinion was cited in the decision of our court. Please elaborate.
☐ No, the advisory opinion was not cited in the decision of our court. Please elaborate.
☐ Not applicable because our court has not requested an advisory opinion.

8. If an advisory opinion was requested and delivered, did the advisory opinion have any wider impact on the national legal order?

☐ Yes. Please elaborate.
☐ No.
☐ Not applicable because our court has not requested an advisory opinion.

9. Have advisory opinions requested by other courts (in your country or abroad) had an impact on the national legal order?

☐ Yes. Please elaborate.
☐ No.

10. The ECtHR is under a duty to give reasons for refusing a request for an advisory opinion. Has such reasoning been useful for your court when deciding whether to request an advisory opinion or when deciding how to formulate it?

☐ Yes. Please elaborate.
☐ No.

The following five questions are addressed to states that have not ratified Protocol No. 16:

11. Is it known whether ratification is forthcoming?

☐ Yes. Please elaborate.
☒ No, we do not know whether ratification is forthcoming.

12. If it is known that ratification is not forthcoming, do you know the reason(s) for this?

☐ Yes. Please elaborate.
☒ No, we do not know the reasons for this.
☐ Not applicable in the light of the answer to Question 11.

13. After the entry into force of Protocol No. 16 in 2018, has your court dealt with a case in which it might have been useful to be able to request an advisory opinion? If so, what was the nature of the question(s)?

☐ Yes. Please elaborate.
☒ No.

14. Does your court make use of advisory opinions requested by courts abroad as sources of case law?

☐ Yes. Please elaborate.
☒ No.

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15. Have advisory opinions requested by courts abroad had an impact on your national legal order?

☐ Yes. Please elaborate.
☒ No.

II THE IMPACT OF THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS ON THE NATIONAL LEVEL

A. CLIMATE CHANGE LITIGATION[2]

The intersection between climate change and human rights law can be regarded as an important theme for future climate litigation. On 9 April 2024, the Grand Chamber of the ECtHR issued three separate rulings on cases relating to climate change. In the case of Verein KlimaSeniorinnen Schweiz and Others v. Switzerland [GC], 2024, the ECtHR found violations of Article 8 and Article 6.1 of the ECHR. Nonetheless, two other cases – Duarte Agosthinho and Others v. Portugal and 32 Others and Carême v. France – were declared inadmissible. These cases illustrate the challenging issues for national courts in relation to climate change, e.g. with regard to holding governments accountable for inadequate national climate policies through the perspective of human rights, admissibility criteria, interpretation of locus standi and national courts' competence to scrutinize political decision-makers' decisions and inaction.

16. Are there specific rules concerning standing of individuals in the climate change litigation context before your court?

☐ Yes. Please elaborate.
☒ No.

The Act on Climate Change and Ozone Layer Protection (Official Gazette, 127/2019) entered into force on 1 January 2020, except for Articles 22 and 24 which entered into force on 1 January 2021. The act lays down provisions on competence and responsibility for climate change mitigation, climate change adaptation and ozone layer protection, documents on climate change and ozone layer protection, monitoring and reporting of greenhouse gas emissions, greenhouse gas emissions trading system, aviation activity, sectors outside the greenhouse gas emissions trading system, Union Registry, ozone depleting substances and fluorinated greenhouse gases, financing climate change mitigation, climate change adaptation and ozone layer protection, information system on climate change and ozone layer protection, administrative and inspection oversight, in line with the implementation of the Directives and other European Union acts on

[2] The phrase "climate change litigation" usually refers to cases that raise material issues of law or fact relating to climate change mitigation, adaptation or the science of climate change. Such cases are brought before a range of administrative, judicial and other adjudicatory bodies. For more details, see https://climate.law.columbia.edu/content/climate-change-litigation and https://www.unep.org/resources/report/global-climate-litigation-report-2023-status-review.

climate change. It also imposes obligations on the authorities. The Act sets out a specific planning system for climate change policy.

In November 2024, there was a public consultation on amendments to the Act on Climate Change and Ozone Layer Protection in order to comply with the EU acquis on climate change, climate change mitigation, climate change adaptation and ozone layer protection, and the process will continue with the adoption of implementing regulations and planning documents, the improvement of institutional conditions for the adoption of strategic documents in the area of climate and ozone layer protection, the improvement of the existing system for monitoring and reporting greenhouse gas emissions, and the establishment of a monitoring and reporting system for the new EU system for greenhouse gas emissions trading, establishment of the Social Fund for Climate Action, improvement of the inspection system and better implementation of legal provisions related to climate change and ozone layer protection.

Nevertheless, there is no general provision for access to justice in cases of governmental inaction. According to Croatian administrative prodecure law, appeals must be based on an administrative decision. The appealability of an administrative decision is subject to Article 3 of the Administrative Litigation Act as a general provision. According to it, the subject matter of an administrative dispute is an assessment of the legality of an individual decision by which a public-law body has ruled on the right, obligation or legal interest of a party in an administrative matter (an administrative act) against which it is not permitted to make a regular appeal, an assessment of the lawfulness of the conduct of a public-law body in the field of administrative law which infringes the right, obligation or legal interest of a party against whom it is not permitted to make a regular appeal, an assessment of the lawfulness of the failure of a public-law body in the field of administrative law to rule on the law within the statutory time-limit, an obligation or legal interest or ordinary remedy of a Party or to comply with a Regulation and an assessment of the legality of concluding, terminating and executing an administrative contract, as well as an assessment of the legality of a general act of a local and regional self-government unit, a legal person having public authority and a legal person performing a public service.
However, we note that, according to the practice of public-law authorities, there is a wide field of access for the initiation of administrative proceedings, which consequently leads to the possibility of bringing an action before the Administrative Court, namely initiating an administrative dispute.

17. Are there specific rules concerning standing of associations in the climate change litigation context before your court?

☐ Yes. Please elaborate.
☒ No.

In accordance with Article 18. of the Administrative Litigation Act, the applicant is a natural or legal person who considers that his rights and legal interests have been violated by an individual decision, by the conduct of a public legal body or by the failure to adopt an individual decision or by the conduct of a public legal body within a legally prescribed time limit or by the conclusion, termination or execution of an administrative contract, or by a person who does not have legal personality or a group of persons if their rights and legal interests have been violated by an individual decision or by the conduct of a public legal body, or a body governed by public law which was or should have been involved in taking a decision, acting or concluding an administrative contract, but may also be a national body authorised by law. In accordance with Article 19. of the Administrative Litigation Act, the defendant is a public law body that has made or failed to make an individual decision, acted or failed to act or which is a party to an administrative contract. Mentioned provisions are applicable in the climate change litigation as explained in the question 16.

18. Have there been any climate related cases before your court during recent years in which Article 8 (right to respect for private and family life) of the ECHR has played a role? Please elaborate and/or provide examples.

☐ Yes.
- ☐ Article 8 has been only a part of the argumentation.
- ☐ Article 8 has formed an essential part of the court's reasoning.

☒ No.

19. Have there been any climate related cases before your court during recent years in which Article 6.1 (right to a fair trial/access to court) of the ECHR has played a role? Please elaborate and/or provide examples.

☐ Yes.
☒ No.

20. Have there been climate related cases before your court during recent years in which there has been a link to the rights of future generations? Please elaborate and/or provide examples.

☐ Yes.
☒ No.

21. Have there been any climate or other environmentally related cases before your court during recent years in which your court's competence to scrutinize political decision-makers' decision or inaction has been dealt with?

No

22. Have there been cases before your court during recent years in which the court has examined whether the competent national authorities, be it at legislative, executive or judicial level, have met relevant requirements pursuant to the domestic climate framework?

No

23. Has the *Klimaseniorinnen Schweiz v. Switzerland* case had an impact in your country? For instance, have new cases been brought to your court after that case? Please elaborate.

No

24. Can you identify any major differences between the legal questions raised by climate change, on one hand, and environmental matters, on the other hand, addressed so far in your court? Please elaborate and/or provide examples.

According to the Croatian Environmental Protection Act, an environmental permit shall be issued with a view to full environmental protection through integrated pollution prevention and control, ensuring a high level of environmental protection and conditions for the prevention of significant environmental pollution due to industrial activities. Taking into account the scope of the law, the definition of an activity causing the risk of environmental pollution and other provisions of the law, the starting point is that the activity subject to an environmental permit is carried out in a pre-defined and geographically limited area. Permit consideration in accordance with the Environmental Protection Act only concerns the risk of environmental pollution caused by the emissions of the activity subject to the permit. The actual broader regulation on combating greenhouse gas emissions is limited outside the scope of the Croatian Environmental Protection Act.

The Croatian Climate Act sets out only a specific planning system for climate change policy and currently, there is no legislative link between the Climate Act and the Environmental Protection Act.

In environmental permit matters, the rights of future generations are usually not brought up very commonly and there are currently no signals that this situation is changing.

In some cases, the main issue has related to granting of an environmental permit to significant industrial project (e.g., amendments to the construction of the waste management centre of Split-Dalmatia County at a location in Kladnjice in the municipality of Lecevica), while climate considerations have not been involved. In all relevant cases, it has not been possible for the Court to address such arguments in view of the applicable law.

B. SUMMARY RETURNS OF ALIENS AT THE BORDER OR SHORTLY AFTER ENTRY INTO THE TERRITORY ("PUSH-BACKS")

In this questionnaire, the focus is particularly on the cases that have been assessed by the ECtHR primarily under Article 4 of Protocol No. 4 to the ECHR. Consequently, the focal question has been whether there has been a violation of the prohibition of the collective expulsion of aliens. The ECtHR cases in point are, in particular, N.D. and N.T. v. Spain [GC], 2020, and Shahzad v. Hungary, 2021. In addition, the existence of a sufficient remedy, in particular whether individuals were afforded an effective possibility of submitting arguments against their removal, has been assessed under Article 13 in conjunction with Article 4 of Protocol No. 4 for example in Khlaifia and Others v. Italy [GC], 2016. In Hirsi Jamaa and Others v. Italy [GC], 2012, the extraterritorial scope of Article 4 of Protocol No. 4 was confirmed with respect to State's action on the high seas aiming at preventing migrants from reaching the borders of the State or even to push them back to another State. Furthermore, there are several cases pending at the ECtHR, and three cases concerning alleged summary returns of individuals to Belarus from neighbouring states have been grouped to be heard together on 12 February 2025 by the Grand Chamber.

25. Is there specific national legislation applicable to returns of aliens at the border within the meaning of the ECtHR case law above? In particular, are there any specific national provisions intended to cover situations where entry is attempted by aliens *en masse* and/or where migratory flows are deemed to result

from actions of a third country with the aim of destabilising the receiving state ("instrumentalised migration")[3]? Please briefly explain the main points of the national provisions.

There are no specific national provisions regulating the return of foreigners to the border in addition to those contained in the International and Temporary Protection Act and the Aliens Act. These acts are fully in line with the *acquis communautaire* of the European Union and the Convention requirements.
The International and Temporary Protection Act prescribes the principles, conditions and procedure for granting international protection and temporary protection, the status, rights and obligations of applicants for international protection, asylum seekers, foreigners under subsidiary protection, foreigners under temporary protection, and the conditions and procedure for the annulment and termination of asylum, subsidiary protection and temporary protection, while the Aliens Act prescribes the conditions for entry, movement, stay and work of foreigners who are third-country nationals in the Republic of Croatia.

26. Does your court have jurisdiction in the field of immigration law? If so, has your court dealt with cases involving alleged summary returns of aliens? In particular, have there been cases where the notion of collective expulsion as defined in Article 4 of Protocol No. 4 has been invoked and/or applied? If yes, please briefly explain the main points of the national jurisprudence.

The High Administrative Court has jurisdiction in the field of immigration law. To date, the Court has decided in cases involving alleged summary returns of aliens and where the notion of collective expulsion of aliens would have been invoked or applied (for the summary of one case see the question 28 below).

27. Has the case law of the ECtHR in the field of summary returns of aliens and specifically the Court's interpretation of the scope of Article 4 of Protocol No. 4 had an impact on the content of the national legislation and/or on its interpretation by the national courts? If yes, please briefly explain the main developments.

The case law of the ECtHR in the field of summary returns of aliens has not been referenced in the government proposal to the according acts. Taking into account the Constitutional Court's view that, in matters of compliance with the judgments of the ECtHR, domestic case-law must be built in a way that respects the international legal obligations arising from the Convention and that it must comply with the relevant legal positions and practices of the ECtHR, it is for the courts to apply the positions of the ECtHR consistently and to amend the case-law accordingly. In the Constitutional Court's case-law the reference is made, among others, to the scope of Article 4 of Protocol No. 4 and the interpretation of the ECtHR in this field, in particular in the case of N.D. and N.T. v. Spain [GC], 2020.
However, in the government proposal of the International and Temporary Protection Act it is expressly acknowledged that the act "would be in tension with the human rights obligations that bind Croatia, especially the principle of non-refoulement, the right to asylum, and the requirements for legal protection related to the principle on non-refoulement in the accordance with the *acquis communautaire* of the European Union and the Convention requirements".

[3] The term "instrumentalised migration" is used, *inter alia*, in Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147.

28. Have any cases been brought against your state in the ECtHR alleging that there has been a violation of Article 4 of Protocol No. 4 (alone or in conjunction with Article 13 of the ECHR) in the field of immigration law? If yes, please briefly explain the main features of these cases.

There has been one case brought against Croatia in the ECtHR alleging a violation of Article 4 of Protocol No. 4 – *M.H. and Others v. Croatia, 2021*.
The applicants are a family of 14 Afghan nationals made up of a father, two mothers and eleven young children. On the night of 21 November 2017, seven applicants attempted to cross the Croatian border illegally, but were stopped by Croatian police officers and ordered them to return to Serbia on the next railway track. As they walked along the tracks a train came along and hit one of the kids, little girl M. H. that died. The other six applicants returned to Serbia. In December 2017, the applicants were assisted by a lawyer filed criminal complaint against unknown Croatian border police officers for criminal offence of negligent death, abuse of office and authority, torture and other cruel, inhuman and degrading treatment and violation of the child's rights. Suppression Office corruption and organised crime (USKOK) rejected their criminal complaint stating that the evidence gathered during the investigation did not show that the applicants crossed the border; and they entered Croatia, talked to Croatian police officers or applied for asylum. USKOK found that the statements of the first applicant and of the second and thirteenth applicants differed in key the facts and contradict the other evidence gathered. The applicants then took over prosecution and requested the investigating judge of the County Court to conduct an investigation, but it was refused considering their proposal unsubstantiated, as confirmed in the appeal proceedings, and the Board of Appeal of the County Court. The Constitutional Court dismissed their constitutional complaint. On 21 March 2018 the applicants again illegally crossed the Croatian border. The police caught them and detained them at the police station where the applicants indicated their intention to apply for international protection. On the same day they were placed in the reception centre Tovarnik where they were detained for about 2 and half months, i.e. until 4 June 2018, when they were transferred to the open-type centre in Kutina. During that period, they approached various NGOs complaining about the conditions of accommodation in the centre of Tovarnik and filed administrative complaints complaining about the restriction of freedom of movement. On 22 May 2018 the Administrative Court in Osijek partially upheld the third applicant's administrative action and ordered that she and her two children dismissed from the Tovarnik centre, while the administrative actions of the remaining applicants were dismissed. The High Administrative Court rejected their appeals and the Constitutional Court rejected their constitutional complaints. The applicants submitted an application for international protection, which application is made by the Ministry of the Interior rejected on 28 March 2018 on the grounds that they should be returned to Serbia as that country was considered a safe third country. That decision was upheld by the administrative courts in two levels, but the Constitutional Court abolished their judgments by finding that they had not properly examined whether Serbia is considered a safe third country. In proceedings before the competent Croatian authorities, the applicants were represented by the lawyer S.B.J. on the basis of a power of attorney signed in December 2017. The Ministry of Interior did not allow S.B.J. to represent the applicants in the proceedings according to the requests for international protection claiming that the power of attorney was invalid. An investigation has been launched for suspicion the applicant's authorised signatures were falsified and the investigation continued after the first the applicant and another applicant confirmed before the investigating judge that they had signed the contested power of attorney. S.B.J. has asked the Ministry of Interior several times for permission to contact the applicants, but without any success. After the warnings of the Croatian Bar Association and after the visit the Croatian Child Ombudsman to whom the applicants confirmed that S.B.J. was their lawyer even if they wanted her to represent them, S.B.J. visited

the applicants in the centre of Tovarnik on 7 May 2018. In April of that year, lawyer S.B.J. also applied for an interim measure on under Rule 39. The rules of procedure of the European Court, asking that Court to give applicants enable contact with her, order their release from the center of Tovarnik and prevent theirs moving to Serbia. The European Court issued two provisional measures stating that the applicants shall be placed in an environment complying with the requirements of Article 3. of the Convention and that the applicants should not be removed to Serbia. The temporary measures were lifted in March 2019 because the applicants left Croatia.
Before the European Court, the applicants complained of an infringement of Articles 2, 3, 5 and 34. of the Convention and of Article 4 of Protocol No. 4 to the Convention.
In relation to Article 4 of Protocol No. 4 to the Convention, the applicants complained that they had been subject to collective expulsion because an individual assessment of their circumstances has not been carried out.
The European Court held that there was *prima facie* evidence in support of version of the event of 21 November 2017 as presented by the applicants. Namely, theirs description of this event was specific and consistent throughout the period and a large number of reports of civil society organisations and international organisations pointed to the problem of return by the short procedure of persons who secretly entered Croatia at the borders with Serbia and Bosnia and Herzegovina. It was therefore for the Government of the Republic of Croatia to prove that the applicants had not entered to Croatia and that they had not been returned on short notice to Serbia before the train hit M.H. However, the Government failed to refute the abovementioned *prima facie* evidence of the applicant the application was therefore considered true by the European Court that on 21 November 2017 the Croatian police officers had returned the first applicant and her six children to Serbia without considering their individual situation.
On the basis of the information provided by the Government of the Republic of Croatia in the present case, the European Court was unable to determine whether the applicants had real and effective at the material time access to procedures for legal entry into Croatia. Consequently, removal of the applicants was of a collective nature and therefore infringed Article 4. of Protocol No. 4 to the Convention.

For the whole text of the decision in English, see:
https://hudoc.echr.coe.int/eng?i=001-213213