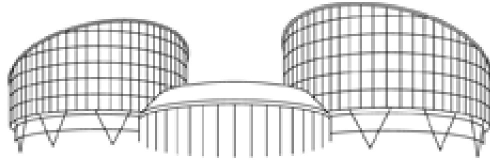

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

# CASE OF NAVALNYY AND OFITSEROV v. RUSSIA

*(Applications nos. 46632/13 and 28671/14)*

JUDGMENT

STRASBOURG

23 February 2016

*This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.*

**In the case of Navalnyy and Ofitserov v. Russia,**

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

Luis López Guerra, *President,*
Helena Jäderblom,
George Nicolaou,
Helen Keller,
Johannes Silvis,
Dmitry Dedov,
Branko Lubarda, *judges,*
and Marialena Tsirli, *Deputy Section Registrar,*

Having deliberated in private on 19 January 2016,

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

## PROCEDURE

1. The case originated in two applications (nos. 46632/13 and 28671/14) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Russian nationals, Mr Aleksey Anatolyevich Navalnyy and Mr Petr Yuryevich Ofitserov ("the applicants"), on 24 June 2013 and 8 April 2014 respectively.

2. The applicants were represented by Ms O. Mikhaylova and Ms S. Davydova, lawyers practising in Moscow. The Russian Government ("the Government") were represented by Mr G. Matyushkin, Representative of the Russian Federation to the European Court of Human Rights.

3. The applicants alleged that their criminal conviction for embezzlement had been based on an unforeseeable application of criminal law, in breach of Article 7 of the Convention, and that those proceedings had been conducted in violation of Article 6 of the Convention. They also alleged that their prosecution and conviction had been for political reasons, in breach of Article 18 of the Convention.

4. On 7 October 2014 the applications were communicated to the Government. It was also decided to grant the applications priority under Rule 41 of the Rules of Court.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1976 and 1975 respectively and live in Moscow.

6. The first applicant is a political activist, opposition leader, anti-corruption campaigner and popular blogger. He is a lawyer and was, before his criminal conviction, a member of the Moscow bar association. The second applicant, a businessman, was at the material time a director of the limited liability company OOO Vyatskaya Lesnaya Kompaniya (*ООО «ВЛК»* – hereinafter "VLK").

#### A. Timber sales contract between Kirovles and VLK

7. In 2007 the Kirov region's Property Management Department founded the State unitary enterprise Kirovles (*КОГУП «Кировлес»*). According to its incorporation documents, Kirovles' commercial activities were woodcutting and timber processing. It owned thirty-six timber mills registered as its operational branches. It appears that by 2009 the company was in substantial debt and continued to make losses.

8. In January 2009 the Governor of the Kirov region, Mr Belykh, invited the first applicant to be a volunteer consultant on enhancing transparency of the region's property management. At first, Mr Navalnyy carried out this role de facto, before being officially appointed on 21 May 2009. One of his projects was to help steer the region's loss-making timber industry out of crisis.

9. In early 2009 the first applicant discussed Kirovles' financial and logistical problems with its director, X. He suggested that the company join forces with a timber trading company to bring in customers and, in particular, curtail the Kirovles timber mills' practice of direct sales for cash bypassing Kirovles' accounts. X agreed, and the first applicant invited the second applicant, who he knew would be interested in working in the industry, to set up the timber trading company. The second applicant created VLK and registered it in March 2009.

10. On 15 April 2009 Kirovles, represented by X, concluded a framework contract with VLK, represented by the second applicant. The contract provided for non-exclusive sales by Kirovles to VLK, who would then sell the goods on to the customers at 7% commission. The timber specifications and prices were set out in thirty-six annexes to the contract, which were signed in the period 15 April to 13 July 2009. In accordance with the contract, from 12 May to 31 August 2009 Kirovles supplied VLK with timber worth 16,165,826 Russian roubles ((RUB), the equivalent of approximately 330,000 euros (EUR) at the material time).

11. On an unidentified date X's stepdaughter, Ms B., the then director of Kirovles' commercial department, was employed by VLK part-time as its deputy director general.

12. Between July and August 2009 the first applicant commissioned Kirovles' audit. In view of its results, the Governor's office set up a working group for restructuring Kirovles, to which the first applicant was appointed.

13. On 17 August 2009 the property management department suspended X as Kirovles' director, and on 17 October 2009 he was dismissed for mismanagement.

14. On 1 September 2009 Kirovles terminated the contract with VLK.

#### B. Kirovles fraud inquiry

15. In the course of 2010 the first applicant pursued an anti-corruption campaign and published a number of articles and documents exposing high ranking officials' involvement in large-scale fraud. In particular, on 16 November 2010 he published an article claiming that at least four billion US dollars of State funds had been misappropriated during the construction of the East Siberia-Pacific Ocean oil pipeline. In the article, he referred to a 2007 audit report and suggested that the President, Vladimir Putin, and the Deputy Prime Minister, Mr Igor Sechin, had both been personally implicated.

16. On 9 December 2010 the Kirov Regional department of the Prosecutor's Office (later replaced by the Investigative Committee of the Russian Federation – "the Investigative Committee") opened an inquiry on suspicion that the applicants had defrauded Kirovles by inducing its director to enter into a loss-making transaction. When questioned, X stated that he had met Mr Ofitserov and Mr Navalnyy at the Governor's office and had complained to them that Kirovles was making losses because of falling timber prices and a lack of customers, among other reasons. Mr Navalnyy had later returned to him with the idea of setting up a trading intermediary, VLK, to bring customers to Kirovles, and they had concluded the contract. He indicated that although VLK had paid average market prices for the timber, he had later realised that their commission and the terms of supply had cost Kirovles extra, making it unprofitable. He had therefore terminated the contract. X further stated that when concluding the contract he had been under the impression that Mr Navalnyy had been acting in his official capacity at the Governor's office, and that as a State enterprise director he had to comply with the decisions of regional government. Two other former Kirovles employees were questioned, Ms B. and its deputy director Z. They confirmed that although VLK had paid average market prices, Kirovles could have increased its margins by selling the timber directly and it had therefore made a limited profit on these sales. They also claimed that the contract had been entered into under pressure from both applicants, whom their director had perceived as acting for the Governor.

17. The Investigative Committee also questioned the second applicant. He stated that he had approached X directly because he knew that Kirovles needed customers and he had offered to act as an intermediary. The other party had not been subjected to pressure or deception, the prices had been fair, and the first applicant had not been involved in the negotiations. The first applicant was not questioned because "his whereabouts could not be established".

18. On 11 January 2011 the Investigative Committee decided not to open a criminal investigation against either applicant for lack of *corpus delicti*.

19. On 12 January 2011 criminal proceedings were instituted against X for alleged abuse of his official position, unrelated to VLK; he was suspected of preferential treatment of a different private company he was affiliated with through his family.

20. On an unidentified date the inquiry resumed in respect of the applicants. The investigator questioned X, Ms B., Kirovles' deputy director Z., the Deputy Head of the Kirov Regional Government, S., and both applicants. The first applicant stated, in particular, that after X had reported to the Governor on Kirovles' losses and lack of customers, the Governor had made an appeal to businesses interested in a commercial partnership with Kirovles. VLK had responded, along with others; the Governor's office had not asked Kirovles to show any preference for VLK or taken part in the contract negotiations. The sales to VLK amounted to only 2% of the total volume of Kirovles' sales.

21. On 28 January 2011 the Investigative Committee decided not to open a criminal investigation against the first applicant for lack of *corpus delicti*. As regards the second applicant, they decided to transfer the inquiry file to the Kirov Regional Department of the Interior, which had competence to decide whether there were grounds to open a criminal investigation.

22. On 2 February 2011 the first applicant gave a radio interview with a strong anti-corruption message, describing the ruling party of United Russia as "a party of crooks and thieves".

23. On 7 February 2011 the inquiry resumed. The investigators questioned both applicants, X, two other former Kirovles employees, Ms B., two other former VLK employees and its then director (the second applicant's brother), as well as five high-ranking officials of the Kirov region, including its Governor. He stated that in 2008 Kirovles had been in a difficult financial situation and had substantial debt. He had therefore assigned the first applicant to study ways of restructuring Kirovles, and the latter had participated in working groups and working meetings concerning this matter. He explained that the first applicant had not been able to put pressure on X or influence the commercial activities of the timber industry, including Kirovles. It was he himself who had ultimately taken the decision to terminate the contract between Kirovles and VLK as a result of a series of working meetings between him, X and both applicants.

24. On 9 February 2011 the Commercial Court of the Kirov region placed Kirovles in administration.

25. On 3 March 2011 the Privolzhskiy Federal Circuit Investigative Committee decided not to open a criminal investigation in respect of the applicants for lack of *corpus delicti*.

26. On 10 May 2011 the acting Chief of the investigation division of the Investigative Committee decided to open a criminal investigation in respect of both applicants. They were suspected of deception and abuse of trust of Kirovles director, an offence under Article 165 § 3 (b) of the Criminal Code.

27. During the investigation, which lasted for eleven months, both applicants were questioned, as well as X, Ms B., two former Kirovles employees and nineteen timber mill directors. Kirovles and VLK's accounts were examined, and three reports were ordered from experts in accounting, finance and economics. It follows from the parties' submissions that the following witnesses were also questioned. Witness Mr A., Chief of the Kirov Regional Forestry Department, made a statement about how the contract between VLK and Kirovles had been concluded and how the first applicant and X had been at odds. Witness Mr K., Deputy Chief of the Kirov Regional Forestry Department, stated that the first applicant had insisted on an independent audit of Kirovles and proposed restructuring it to prevent financial manipulation by X. Seven other witnesses, all managers of VLK, gave details about VLK's work to find customers for Kirovles in accordance with the contract. Based on this evidence, the investigators found that there was no case against the applicants.

28. On 10 April 2012 the Investigative Committee closed the criminal investigation in respect of both applicants for lack of *corpus delicti*.

29. On 25 April 2012 the Investigative Committee reversed that decision.

30. On 5 July 2012 the Chief of the Investigative Committee, Mr Bastrykin, spoke at its general meeting and condemned, in particular, the decision to close the criminal investigation in respect of the first applicant. In the extract broadcasted on Russia's main TV channels he stated:

> "You have got a man there called Mr Navalnyy. The criminal case, why have you terminated it without asking the Investigative Committee superiors? Today the whole country is discussing [this fraud], the talks [between Mr Navalnyy and Mr Belykh] have been published, and we cannot hear anything except grunting. You had a criminal file against this man, and you have quietly closed it. I am warning you, there will be no mercy, no forgiveness if such things happen again. If you have grounds to close it, report it. Feeling weak, afraid, under pressure – report! We will help, support you, take over the file, but quietly, like that – no ..."

31. On 26 July 2012 the first applicant published an article accusing Mr Bastrykin of breaking laws imposing restrictions on high-ranking public servants. The article included copies of documents stating that he held a Czech residence permit and owned a private business during his tenure at the Investigative Committee.

32. On 30 July 2012 the Investigative Committee's investigator for high profile cases decided to open a criminal investigation against X on suspicion that he had conspired with unknown individuals to dissipate Kirovles' assets through VLK, thus committing an offence under Article 160 § 4 of the Criminal Code.

33. On the same day the case against X was joined with the criminal case against the applicants.

34. On 31 July 2012 charges were formulated against the first applicant under Article 160 § 4 of the Criminal Code. On 3 August 2012 the same charges were formulated in respect of X, and on 6 August 2012 in respect of the second applicant. They were all suspected of conspiring to dissipate Kirovles' assets.

### C. Decision to disjoin cases, plea-bargaining and the accelerated proceedings in X's case

35. On 26 September 2012 the Deputy Prosecutor General granted X's request to conclude a plea-bargaining agreement and to have his criminal case examined in accelerated proceedings.

36. On 1 October 2012 the plea-bargaining agreement was signed by X and the Deputy Prosecutor General. Among other conditions, X undertook to "actively provide the investigation with information" about "Mr Ofitserov and Mr Navalnyy's involvement in the misappropriation [of assets], their roles in the commission of the crime, the specific steps taken to implement the criminal plan, including at the stages of preparation and conclusion of the sales contract and demonstration of its feasibility and utility." On 17 October 2012 the criminal case-file against X was disjoined from the applicants' case.

37. On 19 October 2012 the first applicant learned of the plea-bargaining agreement from the press and filed a complaint with the Investigative Committee and the Prosecutor General, alleging that it had breached his procedural rights in the criminal case against him. He requested that X's case, if it had been severed, be joined with their case again.

38. On 21 November 2012 the prosecutor's office replied that the plea-bargaining agreement had been concluded lawfully.

39. On 5 December 2012 the first applicant served the Leninskiy District Court of Kirov ("the District Court") with a complaint challenging the decision to sever X's criminal case and examine it in accelerated proceedings. On the same day he filed another complaint with the Prosecutor General, challenging the decision to disjoin X's criminal file from his own.

40. On 10 December 2012 the Investigative Committee dismissed the request to join X's criminal case with the applicants' case.

41. On 18 December 2012 the prosecutor's office replied that the cases had been disjoined lawfully.

42. On 24 December 2012 the District Court gave judgment in X's case, after examining it in accelerated proceedings, without an examination of evidence. The court found X guilty of dissipating Kirovles' assets (Article 160 § 4 of the Criminal Code) and handed him a four-year suspended sentence with three years' parole. The judgment indicated that X had conspired with two others, "N." and "O." and contained, in particular, the following findings:

> "... at the end of December 2008 [to the] beginning of January 2009...the Governor of the Kirov region ... met the directors of the big State enterprises, including [X] ... and introduced his volunteer consultants including N., who was officially appointed to this role ... on 21 May 2009.
>
> ...
>
> In approximately January to February 2009 N. ... developed a criminal plan to misappropriate Kirovles' assets in favour of a newly created entity under his control, to be founded and led by O.
>
> ...
>
> In approximately February to March 2009 N. continued to implement his criminal intent to dissipate Kirovles' assets, ordered the commission of the crime ... informed [X] about the forthcoming creation of an intermediary enterprise ... aimed at dissipating the assets in [X's] charge.
>
> [X] ... did not take any steps to prevent N.'s unlawful acts [and] agreed with him, thus entering into a criminal conspiracy with N. and O. aimed at large-scale dissipation of the assets ... entrusted to him.
>
> To implement N.'s criminal plan, O., acting in agreement with him, created in March 2009 ... the limited liability company "OOO VLK" ... thus facilitating the commission of the crime ...
>
> ...
>
> Later, [X] ... acting deliberately and in agreement with N. and O., signed a sales contract with VLK ... in full realisation of the damaging consequences ... because of [VLK's ]lack of adequate collateral ...
>
> ...
>
> In doing so, [X], N. and O. had sound knowledge that OOO VLK would pay for the goods under the terms of the contract and its annexes at a price known to be lower than that Kirovles could have received without an intermediary ...
>
> ...
>
> In the period 15 April 2009 to 13 July 2009 ... [X] and O., in conspiracy with N., who had organised the crime and ordered its implementation, signed [thirty-six] annexes to the contract ... which stipulated ... a price which was deliberately reduced by all [of the] partners in crime without any economic need compared to the price Kirovles could have sold its products for if it supplied the VLK customers of directly.
>
> ...
>
> While doing so, N. and O. realised that [X] was unlawfully depriving Kirovles of the possibility of independent sales of its timber products at market prices and was thus placing its timber products at VLK's disposal without a sufficient and equivalent reimbursement of its market value.
>
> In the period 15 April 2009 to 30 September 2009 in Kirov, [X], acting in abuse of his official position, and O., in conspiracy with and on the instructions of N., deliberately implemented the terms of the sales contract ... and its annexes ...
>
> ...
>
> [X], acting in premeditated conspiracy with N. and O., out of acquisitive motives therefore abused his official position, ... unlawfully dissipated the assets he was in charge of ... for the benefit of third parties – partners in crime and OOO VLK under their control, thus causing significant damage to the assets of their owner, Kirovles.
>
> The Deputy Prosecutor General ... proposed [using] accelerated proceedings for the judicial hearing and issuing the judgment ... in respect of [X] ...
>
> The accused [X] has pleaded guilty to the entirety of charges, accepted the indictment and the proposal ... of accelerated proceedings on the basis of the concluded plea-bargaining agreement.
>
> ...

> Information stated by [X] in compliance with the terms of the concluded plea-bargaining agreement, is full and true and corroborated by the evidence gathered in the case. The court therefore concludes that [X] has complied with the obligations set out in the plea-bargaining agreement, and that judgment may therefore be given in respect of the accused without an examination of evidence, in accordance with the procedure set out in Article 316 of the Code of Criminal Procedure as required by Article 317.7 ...”

43. On 3 January 2013 the first applicant lodged an appeal against the judgment given in X’s case. He challenged, in particular, the use of accelerated proceedings in that case, the fact that it had been disjoined from the case against him and the second applicant and alleged that the judgment had been prejudicial to the outcome of their case.

44. On 9 January 2013 the judgment against X acquired legal force.

45. On 17 January 2013 the District Court informed the first applicant that he could not appeal against the judgment in X’s case because he had not been a party to those proceedings. He was denied access to the transcript of the court hearing for the same reason.

46. On the same day the charges under Article 165 § 3 (b) of the Criminal Code were lifted in respect of both applicants. The charges under Article 160 § 4 of the Criminal Code were maintained, although they were reformulated in respect of the second applicant.

47. On 20 February 2013 the first applicant filed a complaint with the Kirov Regional Court (“the Regional Court”) about the refusal to consider his appeal.

48. On 13 March 2013 the Deputy President of the Kirov Regional Court replied, stating that his appeal could not be examined because he had not been a party to the proceedings. Moreover, he indicated that the judgment against X could not be prejudicial to the applicant; his guilt had not been established, he had not participated in those proceedings and his name had not been mentioned in it.

**D. The applicants’ trial and conviction**

49. On 20 March 2013 the indictment was issued in respect of both applicants.

50. On 3 April 2013 the District Court fixed the hearing in the applicants’ case for 13 April 2013.

51. On 10 June 2013 the applicants filed a request with the District Court to have the judgment given in X’s case excluded from evidence. They argued, in particular, that admitting it would prejudice the outcome of their case.

52. On 11 June 2013 the court dismissed the request on the grounds that the judgment against X did not predetermine the applicants’ guilt and, moreover, their names had not been mentioned in it.

53. During the hearing, X was called and examined as a witness. He was first questioned by the public prosecutors, who then asked to read out his statements given during the investigation on the grounds that he could not remember some details and had given contradictory answers to some questions. The applicants objected on the grounds that during the investigation X had made the statements in his capacity as an accused, and an accused had the right to make false statements, not being under oath. Moreover, reading out his previous statements, especially in full, would hinder his cross-examination by the defence as it would remind the witness of the “correct” version of events he had accepted during his trial but could not remember at the applicants’ hearing. The court dismissed these objections and allowed the statements made by X during the investigation to be read out. The applicants and their defence team questioned X afterwards.

54. The court also allowed, despite the applicants’ objections, the statements of Ms B. and six other witnesses to be read out. They were each first questioned by the prosecutor, then their previous testimony and statements were read out in their presence. Only then could the defence question them.

55. On 10 June and 2 July 2013 a challenge by the applicants to the trial judge was rejected.

56. On 11 June 2013 the court dismissed the applicants’ request to have material obtained by interception of the applicants’ telephone calls excluded. On 3 July 2013 it admitted this material as evidence.

57. On 18 June and 2 July 2013 the court rejected the applicants’ requests to have several people called and examined as witnesses, including Mr A., Chief of the Kirov Regional Forestry Department, Mr K., Deputy Chief of the Kirov Regional Forestry Department, and the seven VLK managers who had been questioned during the investigation, as well as three expert witnesses.

58. On 2 and 3 July 2013 the court rejected the applicants’ request for the following evidence: documents relating to Kirovles’ insolvency proceedings, Kirovles’ financial reports, an approved list of standard minimum prices for timber, complete records of intercepted telephone calls between the applicants, material relating to the criminal proceedings against X instituted on 12 January 2011 and the criminal case file relating to X’s conviction in the Kirovles case.

59. On 3 July 2013, at the applicants’ request, the court admitted as evidence a report issued by a trade specialist indicating that the prices paid by VLK to Kirovles were above average. On the same day it rejected their request for the court to order expert reports by finance, economics and

merchandising experts.

60. On 17 July 2013 the first applicant was registered as a candidate for the Moscow mayoral elections.

61. On 18 July 2013 the District Court gave judgment, finding the first applicant guilty of organising, and the second applicant of facilitating, large-scale embezzlement. The court relied on the testimony of X and his statements made during the investigation. It also relied on the testimony of forty-four witnesses and statements made by eight of them during the investigation, material obtained by way of operational-search activities, in particular intercepted email correspondence and telephone calls between the applicants, accounting documents and expert reports. As regards the judgment in respect of X, the court said:

> "It follows from the judgment of the Leninskiy District Court of Kirov given on 24 December 2012 that [X] was found guilty of dissipation [and] embezzlement, that is stealing Kirovles' assets entrusted to [X], on an especially large scale, committed by abuse of his official position in conspiracy with N. and O. ... a criminal offence under Article 160 § 4 of the Criminal Code."

62. The court further noted that it found X's testimony, as well as his statements made during the investigation, truthful and concordant with other evidence; it also found that they were admissible and had been lawfully obtained.

63. The court dismissed the first applicant's allegations of political persecution or revenge by individuals who had lost their jobs at Kirovles or were otherwise disconcerted with his role in reforming the timber industry in the Kirov region. It also dismissed the objection to admitting X and Ms B.'s testimony and statements on the grounds that X had a vested interest in the proceedings, finding the objection unfounded and illogical. It explained the discrepancies between the testimony and pre-trial witness statements by the passage of time that had elapsed since the events in question and held that, in any event, the witnesses at the trial had confirmed the validity of their previous statements.

64. The court noted that X had treated the first applicant as an official from the Governor's office and that the applicant knew this. However, it stressed that the first applicant had not been accused, or convicted, of any abuse of his official position at the Governor's office:

> "Mr Navalnyy [is not suspected of] committing a crime by abuse of his official position; consequently, the defence's arguments that the Governor's volunteer consultant had no powers to give binding instructions to the companies' management do not refute the accusation [or] prove that it was impossible for Mr Navalnyy to commit the crime and order its execution."

65. As regards the legal classification of the applicants' offences, the court held:

> "The court finds that the arguments put forward by the defence about the absence of unlawfulness, a necessary element of theft, because a regular civil-law transaction has been concluded by persons with legal capacity, are unfounded.
>
> The Kirov region's Property Management Department, acting on behalf of the owner of Kirovles, has provided in the certificate of incorporation and [X's] employment contract that [X was under an] obligation to carry out his duties in good faith, reasonably and in accordance with the applicable legislation.
>
> In accordance with Article 10 §1 of the Civil Code, it is not permitted to exercise one's civil rights with the exclusive purpose of causing damage to another person, act in circumvention of the law with unlawful intent, [or any other] intentional exercise of civil rights in bad faith (abuse of rights).
>
> The court has established that contrary to the said provisions of the certificate of incorporation, the employment contract and the law, [X], acting on behalf of the company directed by him, has entered into a sales contract ... with OOO VLK represented by Mr Ofitserov to exclusively facilitate stealing Kirovles' property and transferring [it] for the benefit of OOO VLK ... The conclusion of this sales contract has resulted in material damage [being caused] to Kirovles.
>
> ...
>
> The court notes that neither Mr Navalnyy nor Mr Ofitserov is charged with organising and facilitating the conclusion of a legally invalid sales contract. On the contrary, what the [applicants are suspected of] is organising and facilitating the dissipation of Kirovles' assets by concluding a sales contract with OOO VLK intended exclusively to create the impression that Kirovles had civil-law obligations towards OOO VLK to transfer timber goods to shipment recipients, as if for collateral, whereas in reality the goods would be transferred without OOO VLK [having] equivalent and sufficient collateral.
>
> ...

According to the ruling of the Plenary of the Supreme Court of the Russian Federation no. 51 dated 27 December 2007 “On Court Practice in Cases of Fraud, Misappropriation or Embezzlement”, a perpetrator of misappropriation or embezzlement may only be someone entrusted with the assets of another legal person or individual, based on legal grounds for a specific purpose or for a defined activity. Based on the provisions of Article 34 § 4 of the Criminal Code, those who do not possess these special subjective characteristics qualifying [them] for misappropriation or embezzlement, but who directly participated in stealing assets in prior agreement with the person entrusted with the assets, must be criminally liable under Article 33 in conjunction with Article 160 of the Criminal Code in their capacity as organisers, inciters or facilitators.

It follows from the judgment of the Leninskiy District Court of Kirov given on 24 December 2012, which has acquired legal force, that the perpetrator of the crime Mr Navalnyy and Mr Ofitserov [are suspected of] was found to be [X], who had been entrusted with Kirovles assets as its director general. [X’s] acts were classified by the court as falling under Article 160 § 4 of the Criminal Code.”

66. The court estimated that the damage caused to Kirovles amounted to RUB 16,165,826. It concluded that the first applicant was guilty of organising the theft of Kirovles’ assets by X (Article 33 § 3 in conjunction with Article 160 § 4 of the Criminal Code), and the second applicant of facilitating that theft (Article 33 § 4 in conjunction with Article 160 § 4 of the Criminal Code). They were sentenced to five and four years’ imprisonment respectively, to be served in a correctional colony. In addition, they were both fined RUB 500,000.

67. The applicants were taken into custody immediately after the hearing.

68. On the same day the prosecutor’s office of the Kirov region asked the court to release the applicants pending appeal, particularly since the first applicant was a registered candidate in the Moscow mayoral elections.

69. On 19 July 2013 the Regional Court granted the request and released the applicants on parole.

70. On 26 July 2012 both applicants lodged an appeal against the judgment of 18 July 2013. They challenged their conviction, insisting that it was unlawful and unfounded and that the first-instance court had relied on the judgment of 24 December 2012 against X in violation of the rules of criminal procedure. They also complained about the court’s assessment of evidence and the manner in which it had examined the witnesses.

71. On 8 September 2013 the first applicant stood as a candidate in the Moscow mayoral elections. He came second, securing approximately 27% of the votes.

72. On 13 September 2013 the applicants questioned the accuracy of the transcript of the first-instance hearing. The requested amendments were set out in an eighty-nine page document.

73. On 27 September 2013 the District Court accepted a small number of amendments but rejected the rest.

74. On 2 and 3 October 2013 the applicants filed additional grounds of appeal elaborating on those lodged previously.

75. On 16 October 2013 the Regional Court dismissed the applicants’ appeal and upheld the first-instance judgment in substance. It amended their sentence and gave them both suspended prison terms on an undertaking not to change their place of residence.

76. On 7 February 2013 the applicants each lodged appeals on points of law. On 1 and 2 April 2014 the Regional Court, sitting in a single judge formation, refused to give them leave to appeal.

77. On 28 February 2014 the Basmannyy District Court ordered that the first applicant be placed under house arrest pending another, unrelated, criminal case against him. To justify the application of this preventive measure the court referred to, among other factors, the first applicant’s prior criminal conviction in the Kirovles case. The conditions of the house arrest included a number of restrictions, in particular a ban on communicating with anyone other than his immediate family and legal counsel, a ban on using the Internet and a ban on making public statements or comments to the media. The first applicant remained under house arrest for ten months.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

78. The Criminal Code of the Russian Federation provides as follows:

**Article 33: Types of Accomplices to a Crime**

“1. In addition to the perpetrator, organisers, instigators, and accessories shall be deemed accomplices.

2. A person who has actually committed a crime or who directly participated in its commission with others (co-perpetrators), and a person who has committed a crime by using others who are not subject to criminal liability by reason of age, insanity, or other circumstances set out in this Code, shall be deemed to be a perpetrator.

3. A person who has organised the commission of a crime or ordered its commission, and a person who has created an organised group or criminal community (criminal organisation) or has guided them, shall be deemed an organiser.

4. A person who has abetted another into committing a crime by persuasion, bribery, threat or any other method shall be deemed an instigator.

5. A person who has assisted in the commission of a crime by giving advice, instructions on committing the crime, or removing obstacles to it, and a person who has promised beforehand to conceal the offender, means of or instruments used in carrying out the crime, evidence of a crime, or objects obtained criminally, and equally a person who has promised beforehand to acquire or sell such objects, shall be deemed to be an accessory."

**Article 160: Misappropriation or embezzlement**

"1. Misappropriation or embezzlement, that is, the theft of another's property entrusted to the convicted person:

shall be punishable ...

2. The same acts committed in conspiracy or which cause significant damage to an individual ...

3. The same acts committed by a person by abuse of his official position or on a large scale ...

4. The acts set out in paragraphs 1, 2 or 3 of this Article committed by an organised group or on an especially large scale:

shall be punishable by up to ten years' deprivation of liberty with or without a fine of up to one million roubles or up to three years' wages/salary or other income with or without up to two years' restriction of liberty."

**Article 165: Causing property damage by way of deception or abuse of trust**

"1. Causing property damage to an owner or any other holder of property by way of deception or abuse of trust where there is no evidence of embezzlement on a large scale:

shall be punishable by a fine of up to 300 thousand roubles or up to two years' wages/ salary or other income ... or by up to two years' community work with or without up to a year's restriction of liberty, or by up to two years' deprivation of liberty with or without a fine of up to eighty thousand roubles or up to six months' wages/ salary or other income with or without up to a year's restriction of liberty.

2. The acts set out in paragraph 1 of this Article:

(a) committed by a group of persons in prior agreement or by an organised group;

(b) that has caused damage on a large scale;

shall be punishable by up to five years' community work with or without up to two years' restriction of liberty, or by up to five years' deprivation of liberty with or without a fine of up to eighty thousand roubles or up to six months' wages/salary or other income with or without up to two years' restraint of liberty."

79. The Code of Criminal Procedure provided, at the material time, as follows:

**Article 90: Prejudice**

"Circumstances established in a judgment which has acquired legal force, given by a court in criminal proceedings, or in civil, commercial-court or administrative proceedings, shall be accepted by a court, prosecutor, investigator or inquirer without additional verification. However, such a judgment or decision cannot predetermine the guilt of persons who have not previously participated in the criminal case."

**Article 154: Disjoining a criminal case**

"...

5. Material of a criminal case put into separate proceedings shall be admitted as evidence in the given criminal case ..."

**Article 240: Direct and oral hearing**

"1. In judicial proceedings all evidence in a criminal case shall be subject to direct scrutiny, except as provided for in Section X of the present Code [plea-bargaining and accelerated proceedings]. The court shall hear the testimony of the defendant, victim, witnesses and experts, and shall examine the evidence and read out transcripts and other documents; it shall also carry out other judicial methods of examining evidence.

2. Reading out statements given during the preliminary investigation shall only be possible in the cases specified in Articles 276 and 281 of the present Code.

3. The court judgment may be based solely on evidence examined in a court hearing.”

**Article 276: Reading out the defendant’s statement**

“1. The defendant’s statement given in the course of the preliminary investigation ... may be read out on the application of the parties in the following cases:

(i) where there are significant contradictions between the evidence the defendant gave in the course of the preliminary investigation and in court ...”

**Article 281: Reading out the victim or witnesses’ statement**

“...

A court may, on the application of the parties, decide to read out the evidence of the victim or a witness given earlier in the course of the preliminary investigation or in court where there are significant contradictions between the evidence previously given and the evidence given in court.

...”

80. On 29 June 2015 Article 90 of the Code of Criminal Procedure was amended as follows:

“Circumstances established in a judgment which has acquired legal force given by a court in criminal proceedings, except for a judgment given in accordance with Articles 226.9 [accelerated proceedings], 316 [court hearing in accelerated proceedings] or 317.7 [plea-bargaining] of this Code, or in civil, commercial-court or administrative proceedings, shall be accepted by a court, prosecutor, investigator or inquirer without additional verification. However, such a judgment or decision may not predetermine the guilt of persons who have not previously participated in the criminal case.”

81. In ruling no. 51 of 27 December 2007, the Plenary of the Supreme Court adopted the following guidelines:

“19. Unlawful acts by a person pursuing his own mercenary ends who has dissipated property entrusted to him against the owner’s wishes by consuming it, spending it or transferring it to another must be classed as embezzlement.

20. In deciding whether there was *corpus delicti* of theft in the form of misappropriation or embezzlement, a court must establish the circumstances confirming that the person’s intent covered the unlawful nature of his acts and the absence of consideration, [and] which acts are committed with the purpose of spending property entrusted to him or transferring it to another.

Taking property entrusted to the culprit by replacing it with less valuable property committed with the purpose of appropriation or turning it into the property of others must be classed as stealing.

...

22. A perpetrator of misappropriation or embezzlement may only be a person entrusted with the assets of another legal person or individual, based on legal grounds for a specific purpose or for a defined activity. Based on the provisions of Article 34 § 4 of the Criminal Code, those who do not possess these special subjective characteristics qualifying [them] for misappropriation or embezzlement, but who directly participated in stealing assets in prior agreement with the person entrusted with the assets, must be criminally liable under Article 33 in conjunction with Article 160 of the Criminal Code in their capacity as organisers, inciters or facilitators.”

82. The Civil Code of the Russian Federation provides as follows:

**Article 10: Limits on exercising civil rights**

1. It is not permitted to exercise rights with the exclusive purpose of causing damage to another person, [ act] in circumvention of the law with unlawful intent, [or] any other intentional exercise of civil rights in bad faith (abuse of rights). It is not permissible to use civil rights for the purpose of restricting competition, or abusing dominant market position.

2. Failure to comply with the requirements in paragraph 1 of this Article, shall entitle a court, commercial court or arbitration tribunal to deny the person concerned the protection of the rights he possesses, fully or in part, taking account of the nature and consequences of the abuse committed, as well as to apply other measures provided for by law.

3. If the abuse of rights takes the form of a circumvention of the law with unlawful intent, the consequences set out in paragraph 2 of this Article shall be applied in so far as this Code does not stipulate other consequences of such acts.

4. If the abuse of rights entails a breach of another person’s rights the person concerned may claim [compensation].

5. It shall be presumed that participants in civil legal relationships act reasonably and in good faith.

**Article 50: Commercial and non-profit organisations**

1. Legal entities may either be organisations, which see deriving profits as the chief goal of their activity (commercial organisations), or organisations which do not see deriving profits as their goal and which do not distribute the derived profit among their members (non-profit organisations).

2. Legal entities that are commercial organisations may be set up in the form of financial partnerships and companies, production cooperatives and State and municipal unitary enterprises ...”

# THE LAW

## I. JOINDER OF THE APPLICATIONS

83. Given their similar factual and legal background, the Court decides that the two applications should be joined pursuant to Rule 42 § 1 of the Rules of Court.

## II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

84. The applicants complained under Article 6 §§ 1, 2 and 3 (d) of the Convention that the criminal proceedings against them had been arbitrary and unfair. They complained about the court’s manner of dealing with evidence. They also alleged a violation of the principle of the presumption of innocence referring, in particular, to the finding made in the judgment against X as to the applicants’ involvement in the crime and to the use of evidence originating from those proceedings, and the judgment itself, in the trial against them. Further, they complained about the procedure the court had followed when examining X and other witnesses, and its refusal to call and examine certain witnesses questioned during the investigation. Article 6 § 1 of the Convention reads as follows:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

...”

### A. Admissibility

85. The Government put forward an admissibility objection as regards one specific complaint under Article 6 of the Convention. They contended that the applicants had not contested the decision to disjoin the case against X from the criminal proceedings against them. They claimed, in particular, that the first applicant had not challenged the rulings of 17 October 2012 and 10 December 2012 under the procedure set out in Article 125 of the Code of Criminal Procedure, and that the second applicant had not lodged any complaints at all. The Government therefore argued that the applicants had not exhausted domestic remedies as regards this complaint. If they had considered this remedy ineffective, the Government claimed in the alternative that they had missed the six-month time-limit for lodging their complaint with the Court.

86. The Court considers that the decision to disjoin X’s case must be examined in the context of the complaint that the evidence originating from those separate proceedings had subsequently been used in the applicants’ own trial. It notes that both applicants filed applications with the trial court contesting the admission and use of that evidence and raised those objections in their grounds of appeal. Their appeal was examined and dismissed on 16 October 2013. The applications were lodged on 24 June 2013 by the first applicant and on 8 April 2014 by the second applicant. In these circumstances, the Court considers that the Government’s arguments as to the non-exhaustion of domestic remedies or failure to comply with the time-limit must be dismissed.

87. The Court notes that the complaints under Article 6 of the Convention are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

### B. Merits

*1. The parties' submissions*

88. The Government submitted that the criminal proceedings against the applicants had been lawful and fair. The proceedings against X had had to be disjoined from the applicants' case, to allow for plea-bargaining and the accelerated proceedings to be used in X's case. They also stated that during the accelerated proceedings the trial court had not assessed the evidence or made any finding as to the applicants' guilt or participation in the crime. They further submitted that the judgment of 24 December 2012 had been mentioned in the judgment against the applicants only to confirm that X had been convicted, not to transpose any other facts or corroborate the applicants' guilt.

89. The Government further alleged that no evidence originating from X's case had been used in the proceedings against the applicants. In any event, the use of evidence from the disjoined proceedings would have been lawful under Article 154 § 5 of the Code of Criminal Procedure, subject to Article 240 of the Code which requires a judgment to be based solely on evidence examined in a court hearing. They submitted that under these conditions, using evidence from the disjoined proceedings was compatible with Article 6 of the Convention.

90. The Government alleged that all the witness statements read out during the applicants' trial had been obtained before the cases had been disjoined, and had only been read out in part. The defence could then cross-examine those witnesses and had had ample opportunity to comment on them.

91. The applicants maintained their complaints. They alleged that the decision to disjoin the cases and the subsequent use of evidence originating from the accelerated proceedings against X had had a prejudicial effect on their case. The applicants contended that there had been no obligation to disjoin the proceedings, and that it had been done with the aim of compelling X to give false evidence against them. They pointed out that they had not been party to the proceedings against X and could not have challenged the decisions or the evidence relating to that case. Despite this, the judgment against X had formed the basis of their conviction. Moreover, the testimony of X, the key witness in their case, had been unreliable because he had previously entered into plea-bargaining in the same criminal case and had had a vested interest in the outcome of the applicants' proceedings. In particular, his sentence could have been reversed in accordance with Article 317 § 8 of the Code of Criminal Procedure, if it had transpired that he had made false statements during his plea-bargaining. At the applicants' trial, in his capacity as a witness, he had had no choice but to reiterate the statements he had previously made as an accused when not under oath. Moreover, before testifying as a witness at the applicants' trial, the judge had not warned him about criminal liability for perjury.

92. The applicants further contested the Government's allegation that the judgment against X had not contained a finding of their guilt. They quoted extracts from the judgment of 24 December 2012 in which they were referred to as X's "partners in crime" and were clearly identifiable by their initials and jobs titles (see paragraph 42 above). The applicants submitted that, contrary to the Government's claim, the court which had examined their case had been bound by the earlier judgment in X's case, which, by operation of Article 90 of the Code of Criminal Procedure, was *res judicata* irrespective of whether the court had expressly referred to it as such.

93. Next, the applicants pointed out that they had had no access to the material in X's case file and could not verify its content. When the cases had been disjoined no list of the material transferred had been drawn up. Accordingly, the applicants had had no knowledge as to what evidence had been attached to X's file. They suggested that some exonerating evidence could have been concealed from them. They specifically referred to the collection of telephone-tapping records that had been incomplete in their own case files but had been fully disclosed in X's file; the trial court had refused to allow them to access or examine the missing records.

94. The applicants also complained that the trial court had allowed X's and other witness statements given during the investigation to be read out before the defence had had the opportunity to cross-examine them. The applicants submitted that those statements had reflected the investigators', not the witnesses' own accounts; reading them out during the applicants' trial had thus served to "remind" the witnesses of the official interpretation. The applicants had insisted at the trial on having a chance to cross-examine the relevant witnesses before the earlier statements had been read out, but the court had decided otherwise.

95. Lastly, the applicants submitted that the interpretation of the legal provisions governing liability for embezzlement had been arbitrary, without precedent or basis in domestic law and unforeseeable. They pointed out that VLK had provided collateral for Kirovles' assets and contested that it had caused damage or transferred Kirovles' property for its own, or a third party's, benefit. They maintained, in particular, that VLK had entered into a lawful transaction with Kirovles, and that the parties had concluded, implemented and terminated the contract freely and in accordance with their discretion and commercial interests. This transaction had not been challenged as invalid, a

sham, or irregular. In essence, the second applicant had been prosecuted for carrying out the ordinary activities of a commercial intermediary, and the first applicant for advising the parties to the transaction. They alleged, in conclusion, that the only purpose of their prosecution and conviction was to curb the first applicant's public and political activity.

*2. The Court's assessment*

**(a) General principles**

96. The Court reiterates that the presumption of innocence enshrined in Article 6 § 2 of the Convention and the guarantees relating to the examination of witnesses set out in Article 6 § 3 (d) of the Convention are elements of the right to a fair hearing set forth in Article 6 § 1 of the Convention and must be taken into account in any assessment of the fairness of proceedings as a whole (see *Doorson v. the Netherlands*, 26 March 1996, § 70, *Reports of Judgments and Decision* 1996-II; *Gäfgen v. Germany* [GC], no. 22978/05, §§ 162 and 175, ECHR 2010; *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 118, ECHR 2011; *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, § 743, 25 July 2013; and *Karaman v. Germany*, no. 17103/10, §§ 42-43, 27 February 2014).

97. In deciding whether applicants have received a fair hearing the Court does not take the place of the domestic courts, who are in the best position to assess the evidence before them, establish facts and interpret domestic law. Its task is to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, among other authorities, *Van Mechelen and Others v. the Netherlands*, 23 April 1997, § 50, *Reports* 1997-III; *Gäfgen*, cited above, § 162; *Al-Khawaja and Tahery*, cited above, § 118; and *Schatschaschwili v. Germany* [GC], no. 9154/10, § 101, 15 December 2015). As regards the use in evidence of statements obtained at the police inquiry and judicial investigation stages, it is not in itself inconsistent with Article 6 §§ 1 and 3 (d) of the Convention, provided that the rights of the defence have been respected (see *Saïdi v. France*, 20 September 1993, § 43, Series A no. 261-C, and *A.M. v. Italy*, no. 37019/97, § 25, ECHR 1999-IX).

98. The Convention does not prohibit presumptions of fact or of law in criminal cases, but it requires States "to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence" (see *Salabiaku v. France*, 7 October 1988, § 28, Series A no. 141-A, and *Radio France and Others v. France*, no. 53984/00, § 24, ECHR 2004-II).

99. The Court accepts that in complex criminal proceedings involving several persons who cannot be tried together, references by the trial court to the participation of third parties, who may later be tried separately, may be indispensable for the assessment of the guilt of those on trial. Criminal courts are obliged to establish the facts of the case relevant for the assessment of the legal responsibility of the accused as accurately and precisely as possible, and they cannot present established facts as mere allegations or suspicions. This also applies to facts related to the involvement of third parties, though if such facts have to be introduced, the court should avoid giving more information than necessary for the assessment of the legal responsibility of those accused in the trial before it. Even if the law expressly states that no inferences about the guilt of a person can be drawn from criminal proceedings in which he or she has not participated, judicial decisions must be worded so as to avoid any potential pre-judgment about the third party's guilt in order not to jeopardise the fair examination of the charges in the separate proceedings (see *Karaman*, cited above, §§ 64-65).

100. As regards plea-bargaining, the Court has previously found it to be a common feature of European criminal justice systems allowing an accused to obtain a lesser charge or receive a reduced sentence in exchange for a guilty or *nolo contendere* plea in advance of trial or for substantial cooperation with the investigative authority. Where the effect of plea-bargaining is that a criminal charge against the accused is determined in an accelerated form of judicial examination, this amounts, in substance, to a waiver of a number of procedural rights. To be effective for Convention purposes, therefore, any waiver of procedural rights must always be established in an unequivocal manner, must be attended by minimum safeguards commensurate with its importance and must not run counter to any important public interest (see *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 135, 17 September 2009, and *Natsvlishvili and Togonidze v. Georgia*, no. 9043/05, §§ 90-91, ECHR 2014 (extracts), with further references).

101. Ultimately, the Court will not, in principle, contest the factual and legal findings of the domestic courts, unless their decisions appear arbitrary or manifestly unreasonable and provided that the proceedings as a whole were fair, as required by Article 6 § 1 of the Convention (see, *mutatis mutandis*, *Van Kück v. Germany*, no. 35968/97, §§ 46-47, ECHR 2003-VII, and *Khamidov v. Russia*, no. 72118/01, § 170, ECHR 2007-XII (extracts)). That said, decisions that are "arbitrary or manifestly unreasonable" may be found to be incompatible with the guarantees of a fair hearing (see

*Khamidov*, cited above, § 107; *Berhani v. Albania*, no. 847/05, §§ 50-56, 27 May 2010; *Ajdarić v. Croatia*, no. 20883/09, §§ 47-52, 13 December 2011; and *Anđelković v. Serbia*, no. 1401/08, §§ 26-29, 9 April 2013).

**(b) Application of these principles in the present case**

102. The Court observes that the applicants' complaints about the manner in which evidence was admitted and assessed and the way the witnesses were examined converge on the same underlying allegation that the criminal proceedings against X and the two applicants had been structured in a way which rendered the proceedings as a whole unfair. They effectively alleged that X's conviction in separate accelerated proceedings had been instrumental in circumventing important guarantees they would have been entitled to if all three co-accused had been tried together. Likewise, the complaint lodged under Article 6 § 2 of the Convention about the formulae used in the judgment against X and the prejudicial impact which that had on the applicants' sentence, essentially refers to the same underlying issue. It follows that even though each of the complaints under Article 6 §§ 1, 2 and 3(d) of the Convention would in principle be capable of raising a separate issue under the Convention, in the present case it is appropriate to treat the specific allegations as elements of general fairness.

103. In the present case, the criminal charges against the applicants were based on the same facts as those against X, and the three individuals were accused of conspiring to steal the same assets. It is therefore undeniable that any facts established in the proceedings against X and any legal findings made therein would have been directly relevant to the applicants' case. In such circumstances, it was essential for safeguards to be in place to ensure that the procedural steps and decisions taken in the proceedings against X would not undermine the fairness of the hearing in the subsequent proceedings against the applicants. This was particularly so, given that the applicants were legally precluded from any form of participation in the disjoined proceedings as they had not been granted any status which would have allowed them to challenge the decisions and findings made therein.

104. The Court has previously highlighted the first and most obvious guarantee to be secured when co-accused are tried in separate sets of proceedings, notably the courts' obligation to refrain from any statements that may have a prejudicial effect on the pending proceedings, even if they are not binding (see *Karaman*, cited above, §§ 42-43 and 64-56). If the nature of the charges makes it unavoidable for the involvement of third parties to be established in one set of proceedings and those findings would be consequential on the assessment of the legal responsibility of the third parties tried separately, this should be considered as a serious obstacle for disjoining the cases. Any decision to examine cases with such strong factual ties in separate criminal proceedings must be based on a careful assessment of all countervailing interests, and the co-accused must be given an opportunity to object to the cases being separated.

105. The second requirement for the conduct of concurrent proceedings is that the quality of *res judicata* would not be attached to facts admitted in a case to which the individuals were not party. The state of the evidence admitted in one case must remain purely relative and its effect strictly limited to that particular set of proceedings. In other words, in the present case no finding of fact made in the proceedings against X could have been admitted in the applicants' case without full and proper examination at the applicants' trial. Moreover, the procedure followed by the court in X's case had been accelerated, and the establishment of facts had been a result of plea-bargaining, not the judicial examination of evidence. Consequently, the facts relied on in that case had been legally assumed rather than proven. As such, they could not have been transposed to another set of criminal proceedings without their admissibility and credibility being scrutinised and validated in those other proceedings, in an adversarial manner, like all other evidence.

106. These two basic requirements have not been complied with in the present case. The Court accepts the applicants' argument that the Leninskiy District Court of Kirov had worded its judgment of 24 December 2012 as regards X so that no doubt could remain either about their identities or involvement in the crime of which X had been convicted. Although the said District Court, as the Government rightly pointed out, could not find the applicants guilty in those proceedings, it expressed its findings of fact and opinion about their participation in the offence in such terms which could not be defined as anything but prejudicial.

107. Turning to the question of *res judicata*, the Court takes cognisance of the Government's argument that the courts adjudicating the applicants' criminal case had not been bound by the judgment in X's case. It notes, however, that Article 90 of the Code of Criminal Procedure, as worded at the material time, expressly afforded the force of *res judicata* to judgments even if issued in accelerated proceedings (see paragraph 79 above). Moreover, by stating that "Circumstances established in a judgment ... shall be accepted by a court ... without additional verification", it set forth the rule whereby not only a finding of guilt of an accused but also findings of fact would formally have potential prejudicial effect. Even though in accordance with Article 90, a judgment cannot

predetermine the guilt of those who have not participated in the criminal case under consideration, the fact that the circumstances established in the judgment against X had the force of *res judicata* in effect contravened that prohibition.

108. The Government argued that in the applicants' case the trial court had been obliged to examine all evidence and witnesses and to base its assessment exclusively on the material and testimony presented at the hearing. Even so, the Court considers that in the circumstances, the courts acting in concurrent proceedings had an obvious incentive to remain concordant, because any conflicting findings made in related cases could undermine the validity of both judgments issued by the same court. The Court considers that in the present case, the risk of issuing contradictory judgments was a factor that discouraged the judges from finding out the truth and diminished their capacity to administer justice, thus causing irreparable damage to the court's independence, impartiality and, more generally, its ability to ensure a fair hearing. In view of the foregoing, the Court finds that the judgment of 24 December 2012 had a prejudicial effect on the criminal proceedings against the applicants, and reference to that judgment in the applicants' sentence, even without express reliance on it, accentuated that effect.

109. In the same vein, the Court considers that the separation of the cases, particularly X's conviction with the use of plea-bargaining and accelerated proceedings, compromised his competence as a witness in the applicants' case. As noted above, his conviction was based on the version of events formulated by the prosecution and the accused in the plea-bargaining process, and it was not required that that account be verified or corroborated by other evidence. Standing later as a witness, X was compelled to repeat his statements made as an accused during plea-bargaining. Indeed, if during the applicants' trial X's earlier statement had been exposed as false, the judgment issued on the basis of his plea-bargaining agreement could have been reversed, thus depriving him of the negotiated reduction of his sentence. Moreover, by allowing X's earlier statements to be read out at the trial before the defence could cross-examine him as a witness, the court could give an independent observer the impression that it had encouraged the witness to maintain a particular version of events. Everything above confirms the applicants' argument that the procedure in which evidence had been obtained from X and used in their trial had been suggestive of manipulation incompatible with the notion of a fair hearing.

110. Turning to the point of the allegedly arbitrary application of criminal law, the Court observes that the second applicant, Mr Ofitserov, was convicted of facilitating embezzlement committed by X. The acts imputable to him consisted of setting up a timber trading company VLK, concluding on behalf of that company a framework contract with a timber supplier, Kirovles, and buying Kirovles' timber and reselling it to customers at 7% commission, in accordance with the framework contract and its annexes containing specific sales contracts based on its heads of terms. The first applicant, Mr Navalnyy, was convicted of introducing the second applicant to X, Kirovles' director, and of fostering commercial ties between VLK and Kirovles, acts defined as organising embezzlement.

111. In the original charges, these acts had been defined as deception or abuse of trust, an offence under Article 165 of the Criminal Code, allegedly committed against X, but those charges were dropped for lack of *corpus delicti*. Subsequently, the prosecution and the courts decided that it had been X who had embezzled Kirovles' assets by entering into a loss-making transaction, and the applicants were assigned the roles of his accomplices.

112. The Court observes that under Russian law, limited liability companies such as VLK are defined as commercial entities whose main purpose is deriving profits (Article 50 of the Civil Code). The Court also notes that the domestic courts did not establish, and it was not even argued, that VLK by signing the contract and charging commission had pursued a goal other than deriving profit from timber resale. Moreover, neither the validity of the sales contract between VLK and Kirovles, nor its legal nature, were called into question. It had not been imputed to either X or the applicants that they had concluded a sham transaction or that it had implied a money laundering, tax evasion or kick-back scheme, or that the parties had conspired in advance to turn the proceeds from VLK's commission to some other unlawful or dubious purpose. On the contrary, it transpires from the material in the case file that the two parties to the contract had pursued commercial goals independently of each other and that those goals were precisely those that had been stipulated in the contract. It is also noteworthy that when the court referred to Article 10 § 1 of the Civil Code and found that the transaction had caused damage to Kirovles, it had not established that doing so had been the applicants' exclusive goal, or that they had acted in bad faith or in breach of fair competition rules, contrary to that Article.

113. As regards Kirovles' losses imputed to VLK and, ultimately, the applicants, the Court observes that neither the nature of the transaction nor the context in which it was concluded imposed or implied a requirement that the buyer, VLK, would have to exercise a special duty of care towards the seller, Kirovles, to ensure that the latter sold the timber at the best possible price. Such a requirement would have indeed been an exception to the principle that each party carries the risks

associated with a transaction in accordance with the terms of contract. In the present case, there was no basis for such an exception or legal obstacle for the parties to agree on VLK's commission and set it out in the contract the way they did.

114. It may be derived from X's statements at the applicants' trial that he concluded the contract with VLK because he was under the impression that he was obliged to do so by the first applicant because he had associated him with the Governor's team. However, the trial court also found that the first applicant had no mandate to compel X to choose VLK as a commercial partner and had not made any false representations to the contrary. Accordingly, even if X's assertions were true and he had indeed entered into an unprofitable transaction for the wrong reasons, no causal link was established between the applicants' conduct and Kirovles' losses, if any. Moreover, the losses of Kirovles were not established on the basis of VLK's commission, *inter alia*, but were found to constitute the total amount payable for the timber under the contract.

115. As such, the courts found the second applicant guilty of acts indistinguishable from regular commercial middleman activities, and the first applicant for fostering them. The Court considers that in the present case the questions of interpretation and application of national law go beyond a regular assessment of the applicants' individual criminal responsibility or the establishment of *corpus delicti*, matters which are primarily within the domestic courts' domain. It is confronted with a situation where the acts described as criminal fell entirely outside the scope of the provision under which the applicants were convicted and were not concordant with its intended aim. In other words, the criminal law was arbitrarily and unforeseeably construed to the detriment of the applicants, leading to a manifestly unreasonable outcome of the trial.

116. The foregoing findings demonstrate that the domestic courts have failed, by a long margin, to ensure a fair hearing in the applicants' criminal case, and may be taken as suggesting that they did not even care about appearances. It is noteworthy that the courts dismissed without examination the applicants' allegations of political persecution which were at least arguable for the following reasons.

117. The Court observes that the anti-corruption campaign run by the first applicant gained its momentum in the course of 2010; that year it targeted high-ranking officials, including the President of the Russian Federation, the Deputy Prime Minister and the Chief of the Investigative Committee. Mr Navalnyy's investigations attracted the increasing attention of his Internet blog followers, but also a wider audience through other media republishing the blog content and giving him airtime. Irrespective of whether the officials concerned acknowledged the publications, and whether or not they contested the allegations, they undoubtedly found them unwelcome. Furthermore, it was becoming clear that the first applicant would not confine his revelations to the audience of a niche press, but that his aspiration was to become an acting politician at the national level, capable of reaching out to a wider public. Since the conviction came into force he has been ineligible to stand for elections and has been restricted in his freedom of movement. It is also relevant that his criminal record has been relied on to justify his house arrest, the terms of which included, among other restrictions, a ban on making public statements, even those unrelated to the criminal proceedings.

118. It appears that the first applicant's publications were a regular feature, and virtually any date on which his prosecution would begin would inevitably coincide with some of his articles appearing in the media. Even so, it is impossible to overlook that the first Kirovles inquiry was opened on 9 December 2010, three weeks after the publication of the big-time financial scandal relating to the East Siberia-Pacific Ocean oil pipeline project and implicating Russia's top officials. Over the next two years the inquiry stopped and restarted several times, but in 2012 it was resolutely reopened under the direct orders of Mr Bastrykin, the Chief of the Investigative Committee. This upsurge came at a period when the first applicant was investigating Mr Bastrykin's own off-duty activities; this investigation resulted in the publication of 26 July 2012 exposing Mr Bastrykin's business and residence status as incompatible with his office (see paragraph 31 above). The criminal case was reopened under Mr Bastrykin's direct orders, and this was reflected in his speech of 5 July 2012 when he deplored its termination and unequivocally pledged to take disciplinary action against any investigator failing to pursue the first applicant.

119. It is obvious for the Court, as it must also have been for the domestic courts, that there had been a link between the first applicant's public activities and the Investigative Committee's decision to press charges against him. It was therefore the duty of the domestic courts to scrutinise his allegations of political pressure and to decide whether, despite that link, there had been a genuine cause for bringing him to justice. The same goes for the second applicant who had an arguable claim that he was only targeted as a vehicle for also bringing the first applicant into the orbit of the criminal case, a reason equally unrelated to the true purposes of a criminal prosecution. Having omitted to address these allegations the courts have themselves heightened the concerns that the real reason for the applicants' prosecution and conviction was a political one.

120. The foregoing considerations lead the Court to conclude that the criminal proceedings against the applicants, taken as a whole, constituted a violation of their right to a fair hearing under Article 6 § 1 of the Convention.

121. In view of this, the Court does not consider it necessary to address separately the remainder of the applicants' complaints under Article 6 §§ 1-3 of the Convention.

## III. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

122. The applicants complained that the legal provision on the basis of which they had been convicted of embezzlement had not been applicable to their acts. They claimed that the authorities extended the interpretation of the offence to such broad and ambiguous terms that it did not satisfy the requirements of foreseeability. They relied on Article 7 of the Convention, which reads as follows:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

### A. Admissibility

123. 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

124. The Government submitted that there had been no violation of Article 7 of the Convention as regards the applicants, both of whom had been convicted of large-scale embezzlement, a criminal offence under Article 160 § 4 of the Criminal Code. They maintained that the relevant domestic courts had correctly decided on the legal classification of the offence, in accordance with the Supreme Court's guidelines of 27 December 2007. They also noted that the applicants' appeal on points of law had been rejected at a higher level.

125. The applicants contended that they had been convicted of a criminal offence for acts that had been perfectly legal. They claimed that the scope and purpose of Article 160 of the Criminal Code as interpreted by the Supreme Court had not allowed criminal liability to be extended to theft by persons who had acted lawfully.

126. The Court has established above that the domestic courts applied criminal law arbitrarily and found the applicants guilty of acts indistinguishable from regular commercial activities (see paragraph 115 above), in violation of Article 6 of the Convention.

127. In the light of this finding, the Court considers that it is not necessary to examine whether this also constituted a violation of Article 7 § 1 of the Convention.

## IV. ALLEGED VIOLATION OF ARTICLE 18 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLES 6 AND 7 OF THE CONVENTION

128. Lastly, the applicants alleged that their prosecution and criminal conviction had been for reasons other than bringing them to justice, and in particular in order to prevent the first applicant from pursuing his public and political activities. They relied on Article 18 of the Convention, which reads as follows:

> "The restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

129. The Court notes that the applicants refer to Article 18 in conjunction with all of their other complaints, notably under Articles 6 and 7 of the Convention. The Court observes, however, that the provisions of these Articles, in so far as relevant to the present case, do not contain any express or implied restrictions that may form the subject of the Court's examination under Article 18 of the Convention.

130. For this reason this complaint must be rejected as incompatible *ratione materiae* with the provisions of the Convention.

## V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

131. 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

132. The applicants requested that the Court award them 100,000 euros (EUR) each in respect of non-pecuniary damage, or make an award at its discretion. They indicated the adverse consequences brought about by their prosecution and conviction, in particular the restriction on their freedom of movement, their loss of earnings and the reputational damage they had both sustained. The first applicant, in addition, indicated that he had been stripped of his advocate’s licence and had lost the right to stand in elections.

133. The applicants also asked the Court to award them 500,000 Russian roubles each on account of the fine they had been made to pay in the criminal proceedings. They made this claim under the head of costs and expenses, but it falls to be considered as pecuniary damages.

134. The Government submitted that if the Court were to find a violation of the Convention in the present case, this finding would constitute in itself sufficient just satisfaction. They stated that in any event, a violation of Articles 6 or 7 of the Convention, if the Court were to make such a finding, would constitute grounds for reopening the criminal proceedings against the applicants, in accordance with Article 413 of the Code of Criminal Procedure. They pointed out that the applicants, if acquitted, would be entitled to compensation and would be able to present their claims to the domestic courts at that stage.

135. The Court has found a violation of Article 6 of the Convention and considers that, in the circumstances, the applicants’ suffering and frustration cannot be compensated for by the mere finding of a violation. Making its assessment on an equitable basis, it awards the applicants EUR 8,000 each in respect of non-pecuniary damage.

136. Furthermore, the Court refers to its settled case-law to the effect that when an applicant has suffered an infringement of his rights guaranteed by Article 6 of the Convention, he should, as far as possible, be put in the position in which he would have been had the requirements of that provision not been disregarded, and that the most appropriate form of redress would, in principle, be the reopening of the proceedings, if requested (see, *mutatis mutandis*, *Öcalan v. Turkey* [GC], no. 46221/99, § 210 *in fine*, ECHR 2005-IV, and *Popov v. Russia*, no. 26853/04, § 264, 13 July 2006). This applies to both applicants in the present case. The Court notes, in this connection, that Article 413 of the Code of Criminal Procedure provides a basis for the reopening of the proceedings if the Court finds a violation of the Convention.

137. In view of the above, the Court accepts the Government’s assurance concerning the prospect of reopening the applicants’ criminal case and notes that the scope of the domestic review would allow the applicants to formulate their pecuniary claims and to have them examined by the domestic courts. For this reason, it dismisses the applicants’ claims as regards pecuniary damage.

### B. Costs and expenses

138. The first and second applicants claimed EUR 48,053 and EUR 22,893 respectively for costs and expenses incurred in the domestic proceedings and before the Court. They submitted contracts and receipts indicating their lawyers’ fees and attached travel documents and hotel receipts for the expenses incurred during their trial in Kirov.

139. The Government objected on the grounds that compensation for costs and expenses in this case would be tantamount to setting aside the domestic judgment of 18 July 2013. They proposed that these claims be dealt with in the new domestic proceedings.

140. According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. Moreover, awards for costs and expenses are linked to the finding of a violation of the Convention, violations of Article 6 of the Convention not being an exception (see, as a recent example, *Volkov and Adamskiy v. Russia*, nos. 7614/09 and 30863/10, §§ 68 and 71, 26 March 2015, where the Court found a violation of Article 6 of the Convention and made an award for costs and expenses). It therefore dismisses the Government’s objection that an award for costs and expenses would be tantamount to setting aside the domestic judgment in question.

141. In the present case, which was of a certain complexity and involved multiple levels of domestic court and the proceedings before the Court, there have been a violation of Article 6 of the Convention. Regard being had to the documents in its possession and the above-mentioned criteria, the Court considers it reasonable to award the claimed amounts in full. It awards the first and second applicants EUR 48,053 and EUR 22,893 respectively, plus any tax that may be chargeable on these amounts, in respect of costs and expenses.

### C. Default interest

142. 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. *Decides*, unanimously, to join the applications;

2. *Declares*, unanimously, the complaints under Articles 6 and 7 of the Convention admissible and, by a majority, the remainder of the applications inadmissible;

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

4. *Holds*, unanimously, that there is no need to examine the remaining complaints under Article 6 of the Convention;

5. *Holds*, unanimously, that there is no need to examine the complaint under Article 7 of the Convention;

6. *Holds*,
(a) by six votes to one, that the respondent State is to pay each applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 8,000 (eight thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
(b) unanimously, that the respondent State is to pay the first applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 48,053 (forty-eight thousand and fifty-three euros) in respect of costs and expenses, plus any tax that may be chargeable, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
(c) unanimously, that the respondent State is to pay the second applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 22,893 (twenty-two thousand eight hundred and ninety-three euros) in respect of costs and expenses, plus any tax that may be chargeable, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
(d) unanimously, 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;

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

Done in English, and notified in writing on 23 February 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

| Marialena Tsirli | Luis López Guerra |
| --- | --- |
| Deputy Registrar | President |

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Nicolaou, Keller and Dedov is annexed to this judgment.

L.L.G.
M.T.

## JOINT PARTLY DISSENTING OPINION OF JUDGES NICOLAOU, KELLER AND DEDOV

1. For the reasons set out in paragraphs 102–21 of the present judgment, we are in full agreement with the majority of our colleagues that there has been a violation of Article 6 of the Convention in this case. We also voted with the majority as regards Article 7 of the Convention. However, we are unable to agree with our colleagues' conclusion that the applicants' complaint

under Article 18 of the Convention is inadmissible. Our colleagues considered that, given the findings made under Article 6 § 1 of the Convention, it was not necessary to examine the applicants' other complaints under Articles 6 and 7 of the Convention. They were not, however, content to follow the same approach on Article 18 of the Convention, choosing instead to dismiss that complaint as inadmissible. We respectfully disagree.

2. First, we consider that the majority's approach underestimates the significance of Article 18 of the Convention. That provision states simply that "[t]he restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed". However, the preparatory work on the provision shows that it was drafted as a defence against abusive limitations of Convention rights and freedoms and thus to prevent the resurgence of undemocratic regimes in Europe. Article 18 of the Convention was intended to provide Europe with the new approach needed in the "battle against totalitarianism", premised on the understanding that States could always and would always find excuses or reasons to limit, restrict, and ultimately hollow out individual rights and freedoms: the public interest in "morality, order, public security and above all democratic rights" can all be abused for this purpose[1]. Thus, an early version of the provision, proposed by the Legal Committee to the Consultative Assembly, proscribed "any restriction on a guaranteed freedom for motives based, not on the common good or general interest, but on reasons of state"[2]. This version of Article 18 of the Convention was part of the universal limitations clause that was, at an early stage of the Convention's drafting, introduced to apply to all Convention rights and freedoms[3].

3. As ultimately codified in the Convention, Article 18 was intended to go beyond the content of the rights and freedoms in the Convention to protect individuals from limitations of their rights that run counter to the spirit of the Convention, including politically motivated prosecutions. This application of the provision is also reflected in the Court's practice, though findings of a violation of Article 18 are rather rare, given the exacting standard of proof applied as a result of the presumption that States comply with their Convention obligations in good faith[4]. The Court has nonetheless found a number of violations of Article 18 of the Convention. One example is the Court's 2012 *Lutsenko v. Ukraine* judgment, where it found that the criminal prosecution of the applicant had not only been initiated in order to bring him to justice for a suspected criminal offence, but also "for other reasons", *inter alia* to punish him for asserting his innocence and going to the media in order to contest the allegations made against him[5]. Another example is the 2014 *Ilgar Mammadov v. Azerbaijan* case. There, the applicant was called in for police questioning on the day after posting a blog entry providing information about riots which the authorities had wanted to keep from the public. Criminal proceedings were then begun against him. Given the absence of "objective information giving rise to a *bona fide* suspicion against the applicant"[6], the Court considered it sufficiently proven that "the actual purpose of the impugned measures was to silence or punish the applicant for criticising the Government and attempting to disseminate what he believed was the true information that the Government were trying to hide"[7]. There are also several other examples of judgments in which the Court applied Article 18 of the Convention to politically motivated proceedings[8]. While rare, the application of the provision to such proceedings is nonetheless confirmed by the Court's case-law.

4. Secondly, we consider that the majority limit the scope of application of Article 18 of the Convention without necessity or justification. Of course, we note that Article 18 cannot be invoked to combat abuse of power in every possible form. The Court – and indeed the text of Article 18 itself – makes it clear that the provision enshrines an accessory right which must be invoked together with another Article of the Convention[9]. However, it is important to note that this other Article need not have been violated. The question at issue in the present case is whether Article 18 can be invoked together with any Convention right, or only with those that explicitly provide for justified restrictions. In its past case-law, the Court has explicitly permitted the invocation of Article 18 together with Article 5 of the Convention[10], Article 8 of the Convention[11] and Article 1 of Protocol No. 1 to the Convention[12]. However, the Court also seems to have allowed Article 18 to be invoked together with one of these three provisions and other Convention rights, for example Article 6 of the Convention[13]. Furthermore, the drafting history of Article 18 would indicate that its application was not intended to be limited to those provisions of the Convention containing an explicit restriction clause. Instead, as per its *ratio conventionis*, it applies to limitations on all Convention rights, with the exception of those absolute rights that do not permit limitation and to which it therefore cannot logically apply, for example those under Article 3.

5. The present case is the first in which the Court has been called upon to apply the accessory protection of Article 18 solely in conjunction with Article 6 or 7 of the Convention. The majority have resolved the previously unanswered question as to the possibility of such a combination by finding that it is not possible to invoke Article 18 solely in conjunction with these provisions, which "inasmuch as relevant to the present case do not contain any express or implied restrictions that

may form the subject of the Court's examination under Article 18 of the Convention" (see paragraph 129 of the judgment). Given the textually broad nature of Article 18 of the Convention, the majority's finding would, at the very least, have merited an explanation.

6. Focusing on Article 6 of the Convention, it is undeniable that this right permits limitations: the provision has inherent restrictions according to both its very wording and the Court's case-law[14]. Article 6 of the Convention, like Article 5, does not enshrine an absolute right, and though neither provision textually provides for restrictions in a separate second paragraph analogous to those contained in Articles 8-11 of the Convention, limitations are nonetheless possible[15]. There is therefore no *a priori* reason why Article 18 should apply only in conjunction with Article 5 and not with Article 6.

7. The relevance of Article 18 of the Convention is particularly significant when examining the case of the first applicant. The criminal proceedings brought against him were not simply unfair and thus in violation of Article 6 § 1; there is also an arguable claim to the effect that the proceedings contained an abusive element. The domestic criminal proceedings at issue subjected a government-critical, prominent and politically active person to criminal prosecution in a manner that the majority in this case found to have "arbitrarily and unforeseeably construed [the domestic law] to the detriment of the applicants, leading to a manifestly unreasonable outcome of the trial" (see paragraph 115 of the judgment). The effect of such a distortion of the law – the singling out of dissidents in order to silence them by means of criminal proceedings – is precisely the sort of abuse from which Article 18 is intended to provide protection. This is a separate issue from the complaint under Article 6 § 1, and it is an issue regarding which the applicants raised an arguable claim in Strasbourg. The Court was therefore under a duty to examine the allegation made. Rejecting the complaint as incompatible *ratione materiae*, as the majority do, flies in the face of the *ratio conventionis* and the previous case-law concerning Article 18. For this reason, though we do not consider it our place to make a determination about the merits of the applicants' complaint in this context, we consider that the Court should have declared the complaint under Article 18 of the Convention admissible.

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[1]1. Statement of Lodovico Benvenuti (Italy) at the first session of the Consultative Assembly of the Council of Europe, Strasbourg, 8 September 1949, in *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights*, Vol. I (Martinus Nijhoff, The Hague 1975), pp. 179–180.

[2]2. *Collected Edition of the "Travaux Préparatoires"*, *op. cit.*, Vol. I: Preparatory Commission of the Council of Europe; Committee of Ministers, Consultative Assembly, 11 May–8 September 1949, p. 200.

[3]3. Ibid.

[4]4. *Lutsenko v. Ukraine*, no. 6492/11, §§ 106–07, 3 July 2012.

[5]5. *Lutsenko*, cited above, §§ 106-09.

[6]6. *Ilgar Mammadov v. Azerbaijan*, no. 15172/13, § 142, 22 May 2014.

[7]7. *Ilgar Mammadov*, cited above, § 143.

[8]8. Compare *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, 25 July 2013; *Cebotari v. Moldova,* no. 35615/06, 13 November 2007; *Gusinskiy v. Russia*, no. 70276/01, ECHR 2004-IV; and *Tymoshenko v. Ukraine*, no. 49872/11, 30 April 2013.

[9]9. See, *inter alia*, *Gusinskiy*, cited above, § 73, and *Ilgar Mammadov*, cited above, § 137.

[10]10. *Ilgar Mammadov*, cited above, §§ 137-44; *Tymoshenko*, cited above, §§ 294–301; and *Lutsenko*, cited above, §§ 104-10.

[11]11. *Handyside v. the United Kingdom*, 7 December 1976, § 64, Series A no. 24.

[12]12. *OAO Neftyanaya Kompaniya Yukos v. Russia*, no. 14902/04, §§ 659-66, 20 September 2011.

[13]13. Compare *Khodorkovskiy and Lebedev*, cited above, which is rather vague on this point.

[14]14. *Van Mechelen and Others v. the Netherlands*, 23 April 1997, §§ 54 and 58, *Reports of Judgments and Decisions* 1997-III; *Doorson v. the Netherlands*, 26 March 1996, § 72, *Reports* 1996-II; *Deweer v. Belgium*, 27 February 1980, § 49, Series A no. 35; *Kart v. Turkey* [GC], no. 8917/05, § 67, ECHR 2009 (extracts); and *Guérin v. France*, 29 July 1998, § 37, *Reports* 1998-V.

[15]15. Only Articles 2, 3, 4 § 1 and 7 of the Convention are absolute in the sense of Article 15 of the Convention, meaning that they do not permit derogation in times of emergency. Furthermore, while an interference with the right guaranteed under Article 3 of the Convention cannot be justified, it is indeed possible to justify interference with Article 6 of the Convention.