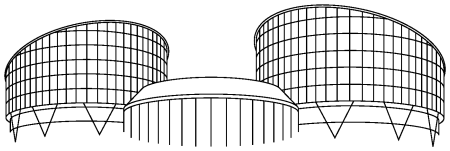

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF SHVYDKA v. UKRAINE

(Application no. 17888/12)

JUDGMENT

STRASBOURG

30 October 2014

FINAL

30/01/2015

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

In the case of Shvydka v. Ukraine,

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

Mark Villiger, *President,*
Angelika Nußberger,
Boštjan M. Zupančič,
Ganna Yudkivska,
Vincent A. De Gaetano,
André Potocki,
Aleš Pejchal, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 30 September 2014,

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

PROCEDURE

1. The case originated in an application (no. 17888/12) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Ms Galyna Mykolayivna Shvydka ("the applicant"), on 21 March 2012.

2. The applicant was represented by Mr D.O. Ilchenko, a lawyer practising in Kherson. The Ukrainian Government ("the Government") were represented by their Agent, most recently Ms Nataly Sevostianova.

3. The applicant alleged, in particular, that her right to freedom of expression under Article 10 of the Convention had been violated. She also complained that she had not been afforded the right of appeal under Article 2 of Protocol No. 7.

4. On 14 October 2013 the above complaints were communicated to the Government and the remainder of the application was declared inadmissible.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

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

6. On 24 August 2011, as part of the Independence Day festivities, there was a wreath-laying ceremony at a monument to Taras Shevchenko, a

famous Ukrainian poet and public figure, with the participation of the then President of Ukraine Mr Yanukovych.

7. The applicant, as a member of the opposition party Batkivshchyna, took part in a public gathering organised by it on the occasion of Independence Day. According to her, the beginning of the meeting was delayed because of the aforementioned wreath-laying ceremony.

8. After the ceremony the applicant approached the wreath laid by Mr Yanukovych and detached part of the ribbon bearing the words "the President of Ukraine V.F.Yanukovych" without damaging the wreath itself. This was meant to express her opinion that Mr Yanukovych could not be called the President of Ukraine for a number of reasons.

9. The case file contains several copies of photos of the applicant in the aforementioned setting. In four of them she is seen near the wreath detaching the ribbon from it in a careful and concentrated manner, without changing the position of the wreath. In another photo the applicant holds the already detached ribbon in front of her and seems to be either laughing or saying something. There are many people next to her. In the last photo the applicant seems to be trying to tear the ribbon apart. Her face expresses either effort or contempt.

10. The applicant's action was video recorded by one of the police officers in charge of maintaining public order. The aforementioned photos may also have been taken by the police.

11. On the same day the police officer in question established the applicant's identity and reported the incident to his superiors.

12. On 25 August 2011 the applicant was apprehended (for less than three hours – see paragraph 16 below) and taken to the Shevchenkivskyy district police station, where a report was drawn up indicating that her actions amounted to petty hooliganism in breach of Article 173 of the Code of Administrative Offences. The applicant, who was not allowed to consult a lawyer, refused to sign that report.

13. On 30 August 2011 the Shevchenkivskyy District Court of Kyiv, at a hearing attended by the applicant and the lawyer retained by her in the meantime, found the applicant guilty of petty hooliganism on account of the incident of 24 August 2011 and sentenced her to ten days' administrative detention. The court explained that it had decided to apply such a penalty given the nature of the offence, the applicant's cynical attitude towards it and her failure of admit her guilt. The applicant submitted at the hearing that she had been expressing her civil position and that she had not damaged the wreath, but had merely taken a piece of the ribbon to show her children and grandchildren and also her acquaintances who had voted for Mr Yanukovych.

14. On the same day the applicant's lawyer lodged an appeal on her behalf. He argued that the applicant's action had been an expression of her civil position and that it had been neither prompted by hooligan motives nor

aimed at disturbing public order or breaching the peace. The appeal further referred to Article 10 of the Convention and the Court's case-law, according to which the notion of "expression" concerned not only words, but also actions intended to convey a certain message or information. Referring to paragraph 16 of Resolution of the Plenary Supreme Court no. 10 of 22 December 2006 (see paragraph 18 below), the lawyer also submitted that the penalty imposed was excessively severe.

15. On 21 September 2011 the Kyiv City Court of Appeal, at a hearing attended by the applicant's two lawyers, upheld the first-instance court's decision in a final ruling. By that time the applicant had served her sentence in full.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Code of Administrative Offences 1984 (with the major amendments of 24 September 2008)

16. The relevant provisions of the Code of Administrative Offences (hereafter referred to as "the Code") read as follows:

Article 32. Administrative detention

"Administrative detention shall be applied only in exceptional cases, in respect of specific types of administrative offences, for a maximum term of fifteen days. ..."

Article 173. Petty hooliganism

"Petty hooliganism – that is, swearing in public, offensive behaviour or other similar actions which amount to a breach of the peace or disturb public order – shall be punishable with a fine ranging from three to seven times the non-taxable minimum income, or correctional labour for one to two months, with retention of twenty per cent of the earnings. Where in the circumstances of a particular case the above measures are deemed insufficient having regard to the character of the perpetrator, the penalty shall be administrative detention for up to fifteen days."

Article 263. Administrative apprehension time-limits

"Administrative apprehension of a person [suspected of] an administrative offence shall last no longer than three hours."

Article 287. The right to challenge a ruling on an administrative offence

"A ruling on an administrative offence may be challenged by the person in respect of whom it was issued and the victim.

A [court] ruling imposing an administrative sanction may be challenged under the procedure envisaged by this Code."

Article 289. Time-limits for challenging a ruling on an administrative offence

"An appeal against a ruling on an administrative offence may be lodged within ten days of the date of the pronouncement of the ruling."

Article 294. Entry into force, and review, of a court ruling on an administrative offence

"A court ruling on an administrative offence shall enter into force after the expiry of the time-limit for lodging an appeal, except for a ruling imposing a sanction envisaged by Article 32 of this Code ... .

An appeal shall be examined by a judge of the appellate court within twenty days of its receipt. ...

A ruling of the appellate court shall be final. ..."

Article 296. Consequences of quashing a ruling [of the first-instance court] and termination of prosecution for an administrative offence

"... Damage caused to a person by the unlawful imposition of administrative detention ... as a sanction shall be compensated under the procedure established by law."

17. According to the Theoretical and Practical Commentary to the Code *(Р.А.Калюжний, А.Т.Комзюк, О.О.Погрібний та ін.; К.: Всеукраїнська асоціація видавців Правова єдність, 2008, стор. 404-05)*, "other similar actions" within the meaning of Article 173 may be extremely varied. They include, but are not limited to, violently breaking into certain public places in violation of an official prohibition; disturbing others by unjustified or insulting telephone calls; singing indecent songs; exclamations or whistling during a film in a cinema; making noise at night time; using as a toilet facility places not designated for that purpose; appearing naked in public; unjustifiably stopping any means of public transport; drawing indecent graffiti; giving untruthful notification of the death of a relative including where this does not lead to serious consequences; queue barging; destroying or damaging, for hooligan motives, property of an insignificant amount; and so on.

B. Resolution of the Plenary Supreme Court of Ukraine no. 10 of 22 December 2006 on judicial practice in hooliganism-related cases

18. Pursuant to paragraph 16, when deciding on an applicable sanction under Article 173 of the Code of Administrative Offences, the judge must in each particular case take into account the nature of the offence committed, the character of the offender, the degree of his or her guilt, his or her property situation, as well as any mitigating or aggravating circumstances. As a rule, administrative sanctions or social measures, rather than detention, should be applied to persons involved in a socially useful activity and

enjoying positive character references at their place of work, study or residence.

C. Law of Ukraine on the Procedure for Compensating Damage caused to Citizens by the Unlawful Actions of Bodies in charge of Operational Enquiries, Pre-trial Investigation Authorities, Prosecutors or Courts ("the Compensation Act")

19. The relevant provisions read as follows:

Section 1

"Under the provisions of this Law, a person is entitled to compensation for damage caused by

...

2) unlawful application of administrative detention ...;

..."

Section 2

"The right to compensation for damage in the amount of and in accordance with the procedure established by this Law shall arise in cases of

...

4) termination of an administrative prosecution."

Section 3

"In the cases referred to in section 1 of this Act the applicant shall be compensated for

1) earnings and other income lost as a result of the unlawful actions;

4) legal costs and expenses ... and

5) non-pecuniary damage."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

20. The applicant complained of a violation of her right to freedom of expression under Article 10 of the Convention, which reads as follows:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. Admissibility

21. The Government submitted that this part of the application should be rejected for non-exhaustion of domestic remedies in accordance with Article 35 § 1 of the Convention. They argued, accordingly, that the applicant had failed to explain either at the hearing before the first-instance court or in her appeal what "civil position" she had sought to express by tearing off a piece of the wreath ribbon and how her administrative sentence had infringed her right to freedom of expression.

22. The applicant disagreed and maintained that she had explicitly raised those issues in her appeal.

23. The Court reiterates that under Article 35 § 1 of the Convention, it may only deal with an application after all domestic remedies have been exhausted. The rule of exhaustion of domestic remedies normally requires that the complaints intended to be brought subsequently before the Court should have been brought before the domestic courts, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law (see, among other authorities, *Cardot v. France*, 19 March 1991, § 34, Series A no. 200, and *Elçi and Others v. Turkey*, nos. 23145/93 and 25091/94, §§ 604 and 605, 13 November 2003).

24. Having regard to the case-file materials, the Court has no doubt that the applicant raised the complaint in question in the domestic proceedings, in compliance with all the formalities, before bringing it to this Court. To go as far as assessing the completeness or soundness of her argumentation in support of that complaint would involve an excessively restrictive interpretation of the exhaustion requirement. The Court therefore dismisses this objection by the Government.

25. It further notes that this complaint is neither manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention nor inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

26. The applicant submitted that, by having detached the ribbon with the inscription "President of Ukraine V.F.Yanukovych" from the wreath laid by

Mr Yanukovych, she had expressed her utter disagreement with his policies, including oppression of the opposition. According to her, that act was also meant to express her protest against the imprisonment of the opposition leader Ms Yuliya Tymoshenko. Furthermore, the applicant sought to show her frustration with the constraints imposed on the public as a result of the security arrangements for Mr Yanukovych in the context of the wreath-laying ceremony. She emphasised that she had neither damaged the wreath itself nor disturbed public order.

27. The applicant further submitted that her act had not been given the correct legal qualification, since it had not amounted to any form of hooliganism.

28. Lastly, she argued that her ten days' detention had been grossly disproportionate to the offence with which she had been charged.

29. The Government contended that the applicant had never clearly explained what exactly she had sought to express by her act. In any event, they maintained, she had been held liable not for her disagreement with the President Yanukovych's policies or activities, but for having torn the ribbon off the wreath laid by him.

30. The Government were of the view that the domestic courts had given a comprehensive and correct legal and factual assessment of what the applicant had done, and that the punishment imposed on her had been reasonable and proportionate.

2. The Court's assessment

(a) General principles established in the Court's case-law

31. According to the Court's well-established case-law, freedom of expression, as secured in paragraph 1 of Article 10, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self‑fulfilment. Subject to paragraph 2, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those which offend, shock or disturb; such are the demands of pluralism, tolerance and broadmindedness, without which there is no "democratic society". Moreover, Article 10 of the Convention protects not only the substance of the ideas and information expressed but also the form in which they are conveyed (see, among many other authorities, *Oberschlick v. Austria (no. 1)*, 23 May 1991, § 57, Series A no. 204, and *Women On Waves and Others v. Portugal*, no. 31276/05, §§ 29 and 30, 3 February 2009).

32. As set forth in Article 10, the freedom of expression it protects is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see *Stoll v. Switzerland* [GC], no. 69698/01, § 101, ECHR 2007-V).

33. In order for the interference to be justified under Article 10, it must be "prescribed by law", pursue one or more of the legitimate aims listed in the second paragraph of that provision and be "necessary in a democratic society" – that is to say, proportionate to the aim pursued (see, for example, *Steel and Others v. the United Kingdom*, 23 September 1998, § 89, *Reports of Judgments and Decisions* 1998-VII).

34. In assessing the proportionality of the interference, the nature and severity of the penalty imposed are among the factors to be taken into account (see *Ceylan v. Turkey* [GC], no. 23556/94, § 37, ECHR 1999-IV, Tammer v. Estonia, no. 41205/98, § 69, ECHR 2001-I, and *Skałka v. Poland*, no. 43425/98, § 38, 27 May 2003). Furthermore, the Court must examine with particular scrutiny cases where sanctions imposed by the national authorities for non-violent conduct involve a prison sentence (see *Taranenko v. Russia*, no. 19554/05, § 87, 15 May 2014).

(b) Application of the above principles to the present case

35. The first question for the Court is whether the applicant's act for which she was prosecuted in administrative proceedings and subsequently detained was covered by the notion of "expression" under Article 10 of the Convention.

36. The Court notes in this connection that it has examined various forms of expression falling within the ambit of Article 10. For example, it has considered that the public display of several items of dirty clothing for a short time near Parliament, which had been meant to represent the "dirty laundry of the nation", amounted to a form of political expression (see *Tatár and Fáber v. Hungary*, no. 26005/08 and 26160/08, § 36, 12 June 2012).

37. In the present case the applicant detached the ribbon from the wreath laid by the President of Ukraine at the monument to a famous Ukrainian poet on Independence Day, and that act was witnessed by many people. It is also noteworthy that the applicant belonged to the opposition party Batkivshchyna, the leader of which – Ms Tymoshenko – was then in prison.

38. Having regard to the applicant's conduct and its context, the Court accepts that by her act she sought to convey certain ideas in respect of the President to the people around her. That act can therefore be regarded as a form of political expression. Accordingly, the Court considers that penalising the applicant for it with ten days' detention amounted to an interference with her right to freedom of expression.

39. The Court does not share the applicant's view that the provision of the Code of Administrative Offences on petty hooliganism was manifestly inapplicable to her situation. The provision in question concerns, in particular, offensive behaviour disturbing public order (see paragraph 16 above). In the Court's opinion, damaging the wreath ribbon by the applicant could be regarded as falling under the aforementioned category. The Court is mindful of the quite general legal definition of "petty hooliganism", the

interpretation and practical implementation of which might be open to abuse in certain cases. In the present case, however, the applicant resorted to a provocative gesture likely to disturb or insult some of the many people who witnessed it. Having regard to the applicant's behaviour and to its classification by the domestic courts, the Court accepts that the applicable national legislation met the foreseeability requirement. It concludes that finding the applicant guilty of petty hooliganism and penalising her with a sanction envisaged by the relevant provision complied with the requirement of lawfulness.

40. Having regard to the above observations, the Court also takes the view that the measure applied to the applicant pursued a legitimate aim of protecting public order and the rights of others. It remains to be seen whether it was "necessary in a democratic society" to achieve that aim.

41. As stipulated in the Code of Administrative Offences and further explained by the Plenary Supreme Court, administrative offences (that is, minor offences under Ukrainian legislation) should be punished by deprivation of liberty only in exceptional cases (see paragraphs 16 and 18 above). Nonetheless, the domestic courts applied to the applicant, a sixty-three-year-old woman with no criminal record, the harshest sanction for what in fact constituted a wrongdoing not involving any violence or danger. In doing so, the court referred to the applicant's refusal to admit her guilt, thus penalising her reluctance to change her political views. The Court sees no justification for that and considers the measure to be disproportionate to the aims pursued.

42. The Court therefore concludes that the applicant's right to freedom of expression has been violated. There has accordingly been a violation of Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 2 OF PROTOCOL NO. 7 TO THE CONVENTION

43. The applicant complained that the delayed examination of her appeal, although being in accordance with the established procedure, undermined her right of appeal because it took place only after she had served her sentence in full.

44. The Court considers it appropriate to examine the above complaint under Article 2 of Protocol No. 7, which reads as follows:

> "1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.
>
> 2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal."

A. Admissibility

45. 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

46. The applicant maintained her complaint. She submitted that the delayed examination of her appeal had, in practical terms, nullified its effect on the outcome of the proceedings brought against her for an administrative offence. She noted that she had already served her sentence in full by the time her appeal was examined and that it had therefore been immaterial to her whether or not the appellate court upheld or quashed the decision of the first-instance court.

47. The Government contested the applicant's arguments. They submitted that the applicant had encountered no impediments in using the existing ordinary appeal procedure and that her appeal had been duly examined.

48. The Court notes that the Contracting States in principle enjoy a wide margin of appreciation in determining how the right secured by Article 2 of Protocol No. 7 to the Convention is to be exercised (see *Krombach v. France*, no. 29731/96, § 96, ECHR 2001-II).

49. The Court further observes that this provision mostly regulates institutional matters, such as accessibility of the court of appeal or scope of review in appellate proceedings (see, for example, *Pesti and Frodl v. Austria* (dec.), nos. 27618/95 and 27619/95, 18 January 2000). As the Court has observed in its case-law, the review by a higher court of a conviction or sentence may concern both points of fact and points of law or be confined solely to points of law. Furthermore, it is considered acceptable that, in certain countries, a defendant wishing to appeal may sometimes be required to seek permission to do so. However, any restrictions contained in domestic legislation on the right to a review mentioned in that provision must, by analogy with the right of access to a court embodied in Article 6 § 1 of the Convention, pursue a legitimate aim and not infringe the very essence of that right (see *Krombach*, cited above, § 96; *Gurepka v. Ukraine*, no. 61406/00, § 59, 6 September 2005; and *Galstyan v. Armenia*, no. 26986/03, § 125, 15 November 2007).

50. Having regard to the aforementioned analogy, it appears pertinent to reiterate here the Court's well-established principle on the importance of the right of access to a court, having regard to the prominent place held in a democratic society by the right to a fair trial (see *Airey v. Ireland*, 9 October

1979, § 24, Series A no. 32). Where the right to a review under Article 2 of Protocol No. 7 exists, it should be effective in the same way.

51. The Court notes that this provision is aimed at providing a possibility to put right any shortcomings at the trial or sentencing stages of proceedings once these have resulted in a conviction (see *Rybka v. Ukraine* (dec.), no. 10544/03, 17 November 2009). Indeed, an issue would arise under the Convention if the appellate jurisdiction is deprived of an effective role in reviewing the trial procedures (see, *mutatis mutandis, Hewitson v. the United Kingdom* (dec.), no. 50015/99, 22 October 2002).

52. The Court has held that delays by the national courts in examining appeals against decrees on a special prison regime applicable for a limited period time may raise issues under the Convention, in particular, its Article 13. Thus, in *Messina v. Italy* (no. 2) the Court, while acknowledging that the right to an effective remedy was not infringed merely by a failure to comply with a statutory time-limit, concluded that the systematic failure to comply with the ten-day time-limit imposed on the courts was liable to considerably reduce, and indeed practically nullify, the impact of judicial review of the decrees on a special regime. One of the factors, which drove the Court to that conclusion, was the limited period of validity of each decree imposing the special regime (no. 25498/94, §§ 94-96, ECHR 2000-X; see also *Enea v. Italy* [GC], no. 74912/01, §§ 73 and 74, ECHR 2009). In other words, a judicial review of a measure, which had by that time expired or almost expired, was considered to serve no longer any purpose.

53. A similar approach should be taken in the circumstances of the present case. The Court notes that the applicant's appeal against the judgment of 30 August 2011, lodged on the same day, did not have a suspensive effect, and the imposed sentence was executed immediately. This was done pursuant to the Code of Administrative Offences providing for the immediate enforcement of a sentence only if it concerned deprivation of liberty (with another unrelated exception – see paragraph 16 above). Had the sanction been different, the first-instance court's decision would have become enforceable only in the absence of an appeal within the legally envisaged time-limits or once upheld by the appellate court. In the present case, however, the appellate review took place after the detention sentence imposed on the applicant by the first-instance court had been served in full. The Court finds it inconceivable how that review would have been able to effectively cure the defects of the lower court's decision at that stage.

54. It does not escape the Court's attention that, had the court of appeal quashed the first-instance decision, it would have been open to the applicant to seek compensation in respect of both pecuniary and non-pecuniary damage on that ground (see paragraph 19 above). However, that retrospective and purely compensatory remedy cannot be regarded as a

substitute of the right to a review embedded in Article 2 of Protocol No. 7. To hold otherwise would run contrary to the well-established principle of the Court's case-law that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see, *mutatis mutandis*, *Airey v. Ireland*, cited above, § 24, and *García Manibardo v. Spain*, no. 38695/97, § 43, ECHR 2000-II).

55. In the light of the foregoing considerations the Court concludes that there had been a violation of Article 2 of Protocol No. 7 in the present case.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

56. 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

57. The applicant claimed 5,000 euros (EUR) in respect of non-pecuniary damage.

58. The Government contested this claim as excessive and unfounded.

59. Having regard to all the circumstances of the present case and the nature of the violation found, the Court considers it appropriate to award the applicant's claim under this head in full. It therefore awards her EUR 5,000 in respect of non-pecuniary damage.

B. Costs and expenses

60. The applicant also claimed EUR 1,000 for the costs and expenses incurred before the Court.

61. The Government noted that the applicant had failed to submit any documents in support of this claim and invited the Court to reject it as unsubstantiated.

62. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court rejects the claim for costs and expenses.

C. Default interest

63. 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, UNANIMOUSLY,

1. *Declares* admissible the applicant's complaint under Article 10 of the Convention that her right to freedom of expression was violated, as well as her complaint under Article 2 of Protocol No. 7 that she could not effectively exercise her right of appeal in the proceedings regarded criminal for the Convention purposes;

2. *Holds* that there has been a violation of Article 10 of the Convention;

3. *Holds* that there has been a violation of Article 2 of Protocol No. 7;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted in the currency of the respondent State at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 30 October 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Mark Villiger
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge De Gaetano is annexed to this judgment.

M.V.
C.W.

SEPARATE OPINION OF JUDGE DE GAETANO

1. I have voted for a violation in this case. Nevertheless I am not in agreement with what is stated in paragraph 39 of the judgment.

2. It has long been established in the case-law of the Court that for the interference with the freedom enshrined in the first paragraph of Article 10 to be "prescribed by law" in the sense of the second paragraph thereof, the law must satisfy the test of foreseeability; or, in the words of the High Court of Justiciary in Scotland in the case *Smith v. Donnelly* [2001] ScotHC 121, at 8 – a case which dealt with the generic offence of breach of the peace, and in the context of Article 7 – the "law creating a criminal offence must meet a certain standard of clarity and comprehensibility". This applies wherever the expression "prescribed by law" is used in the Convention. Reference is made, *inter alia*, to *Müller and Others v. Switzerland*, no. 10737/84, 24 May 1988, § 29; *Groppera Radio AG and Others v. Switzerland* no. 10890/84, 28 March 1990, § 68; *Hashman and Harrup v. the United Kingdom* 25594/94, § 31; and, in the context of an alleged violation of Article 8, *S. and Marper v. the United Kingdom*, nos. 30562/04 and 30566/04, 4 December 2008, §§ 95-96.

3. In the instant case the generic offence was "petty hooliganism". Hooliganism implies behaviour which is objectively unacceptable because of its public nuisance element. Article 173 of the legislation under which the applicant was arrested and convicted (see paragraph 16 of the judgment) indicates only one specific instance of such unacceptable behaviour – swearing in public – the other descriptions given, namely "offensive behaviour or other similar actions which amount to a breach of the peace or disturb public order", being generic and vague. The Theoretical and Practical Commentary to the Code referred to in paragraph 17 gives other examples of petty hooliganism. Even if these examples were taken from decided cases – and this is not clear from the aforesaid paragraph 17 – there is nothing in these examples which could even remotely justify, by application of the *eiusdem generis* principle, the conclusion that detaching part of a ribbon and disposing of it in the manner described in paragraphs 8 and 9 amounts to offensive behaviour or to a breach of the peace, or to action or actions which disturb public order, as contemplated in the above-mentioned Article 173. There was no "public nuisance" element in the applicant's conduct; and even if it was "a provocative gesture likely to disturb or insult some of the many people who witnessed it", which I do not believe to be the case, it certainly did not amount to a breach of the peace (actual or reasonably apprehended) or to a disturbance of public order. When the applicant removed the ribbon, the official ceremony was over, and the Government did not submit anything to the effect that the applicant's actions were likely to lead, in the concrete circumstances of the case, to even some minor disturbance.

4. In sum, therefore, the interference with the applicant's right of freedom of expression failed, in my view, to meet the first test, that is, it was not "prescribed by law", and it was therefore not necessary to go into the question of the legitimate aim of the interference or of whether it was "necessary in a democratic society."