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

FIRST SECTION

CASE OF SÕRO v. ESTONIA

(Application no. 22588/08)

JUDGMENT

STRASBOURG

3 September 2015

FINAL

03/12/2015

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Sõro v. Estonia,

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

Elisabeth Steiner, *President,*
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Paulo Pinto de Albuquerque,
Ksenija Turković,
Dmitry Dedov, *judges,*
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 30 June 2015,

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

PROCEDURE

1. The case originated in an application (no. 22588/08) against the Republic of Estonia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Estonian national, Mr Mihhail Sõro (“the applicant”), on 3 May 2008.

2. The applicant was represented by Ms M. Valge, a lawyer practising in Tartu. The Estonian Government (“the Government”) were represented by their Agent, Ms M. Kuurberg, of the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that the publication of information about his service in the former State security organisations had violated his right to respect for his private life in breach of Article 8 of the Convention.

4. On 27 August 2013 the complaint concerning the publication of the information about the applicant’s past employment was communicated to the Government and the remainder of the application was declared inadmissible.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1948 and lives in Tartu.

A. Historical background

6. Estonia lost its independence as a result of the Treaty of Non-Aggression between Germany and the Union of Soviet Socialist Republics (also known as "Molotov-Ribbentrop Pact"), concluded on 23 August 1939, and the secret additional protocols to it. Following an ultimatum to set up Soviet military bases in Estonia in 1939, a large-scale entry of the Soviet army into Estonia took place in June 1940. The lawful government of the country was overthrown and Soviet rule was imposed by force. Interrupted by the German occupation in 1941-1944, Estonia remained occupied by the Soviet Union until its restoration of independence in 1991 (see *Kolk and Kislyiy v. Estonia* (dec.), nos. 23052/04 and 24018/04, ECHR 2006-I, and *Penart v. Estonia* (dec.), no. 14685/04, 24 January 2006). After the independence of the Republic of Estonia was restored on 20 August 1991, Soviet troops remained in the country. Following the dissolution of the Soviet Union, the Russian Federation assumed jurisdiction over the Soviet armed forces. On 26 July 1994 Estonia and Russia concluded a treaty on the withdrawal of Russian troops from Estonia and the conditions under which they could reside temporarily in Estonia. Under the terms of the treaty, the Russian Federation undertook to withdraw from Estonia, by 31 August 1994, all military personnel who were in active service with the Russian armed forces (see *Nagula v. Estonia* (dec.), no. 39203/02, ECHR 2005-XII (extracts); *Mikolenko v. Estonia* (dec.), no. 16944/03, 5 January 2006; and *Dorochenko v. Estonia* (dec.), no. 10507/03, 5 January 2006) .

7. After the regaining of independence Estonia carried out comprehensive legislative reforms for transition from a totalitarian regime to a democratic system and for rectifying injustices. On 28 June 1992 the Constitution of the Republic of Estonia (*Eesti Vabariigi põhiseadus*) and the Constitution of the Republic of Estonia Implementation Act (*Eesti Vabariigi põhiseaduse rakendamise seadus*) were adopted by a referendum. The Constitution Implementation Act provided that until 31 December 2000, persons standing in elections or seeking certain high positions, such as those of ministers or judges, or any other elected or appointed position in an agency of the national government or a local authority, had to take a written oath of conscience (*süümevanne*) affirming that they had not been in the service or agents of security, intelligence or counterintelligence services of countries which had occupied Estonia. On 8 July 1992 the Riigikogu (the Estonian Parliament) adopted the Procedure for Taking Oath of Conscience Act (*Seadus süümevande andmise korra kohta*).

8. In order to ensure national security of the Republic of Estonia, persons having been in the service of or having collaborated with the security, intelligence or counterintelligence services of the countries which had occupied Estonia, had to be ascertained. Such a security authority was first and foremost the Committee for State Security of the USSR and its

local arm, the Estonian SSR Committee for State Security (also known as "the KGB"). However, the most sensitive of the KGB materials were removed from Estonia and the government committee set up by the Estonian authorities to liquidate the KGB managed to get hold of documents of mainly historical value.

9. On 10 March 1994 the Riigikogu adopted the Procedure for the Collection, Recording, Preservation and Use of the Materials of Other States' Security and Intelligence Authorities which Have Operated in Estonia Act (*Eestis tegutsenud teiste riikide julgeoleku- ja luureorganite materjalide kogumise, arvelevõtmise, säilitamise ja kasutamise korra seadus*) which established the obligation to hand over for preservation to the Estonian National Archives the materials in question.

10. On 1 June 1994 the Riigikogu Temporary Committee for the Investigation of the Activities of the Security and Intelligence Authorities of the USSR and Other States in Estonia submitted to the Riigikogu a draft decision proposing the Government to initiate, by 15 September 1994 at the latest, a Draft Act on the Procedure for Registration and Disclosure of Persons who Have Served in or Co-operated with Security Organisations or Intelligence or Counterintelligence Organisations of Armed Forces of States which Have Occupied Estonia. On 28 June 1994 the Riigikogu adopted the proposed decision.

11. As the Government did not submit the Draft Act by the time requested by the Committee, on 5 December 1994 the Riigikogu Temporary Committee itself decided to initiate the Draft Act in issue.

12. On 6 February 1995 the Riigikogu passed the Procedure for Registration and Disclosure of Persons who Have Served in or Co-operated with Security Organisations or Intelligence or Counterintelligence Organisations of Armed Forces of States which Have Occupied Estonia Act (*Eestit okupeerinud riikide julgeolekuorganite või relvajõudude luure- või vastuluureorganite teenistuses olnud või nendega koostööd teinud isikute arvelevõtmise ja avalikustamise korra seadus*) ("the Diclosure Act"). According to the Disclosure Act, the persons in question were to be registered by the Estonian Internal Security Service (*Kaitsepolitseiamet*). Information about such persons' service or co-operation was to be made public unless they themselves made a pertinent confession about that to the Estonian Internal Security Service within one year from the entry into force of the Disclosure Act. The Disclosure Act entered into force on 28 March 1995.

13. According to the information provided by the Government, 1,153 persons submitted a confession under the Disclosure Act by 1 April 1996. For the first time, names of the persons subject to disclosure were published in *Riigi Teataja Lisa* (Appendix to the State Gazette) on 30 January 1997. From 1997 until 2009, on thirteen occasions, the names of a total of 647 persons were published in *Riigi Teataja Lisa*. Among them there were 42

drivers, of whom at least seven had advanced to higher positions during their career in the KGB.

14. On 18 June 2002 the Riigikogu made a statement declaring the Soviet communist regime which in its view committed crimes – including genocide, war crimes and crimes against humanity – during the occupation, as well as the bodies of the Soviet Union, such as NKVD, NKGB, KGB and others, which forcefully executed the regime, and their activities to be criminal. The statement emphasised that this did "not mean collective liability of their members and employees. Each individual's liability [was determined by] his or her specific activities, an ethical assessment of which should be made first and foremost by each person himself or herself". Riigikogu also noted that the threat of the repetition of such crimes had not disappeared and that the regimes relying on extremist ideologies threatened the World peace and free development of the people until their criminal nature was fully disclosed and condemned.

15. On 17 December 2003 the Riigikogu passed the Persons Repressed by Occupying Powers Act (*Okupatsioonirežiimide poolt represseeritud isiku seadus*) aimed at alleviating the injustices committed against persons who were unlawfully repressed by the States that occupied Estonia between 16 June 1940 and 20 August 1991. Certain pension rights and other benefits were foreseen to the persons who fell under the Act in question.

B. Publication of information about the applicant's employment by the KGB

16. From 1980 to 1991 the applicant was employed as a driver by the Committee for State Security.

17. On 27 February 2004 the applicant was invited to the Estonian Internal Security Service and presented with a notice according to which he had been registered pursuant to the Disclosure Act. It was stated in the notice that a pertinent announcement would be published in *Riigi Teataja Lisa* and the text of the announcement was set out. Furthermore, it was mentioned in it that the person concerned had the right, within one month of the receipt of the notice, to have access to the documents proving his or her links to the security, intelligence of counterintelligence organisations, and to contest the information contained in the notice before the Estonian Internal Security Service or a court. The applicant signed a document stating that he had received the notice.

18. According to the applicant his request to be shown the material gathered in respect of him was not met whereas he was told that he could lodge a complaint against the notice with an administrative court within one month. According to the Government the applicant's argument, that he could not examine the documents on which the notice had been based, was declaratory, unproved and wrong.

19. On 16 June 2004 an announcement was published both in the paper and Internet version of *Riigi Teataja Lisa*. It read as follows:

“ANNOUNCEMENTS OF THE ESTONIAN INTERNAL SECURITY SERVICE about persons who have served in or co-operated with security organisations or intelligence or counterintelligence organisations of armed forces of States which have occupied Estonia

Hereby the Estonian Internal Security Service announces that pursuant to section 5(1) of the Procedure for Registration and Disclosure of Persons who Have Served in or Co-operated with Security Organisations or Intelligence or Counterintelligence Organisations of Armed Forces of States which Have Occupied Estonia Act the Estonian Internal Security Service has registered the following persons.

...

Announcement no. 695 of 27.02.2004

MIHHAIL SÕRO (born on 12.12.1948, Estonia, Põlva County, Värska rural municipality) – AS Tarbus bus driver

1. Committee for State Security of the Estonian SSR[,] Tartu department – driver[,] 12.08.1980 – 1989

2. Committee for State Security of the Estonian SSR[,] Põlva branch – driver[,] 1989 – 05.11.1991”

20. In the Internet version, which had legal force equal to that of the paper version, the announcements of the Estonian Internal Security Service were published under the following section title: “Copies of announcements of the Estonian Internal Security Service about persons who have served in intelligence or counterintelligence organisations of the former USSR to be published in *Riigi Teataja Lisa*.”

21. The applicant raised the issue with the Chancellor of Justice (*Õiguskantsler*) who, having analysed the matter and sought additional information from the Estonian Internal Security Service, addressed the Riigikogu with a report, dated 12 July 2005, where he concluded that the Disclosure Act was unconstitutional in so far as all employees of the security and intelligence organisations were made public with no exception made in respect of the personnel who merely performed technical tasks not related to the main functions of the organisations. He further found that the Disclosure Act was unconstitutional in that the person’s place of employment at the time of the publication of the announcement was also made public.

22. The Constitutional Law Committee of the Riigikogu disagreed with the assessment of the Chancellor of Justice.

23. After the applicant had again addressed the Chancellor of Justice, the latter replied by a letter of 31 January 2006 that he had not deemed necessary to initiate constitutional review proceedings in respect of the Disclosure Act. The Chancellor of Justice had in the meantime been briefed

by the Estonian Internal Security Service about the practice according to which the persons who had performed merely technical tasks were not being made public.

C. Court proceedings initiated by the applicant

24. On 20 June 2006 the applicant lodged a complaint with the Tallinn Administrative Court. He asked that the court declare the text published in *Riigi Teataja Lisa* unlawful and oblige the Estonian Internal Security Service delete the word *okupant* (occupier, invader) and add the word *endine* (former). In that way the information that he had been a foreign invader occupying Estonia from 1980-1991 could be disproved. He noted that he had never been accused of or provided with any evidence showing that he had participated in the forceful occupation of the Estonian territory as a member of the armed forces of a foreign country or participated in the exercise of the occupation powers. He disagreed having been associated with the crimes committed by the employees of security organisations of the Nazi Germany and the Stalinist regime and argued that a person could only be held individually accountable for his own acts but that principle was ignored by the Disclosure Act. He asserted that he had only worked for the Committee for State Security as a driver and knew nothing about gathering information. As a result of the publication of the announcement the applicant had lost his work and he had been a victim of groundless accusations by third parties. He was being called an occupier (*okupant*) and an informant (*koputaja*) and it was being said that "he [was] not a proper man" if the Estonian Internal Security Service dealt with him.

25. At the Tallinn Administrative Court hearing on 15 January 2007 the applicant submitted, *inter alia*, that he had in the meantime changed his employment but was, at the time of the court hearing, back in the bus company where he had previously worked.

26. By a judgment of 29 January 2007 the Tallinn Administrative Court dismissed the applicant's complaint. It noted that the applicant had failed to contest the notice which he had been presented with by the Estonian Internal Security Service on 27 February 2004. Accordingly, the notice had been made public pursuant to the Disclosure Act. The Administrative Court concluded that the publication of the announcement had become possible because of the applicant's inaction as he had failed to contest the notice and disprove the information it contained. The information contained in the published announcement corresponded to the information which the applicant had previously been presented with.

27. The Administrative Court further verified that in the Internet version of *Riigi Teataja Lisa* the announcements of the Estonian Internal Security Service were published under the section title "Copies of announcements of the Estonian Internal Security Service about persons who have served in

intelligence or counterintelligence organisations of the former USSR to be published in *Riigi Teataja Lisa*” and, thus, the notion “former” (*endine*) also applied to the announcement concerning the applicant. Furthermore, the word “occupier” (*okupant*) had not been used in respect of the applicant. The Administrative Court did not establish that the publication of the announcement was unlawful or violated the applicant’s rights.

28. The Administrative Court found that the applicant’s request for the review of the constitutionality of the Disclosure Act would have been pertinent in case he would have contested the notice issued on 27 February 2004. The applicant had been informed that pursuant to the Disclosure Act he had the right, within a month, to familiarise himself with the documents and contest the information contained in the notice before the Estonian Internal Security Service or a court. Thus, the law had given him a possibility to immediately counter the information gathered. If a court then would have reviewed the issue of the constitutionality of the Disclosure Act, the Estonian Internal Security Service would have been obliged to proceed with the publishing or to refrain from it, depending on the results of the review. In the circumstances at hand, however, the announcement had been published and the notice no. 695 of 27 February 2004, which it had been based on, was lawful.

29. The Administrative Court also noted that the applicant had not produced any evidence to disprove the information published. The applicant himself had confirmed that he had worked as a driver of the former Committee for State Security of the Estonian SSR.

30. The applicant appealed arguing that after the publication of the announcement he had become a victim of groundless mocking and had to quit his work. He had sustained substantial pecuniary and non-pecuniary damage. He pointed out that the notice of 27 February 2004 had not caused him any negative results. Rather, what had been of importance was the publication of the announcement in *Riigi Teataja Lisa* on 16 June 2004. He maintained that in the published announcement he had been depicted as an occupier of the Estonian State. It remained unclear, however, which acts he had committed against Estonia and in what way these acts had been criminal. His work as a driver of the Committee for State Security had been of a merely technical nature and had in fact not been directed against the Estonian State.

31. By a judgment of 22 November 2007 the Tallinn Court of Appeal dismissed the appeal. The Court of Appeal considered that the fact that a person did not contest the initial notice before its publication did not deprive him of a right to lodge a complaint against the publication of the announcement in *Riigi Teataja Lisa*. It also considered that the implementation of the Disclosure Act could in some circumstances involve indirect interference with a person’s fundamental rights caused by the acts of third parties as the person’s reputation could be damaged as a result of

the disclosure of his relations with the Soviet security organisations. However, in the case in question the interference was in conformity with the Constitution.

32. The Court of Appeal found as follows:

> "10. ... The Chancellor of Justice established in his proceedings that according to the defendant's administrative practice information about the merely technical employees was not, by way of exception, disclosed. According to the assessment of the Court of Appeal, the [applicant] cannot demand an exception to be made in respect of him. According to the assessment of the defendant, drivers of the security and intelligence organisations were related to the performance of the organisations' substantial tasks ... The court has no ground to take a different position in this question relating to the security risks. The Estonian State cannot establish decades later with absolute certainty whether a specific driver performed merely technical or also substantial tasks. Thus, one has to proceed from the possibility that a KGB driver may also pose a potential security risk and the disclosure of the information about him may be in the public interests. Therefore, it is proportionate to apply the [Disclosure Act] in respect of the persons who worked as drivers in the security or intelligence organisations. Thereby account must be taken of the fact that the publication of the announcement and the indirect interferences caused by that were not inevitably foreseen by law; the [applicant] could have prevented these consequences by making a confession pursuant to ... the [Disclosure Act]."

33. In respect of the applicant's complaint about the use of the language in the text of the announcement the Court of Appeal noted that the word "to occupy" had not referred to the applicant but rather to a State (former Soviet Union). Nor had the applicant been treated as a person co-operating with the Committee for State Security (an informant or a sneak) but rather as its staff member. In the announcement the period of the applicant's employment had also been indicated. There was nothing to imply that he was accused of continuous contact with an intelligence or security organisation of a foreign country. The defendant was not responsible for arbitrary conclusions that third parties may have drawn from the announcement. Lastly, the Court of Appeal considered that it was proportionate to publish the current places of work of the persons concerned, *inter alia*, in order to avoid confusion in the public that might otherwise arise in respect of persons with identical or similar names.

34. On 14 February 2008 the Supreme Court declined to hear an appeal lodged by the applicant.

II. RELEVANT DOMESTIC LAW AND PRACTICE

35. On 6 February 1995 the Procedure for Registration and Disclosure of Persons who Have Served in or Co-operated with Security Organisations or Intelligence or Counterintelligence Organisations of Armed Forces of States which Have Occupied Estonia Act (*Eestit okupeerinud riikide julgeolekuorganite või relvajõudude luure- või vastuluureorganite teenistuses olnud või nendega koostööd teinud isikute arvelevõtmise ja*

avalikustamise korra seadus) was passed. It entered into force on 28 March 1995.

36. The Act provided for registration and disclosure of persons who had served in or co-operated with certain security or intelligence organisations of Nazi Germany and Soviet Union, enumerated in the Disclosure Act, between 17 June 1940 and 31 December 1991 (sections 1 to 3). Section 4 of the Disclosure Act stipulated that it applied to staff members of the security or intelligence organisations as well as to persons who had co-operated with these organisations and set forth criteria as to what was to be deemed as the co-operation in question.

37. Section 5 provided that the persons concerned were registered on the basis of a personal confession submitted to the Estonian Internal Security Service within one year of the entry into force of the Disclosure Act or on the basis of other available evidence.

38. In case the person concerned did not make a personal confession or knowingly provided false information, information about his service in or co-operation with the security or intelligence organisations was to be made public (sections 6 to 8). Conversely, persons who submitted a personal confession within one year of the entry into force of the Disclosure Act without providing false information were, as a rule, not made public (sections 7(2) and 8(1)) and information concerning them was classified as state secret for fifty years (section 6 of the State Secrets Act (*Riigisaladuse seadus*)).

39. Before presentation of the notice for publication the person concerned was notified of the text thereof by the Estonian Internal Security Service (section 8(2) of the Disclosure Act). He or she had the right, within one month of receipt of the notice, to have access to the pertinent documents in the Estonian Internal Security Service and to contest the information contained in the notice before the Estonian Internal Security Service or a court. The burden of proof of the person's service in security or intelligence organisations or co-operation therewith lied with the Estonian Internal Security Service (section 8(4)).

40. In a judgment of 31 January 2003 (case no. 3-257/2003) the Tallinn Administrative Court granted a complaint against a notice of the Estonian Internal Security Service. It found that the complainant's employment in the NKVD (People's Commissariat for Internal Affairs, a predecessor of the KGB) had not been proven by proper evidence. The court ordered the Estonian Internal Security Service to delete the data on the complainant from its register. This judgment was upheld by the Tallinn Court of Appeal judgment of 8 December 2003 (case no. 2-3/394/2003). The Court of Appeal noted that the burden of proof in the cases falling under the Disclosure Act lied with the Estonian Internal Security Service and emphasised that registration and disclosure of the persons in question could not be based on mere suspicions.

III. RELEVANT COUNCIL OF EUROPE DOCUMENTS

41. On 27 June 1996 the Parliamentary Assembly of the Council of Europe (PACE) adopted Resolution 1096 (1996) on measures to dismantle the heritage of former communist totalitarian systems. It reads, in so far as relevant:

> “1. The heritage of former communist totalitarian systems is not an easy one to handle. On an institutional level this heritage includes (over)centralisation, the militarisation of civilian institutions, bureaucratisation, monopolisation, and over-regulation; on the level of society, it reaches from collectivism and conformism to blind obedience and other totalitarian thought patterns. To re-establish a civilised, liberal state under the rule of law on this basis is difficult - this is why the old structures and thought patterns have to be dismantled and overcome.
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> ...
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> 3. The dangers of a failed transition process are manifold. At best, oligarchy will reign instead of democracy, corruption instead of the rule of law, and organised crime instead of human rights. At worst, the result could be the "velvet restoration" of a totalitarian regime, if not a violent overthrow of the fledgling democracy. In that worst case, the new undemocratic regime of a bigger country can present also an international danger for its weaker neighbours. The key to peaceful coexistence and a successful transition process lies in striking the delicate balance of providing justice without seeking revenge.
>
> 4. Thus a democratic state based on the rule of law must, in dismantling the heritage of former communist totalitarian systems, apply the procedural means of such a state. It cannot apply any other means, since it would then be no better than the totalitarian regime which is to be dismantled. A democratic state based on the rule of law has sufficient means at its disposal to ensure that the cause of justice is served and the guilty are punished - it cannot, and should not, however, cater to the desire for revenge instead of justice. It must instead respect human rights and fundamental freedoms, such as the right to due process and the right to be heard, and it must apply them even to those people who, when they were in power, did not apply them themselves. A state based on the rule of law can also defend itself against a resurgence of the communist totalitarian threat, since it has ample means at its disposal which do not conflict with human rights and the rule of law, and are based upon the use of both criminal justice and administrative measures.
>
> 5. The Assembly recommends that member states dismantle the heritage of former communist totalitarian regimes by restructuring the old legal and institutional systems, a process which should be based on the principle(s) of:
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> i. demilitarisation, to ensure that the militarisation of essentially civilian institutions, such as the existence of military prison administration or troops of the Ministry of the Interior, which is typical of communist totalitarian systems, comes to an end;
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> ii. decentralisation, especially at local and regional levels and within state institutions;
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> iii. demonopolisation and privatisation, which are central to the construction of some kind of a market economy and of a pluralist society;

iv. debureaucratisation, which should reduce communist totalitarian over-regulation and transfer the power from the bureaucrats back to the citizens.

6. This process must include a transformation of mentalities (a transformation of hearts and minds) whose main goal should be to eliminate the fear of responsibility, and to eliminate as well the disrespect for diversity, extreme nationalism, intolerance, racism and xenophobia, which are part of the heritage of the old regimes. All of these should be replaced by democratic values such as tolerance, respect for diversity, subsidiarity and accountability for one's actions.

7. The Assembly also recommends that criminal acts committed by individuals during the communist totalitarian regime be prosecuted and punished under the standard criminal code. If the criminal code provides for a statute of limitations for some crimes, this can be extended, since it is only a procedural, not a substantive matter. Passing and applying retroactive criminal laws is, however, not permitted. On the other hand, the trial and punishment of any person for any act or omission which at the time when it was committed did not constitute a criminal offence according to national law, but which was considered criminal according to the general principles of law recognised by civilised nations, is permitted. Moreover, where a person clearly acted in violation of human rights, the claim of having acted under orders excludes neither illegality nor individual guilt.

8. The Assembly recommends that the prosecution of individual crimes go hand-in-hand with the rehabilitation of people convicted of "crimes" which in a civilised society do not constitute criminal acts, and of those who were unjustly sentenced. Material compensation should also be awarded to these victims of totalitarian justice, and should not be (much) lower than the compensation accorded to those unjustly sentenced for crimes under the standard penal code in force.

9. The Assembly welcomes the opening of secret service files for public examination in some former communist totalitarian countries. It advises all countries concerned to enable the persons affected to examine, upon their request, the files kept on them by the former secret services.

...

11. Concerning the treatment of persons who did not commit any crimes that can be prosecuted in accordance with paragraph 7, but who nevertheless held high positions in the former totalitarian communist regimes and supported them, the Assembly notes that some states have found it necessary to introduce administrative measures, such as lustration or decommunisation laws. The aim of these measures is to exclude persons from exercising governmental power if they cannot be trusted to exercise it in compliance with democratic principles, as they have shown no commitment to or belief in them in the past and have no interest or motivation to make the transition to them now.

12. The Assembly stresses that, in general, these measures can be compatible with a democratic state under the rule of law if several criteria are met. Firstly, guilt, being individual, rather than collective, must be proven in each individual case - this emphasises the need for an individual, and not collective, application of lustration laws. Secondly, the right of defence, the presumption of innocence until proven guilty, and the right to appeal to a court of law must be guaranteed. Revenge may never be a goal of such measures, nor should political or social misuse of the resulting lustration process be allowed. The aim of lustration is not to punish people presumed guilty - this is the task of prosecutors using criminal law - but to protect the newly emerged democracy.

> 13. The Assembly thus suggests that it be ensured that lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law, and focus on threats to fundamental human rights and the democratisation process ...”

42. On 25 January 2006 the PACE adopted Resolution 1481 (2006) on the need for international condemnation of crimes of totalitarian communist regimes. It reads, in so far as relevant, as follows:

> “2. The totalitarian communist regimes which ruled in central and eastern Europe in the last century, and which are still in power in several countries in the world, have been, without exception, characterised by massive violations of human rights. The violations have differed depending on the culture, country and the historical period and have included individual and collective assassinations and executions, death in concentration camps, starvation, deportations, torture, slave labour and other forms of mass physical terror, persecution on ethnic or religious grounds, violation of freedom of conscience, thought and expression, of freedom of the press, and also lack of political pluralism.
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> 3. The crimes were justified in the name of the class struggle theory and the principle of dictatorship of the proletariat. The interpretation of both principles legitimised the “elimination” of people who were considered harmful to the construction of a new society and, as such, enemies of the totalitarian communist regimes. A vast number of victims in every country concerned were its own nationals. It was the case particularly of the peoples of the former USSR who by far outnumbered other peoples in terms of the number of victims.
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> ...
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> 5. The fall of totalitarian communist regimes in central and eastern Europe has not been followed in all cases by an international investigation of the crimes committed by them. Moreover, the authors of these crimes have not been brought to trial by the international community, as was the case with the horrible crimes committed by National Socialism (Nazism).
>
> 6. Consequently, public awareness of crimes committed by totalitarian communist regimes is very poor. Communist parties are legal and active in some countries, even if in some cases they have not distanced themselves from the crimes committed by totalitarian communist regimes in the past.
>
> 7. The Assembly is convinced that the awareness of history is one of the preconditions for avoiding similar crimes in the future. Furthermore, moral assessment and condemnation of crimes committed play an important role in the education of young generations. The clear position of the international community on the past may be a reference for their future actions.
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> 8. Moreover, the Assembly believes that those victims of crimes committed by totalitarian communist regimes who are still alive or their families, deserve sympathy, understanding and recognition for their sufferings.
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> ...
>
> 12. Therefore, the Assembly strongly condemns the massive human rights violations committed by the totalitarian communist regimes and expresses sympathy, understanding and recognition to the victims of these crimes.
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> 13. Furthermore, it calls on all communist or post-communist parties in its member states which have not yet done so to reassess the history of communism and their own

past, clearly distance themselves from the crimes committed by totalitarian communist regimes and condemn them without any ambiguity.

14. The Assembly believes that this clear position of the international community will pave the way to further reconciliation. Furthermore, it will hopefully encourage historians throughout the world to continue their research aimed at the determination and objective verification of what took place.”

IV. RELEVANT EUROPEAN UNION MATERIAL

43. On 23 September 2008 the European Parliament adopted a Declaration on the proclamation of 23 August as European Day of Remembrance for Victims of Stalinism and Nazism. The Declaration reads as follows:

“*The European Parliament,*

...

D. whereas the influence and significance of the Soviet order and occupation on and for citizens of the post-Communist States are little known in Europe,

...

1. Proposes that 23 August be proclaimed European Day of Remembrance for Victims of Stalinism and Nazism, in order to preserve the memory of the victims of mass deportations and exterminations, and at the same time rooting democracy more firmly and reinforcing peace and stability in our continent ...”

44. On 2 April 2009 the European Parliament adopted a Resolution on European conscience and totalitarianism. The Resolution reads as follows:

“*The European Parliament,*

...

– having regard to the Truth and Justice Commissions established in various parts of the world, which have helped those who have lived under numerous former authoritarian and totalitarian regimes to overcome their differences and achieve reconciliation,

...

A. whereas historians agree that fully objective interpretations of historical facts are not possible and objective historical narratives do not exist; whereas, nevertheless, professional historians use scientific tools to study the past, and try to be as impartial as possible,

...

F. whereas the memories of Europe’s tragic past must be kept alive in order to honour the victims, condemn the perpetrators and lay the foundations for reconciliation based on truth and remembrance,

G. whereas millions of victims were deported, imprisoned, tortured and murdered by totalitarian and authoritarian regimes during the 20th century in Europe; whereas the uniqueness of the Holocaust must nevertheless be acknowledged,

H. whereas the dominant historical experience of Western Europe was Nazism, and whereas Central and Eastern European countries have experienced both Communism and Nazism; whereas understanding has to be promoted in relation to the double legacy of dictatorship borne by these countries,

I. whereas from the outset European integration has been a response to the suffering inflicted by two world wars and the Nazi tyranny that led to the Holocaust and to the expansion of totalitarian and undemocratic Communist regimes in Central and Eastern Europe, as well as a way of overcoming deep divisions and hostility in Europe through cooperation and integration and of ending war and securing democracy in Europe,

J. whereas the process of European integration has been successful and has now led to a European Union that encompasses the countries of Central and Eastern Europe which lived under Communist regimes from the end of World War II until the early 1990s, and whereas the earlier accessions of Greece, Spain and Portugal, which suffered under long-lasting fascist regimes, helped secure democracy in the south of Europe,

K. whereas Europe will not be united unless it is able to form a common view of its history, recognises Nazism, Stalinism and fascist and Communist regimes as a common legacy and brings about an honest and thorough debate on their crimes in the past century,

...

3. Underlines the importance of keeping the memories of the past alive, because there can be no reconciliation without truth and remembrance; reconfirms its united stand against all totalitarian rule from whatever ideological background;

4. Recalls that the most recent crimes against humanity and acts of genocide in Europe were still taking place in July 1995 and that constant vigilance is needed to fight undemocratic, xenophobic, authoritarian and totalitarian ideas and tendencies;

5. Underlines that, in order to strengthen European awareness of crimes committed by totalitarian and undemocratic regimes, documentation of, and accounts testifying to, Europe’s troubled past must be supported, as there can be no reconciliation without remembrance;

6. Regrets that, 20 years after the collapse of the Communist dictatorships in Central and Eastern Europe, access to documents that are of personal relevance or needed for scientific research is still unduly restricted in some Member States; calls for a genuine effort in all Member States towards opening up archives, including those of the former internal security services, secret police and intelligence agencies, although steps must be taken to ensure that this process is not abused for political purposes;

...

9. Calls on the Commission and the Member States to make further efforts to strengthen the teaching of European history and to underline the historic achievement of European integration and the stark contrast between the tragic past and the peaceful and democratic social order in today’s European Union;

10. Believes that appropriate preservation of historical memory, a comprehensive reassessment of European history and Europe-wide recognition of all historical aspects of modern Europe will strengthen European integration;

...

> 13. Calls for the establishment of a Platform of European Memory and Conscience to provide support for networking and cooperation among national research institutes specialising in the subject of totalitarian history, and for the creation of a pan-European documentation centre/memorial for the victims of all totalitarian regimes;
>
> ...
>
> 15. Calls for the proclamation of 23 August as a Europe-wide Day of Remembrance for the victims of all totalitarian and authoritarian regimes, to be commemorated with dignity and impartiality;
>
> 16. Is convinced that the ultimate goal of disclosure and assessment of the crimes committed by the Communist totalitarian regimes is reconciliation, which can be achieved by admitting responsibility, asking for forgiveness and fostering moral renewal ...”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

45. The applicant complained that his right to respect for his private and family life had been breached owing to the publication of the information that he had worked as a driver of the KGB. He relied on Article 8 of the Convention, which reads as follows:

> “1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

46. The Government contested that argument.

A. Admissibility

1. The parties’ submissions

47. The Government argued that the applicant had not exhausted domestic remedies. He had not contested the notice of 27 February 2004 of the Estonian Internal Security Service neither before the Service nor before an administrative court. Only by contesting the notice could he have prevented publication of the announcement and disclosure of the fact of his service in the KGB. The Government additionally suggested that the fact that the announcement had already been published by the time the court proceedings took place, and that the Chancellor of Justice had expressed his opinion on the matter in the meantime, may have played certain role in the

domestic courts' assessment of the proportionality of the interference. Although the applicant's subsequent complaint to the administrative courts was admissible, it could not bring along the same consequence as contestation of the notice of 27 February 2004, that is prevention of the disclosure.

48. The applicant submitted that he had not wished to contest the notice by the Estonian Internal Security Service as the fact of his work in the security department had been known to everyone. Negative consequences for him had occurred several months later when the announcement in which he had been called a person who had occupied Estonia had been published on the Internet.

2. *The Court's assessment*

49. As regards the question whether the applicant was required to contest the notice presented to him by the Estonian Internal Security Service in order to comply with the requirement of exhaustion of domestic remedies, the Court has taken note of the domestic case-law which demonstrates that publication of an announcement in *Riigi Teataja Lisa* could be prevented by contesting the notice in question (see paragraph 40 above). The Court observes, however, that the present case differs from the one referred to above in that in the present case the applicant did not dispute the fact of his service in the KGB. It would appear that the question of whether the publication amounted to a disproportionate interference with the private life of the person falling under the Disclosure Act could be raised either through challenging the Estonian Internal Security Service's initial notice or the actual publication of the announcement in *Riigi Teataja Lisa*. The Court notes that in the present case, although the applicant did not use the possibility to contest the notice, the administrative courts nevertheless examined on the merits his complaint against the publication of the announcement. Therefore, the Government's argument about non-exhaustion of domestic remedies must be rejected.

50. The Court considers that the Government's additional arguments on non-exhaustion (see paragraph 47 above) are not pertinent. Firstly, the argument about the relevance of the fact that the announcement had been published by the time of the court proceedings does not find support in the Court of Appeal's reasoning (see paragraph 31 above). Secondly, as concerns the fact that the opinion of the Chancellor of Justice – according to which the Disclosure Act was not unconstitutional (see paragraph 23 above) – was known to the domestic courts, it is not for the Court to speculate whether the domestic courts would have decided the applicant's case differently if they would have dealt with it before the Chancellor of Justice gave his opinion. In any event, this opinion was not binding on the courts which were independent in deciding the case. Therefore, the Government's additional arguments on non-exhaustion must also be rejected.

51. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

52. The applicant was of the opinion that in the announcement of the Estonian Internal Security Service published in *Riigi Teataja Lisa* in 2004 he had been considered as a person who had occupied Estonia whereas in the announcements published later, in 2005, the persons in question had not been referred to as persons who had occupied Estonia but rather as persons who had been in the service of the intelligence organisations of the USSR. He argued that it was unclear on the basis of which evidence he was deemed as an occupier and why he was considered to be dangerous. He submitted that "occupier" (*okupant*) was a word that was understood to refer to a serious crime involving conquering the country with the use of arms and exercising occupation therein. At the time when the applicant had worked as a driver for the security department, the activities of this institution had been supervised by the local Communist Party committee where the Prime Minister of the Republic of Estonia of the time of the submission of the observations had held a position of responsibility.

53. The applicant had never concealed his employment in the security department. This fact could be seen from his employment record and no employer had had any problems with that. However, after the publication of the announcement on the Internet under the title referring to an "occupier" he was being considered as an occupier, a traitor, a snitch among his colleagues and acquaintances. He was forced to quit his job and lost his income. The applicant considered that it was wrong and offending to call him an occupier.

(b) The Government

54. The Government emphasised that it was not in dispute that from 1980 until 1991 the applicant had worked as a driver in the KGB. Furthermore, the interference with the applicant's right to respect for his private life was in accordance with law and it was necessary in a democratic society in the interests of national security, public safety and for the protection of the rights and freedoms of others. The Government pointed out that for the transfer from a totalitarian regime to a democratic system, Estonia took various measures which, in aggregate, had to ensure the development and security of the democratic system. Criminal liability for

crimes against humanity and war crimes committed under the totalitarian regime was established and an obligation to take an oath of conscience was introduced for those seeking the highest offices in the country. The Disclosure Act dealt with the persons who had not committed any crimes but had been employed by or collaborated with the intelligence or counterintelligence authorities of the States which had occupied Estonia. It was found that such persons had to come to terms with their past and not to try to forget, conceal or be silent about it. There was also a significant public interest in the publicity of information relating to the past; this had to guarantee transparency and clarity as well as overall internal peace in the society. Obtaining complete information about the members and agents of the security and intelligence authorities which had operated on the territory of Estonia was also important for the protection of independence and security of the Republic of Estonia. Estonia was lacking the relevant information; such information, including the lists of persons who had worked in the KGB, was in the hands of foreign States. There could be attempts to recruit former staff of the security authorities and make them perform security or intelligence tasks, or they could be subject to blackmailing. Such situation was dangerous and damaging for Estonia. The Government referred to recent cases where former employees or collaborators of the KGB had provided a foreign country with state secrets leading to their conviction of treason.

55. The Government also pointed out that persons falling under the Disclosure Act could express their loyalty to the Republic of Estonia by submitting a confession, in which case their data was not disclosed. Moreover, in order to secure protection to the persons concerned, the disclosure was subject to prior judicial review. As regards the question whether it was necessary to also disclose information about persons who, as the applicant, had worked as drivers, the Government argued that the formal job title was not decisive as the drivers could also perform other tasks, especially in rural regions where the applicant had worked. There had even been separate positions formally combining the tasks of the driver with other functions, such as "driver-intelligence officer" dealing with secret surveillance, and for some of the drivers the driver's position had been a step for advancement to the next, "more important" position, like that of an operative agent or intelligence officer. The Government also argued that the Estonian Internal Security Service, having regard to their limited resources, focused on cases which were more important and which could involve real danger to the Republic of Estonia.

2. The Court's assessment

56. The Court considers that the publication of the information about the applicant's service in the KGB concerned facts about his personal past that were made available to the public and also affected his reputation. It

therefore constituted an interference with his right to respect for his private life (compare *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, §§ 42-50, ECHR 2004-VIII).

57. The Court further notes that the lawfulness of the interference was not in dispute between the parties. It observes that the interference in question was based on the Diclosure Act that had been adopted by the Riigikogu and published according to the rules in force. Nor has it been disputed that the text of the law was sufficiently clear to enable those affected to foresee the consequences it entailed. The law's accessibility and public awareness of it is also confirmed by the information provided by the Government according to which 1,153 persons submitted a confession to the Estonian Internal Security Service within one year of the entry into force of the Disclosure Act in order not to have information about their service in or collaboration with the security and intelligence organisations published. Thus, the Court is satisfied that the impugned interference was lawful for the purposes of the second paragraph of Article 8 of the Convention.

58. As regards the purpose of the interference, the Court notes that the registration and disclosure of the former employees and collaborators of the security and intelligence organisations of the regimes that had operated in Estonia were part of the measures taken to ensure the transparency, clarity and internal peace in the society, as well as to avoid security threats. The Court has also taken note of the cases referred to by the Government where former employees or collaborators of the KGB had provided a foreign country with state secrets leading to their conviction of treason (see paragraph 54 above). The Court concludes that the interference in question pursued legitimate aims within the meaning of paragraph 2 of Article 8, namely the protection of national security and public safety, the prevention of disorder as well as well as the protection of the rights and freedoms of others (compare, *mutatis mutandis*, *Sidabras and Džiautas*, cited above, §§ 54-55).

59. Accordingly, the Court proceeds to the examination of whether the measure was "necessary in a democratic society". The Court observes in this connection that there is no uniform approach among High Contracting Parties as to the measures to dismantle the heritage of former communist totalitarian systems (see *Matyjek v. Poland* (dec.), no. 38184/03, § 36, ECHR 2006-VII). Different measures have been applied and their application has given rise to a number of cases before the Court concerning a variety of issues such as restrictions on the persons' eligibility to stand for elections (see *Ždanoka v. Latvia* [GC], no. 58278/00, ECHR 2006-IV, and *Ādamsons v. Latvia*, no. 3669/03, 24 June 2008) or to their employment (see *Vogt v. Germany*, 26 September 1995, Series A no. 323; *Volkmer v. Germany* (dec.), no. 39799/98, 22 November 2001; *Sidabras and Džiautas*, cited above; *Rainys and Gasparavičius v. Lithuania*, nos. 70665/01 and 74345/01, 7 April 2005; and *Žičkus v. Lithuania*,

no. 26652/02, 7 April 2009) as well as lack of access to the information on the basis of which the persons' collaboration with former secret services was established (see *Matyjek v. Poland*, no. 38184/03, 24 April 2007) or reduction of pensions of the persons concerned (see *Cichopek and Others v. Poland* (dec.) no. 15189/10 and other applications, 14 May 2013). Against this background, the Court turns to the proportionality analysis of the impugned measures in the present case.

60. The Court reiterates that in a number of previous cases it has criticised the lack of individualisation of the impugned measures. Thus, in *Ādamsons* it considered that the group of persons – former KGB agents – to which the restrictions to stand for elections applied, had been designed in a too broad manner without having regard to the period of service of the persons concerned, specific tasks assigned to them or their individual behaviour (see *Ādamsons*, cited above, § 125). Similarly, in *Žičkus* the lack of differentiation in domestic law between different levels of former involvement with the KGB was pointed out by the Court (see *Žičkus*, cited above, § 33). In addition to the lack of differentiation in domestic law as regards the premises for the application of the restrictions, the Court has also addressed the issue of broadly fashioned restrictions applied to the individuals concerned. Thus, in *Sidabras and Džiautas*, it noted that with the exception of references to "lawyers" and "notaries", domestic law contained no definition of the specific private sector jobs, functions or tasks which the applicants were barred from holding (see *Sidabras and Džiautas*, cited above, § 59).

61. The Court is of the view that the above considerations also apply to the present case. It notes that the Disclosure Act made no distinction between different levels of former involvement with the KGB. It is true that under the applicable procedure the applicant was informed beforehand of the text of the announcement to be published, and given a possibility to contest the factual information contained in it. However, there was no procedure put in place to assess the specific tasks performed by individual employees of the former security services in order to differentiate the danger they could possibly pose several years after the termination of their career in these institutions. The Court is not convinced that there existed a reasonable link between the legitimate aims sought by the enactment of the Disclosure Act and the publication of information about all former employees of the former security services including drivers, as in the applicant's case, regardless of the specific function they performed in these services.

62. The Court also notes that although the Disclosure Act came into force three and a half years after Estonia had declared its independence on 20 August 1991, the publication of the information about the former employees of the security services was stretched over several years. Thus, in the applicant's case the information in question was only published in 2004

– almost thirteen years after the restoration of the Estonian independence. The Court is of the opinion that any threat the former servicemen of the KGB could initially pose to the newly created democracy must have considerably decreased with the passage of time. It notes that it does not appear from the file that any assessment of the possible threat posed by the applicant at the time of the publication of the information was carried out (compare *Žičkus*, loc. cit.).

63. Lastly, the Court observes that the Disclosure Act in itself did not impose any restrictions on the applicant's employment. Nevertheless, according to the applicant he was derided by his colleagues and forced to quit his job. The Court considers that even if such a result was not sought by the Disclosure Act, it is nevertheless indicative of the seriousness of the interference with the applicant's right to respect for his private life.

64. The foregoing considerations are sufficient to enable the Court to conclude that the applicant's right to respect for his private life was subject to a disproportionate interference in the present case.

There has accordingly been a violation of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

65. Article 41 of the Convention provides:

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

A. Damage

66. The applicant claimed 2,556 euros (EUR) – loss of his four months' salary – in respect of pecuniary damage and EUR 6,000 in respect of non-pecuniary damage.

67. The Government argued that it had not been proven that the applicant had been forced to quit his work, or that he had lost his income. In respect of non-pecuniary damage, the Government were of the opinion that as the Convention had not been violated, there was no basis for awarding any compensation. In the event that the Court found a violation, such a finding itself would constitute sufficient just satisfaction. If the Court decided to award monetary compensation, the Government left it to the Court to determine a reasonable sum in non-pecuniary damages.

68. The Court considers that the applicant has not submitted any proof to determine the sum of the alleged pecuniary damage. It therefore rejects this claim. On the other hand, having regard to all the circumstances of the present case, the Court considers that the applicant suffered non-pecuniary damage which cannot be compensated for solely by the finding of a

violation. Making its assessment on an equitable basis, the Court awards the applicant EUR 6,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

69. The applicant also claimed EUR 1,508.65 for the costs and expenses incurred before the domestic authorities and before the Strasbourg Court.

70. The Government were of the opinion that part of the legal costs claimed by the applicant were completely irrelevant to the present case and in respect of other alleged costs no invoices had been submitted or money paid. The Government asked the Court to reject the applicant's claims for costs and expenses.

71. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. The Court notes that absence of proof of payment does not necessarily result in the rejection of a claim for costs and expenses that is in itself well-founded (see *S. v. Estonia*, no. 17779/08, § 55, 4 October 2011, and *Krejčíř v. the Czech Republic*, nos. 39298/04 and 8723/05, § 137, 26 March 2009). In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,444.74 covering costs under all heads.

C. Default interest

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

FOR THESE REASONS, THE COURT

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

2. *Holds*, by four votes to three, that there has been a violation of Article 8 of the Convention;

3. *Holds*, by four votes to three,
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:

(i) EUR 6,000 (six thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
(ii) EUR 1,444.74 (one thousand four hundred forty-four euros seventy-four cents), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

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

Søren Nielsen Elisabeth Steiner
Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge P. Pinto de Albuquerque;
(b) dissenting opinion of Judges K. Hajiyev, J. Laffranque and D. Dedov.

E.S.
S.N.

CONCURRING OPINION OF JUDGE PINTO DE ALBUQUERQUE

1. I agree with the majority in finding a violation of Article 8 of the European Convention on Human Rights (the Convention). Nevertheless, I find the reasoning provided by the judgment insufficient, both with regard to the necessity and the proportionality of the interference with the applicant's Article 8 right. I am particularly dissatisfied with the fact that the European Court of Human Rights (the Court) missed the opportunity to assess the personal and temporal scope and the procedural and institutional guarantees of the Act on the Procedure for the Registration and Disclosure of Persons who Have Served in and Cooperated with Intelligence or Counter-Intelligence Authorities of Security Organisations or Military Forces of States which Have Occupied Estonia (the Disclosure Act) in the light of the recent developments regarding lustration measures in international human rights law. The Court should have made an effort to review and update its own standards with regard to lustration measures, especially having regard to the wide-ranging effects of the Estonian disclosure mechanism, which provides for the publication of the disclosed information on the paper and Internet versions of the State gazette. Special attention should have been paid to the central novelty of this case, which is precisely the use of the Internet as a means of lustration[1]. Lastly, in view of the systemic repercussions of the present judgment in the Estonian legal order, I consider it crucial to clarify the Convention obligations of the respondent State when implementing this judgment.

Registration and disclosure of KGB service as a lustration measure in Estonia

2. On 6 February 1995 the Riigikogu passed the Disclosure Act, which entered into force on 28 March 1995. The Act provides that all persons who have served in or collaborated with the security or intelligence services of the former USSR or Nazi Germany shall be registered. Section 2 of the Disclosure Act specifically lists the central bodies of German and USSR security and intelligence authorities and military intelligence and counter-intelligence authorities, including structures subordinated to a central authority. The list also mentions the USSR Committee for State Security, which includes the Estonian SSR Committee for State Security (KGB) subordinated to it. Under section 4 of the Disclosure Act, being in the

[1] The concept of lustration will be used in this opinion with the meaning that it was given in the Parliamentary Assembly of the Council of Europe Resolution 1096 (1996) on measures to dismantle the heritage of former communist totalitarian systems. The Court has used the concept with this same meaning, as will be shown below.

service of a security or intelligence authority means being a staff member of the respective authority during the period from 17 June 1940 to 31 December 1991. Under section 5(1) and (3) of the Act, the duty to ascertain and prove the employment of a person by a security or intelligence authority, including the ascertainment of the local structural unit of the respective central authority, lies on the Estonian Internal Security Service (the KAPO).

3. The data on persons who registered themselves voluntarily under section 5(2)(1) and section 6 of the Disclosure Act within one year of the entry into force of the Act, that is,until 1 April 1996, by submitting a confession in accordance with the procedure established by the Act, were not disclosed as a rule. Under section 8(1) of the Disclosure Act, the data on persons who submit a confession are disclosed only if that information is not a State secret, namely, persons who had violated the laws in force at the relevant time or who had committed crimes against humanity or war crimes and the violation of the law or commission of the crime had been established by a final court judgment (see section 6(17) of the State Secret Act in force until 1 January 2008).

4. Section 8 of the Disclosure Act establishes the procedure for the disclosure of data on persons who have not submitted a confession. In accordance with that procedure, prior to the disclosure of the notice by the KAPO the person will be summoned before the KAPO where they will be given the text to be disclosed in the Appendix to the State Gazette (*Riigi Teataja Lisa* – the RTL). The text is drawn up in the form of a notice by the KAPO containing the person's name, date and place of birth, place of employment at the time of the disclosure and the name of the body where the person worked or with whom they collaborated, and his or her job status. Under section 9 of the Disclosure Act, these are the data to be subsequently disclosed in the RTL. The notice includes a reference to the right under section 8(4)(1) of the Disclosure Act to examine the documents on the basis of which the KAPO's notice is drawn up, and the right under section 8(4)(2) to contest the substance of the notice in an application to the KAPO or in court within one month of the receipt of the notice. Under section 8(5) of the Disclosure Act, the person's data will not be disclosed and will be deleted from the KAPO register if, by a final court judgment, the KAPO notice concerning the person's service in or collaboration with the security or intelligence authorities is declared unfounded. If the person does not contest the KAPO notice or the court does not allow his or her appeal, the notice is published as a KAPO announcement in the RTL. Moreover, if a person does contest the KAPO notice, it is up to the KAPO to prove that the person was employed by or collaborated with the KGB. If no agreement is reached, the matter will be adjudicated through court proceedings where the burden of proof also lies on the KAPO. Lastly, section 11 of the Act provides that supervision of the legality of the KAPO's activities in

implementing the procedure for the registration and disclosure of persons will also be performed by a committee formed by the Riigikogu.

5. The reason for the Disclosure Act is that Estonia lacked a complete overview of the persons who were in the service of the security and intelligence authorities of the former USSR, some of whom are Estonian citizens. In the Act's explanatory memorandum, it is noted that it is difficult to be convinced of their current loyalty towards the Estonian State, if only because they have so far refused to provide exhaustive information about their activities. Persons who are not criminals and are thus not subject to criminal liability may turn into criminals if contacts with them are renewed or they are re-recruited. The Republic of Estonia should try to prevent this from happening, on the one hand, by "exerting pressure" on these individuals through the requirement of disclosure and, on the other hand, by enabling them to prevent public disclosure by making a confession. The purpose of the legislation was not so much to punish the suspects, but to "ensure sufficient national supervision" of them[2].

6. According to the Government, after the regaining of independence there were doubts about the loyalty of persons who had knowingly and voluntarily entered into the service of the repressive bodies of the occupying power and who had not provided exhaustive information about their activities. The doubts and security risk were further amplified by the fact that few people had voluntarily confessed before the Act was passed and therefore the Estonian State had to gain control over such persons. The precondition for gaining that control was obtaining complete information about the members and agents of the security and intelligence authorities who had operated on the territory of Estonia, namely, information which Estonia was lacking after the regaining of independence. Thus, the interference foreseen by the Disclosure Act was, according to the Government, in line with Article 8 § 2 of the Convention because it was necessary in a democratic society in the interests of national security, public safety and for the protection of the rights and freedoms of others.

In addition, after 2000 the obligation to take an oath of conscience arising from the Constitution Implementation Act was no longer valid and was not extended although it was thought that Estonia still needed protection against disloyal persons who had not disclosed their activities or expressed remorse for them. Thus, after 2000 past service within or in collaboration with the security or intelligence authorities no longer directly ruled out appointment to high-level offices, and the disclosure of earlier connections of such persons remained the only way of ensuring public control over their activities.

Moreover, disclosure under the conditions provided for by the Disclosure Act was necessary because other measures serving the same purpose – for

[2] Paragraph 7 of the Government's observations.

example extension of the range of offices for which the obligation of security clearance applies – would entail interference with the rights and freedoms of third persons, which would be disproportionate and also in conflict with Estonia's international commitments.

Lustration measures under international law

7. Soviet communism was an inhuman, totalitarian political regime, which breached the basic principles of democracy, the rule of law and human rights[3]. After the fall of the Berlin wall, the transition process to democracy in some European countries was based on the implementation of decommunisation measures. These measures, which varied widely in their legal nature and practical impact, were known as lustration. Two main trends can be found: some countries have preferred mechanisms of public confession of one's previous communist activities and other countries have chosen more discreet mechanisms of screening and vetting of suspects with a view to their exclusion from employment in the public and sometimes also in the private sector or even stripping them of their political rights[4]. The protection of the new fragile democratic regimes from covert communist networks, the lack of control over communist security-service files, the improvement of transparency and openness of public life, the furtherance of the public trust in the new political institutions, the avoidance of blackmail of the new political leaders with tarnished past careers and the general interest in the establishment of historical truth have been the overlapping lines of argument presented to provide political justification for such measures[5]. Although the dismantling of a totalitarian regime is a desirable

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[3] See, for example, PACE Resolution No. 1481 (25 January 2006) on Need for international condemnation of crimes of totalitarian communist regimes and EP declaration on the proclamation of 23 August as European day of remembrance for Victims of Stalinism and Nazism, 23 August 2008, and the EP Resolution on European conscience and totalitarianism, 2 April 2009.

[4] See for a review of the different approaches, Montero, Study on how the memory of crimes committed by totalitarian regimes in Europe is dealt with in the Member States, European Commission Contract No JLS/2008/C4/006, 2010.

[5] See David, Lustration and transitional justice: personnel systems in the Czech Republic, Hungary, and Poland, Philadelphia, University of Pennsylvania Press, 2011; Bohnet and Bojadzieva, Coming to Terms with the Past in the Balkans: the Lustration Process in Macedonia, KAS International Reports, 2011; Guerra, Membership of East European Parties and Security Services Collaborators and Functionaries, and Dealing with the Communist Past: Lustration?, in Goodbye Lenin: Central & Eastern European Politics from Communism to Democracy, 2011; Grodsky, Beyond Lustration: Truth-Seeking Efforts in the Post-Communist Space', in Taiwan Journal of Democracy, vol. 5, no. 2, 2009, pp. 21-43; David, From Prague to Baghdad: Lustration Systems and their Political Effects, in Government and Opposition, vol. 41, no. 3, 2006, pp. 347-72; Appel, Anti-Communist Justice and Founding the Post-Communist Order: Lustration and Restitution in Central Europe, in East European Politics & Societies, vol. 19, no. 3, 2005, pp. 379-405; Williams

policy purpose from a human-rights perspective and lustration and decommunisation measures are consequently justified to achieve that purpose, the new democratic States must ensure, nonetheless, that these measures comply with international human rights law.

8. In 1996 the Council of Europe's Parliamentary Assembly set out guidelines to ensure that lustration laws and "similar administrative measures" comply with the requirements of a State based on the rule of law[6]. Lustration is limited to positions in which there is good reason to believe that the subject would pose a significant danger to human rights or democracy, that is to say, appointment to State offices involving significant responsibility for making or executing governmental policies and practices relating to internal security, or to State offices where human-rights abuses may be ordered and/or perpetrated, such as law-enforcement, security and intelligence services, the judiciary and the prosecutor's office. Hence, lustration does not target low or medium-ranking State employees and definitely does not apply to positions in private or semi-private organisations.

No person is subject to lustration solely on grounds of personal opinions or beliefs or association with, or activities for, any organisation that was legal at the time of such association or activities, except where an organisation has perpetrated serious human-rights violations and he or she was a senior official of the organisation (unless the person concerned can show that he or she did not participate in planning, directing or executing such policies, practices or acts[7]). Lustration is imposed only with respect to

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and others, Explaining lustration in Eastern Europe: 'A post-communist politics approach', SEI Working Paper No. 62, 2003, and in Democratisation, vol. 12, no. 1, 2005, pp. 22-43; Williams, Lustration as the securitization of democracy in Czechoslovakia and the Czech Republic, in Journal of Communist Studies and Transition Politics, vol. 19, no. 4, 2003, pp.1-24; Letki, Lustration and Democratisation in East-Central Europe, in Europe-Asia Studies, vol. 54, no. 4, 2002, pp. 529-52; Calhoun, The Ideological Dilemma of Lustration in Poland, in East European Politics and Societies, vol. 16, no. 2, 2002, pp.494-520; Szczerbiak, Dealing with the Communist Past or the Politics of the present? Lustration in Post-Communist Poland, in Europe-Asia Studies, vol. 54, no. 4, 2002, pp. 553-72; Welsh, Dealing with the Communist past: Central and East European Experiences after 1990, in Europe-Asia Studies, vol. 48, no. 3, 1996, pp. 413-28; and Huntington, The Third Wave: Democratisation in the Late Twentieth Century, London, 1991.

[6] Parliamentary Assembly of the Council of Europe Resolution 1096 (1996) on measures to dismantle the heritage of former communist totalitarian systems and the respective Guidelines to ensure that lustration laws and similar administrative measures comply with the requirements of a State based on the rule of law (doc. 7568), 3 June 1996.

[7] This reminiscent element of "guilt by association" is questionable. According to the Venice Commission's interpretation of the Guideline, no person below the rank of a senior official of such an organization may be the subject of lustration measures, unless his individual guilt is proven in a fair trial. This proof includes both his or her motivation and concrete participation in the violation of human rights (§ 106 of the Venice Commission, CDL-AD(2009)044, *Amicus Curie* on the Law on the Cleanliness of the Figure of High

acts, employment or membership between 1 January 1980 and the fall of the communist dictatorship and is not imposed on a person who in good faith voluntarily repudiated and/or abandoned membership, employment or agency in respect of the relevant organisation before the transition to a democratic regime.

In no case may a person be lustrated without being furnished with full due-process protection, including, but not limited to, the right to legal counsel and, if he or she cannot afford to pay one, to an officially assigned counsel, to confront and challenge the evidence used against him, to have access to all available inculpatory and exculpatory evidence, to present his own evidence, to have an open hearing if he or she requests it, and the right to appeal to an independent judicial tribunal.

Lastly, the 1996 Guidelines require that lustration be administered by a commission which is: a) specifically created, b) independent, c) composed of distinguished citizens; and d) composed of members appointed by the Head of State and approved by Parliament.

9. These guidelines were developed in 2006 by the Office of the United Nations High Commissioner for Human Rights. Every lustration mechanism should provide for due-process guarantees, including the initiation of proceedings within a reasonable time and generally in public; notification of the parties under investigation of the proceedings and the case against them; an opportunity for those parties to prepare a defence, including access to relevant data; an opportunity for them to present arguments and evidence, and to respond to opposing arguments and evidence, before a body administering the vetting process; the opportunity to be represented by counsel; and notification to the parties of the decision and the reasons for the decision. As a general rule, a hearing should be guided by the principle of equality of arms.[8]

10. Lustration measures have been examined by the Court in several cases relating to the relevant legislation enacted in Lithuania[9], Slovakia[10],

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Functionaries of the Public Administration and Elected Persons of Albania, Opinion no. 524/2009, 13 October 2009).

[8] Office of the United Nations High Commissioner for Human Rights, Rule-of-Law Tools for Post-Conflict States. Vetting: an operational Framework, 2006, p.26.

[9] *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, ECHR 2004-VIII (violation of Article 14 of the Convention, in conjunction with Article 8, to the extent that the "KGB Act" precluded thee applicants from employment in the private sector as a sports instructor and a lawyer on the basis of their "former KGB officer" status), *Rainys and Gasparavičius v. Lithuania,* nos. 70665/01 and 74345/01, 7 April 2005 (similar violations on account of the applicants' dismissal from their jobs as private-sector lawyers), and *Žičkus v. Lithuania,* no. 26652/02, 7 April 2009. In these cases, the Court stated the principle that "State-imposed restrictions on a person's opportunities to find employment in the private sector by reason of a lack of loyalty to the State cannot be justified from the Convention perspective in the same manner as restrictions on access to their employment in the public service, regardless of the private company's importance to the State's economic, political or security interests" (*Sidabras and Džiautas*, cited above, § 58, *Rainys and*

Poland[11], Latvia[12] and Romania[13]. In principle, lustration does not constitute a violation of human rights because "a democratic State is entitled to require civil servants to be loyal to the constitutional principles on which it is founded"[14]. Nevertheless, measures of lustration are inherently temporary

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Gasparavičius, cited above, § 36, and *Žičkus*, cited above, § 31). In *Žičkus*, the Court specifically noted the lack of differentiation in the "KGB Law" itself between different levels of former involvement with the KGB and the lack of objective materials in the case file verified by the domestic courts to indicate that the applicant posed a "current danger to national security" if he were to be employed in certain sectors of private business (§ 33).

10 *Turek v. Slovakia,* no. 57986/00, § 115, 14 February 2006. The Article 8 violation was found on account of the lack of a procedure by which the applicant could seek effective protection of his right to respect for his private life. The Court established the principle according to which "it cannot be assumed that there remains a continuing and actual public interest in imposing limitations on access to materials classified as confidential under former regimes".

11 *Matyjek v. Poland,* no. 38184/03, 30 May 2006, *Bobek v. Poland,* no. 68761/01, 17 July 2007, and *Luboch v. Poland,* no. 37469/05, 15 January 2008. In all three cases, an Article 6 violation was found on the basis of the confidentiality of the documents and the limitations on access to the case file by the lustrated person, as well as the privileged position of the Commissioner of the Public Interest in the lustration proceedings. In *Joanna Szulc v. Poland,* no. 43932/08, 13 November 2012, the Court found that the respondent State had not fulfilled its positive obligation to provide an effective and accessible procedure enabling the applicant to have access to all relevant information that would allow her to contest her classification by the security services as their secret informant.

12 *Ždanoka v. Latvia (GC),* no. 58278/00, ECHR 2006-IV (no violation of Article 3 of Protocol No. 1: disqualification from standing for election to the national parliament as well as municipal councils, in spite of no legal time-limit for the restriction, since only 15 years had elapsed from 13 January 1991, and measures applicable to acts committed after the end of a totalitarian regime are admissible), and *Adamsons v. Latvia*, no. 3669/03, 24 June 2008 (violation of that provision: ineligibility after a 10-year military and political career in the free Latvia).

13 *Naidin v. Romania,* no. 38162/07, 21 October 2014 (no violation of Article 8 of the Convention, in conjunction with Article 14: absolute prohibition of public employment). In *Haralambie v. Romania*, the Court established an obligation to inform about a person's records created by the secret services during the period of a totalitarian regime (no. 21737/03, §§ 87-89, 27 October 2009; see also *Jarnea v. Romania*, no. 41838/05, § 60, 19 July 2011). But the Convention does not impose a specific obligation on the Contracting States to provide redress for wrongs or damage caused under the general cover of State authority prior to their ratification of the Convention (see *Kopecký v. Slovakia [GC]*, no. 44912/98, § 38, ECHR 2004‑IX; *Woś v. Poland (dec.),* no. 22860/02, § 80, ECHR 2005‑IV; *Woś v. Poland*, no. 22860/02, § 72, ECHR 2006‑VII; *Associazione Nazionale Reduci Dalla Prigionia dall'Internamento e dalla Guerra di Liberazione and Others v. Germany (dec.),* no. 45563/04, 4 September 2007; *Epstein and Others v. Belgium (dec.),* no. 9717/05, ECHR 2008‑... (extracts); and *Preussische Treuhand GmbH & Co. Kg a. A. v. Poland (dec.),* no. 47550/06, § 64, ECHR 2008‑... (extracts)).

14 *Vogt v. Germany,* No. 17851/91, § 59, 26 September 1995. This principle was inspired by the German Constitutional Court's *Radikalenbeschluss*. In their own terms, *die Treupflicht des Beamten (…) fordert vom Beamten insbesondere, daß er sich eindeutig von Gruppen und Bestrebungen distanziert, die diesen Staat, seine verfassungsmäßigen Organe und die geltende Verfassungsordnung angreifen, bekämpfen und diffamieren. Vom Beamten*

and the objective necessity for the restriction of individual rights resulting from this procedure decreases over time.[15] Thus, lustration laws are disproportionate when they apply, without distinction, to positions in the public and private sphere, or remain in force once the need for them has ceased and/or there is no review of their enduring utility.

As a matter of principle, the procedural guarantees of Article 6 of the Convention under its criminal head are applicable to lustration proceedings[16]. Hence, lustration may violate human rights if, for instance, individuals subject to it do not have sufficient access to classified materials relating to their case or are denied adequate procedural guarantees.

11. The Venice Commission has also considered lustration with respect to the draft lustration laws of Albania[17], "the former Yugoslav Republic of Macedonia"[18] and Ukraine[19]. In all three cases, the Commission embraced

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wird erwartet, daß er diesen Staat und seine Verfassung als einen hohen positiven Wert erkennt und anerkennt, für den einzutreten sich lohnt. Politische Treuepflicht bewährt sich in Krisenzeiten und in ernsthaften Konfliktsituationen, in denen der Staat darauf angewiesen ist, daß der Beamte Partei für ihn ergreift. Es ist eine von der Verfassung (Art. 33 Abs. 5 GG) geforderte und durch das einfache Gesetz konkretisierte rechtliche Voraussetzung für den Eintritt in das Beamtenverhältnis, daß der Bewerber die Gewähr bietet, jederzeit für die freiheitliche demokratische Grundordnung einzutreten. (BVerfG, 22.05.1975 - 2 BvL 13/73)

[15] *Adamsons v. Latvia*, No. 3669/03, § 116, 24 June 2008. In addition to this time requirement, § 116 defined a certain number of conditions for the admissibility of lustration laws: a lawful basis; a procedure which does not "exclusively" aim at punishment or revenge, but determines the responsibility of each individual; and "adequate procedural guarantees".

[16] *Matyjek v. Poland (dec.)*, no. 38184/03, ECHR 2006-...., and *Bobek v. Poland (dec.)*, no. 68761/01, 24 October 2006. But in the Lithuanian cases, the Court concludes that the civil limb is applicable (*Sidabras and Džiautas v. Lithuania (dec.)*, nos. 55480/00 and 59330/00, 21 October 2003, and *Rainys and Gasparavičius v. Lithuania (dec.)*, nos. 70665/01 and 74345/01, 22 January 2004).

[17] Venice Commission Opinion no. 524/2009, cited above. The Commission underlined that lustration has strict limits of time in both the period of its enforcement and the period to be screened (§§ 19, 109 and 110) and, consequently, it expressed the view that there must be cogent reasons to justify enacting a new lustration law eighteen years after the fall of the communist regime (§ 38). The longer the objected activities date back, the more significant the personal misconduct in the past and the individual guilt have to be (§ 39). The Commission censured the extremely wide range of application of the law, which included "every employee of the organs of State Security", like for example the secretary or the cleaner. In view of the fact that lustration measures affect significantly certain fundamental rights, for any law on lustration to be constitutional it is inevitable to supply a precise definition of the objected connection with the totalitarian system (§ 50). Moreover, the Commission also noted that the Lustration law does not leave room for consideration of each case individually, but addresses all cases globally, without distinction. Sanctions are imposed on the basis of formal criteria (§ 106). The court must be empowered to quash the decision of the lustration commission due to circumstances of each individual case (§ 108).

[18] Venice Commission, CDL-AD(2012)028, *Amicus Curie* Brief on Determining a Criterion for Limiting the Exercise of Public Office, Access to Documents and Publishing, the Co-operation with the Bodies of the State Security ("lustration law") of "the Former

the European standards based on the Court's case-law and the PACE Resolution 1096 (1996) and added yet another requirement: the active involvement of civil society. The Venice Commission stressed that an administrative review could never serve as a substitute for judicial review. Yet, the administrative procedure and possible review within the administrative procedure should already follow the principles of a fair trial[20].

12. The principles applicable to lustration are *a fortiori* valid for disclosure mechanisms like the Estonian one, whose "wide-ranging" social impact has been acknowledged by the Government themselves[21]. The legal obligation to confess is not directed at a small group of individuals possessing a special status. It is directed at a vast group of citizens who had served in or collaborated with the security or intelligence services of the former USSR or Nazi Germany during the period from 17 June 1940 to 31 December 1991. Failure to comply with the legal obligation to confess is sanctioned. The misconduct attributable to the suspect consists of having not confessed his or her previous activities or having made a false declaration which he or she had a statutory obligation to submit. The KAPO announcement, which is published in the paper and Internet versions of the State gazette, reaches a circle of people considerably wider than the suspect's closer acquaintances. This is the core element of the Estonian lustration policy: indefinite, widespread social stigmatisation is supposed to cure the evils of the communist past and neutralise future threats to democracy and national security. Such a disclosure mechanism is capable of producing a wide range of long-lasting, negative effects in the professional, economic and social sphere of the persons concerned. It should thus be regarded as having at least a partly punitive and deterrent character[22]. The

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Yugoslav Republic of Macedonia", Opinion no. 694/2012, 17 December 2012. In the Commission's view, applying lustration measures more than 20 years after the end of the totalitarian rule requires cogent reasons (§ 17) and basing a decision on deprivation of office on a specific behaviour dating back to - at least - 21 years ago and as much as 78 years ago, may – if at all – only be justified on the basis of most serious forms of offences, in particular massive and repeated violation of fundamental rights, which would also give rise to substantial custodial sentence under criminal law (§ 24). It also seems reasonable to provide for a fixed end of all the lustration process (§ 33). Article 6 of the Convention under its criminal head applies to lustration proceedings (§ 55).

[19] Venice Commission, CDL-AD(2015)012, Final opinion on the law on government cleansing (lustration law) of Ukraine, as would result from the amendments submitted to the Verkhovna Rada on 21 April 2015, Opinion no. 788/2014, 19-20 June 2015.

[20] Venice Commission Opinion no. 788/2014, cited above, paragraph 97.

[21] The Government acknowledged that "By 2004, the disclosure announcements had been published for eight years already and the publication of the KGB lists was always followed by wide-ranging reaction by the media and the public." (paragraph 33 of the Government's Observations).

[22] On publicity as a lustration means see *Matyjek*, cited above, and *Bobek*, cited above, and on the use of the Internet as an instrument of social control see my separate opinion,

position of the person subject to lustration is likened to that of an accused in criminal proceedings, in particular in so far as the procedural guarantees enjoyed by him or her are concerned.

13. Hence, disclosure mechanisms for lustration purposes, namely national security, public safety and the rights and freedoms of others, are acceptable if and when they have a clear and precise lawful basis, the interference with private life complies with the test of necessity[23] and the test of proportionality[24], and the law is applied individually, which implies the prohibition of collective guilt[25], and fairly, which requires at least the acknowledgment of basic procedural guarantees such as the right of defence, the presumption of innocence and the right of appeal to a court. To put it in Convention terms, disclosure mechanisms for lustration purposes, such as the one implemented in Estonia, must comply with the procedural standards akin to those of the criminal limb of Article 6 of the Convention.

The application of the international law standard in the present case

14. The applicant has not disputed the fact that from 1980 to 1989 he worked as a driver in the Tartu branch of the KGB and from 1989 to 1991 as a driver in the KGB Põlva branch. Thus, it is not disputed that the applicant worked in the KGB from 12 August 1980 to 5 November 1991, that is, even after the restoration of Estonia’s independence. It is also unequivocally clear that the applicant himself did not submit a confession under the Disclosure Act which would have ruled out the disclosure of his name; neither did he contest the KAPO’s notice of 27 February 2004. After the publication of the data on the applicant in the RTL on 16 June 2004, he

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annexed to *Yildirim v. Turkey*, no. 3111/10, 18 December 2012, about the collateral blocking of a site hosted on Google Sites.

[23] The test of necessity assesses whether the interference with the right or freedom adequately advances the “social need” (national security, public safety and the rights and freedoms of others) pursued and extends no further than necessary to meet the said “social need”. The “adequacy” test verifies whether there is a “rational connection” between the interference and the social need, by establishing a plausible instrumental relationship between them. The test of the less intrusive measure envisages the minimal impairment of the right or freedom at stake, by asking if there is an equally effective but less restrictive means available to further the same social need (see my separate opinion annexed to *Mouvement raëlien suisse v. Switzerland (GC)*, no. 16354/06, 13 July 2012).

[24] The test of proportionality evaluates whether a fair balancing of the competing rights, freedoms and interests has been achieved, whilst ensuring that the essence (or minimum core) of the right or freedom is respected (see my separate opinion cited in the previous footnote).

[25] PACE Opinion No. 175 (29 June 1993) on the application by the Slovak Republic for membership of the Council of Europe already encouraged the authorities of the Slovak Republic to eliminate all the laws or decrees discriminating against a group of persons or an ethnic, national community living on its territory, particularly those concerning ‘collective guilt” (§10).

quit his employment at the end of 2004, but at the beginning of 2007 was already back at the same job. The disclosed data included the place of employment at the time of the publication of the notice in the RTL. He complained of the interference with his private life on 20 June 2006. He also argued that the fact that his job as KGB driver was recorded on the birth certificates of his children issued by the Estonian SSR – that is, during the occupation period – which are held in the archives of the vital statistics office could violate his right to respect for his family life.

15. The publication in the RTL of the information about the applicant's employment by the KGB was lawful in so far as it was based on the provision of the Disclosure Act establishing the substantive grounds and procedure for the registration and disclosure of persons who had been in the service of or collaborated with the security or intelligence authorities. The Estonian courts, in their judgments in respect of the applicant, also clearly relied on the provisions of the Disclosure Act which purport to protect national security, public safety and the rights and freedoms of others. Yet they failed to ensure that a proper balance was achieved between those interests and the applicant's Article 8 right. The proportionality and necessity tests will provide evidence of that failure.

16. The proportionality test must first assess the personal scope of the Disclosure Act as it was implemented in the present case. At the time of debating the draft Act in the Riigikogu, it was agreed that a list of titles or positions would not be the most practicable solution as some titles might accidentally be omitted. For example, the position of a driver or a secretary may seem innocent but in essence not necessarily be so. In the explanatory memorandum to the Disclosure Act it was pointed out that "there have been cases when persons were officially hired as support staff but in reality were directly engaged in intelligence gathering and surveillance activities. Therefore each particular case has to be dealt with on the grounds of the activity (acts) of a particular person. For the same reason it is not possible to define the concept 'to cooperate in any other way knowingly and voluntarily' since the fact of cooperation with an organisation needs to be addressed as unique."

17. Having analysed the matter and sought additional information from the Estonian Internal Security Service, the Chancellor of Justice (*Õiguskantsler*) sent the Riigikogu a report, dated 12 July 2005, in which he concluded that the Disclosure Act was unconstitutional in so far as data on all employees of the security and intelligence organisations were made public with no exception being made in respect of the staff who merely performed technical tasks not related to the main functions of the organisations. He further found that the Disclosure Act was unconstitutional in that the person's place of employment at the time of the publication of the announcement was also made public.

Later on, the Chancellor of Justice changed his views. According to the information provided by the KAPO to the Chancellor, there was a large number of persons in respect of whom data were to be disclosed and before the disclosure of each specific case the KAPO was obliged to collect sufficient evidence which would also be convincing in possible judicial proceedings; therefore, due to the limited available resources, the focus was on cases which were important and which could involve a real danger to the Republic of Estonia. On the basis of this information, the Chancellor agreed that the use of an undefined legal concept which would be substantiated on a case-by-case basis was justified, as in practice the KAPO was exercising discretion in disclosing data on the persons in question. Discretion was thus being exercised first of all regarding the job position and type of collaboration in order to identify persons who, due to their position, could be influenced.[26]

18. Likewise, the Estonian Supreme Court expressed the view that being in the service of a repressive organisation (local body) of the Estonian SSR – including performance of auxiliary functions – placed persons in a different role from those who were not in the security or intelligence service during the occupation, and that service in the security authorities was regarded, under certain conditions, as a danger to the Republic of Estonia[27]. The Supreme Court affirmed that the staff performing auxiliary functions in the respective service had an inevitable link with the performance of the main functions of the authority and, through their work, at least created the conditions for the performance of its main functions[28]. The Supreme Court was of the opinion that there was also no possibility to establish with absolute certainty which functions anyone working in the security

[26] According to the Government, the KAPO had explained that drivers worked in close contact with operative agents and their superiors. Immediate work-related tasks were also given to drivers by operative agents or their superiors. It was team work, on the quality and quantity of which the achievement of operative goals depended. This constituted an essential difference in comparison with the other auxiliary staff whose work tasks were autonomous and not dependent on the operative goals. The KAPO had also given a practical example, noting that the 7th department of the KGB of the Estonian SSR, which was one of the central departments, had a separate position of a driver-intelligence officer dealing with secret surveillance. At the same time, the tasks of drivers in other regions – including the rural regions where the applicant worked – were usually more diverse than the tasks of drivers in Tallinn. Therefore, the official job position "driver" did not always necessarily simply involve driving. Some of the drivers continued their career in other positions as operative agents or intelligence officers. In sum, the position of a driver was often immediately linked to other tasks (like in rural regions) or served as a step for advancement to the next "more important" position (paragraphs 78-81 of the Government's observations).

[27] Supreme Court judgment of 3 January 2008 in administrative case No. 3-3-1-101-06.

[28] According to the Government, such an interpretation also extends to drivers since their job involved information about the movement, meetings, and so forth, of KGB employees, and they could also overhear conversations of persons whom they transported.

authorities of a foreign country was actually performing and to form comparable categories of persons on this basis.

19. Hence, the domestic courts found force in the argument that drivers could also perform other, more substantial, tasks and that, decades later, it was impossible to establish with absolute certainty what the exact role of a specific driver had been. The logical fallacy inherent in this argument is patent. The Estonian authorities themselves admitted that most of the time they had relied on assumptions and generalisations, since their sources of information were incomplete and indirect. The domestic courts drew a negative conclusion about the applicant from incomplete information[29]. Referring to the lack of evidence to the contrary, the domestic courts had established the relevance of the applicant's function within the KGB. An *argumentum ad ignorantiam* was used as a basis for the domestic courts' findings.

20. The Government's contention that, in practical terms, the KAPO did not deal with staff who had no connection with the main security or intelligence functions[30] is not only unconvincing, but also contradicted by the facts. First, the Government did not provide the Court with any evidence of such KAPO practice, for example by means of internal regulations or guidelines and their practical application. Second, the deficiency of the overbroad personal scope of the Disclosure Act cannot be cured by a judicial appeal, since there are no provisions in it empowering the courts to hold the KAPO's assessment of the current and significant dangerousness of the suspect unfounded in individual cases[31].

21. The blanket provision in Estonian law, which is an automatic, one-size-fits-all regulation under the Disclosure Act, is at odds with the basic individualisation principle of the human-rights-compatible lustration

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[29] As the Court of Appeal said, "Decades later it is impossible for the Estonian State to ascertain with full certainty whether a particular driver performed only technical or also substantive tasks. Therefore, the starting point should be a possibility that KGB drivers may also pose a potential security threat and a public interest for their disclosure may exist. Accordingly, the extension of the Disclosure Act to persons having worked as drivers of security and intelligence authorities is proportionate." The Government repeated this argument in paragraph 82 of their observations.

[30] Paragraph 86 of the Government's observations.

[31] This is the European criterion at the heart of the individualisation principle: lustration should target only those people who constitute a current and significant danger to democracy (*Adamsons*, cited above, § 116, and the Venice Commission Opinion no. 524/2009, cited above, § 108). The immense latitude of the Estonian legal framework allows for an interpretation based on the "understanding and sense of justice prevalent in society that KGB drivers were considered as subjects of the Disclosure Act and had to submit either a confession or be disclosed", like the one that the Government upholds in paragraph 81 of their observations. In addition to promoting uncertainty in the application of a law with possible dramatic consequences for those targeted and thus contradicting the basic tenets of the principle of legality (Venice Commission Opinion no. 524/2009, cited above, paragraph 50), this interpretation fosters social resentment and personal revenge.

standards of the Council of Europe. Even assuming that the KAPO did exercise some degree of discretion in selecting those suspects whose data were to be disclosed, a large-scale, Internet-based lustration process founded on a discretionary administrative practice which is not grounded on any specific legal criteria, such as the one taking place in Estonia, risks being misused for political and other illegitimate purposes, thus affecting social peace, the functioning of the State and the well-being of the economy, giving rise to targeted personal scapegoating, fostering serious social antagonism and stimulating revenge and rancour in society[32].

22. The temporal scope of application of the Disclosure Act is problematic in four ways: in relation to the period of time that is the subject of the disclosure measures (from 17 June 1940 to 31 December 1991), to the period of time that elapsed between the termination of the suspect's membership of, employment by or agency for the KGB and the disclosure of his or her KGB status, to the period of duration of the disclosure mechanism and to the period during which the disclosure measures should remain in force[33]. This evaluation is specifically connected with the idea that the passage of time reduces the weight of the exigencies of defending the newly established democracies, which underpins the legitimacy of lustration.

23. The application of the Disclosure Act breached the applicant's right to privacy on account of the long period of time that has passed since the termination of the applicant's KGB service and the dissolution of the Estonian branch of the KGB. While it is true that the Disclosure Act was passed less than four years after Estonia regained its independence and less than six months after the withdrawal from its territory of the last remaining troops of the former Soviet Union, the fact is that 13 years elapsed between 1991, the last year of the applicant's employment at the KGB, and 2014, the year of publication of the announcement on the Internet and on paper. The

[32] Venice Commission Opinion no. 788/2014, cited above, paragraph 33.

[33] In the *Ždanoka* case, the Court stated that the national authorities "must keep the statutory restriction under constant review, with a view to bringing it to an early end" (§ 135). In the *Rainys and Gasparavičius* case, the court criticised the very belated nature of the KGB Act, imposing the impugned employment restrictions on the applicants "a decade after the Lithuanian independence had been re-established and the applicants' KGB employment had been terminated" (§ 36). In the *Žičkus* case, the Court also observed that the KGB Law came into force in 2000, that is, almost a decade after Lithuania had declared its independence on 11 March 1990. Thus the restrictions on the applicant's professional activities were imposed on him at least a decade after he had ceased collaborating with the KGB. The fact of the Law's belated timing, although not in itself decisive, may nonetheless be considered relevant to the overall assessment of the proportionality of the measures taken (§ 33). In the *Adamsons* case, the Government's argument that the belatedness of their action after the applicant's 10-year military and political career in the free Latvia resulted from the fact that most of the KGB archives were in Russia and they therefore had difficulties in obtaining useful information concerning the applicant's past was rejected (§ 130).

Court was not provided with a plausible motive why the Estonian security service needed so much time to gather the information on the applicant[34].

24. Furthermore, generally speaking, the legally relevant period from 17 June 1940 to 31 December 1991 is not compatible with the 1996 Guidelines that set a time bar for suspect activities that occurred before 1 January 1980. Maintaining a legal obligation to confess non-criminal, professional activities that may have occurred thirty-five to seventy-five years ago is pointless[35]. The violation of these Guidelines is compounded by the circumstance that no time-limits were set by the legislature for the implementation of the disclosure mechanism and the validity of the concrete disclosure announcements already published. Maintaining an indefinite legal obligation to be subject to such a mechanism almost twenty-five years after the fall of communism in Estonia is even more pointless[36]. Keeping public, indefinitely, the identities of those who have not confessed or have provided false information is sheer, wanton punishment, to say the least[37].

25. The practical consequences of the application of the Estonian disclosure mechanism to the applicant were limited, according to the Government. In their view, the indefinite, widespread social stigmatisation of the applicant is "totally irrelevant"[38]. They added that no restrictions were

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[34] The justification that the KAPO was only ready to prove the data concerning the applicant in 2004 after it had received letter No. 11.6-12/04/20 of 21 January 2004 from Tartu County Administration's vital statistics department in which the KAPO was sent the transcripts of the birth registration records of the applicant's children which showed the applicant's employment in the KGB (para. 64 of the Government's observations) proves nothing. It only shows that in the case of the applicant the KAPO did not investigate of its own motion and triggered the disclosure proceedings on the initiative of a denunciation by another public authority.

[35] Rigorously speaking, the suspected activities should be considered only up until the fall of the communist dictatorship, which in Estonia occurred with the restoration of its independence on 20 August 1991. The Court should have clearly adopted the strict guideline from the 1996 Guidelines prohibiting the extension of the period of the past being screened to a period of time after the end of the communist totalitarian regime, since a democratic constitutional order should defend itself directly through the democratic functioning of its institutions and the safeguards of human-rights protection.

[36] See, for a similar argument, Venice Commission Opinion no. 788/2014, cited above, paragraph 70. In fact, Guideline (g) of the 1996 Guidelines quite rightly recommended that lustration measures should "preferably end no later than 31 December 1999, because the new democratic system should be consolidated by that time in all former communist totalitarian countries." No one would dispute that the democratic regime is now consolidated in Estonia.

[37] It is relevant to note that, six years after the end of the Second World War, the Law on the end of denazification of 11 May 1951, as well as the Law on the regulation of the legal position of persons falling under article 131 of the Basic Law, put an end to denazification in West Germany. With the exception of persons with special responsibilities in the Nazi regime (*Hauptschuldige* and *Belastete*), persons were allowed to return to their public offices.

[38] Paragraph 87 of the Government's observations. Nevertheless, the Government admitted that the disclosure measure has an inherent defamatory element which is not totally absent

imposed on the activities of the persons whose data were disclosed and that at least at the beginning of 2007 the applicant himself was also back at work with the same employer for whom he had worked at the time of the disclosure of the notice[39]. The Government also emphasise that the proportionality of the disclosure in comparison with any interference with private life was additionally ensured by the fact that the announcement in the RTL disclosed specific job positions together with the dates of employment, which helped to avoid any public speculation as to the job that the applicant had had in the KGB[40], as well as the present job position, in order to avoid confusion with other persons with the same names[41].

26. The lightness with which the Government refer to the consequences of the disclosure of the applicant's past on the Internet must be challenged. As underscored by the majority, the adverse consequences for the applicant's professional and social life are patent and should not be neglected. The fact that the present job status of the applicant was made public only aggravated the effect of the Convention breach. To make it even worse, the literal terms of the announcement are ambiguous with regard to the applicant in so far as they refer to "persons who have served in or co-operated with security organisations or intelligence or counterintelligence organisations of armed forces of States which have occupied Estonia", which could imply that the applicant had been instrumental to an intelligence or security organisation of a foreign country during its occupation of Estonia, namely, an informant for Russia.

27. Lastly, the Government claim that there is no alternative to such disclosure that would be less restrictive of the Convention rights and freedoms and nonetheless operate with the same degree of efficiency, because the oath of conscience is no longer valid and security clearance of additional offices would bring about a severe infringement of an individual's fundamental rights. This line of argument is unfounded. Neither the oath of conscience nor the security clearance nor any other lustration

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in spite of the applicable procedural guarantees (paragraph 45 of the Government's observations). The Tallinn Court of Appeal judgment of 22 November 2007 also explicitly recognised the potential damage to the applicant's reputation as a result of the disclosure of his relations with the Soviet security organisations (paragraph 31 of the judgment). In other words, the "name and shame" procedure has a punitive character on top of its alleged preventive purpose.

[39] Paragraph 70 of the Government's observations.

[40] Paragraph 84 of the Government's observations.

[41] The Government's justification is that "There are many people with the same name in Estonia and to protect their rights under Article 8 the announcements had to be sufficiently precise to avoid confusion about the identity of the persons. The Tallinn Court of Appeal in its judgment of 22 November 2007 also noted that this measure helped to avoid mixing up persons with the same name in the eyes of the public (point 12 of the judgment)." (paragraph 45 of the Government's observations). But the Government admitted that "the disclosure of the place of work did not always ensure the rights of third persons either".

measure is admissible in the private sector under Convention standards[42]. In the public sector, the suppression of the oath of conscience reflects the maturity of a democracy that can cope with political pluralism among public servants. In a democratic society the interests of national security, public safety and the protection of the rights and freedoms of others can be sufficiently safeguarded by a parsimonious regime of security clearance of strategic public-sector offices[43].

Conclusion

28. Lustration is an extraordinary measure of a democracy defending itself[44]. To the extent that it respects European human-rights and rule-of-law standards, it is admissible alone or in conjunction with an array of common criminal-law sanctions. The social need to break with the tarnished past of a nation and for reform of the State apparatus must be reconciled with the human rights of those lustrated, otherwise democracy will itself not differ from the draconian, repressive instruments of the previous political regime. As an exceptional means of transitional policy, any lustration mechanism must be strictly limited in object and time. This is particularly true in the case of publication of defamatory information on the Internet by State authorities, in view of its long-lasting and widespread negative effects on the life of the person being targeted.

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[42] I regret that the Chamber did not clarify this point. It was high time that the Court clearly aligned its case-law with the 1996 Guidelines in the prohibition of lustration in the private sector (Guideline f). To use the words of the German Federal Constitutional Court, *Für eine berufliche Tätigkeit in der freien Wirtschaft gibt es, was die politischen Aktivitäten anlangt, nur die Schranken der allgemeinen Strafgesetze und die Androhung der Verwirkung von Grundrechten gemäß Art. 18 GG; im übrigen gilt das Grundrecht der Berufsfreiheit* (BVerfG, 22.05.1975 - 2 BvL 13/73).

[43] The Government provide two examples to justify their contention that the disclosure mechanism continues to be important for Estonia for the protection of national security (paragraph 65 of the Government's observations): Vladimir Veitman, who had been in the service of the KGB of the Estonian SSR from 1980 to 1991 (he was convicted of treason by the Harju County Court judgment of 30 October 2013 in a settlement procedure, appendix 22) and Hermann Simm, who had been collaborating with the KGB of the Estonian SSR (he was convicted of treason by the Harju County Court judgment of 25 February 2009 in a settlement procedure, appendix 23). In both cases the earlier connection of these persons with the intelligence authorities of the Soviet Union was exploited. The latter is a former high-level Ministry of Defence official and the former a member of the KAPO itself. Even assuming that these cases could provide a picture of the current danger that Estonia is allegedly facing, they would disprove the Government's contention. In fact, they show that drivers in the private sector are not exactly the type of suspects that should be lustrated.

[44] The Court has repeatedly referred to the concept of a "democracy capable of defending itself" (see *Vogt*, cited above, § 59; *Sidabras and Džiautas*, cited above, § 54; *Bester v. Germany (dec.)*, no 42358/98, 22 November 2001; and *Knauth v. Germany (dec.)*, no 41111/98, 22 November 2001).

29. The Estonian disclosure mechanism is not an extraordinary measure, since it envisages securing a confession from an indeterminate, large category of citizens about their former political and professional background even when these do not constitute a current and significant danger to human rights and the democratisation process. Thus, it is prone to be misused as an instrument of partisan discrimination, personal revenge and political witch-hunting. In addition to an overbroad definition of the objects of the law and of the period of the past to be screened, it does not set a period during which the disclosure mechanism and the disclosed information remain effective.

30. The applicant was the victim of that disproportionate disclosure mechanism. It is now up to the respondent State not only to compensate him for non-pecuniary damage, but also to withdraw his name from the impugned RTL list, which is the source of the Convention violation. Furthermore, having regard to the systemic effect of the findings of the present judgment, the respondent State must evidently also reform the Disclosure Act in the light of the above-mentioned binding international standards.

JOINT DISSENTING OPINION OF JUDGES HAJIYEV, LAFFRANQUE AND DEDOV

1. To our regret, we cannot subscribe to the Chamber's finding of a violation of Article 8 of the Convention in the present case.

2. At the outset, we would like to note that this case concerns the publication of information about the applicant's service in the KGB as a driver, after he was invited to voluntarily confess his service to the Estonian Internal Security Service, which he of his own accord chose not to do. Viewed in the context of the Court's case-law on forms of individualised reactions to cooperation with totalitarian regimes, this case is concerned with the mildest of those reactions.

3. In deciding the case, the majority have, firstly, failed to take into account essential aspects of the purpose behind the impugned measure (see below, § 5). Secondly, they have ignored the scope of the margin of appreciation afforded to the States in the Court's case-law (see below, §§ 6-8). Thirdly, in the light of this margin of appreciation, while assessing the necessity of the impugned measure in a democratic society, the majority have overlooked several features of the case. In particular, they have criticised the lack of an assessment of the specific tasks performed by individual employees of the former security services, but have themselves not taken into account the fact that according to the Court's case-law, the requirement for "individualisation" is not a precondition for the compatibility of a measure with the Convention when the legislative framework is itself proportionate and not discriminatory (see below, § 9). In this context the majority have not considered the graduated approach in Estonian legislation to the different persons concerned and have not taken into account the procedural and substantive safeguards in Estonian legislation to prevent errors and unjustified or arbitrary interferences (see below, §§ 10-18). They have overstated the significance of the impugned publication's consequences for the applicant (see below, §§ 19-22) and have failed to comprehend that these were far less serious than the consequences faced by applicants in other cases concerned with forms of individualised reactions to cooperation with totalitarian regimes (see below, § 23). In the same vein, the majority have attached undue weight to the applicant's job title in the KGB, and to the time that had elapsed between his service and publication of the notice about it (see below, §§ 24-29).

4. These shortcomings in the majority's reasoning have in our opinion led to the wrong conclusion. Instead, we suggest that the interference with the applicant's right to respect for his private life was necessary in a

democratic society and constituted a proportionate measure, and we do so for the following reasons.

Purpose of the interference

5. Before turning to the assessment of the proportionality of the impugned measure, we would like to underline two specific aspects regarding its purpose. Firstly, the publication of the information also served as an expression of individualised moral disapproval of service with the security and intelligence organisations of the totalitarian regimes which have occupied Estonia, including Nazi Germany. Secondly, it also served as an expression of moral disapproval of the choice not to confess one's service and thereby also to refuse to help the new democratic regime in its efforts to dismantle the heritage of the totalitarian regimes. We refer in this context to the Disclosure Act, pursuant to which persons who wished to confess their service were required to come to the office of the Estonian Internal Security Service. They were required to state in which capacity they had served in or cooperated with security or intelligence organisations and the time of their service in or cooperation with those organisations. They were also required to submit other information concerning their activities in the security or intelligence organisations, except for any information which might have been used against them or persons close to them. The Estonian Internal Security Service could ask them questions and could summon them to specify information about their service. In the absence of complete archives, this was needed to develop an understanding of the methods, tactics and operations of those organisations, as well as the network of persons who had worked for them or secretly collaborated with them.

Margin of appreciation

6. It is unfortunate that the majority failed to see the overall context of this case and its consequences for Estonian society and security, to respect subsidiarity and the margin of appreciation and to leave any room for the respondent State and its courts to deal with sensitive issues of a moral, historical and political nature, given that there was no disproportionate interference with the applicant's rights and no manifest errors or arbitrariness in the actions of the authorities, including the domestic courts.

7. The approach of the majority is in contradiction to the ideas expressed by the Court in *Cichopek and Others v. Poland* ((dec.), nos. 15189/10 and other applications, 14 May 2013), where the Court found as follows (§ 143):

> "It is a matter of common knowledge that the political transition in the post-communist countries has involved numerous complex, far-reaching and controversial reforms which necessarily had to be spread over time. The dismantling of the

> communist heritage has been gradual, with each country having its own, sometimes slow, way to ensure that the past injustices are put right and accounts settled. Even though on the collapse of the totalitarian regimes those countries faced similar problems, there is, and there can be, no common pattern for the restructuring of their political, legal or social systems. Nor can any specific time-frame or speed for completing this process be fixed.
>
> Indeed, in assessing whether in a given country, considering its unique historical and political experience, 'the public interest' requires the adoption of specific de-communisation measures in order to ensure greater social justice or the stability of democracy, the national legislature empowered with direct democratic legitimation is better placed than the Court. ... By the same token, the national authorities, having direct knowledge of their country, are entitled to condemn, in the form and at the time chosen by them, past institutions or activities which, as shown by the country's historical experience, had not respected the principle of democracy, the rule of law and human rights."

8. We reiterate that it is not the Court's role to arbitrate on historical issues (compare *Dzhugashvili v. Russia* (dec.), no. 41123/10, § 33, 9 December 2014). It must exercise caution when scrutinising decisions made in this connection by a democratically elected legislature wishing to draw a clear line between the former regime together with its oppressive institutions and the newly established democratic order, to offer reconciliation with the past and to help to make good past injustices. The expectations of society and the legislature's choices in different countries inevitably differ in such matters, depending on their unique historical experience. In such matters the Court should have due regard to the principle of subsidiarity and allow the States an appropriate margin of appreciation.

Graduated approach in Estonian legislation

9. As regards the analysis of the proportionality of the impugned measures in the present case, we are of the opinion that the Estonian authorities adopted a graduated approach towards the persons concerned and that the relevant Estonian legislation contained adequate safeguards against unjustified interferences.

10. In this connection we would like to point out that the Convention does not, in principle, prevent Contracting States from introducing general policy schemes by way of legislative measures whereby a certain category or group of individuals is treated differently from others, provided that the interference with the rights of the statutory category or group as a whole can be justified under the Convention. As long as the statutory distinction itself is proportionate and not discriminatory as regards the whole category or group specified in the legislation, the task of the domestic courts may be limited to establishing whether a particular individual belongs to the

impugned statutory category or group. The requirement for "individualisation", that is, the necessity of supervision by the domestic judicial authorities of the proportionality of the impugned statutory restriction in view of the specific features of each and every case, is not a precondition of the measure's compatibility with the Convention (see, for example, *Ždanoka v. Latvia* [GC], no. 58278/00, §§ 112-14, ECHR 2006-IV, and *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, §§ 106 et seq., ECHR 2013, both with further references). In order to determine the proportionality of a general measure, the Court must primarily assess the legislative choices underlying it, keeping also in mind that by reason of their direct and continuous contact with the vital forces of their countries, their societies and their needs, the legislative and judicial authorities are best placed to assess the particular difficulties in safeguarding the democratic order in their State (see *Animal Defenders International*, cited above, §§ 108 and 111, with further references).

11. In Estonia several measures aimed at dealing with the legacy of the half-century-long sequence of occupation regimes have been taken. Persons who had suffered from repressions were granted certain benefits (see paragraph 15 of the judgment). Persons who had committed crimes against humanity have been brought to justice (see, for example, *Kolk and Kislyiy v. Estonia* (dec.), nos. 23052/04 and 24018/04, ECHR 2006-I, and *Penart v. Estonia* (dec.), no. 14685/04, 24 January 2006). The right of former servicemen and agents of the security, intelligence and counter-intelligence services of countries that had occupied Estonia to stand for election and enter public service was temporarily – until 31 December 2000 – restricted by the Constitution Implementation Act, passed by a referendum (see paragraph 7 of the judgment). Former servicemen and collaborators of the security services were registered by the Estonian Internal Security Service if they made a confession concerning their service or collaboration. In the event that they failed to make such a confession, the fact of their service or collaboration was made public (see paragraphs 8 to 13 of the judgment).

12. We consider that these measures – ranging from criminal sanctions to employment restrictions in the public sector and conditional disclosure of certain items of personal information, as well as the granting of benefits to victims – demonstrate, at legislative level, a graduated approach towards the persons concerned.

Safeguards in the Estonian legislation

13. The procedural elements of the Disclosure Act guaranteed the protection of the applicant's rights by giving him the possibility of

preventing and also contesting the decision to publish the information in question both prior to and after its publication.

14. As far as the specific procedure put in place under the Disclosure Act is concerned, the Act provided that persons falling under it could prevent publication of their names in *Riigi Teataja Lisa* by submitting a confession about their service in or collaboration with the security or intelligence organisations listed in the Disclosure Act. We consider this element to be of importance, and find that the context of the present case differs substantially from that dealt with in *Žičkus v. Lithuania* (no. 26652/02, 7 April 2009), where the applicant's danger to national security, if employed in the private sector, was at issue.

15. According to the information provided by the Estonian Government, 1,153 persons submitted a confession to the Estonian Internal Security Service within one year of the entry into force of the Disclosure Act in order not to have information about their service in or collaboration with the security and intelligence organisations published (see paragraph 13 of the judgment). According to the Government, the Estonian Internal Security Service has affirmed that the persons who submitted such a confession also included drivers.

16. Furthermore, we note that the procedure followed under the Disclosure Act prescribed that the text of the announcement to be published was made known to the persons concerned beforehand and that its factual basis, as well as the constitutionality of the publication as such, could be contested in court before its publication. The burden of proof as regards the information to be published (that is, the fact of service in or collaboration with the security or intelligence organisations) lay with the Estonian Internal Security Service. Thus, we consider that there existed strong procedural safeguards for the prevention of any possible mistakes, arbitrariness or abuses relating to the publication of the information in question.

17. We would like to emphasise that the applicant did not contest either the factual basis or the constitutionality of the publication and he did not question the wording of the text to be published as such (for example, the use of the word "occupier") prior to its publication either.

18. As to the substantive safeguards offered by the legislation, we note that pursuant to the Disclosure Act, the period of service or collaboration of the persons concerned and the capacity in which they were involved in the activities of the former security organisations were made public. We consider that publication of these aspects was in line with the aim of consolidation of an open society and the dissemination of information about

the functioning of totalitarian regimes, and in this spirit it also shed light on the degree and level of the collaboration of the persons concerned. Being employed in the former security organisations in the era of mass repressions, spending one's whole career in these institutions or performing important functions undoubtedly carried a different connotation from short-term employment in a less important function. In the same vein, employment by the former security organisations gave rise to a different perception in society as compared to secret collaboration with them. The availability of such official and verified information allowed the members of society to make an informed assessment of the degree and level of a specific individual's past involvement in the security services.

19. Moreover, the publication and the personal confession also allowed those concerned to protect themselves against any undue accusations or blackmailing. In this connection, we would refer also to the dissenting opinion of Judges Jočienė, Tsotsoria and Sajó in *Žičkus v. Lithuania* (cited above), which states in paragraph 3 that the law applicable in *Žičkus* was also concerned with one particular consequence of past secret collaboration, namely the fact that all secret collaborators might be open to blackmail, and that one of the intentions of this law was to prevent private and institutional blackmail and that, as such, it served national security considerations too.

Consequences of the interference for the applicant

20. In this context it is important to take note of the fact that the applicant not only never disputed the fact of his service in the KGB for a considerable period of more than ten years, but even submitted that this fact had been publicly known and also known to his employer. The information was also included in his employment record book. Furthermore, the applicant did not contest before the Court the disclosure of his (current) place of employment – that is, his employment at AS Tarbus at the time of publication. Neither could it be seen that the company which employed him (a relatively big bus company) was concerned in any manner about its own name being published as the current employer of the applicant.

21. Although the details of the applicant's past employment had not been the subject of widespread media comment before their official publication (compare and contrast *Editions Plon v. France*, no. 58148/00, § 53, ECHR 2004-IV) and it is doubtful that these facts were known to a significantly wider circle than the applicant's employers and acquaintances, the same also applied to the level of public attention paid to the applicant's past employment after the information about it had been published in *Riigi Teataja Lisa*; the applicant has not argued that the information in question was the subject of any media comment after its publication.

22. As regards the applicant’s argument about his loss of employment as a result of the publication of the information in question, we consider that this argument is neither entirely consistent nor supported by evidence. We therefore disagree with the conclusions drawn in paragraph 63 of the judgment. As noted above, according to the applicant, he had not concealed the fact of his employment in the KGB and this fact had already been publicly known before the publication of the information. At the same time, he submitted that his colleagues had derided him after the publication of the announcement. Furthermore, while the applicant argued that he had been forced to quit his job, he resumed his employment with the same employer after a while (see paragraph 25 of the judgment). In connection with his claim for just satisfaction, the applicant referred to the loss of four months’ salary without submitting any evidence in this respect. For that reason the Court rejected his claim in respect of pecuniary damage (see paragraph 68 of the judgment). In these circumstances, we are unable to find that the interruption of the applicant’s employment was attributable to the respondent State, regard also being had to the fact that the Disclosure Act did not provide for such consequences and that it was open to the applicant to challenge any possible unlawful termination or interruption of his employment according to the labour law in force. Similarly, civil-law remedies were at the applicant’s disposal as regards any possible damage to his personality rights (for example, injury to his honour) caused by third parties. However, the applicant has not argued that he has made use of any such remedies.

23. In respect of the applicant’s argument that in the announcement he was called an occupier (*okupant*) – a word referring to persons who had invaded the country and exerted the power associated with occupation there, and bearing a strongly negative connotation in Estonian – we would like to clarify that this argument was disproved by the domestic courts, which found that the text used in respect of the applicant did not state that he was an occupier; rather, the word “to occupy” in the announcement referred to the States who had occupied Estonia (see paragraphs 27 and 33 of the judgment). We are unable to discern any fault in this self-evident and logical assessment and share the opinion of the domestic courts; therefore, the applicant’s arguments relating to the word “occupier” are manifestly groundless.

24. In this context, we would lastly emphasise that the case differs considerably from the Court’s previous case-law about various measures that have been applied in connection with the issues of dismantling the heritage of former communist totalitarian systems (see *Ždanoka*, cited above; *Ādamsons v. Latvia*, no. 3669/03, 24 June 2008; *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, §§ 42-50, ECHR 2004-

VIII; *Rainys and Gasparavičius v. Lithuania,* nos. 70665/01 and 74345/01, 7 April 2005; *Žičkus*, cited above; and *Matyjek v. Poland*, no. 38184/03, 24 April 2007). In particular, we would like to underline that this case is not about criminal sanctions or employment restrictions in the public or private sector. None of the cases referred to above involved situations where the applicants' complaints were limited to the mere fact that their service in the security or intelligence organisations of an undemocratic regime had been made public.

The applicant's functions in the KGB

25. We have taken note of the emphasis placed by the applicant on the fact that he served as a mere driver in the KGB (see also the reasoning in paragraph 61 of the judgment). Indeed, according to the announcement published, he had been employed by the KGB in that function from 12 August 1980 to 5 November 1991. Nevertheless, according to the information provided by the Government, on thirteen occasions between 1997 and 2009 the names of a total of 647 persons were published in *Riigi Teataja Lisa* and among them there were drivers, of whom at least seven had advanced to higher positions during their career in the KGB (see paragraph 13 of the judgment). The Court of Appeal found, however, that it was not possible to establish with absolute certainty which tasks a specific driver had performed. Having regard to the fact that the most important parts of the KGB archives had been removed from Estonia and that the Estonian authorities therefore apparently had to rely on incomplete and indirect information, we accept that this would have been a difficult task. However, under the terms of the Disclosure Act, the domestic authorities were not required to establish further factual circumstances beyond the fact of a person's service in the former security organisations. The disclosure procedure under the Disclosure Act did not amount to criminal charges, in which case it would have been essential to establish specific acts committed by a specific person. The disclosure procedure, in the present case, involved official publication of the information that the applicant was a former serviceman of the KGB. Service in the KGB was not and is not, as such, a crime, and employees of the KGB have not been collectively treated as accomplices to the crimes committed by certain members of that security organisation. On the contrary, the collective liability of employees of institutions such as the KGB has been explicitly excluded by the Estonian Parliament (*Riigikogu* – see paragraph 14 of the judgment).

26. In any event, regardless of the applicant's functions in the KGB, by making a confession he could have assisted the new democratic regime in its endeavours to dismantle the heritage of the totalitarian past. He chose not to do so.

27. We consider that questions relating to access to and publication of information concerning the functioning of the security services of former regimes involve a delicate balancing exercise between different values of a moral, legal and political nature. Society's general interest in the establishment of the historical truth cannot be underestimated in this connection. Furthermore, organisations that served as the main tools of oppressive regimes also employed, besides the masterminds of the oppression, persons who supported the regime in a seemingly neutral manner, but without whom the organisations could not have functioned. Save for the cases of mandatory service or forced collaboration, these persons, by becoming employed by the secret services, made a choice in their lives, a choice that was different from that of the majority of members of society. We refer again in this connection to the Court's recent decision concerning former staff of communist secret services, in which it stressed that the applicants had been functionaries of the State security authorities whose *raison d'être* had been to infringe the most fundamental values on which the Convention was based (see *Cichopek and Others*, cited above, § 142 *in fine*); that case also involved applicants who had served as typists and clerks (ibid., § 44). It takes more than one dictator, a couple of generals and a bunch of executioners to run an oppressive regime. Such regimes rely on the collaboration and approval of a much larger number of individuals who themselves may have never committed any crimes but without whose support the whole system could not survive. It goes without saying that these people cannot and should not be retroactively convicted. However, moral disapproval of their collaboration is a different matter.

The time between service in the KGB and publication

28. We disagree with the outcome of the question dealt with in paragraph 62 of the judgment as to whether the publication of the information about the applicant's former service in the KGB could have constituted a disproportionate interference on account of the long period of time that had passed since the termination of his service and the dissolution of the Estonian branch of the KGB (compare *Sidabras and Džiautas*, cited above, § 60, and *Ādamsons*, cited above, § 129). We note, in this connection, that the Disclosure Act was passed less than four years after Estonia regained its independence and less than six months after the withdrawal from its territory of the last remaining troops of the former Soviet Union, for which the Russian Federation had assumed jurisdiction after the dissolution of the Soviet Union. We do not consider that in these circumstances the time of the enactment of the Disclosure Act can be seen as reflecting the lack of a genuine necessity to take the measures envisaged by the Act (compare *Ždanoka*, cited above, § 131, with references to further cases discussed therein; compare also *Cichopek and Others*, cited above,

§ 143). The same applies to the publication of the information specifically about the applicant: we understand that the newly created Estonian security institutions needed time to gather the information which they continued to publish annually, depending on the material and evidence becoming available from various sources in the absence of complete archives. In addition, as explained above, the publication served not only as an expression of moral disapproval of the applicant’s service with the KGB, but also as an expression of moral disapproval of his choice not to confess his service and not to assist the new democratic regime in dismantling the totalitarian heritage. The period between the time the applicant decided to refuse to make a confession and the time when the information was published cannot in this context be considered significant.

29. In addition, we would like to draw attention to examples of the continued relevance of the measures taken to deal with the totalitarian past, namely the documents adopted by the Council of Europe in 1996 and 2006 and by the European Parliament in 2008 and 2009, quoted in paragraphs 41 to 44 of the judgment. In particular, we would like to emphasise the wording of PACE Resolution 1481 (2006) of 25 January 2006 on the need for international condemnation of crimes of totalitarian communist regimes, which in paragraph 7 reads as follows:

> “The Assembly is convinced that the awareness of history is one of the preconditions for avoiding similar crimes in the future. Furthermore, moral assessment and condemnation of crimes committed play an important role in the education of young generations. The clear position of the international community on the past may be a reference for their future actions.”

Viewed in this context also, the publication in 2004 of the announcement about the applicant’s KGB service was not an inappropriate step.

30. Furthermore, in addition to the awareness and prevention aspects, we would like to point out the worrying and frightening examples given by the Government of cases where former employees or collaborators of the KGB had provided a foreign country with State secrets leading to their conviction for treason (see paragraph 54 of the judgment).

Conclusion

31. Having regard to the above, we conclude that the applicant’s right to respect for his private life was not subjected to disproportionate interference in the present case and that there has accordingly been no violation of Article 8 of the Convention.

32. In addition, we would like to underline once more that there is no previous case-law dealing with this type of reaction to cooperation with the

regimes of the past. Nevertheless, the issue of appropriate methods in this context is still pertinent in many member States of the Council of Europe (for instance, Ukraine has recently passed a law on cleansing the government (Law on Lustration); in addition, there are cases pending before the Court against “the former Yugoslav Republic of Macedonia” (nos. 78392/14 and 229/15).

33. We are of the opinion that the finding of a violation in the present case raises a serious question affecting the interpretation and application of Article 8 of the Convention in this context. In our view there is no reason to hold that the simple publication of information with adequate safeguards as undoubtedly the mildest form of individualised moral disapproval of cooperation with totalitarian regimes conflicts with the values of the Convention.