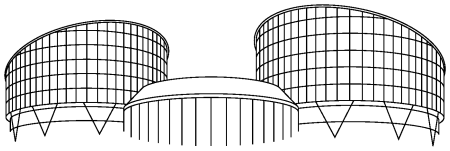

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF NAVALNYYE v. RUSSIA

(Application no. 101/15)

JUDGMENT

STRASBOURG

17 October 2017

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 Navalnyye v. Russia,

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

Branko Lubarda, *President*,
Luis López Guerra,
Helen Keller,
Dmitry Dedov,
Pere Pastor Vilanova,
Alena Poláčková,
Georgios A. Serghides, *judges*,
and Stephen Phillips, *Section Registrar*,

Having deliberated in private on 26 September 2017,

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

PROCEDURE

1. The case originated in an application (no. 101/15) 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 ("the first applicant") and Mr Oleg Anatolyevich Navalnyy ("the second applicant"), on 5 January 2015.

2. The applicants were represented by Ms O. Mikhaylova, Ms A. Polozova and Mr K. Polozov, 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, and then by his successor in that office, Mr M. Galperin.

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.

4. On 8 March 2016 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1976 and 1983 respectively.

6. The first applicant, Aleksey Navalnyy, is a political activist, opposition leader, anti-corruption campaigner and popular blogger. He lives in Moscow. The second applicant, Oleg Navalnyy, is the first applicant's brother; he is an entrepreneur and a former employee of the Federal State unitary enterprise Russian Post. He is currently serving a three-and-a-half year sentence in a correctional colony in the Oryol Region.

7. From 2005 the second applicant worked at the Main Centre for Long Distance Mail, a subsidiary of Russian Post. On 1 December 2007 he became head of its Internal Mail department and then worked in other managerial posts in various departments and divisions of Russian Post.

8. On 17 October 2006 Russian Post concluded a contract with the limited liability company Multidisciplinary Processing (*ООО Многопрофильная процессинговая компания* – hereinafter "MPK") and the telecommunications company Rostelekom, whereby MPK undertook to print Rostelekom's telephone bills and deliver them through Russian Post to Rostelekom's customers.

9. On 1 February 2007, under a separate contract, Russian Post leased electronic equipment from MPK. On 10 April 2007 MPK subcontracted the sorting, packing and the transfer of the equipment leased to Russian Post to a private joint-stock company, the Interregional Mail Centre (*ОАО Межрегиональный специализированный почтовый центр* – hereinafter "MSPT").

10. On 3 December 2007 the applicants and their parents acquired the limited liability company Alortag Management Limited, incorporated in Cyprus.

11. On 7 May 2008 MPK subcontracted the printing of the Rostelekom telephone bills to the limited liability company IPS M-City (*ООО ИПС М-Сити* – hereinafter "M-City").

12. On 19 May 2008 Alortag Management Limited set up a Russian limited liability company, Chief Subscription Agency (*ООО Главное подписное агентство* – hereinafter "GPA"). Neither of the applicants held formal positions in GPA, but it appears that the second applicant was actively involved in its functioning.

13. On 16 July 2008 the chief of Russian Post's Mail Service Directorate informed its client, the Russian subsidiary of French company Yves Rocher, the limited liability company Yves Rocher Vostok (*ООО Ив Роше Восток*), that from 1 October 2008 it would terminate the practice of collecting the client's parcels from a specific distribution centre and that this service would henceforth be subject to a separate contract. Subsequently, Ms B., a manager at Yves Rocher Vostok, asked the second applicant for advice on handling the transfer of parcels from the distribution centre and he suggested that she use a private contractor, GPA.

14. On 2 August 2008 the financial director of Yves Rocher Vostok, Mr K.M., signed a freight forwarding agreement with GPA for the collection and transfer of parcels from the distribution centre at

23,600 Russian roubles (RUB) per shipment. On 10 August 2008 GPA subcontracted the freight forwarding services under that agreement to two specialist courier companies. GPA paid the couriers RUB 14,000 per shipment. GPA and its contractors provided those services to Yves Rocher Vostok until the end of 2012.

15. On 7 November 2008 the general director of MPK, Mr Sh., signed an agreement with GPA whereby the latter undertook to provide overall logistical services to MPK related to the printing, sorting, packing and distribution of telephone bills as well as the sorting, packing and transfer of electronic equipment to Russian Post. Subsequently, GPA subcontracted those services to seventeen specialist companies, including M-City. GPA and its contractors rendered the services to MPK until March 2013.

16. In the same period, the first applicant ran an increasingly public anti-corruption campaign targeting high-ranking public officials (see *Navalnyy and Ofitserov v. Russia*, nos. 46632/13 and 28671/14, § 15, 23 February 2016). In 2011-2012 he organised and led a number of rallies, including an assembly at Bolotnaya Square in Moscow on 6 May 2012 (see, among other sources, *Frumkin v. Russia*, no. 74568/12, §§ 7-65, ECHR 2016 (extracts)).

17. At the beginning of 2012 the first applicant investigated the off-duty activities of the chief of the Investigative Committee of the Russian Federation ("the Investigative Committee"), Mr Bastrykin. On 25 April 2012 the Investigative Committee, at the direct order of Mr Bastrykin, instituted criminal proceedings in embezzlement case against the first applicant (see *Navalnyy and Ofitserov*, cited above, hereinafter "the Kirovles case"). On 5 July 2012 Mr Bastrykin made a public statement expressing his determination to have the first applicant prosecuted. On 26 July 2012 the first applicant published an article about Mr Bastrykin, alleging in particular that his business activities and residence status were incompatible with the office he held (ibid., §§ 30-31 and 118).

18. On 4 December 2012 the general director of Yves Rocher Vostok, Mr B.L., lodged a complaint with the Investigative Committee, alleging that in 2008 unidentified persons had misled his company's employees and had persuaded them to conclude a contract with GPA, thus depriving the company of a free choice of contractor. He stated that it was possible that the company had suffered significant damage as a result.

19. On 10 December 2012 the first applicant made a public plea for people to participate in the Freedom March, an opposition rally at Lubyanskaya Square on 15 December 2012, in defiance of a ban by the Moscow authorities.

20. On the same day the Investigative Committee decided to open a criminal file on the basis of material severed from the Kirovles case. The new file concerned suspicions of fraud by the applicants against Yves Rocher Vostok and the laundering of the proceeds of illegal transactions, offences set out in Articles 159.4 and 174.1 § 2 (a) and (b) of the Criminal Code.

21. On 20 December 2012 charges of fraud and money laundering were brought against the applicants under Articles 159.4 and 174.1 § 2 (a) and (b) of the Criminal Code in connection with acts allegedly committed against MPK and Yves Rocher Vostok.

22. On 13 February 2013 the second applicant requested that five Yves Rocher Vostok employees be questioned as witnesses, including the general director Mr B.L. and the manager Ms B., but the investigator rejected the request on 18 February 2013. It appears that the witnesses were questioned during the investigation, but the applicants were not informed of that fact or given the opportunity to have a formal face-to-face confrontation with them.

23. On 18 July 2013 the Leninskiy District Court of Kirov found the first applicant guilty of organising large-scale embezzlement in the Kirovles case and gave him a suspended prison sentence of five years. The Court subsequently found that those proceedings had been conducted in violation of Article 6 of the Convention (see *Navalnyy and Ofitserov*, cited above, §§ 102-21).

24. On 11 February 2013 the financial director of Yves Rocher Vostok, Mr K.M., submitted an internal audit report to the investigator stating that the company had not sustained any damage or loss of profits due to its agreement with GPA; it had been established by the auditors that GPA had charged the market price for its services.

25. On 28 February 2014 the Basmannyy District Court ordered that the first applicant be placed under house arrest. This preventive measure was maintained until 5 January 2015.

26. On 14 August 2014 the Zamoskvoretskiy District Court began hearing the applicants' criminal case.

27. On 14 November 2014 the applicants requested that the court call and examine the general director of Yves Rocher Vostok, Mr B.L., the manager, Ms B. and several employees of Russian Post as witnesses. They also asked the court to obtain certain internal documents relating to the structure and functioning of Russian Post. The court dismissed those requests.

28. On 9 December 2014 the applicants asked the court to summon six witnesses, again including Mr B.L. and Ms B.

29. On 15 December 2014 the court, at the request of the prosecutor, issued a warrant compelling Mr B.L. to appear, however, it was not executed. The court subsequently allowed statements that he and Ms B. had given during the investigation to be read out.

30. On 19 December 2014 the court concluded the trial and said it would deliver a judgment on 15 January 2015.

31. At about 4 p.m. on 29 December 2014 the applicants and their defence counsel were summoned by telephone to appear in court at 9 a.m. on 30 December 2014 for delivery of the judgment, which had been brought forward from 15 January 2015 for unknown reasons.

32. On 30 December 2014 the court delivered the introductory and operative parts of the judgment. The applicants were found guilty of money laundering and of defrauding MPK and Yves Rocher Vostok and were convicted under Articles 159.4 §§ 2 and 3 and 174.1 § 2 (a) and (b) of the Criminal Code. The first applicant received a suspended sentence of three and a half years and the second applicant a prison sentence of the same duration, to be served in a correctional colony. They were also fined RUB 500,000 each and had to pay jointly RUB 4,498,546 in damages to MPK. The court ordered that the first applicant should remain under house arrest and that the second applicant be placed in "pre-trial detention", with his term of imprisonment running from that day. Delivery of the judgment in full was adjourned until 12 January 2015.

33. The second applicant appealed against his detention the same day.

34. The first applicant appealed against the extension of his house arrest on 31 December 2014.

35. On 12 January 2015 the applicants appealed against the judgment of 30 December 2014 on the merits. They received the full text of the judgment on the same day, which included the reasons for finding the applicants guilty of fraud. The court found that the applicants had set up a "fake company", GPA, with the intention to use it as an intermediary to offer services to two clients of Russian Post, MPK and Yves Rocher Vostok. It held that the second applicant had taken advantage of insider information that Russian Post had ceased to provide the companies with certain services for lack of operational capacity and had convinced those clients to use GPA as a substitute; that he had misled the clients about GPA's pricing policy and its relationship with Russian Post, thus depriving them of the freedom of choice of service providers; that he had promoted his company's services while knowing that it would have to subcontract the work to other companies; and that GPA had retained the difference in price between what MPK and Yves Rocher Vostok paid for its services and what GPA paid to its subcontractors. The court concluded that the latter margin had been stolen from MPK and Yves Rocher Vostok by the applicants through GPA. The court further established that the amounts in question constituted the proceeds of crime, and that using that money to pay GPA's office rent, legal services, dividends to the applicants and for transfers to affiliated companies had constituted money laundering.

36. On 19 January 2015 the Moscow City Prosecutor's Office appealed against the first-instance judgment on the grounds that the sentence given to both applicants had been too lenient.

37. On 28 January 2015 the applicants challenged the accuracy of the verbatim records of the first-instance hearing. Only a few of their corrections were accepted.

38. On 11 February 2015 the applicants lodged additional points of appeal and a request that six witnesses be called and examined, including Mr B.L. and Ms B.

39. On 17 February 2015 the Moscow City Court upheld the first-instance judgment, except for the part imposing a fine and awarding damages to MPK, which was reversed.

40. On 27 April 2015 the applicants lodged a cassation appeal.

41. On 26 June 2015 the Moscow City Court refused leave to lodge a cassation appeal.

II. RELEVANT DOMESTIC LAW

A. Criminal liability for fraud and money laundering

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

Article 158. Theft

"...

Note. 1. For the purposes of the present Code theft is to be understood as the unlawful taking or appropriating of another person's property committed for motives of personal gain and in the absence of consideration, which benefits the perpetrator or others and which has caused damage to the owner or other holder of such property."

Article 159. Fraud

(in force from 29 November 2012)

"1. Fraud, the theft of another's property or the acquisition of the right to another's property by way of deception or abuse of trust, shall be punishable by a fine ... or up to three years' imprisonment ...

...

4. Fraud committed by an organised group or on a 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 159.4. Commercial fraud

(in force from 29 November 2012 to 3 July 2016)

"1. Fraud committed in conjunction with deliberate non-compliance with contractual obligations in the commercial sphere:

shall be punishable ...

2. The same acts committed on a large scale:

shall be punishable by a fine of up to one million roubles or up to two years' wages/salary or other income ... or up to three years' community service or deprivation of liberty of the same duration with or without up to a year's restriction of liberty.

3. The same acts committed on an especially large scale:

shall be punishable by a fine of up to one million five hundred thousand roubles or up to three years' wages/salary or other income ... or up to five years' community service or deprivation of liberty of the same duration with or without up to two years' restriction of liberty."

Article 174.1. Laundering funds or other property acquired in the commission of an offence

(in force between 7 December 2011 and 28 June 2013)

"1. Financial operations and other transactions using funds or other property acquired by a person as a result of committing a crime ... to create the appearance of lawful possession, use or disposal of the said funds or property, committed on a large scale:

shall be punishable ...

2. The acts provided for by paragraph 1 of this Article committed:

(a) in conspiracy;

(b) by someone in abuse of an official position or on a large scale

shall be punishable by up to five years' community service or deprivation of liberty for the same duration with or without a fine of up to five hundred thousand roubles or up to three years' wages/salary or other income ..."

Article 174.1. Laundering funds or other property acquired in the commission of an offence

(in force from 28 June 2013)

"1. Financial operations and other transactions using funds or other property acquired as the result of a crime to create an appearance of lawful possession, use or disposal of the said funds or property, committed on a large scale:

shall be punishable by a fine of up to one hundred and twenty thousand roubles or up to a year's wages/salary or other income ...

2. The same acts committed on a large scale:

shall be punishable by a fine of up to two hundred thousand roubles or between one and two years' wages/salary or other income ... or up to two years' community service or up to two years' deprivation of liberty with or without a fine of up to fifty thousand roubles or up to three months' wages/salary or other income ...

3. The acts provided for by paragraphs 1 or 2 of this Article committed:

(a) in conspiracy;

(b) by someone in abuse of an official position or on a large scale

shall be punishable by up to three years' community service with or without up to two years' restriction of liberty, with or without a ban on holding certain posts or pursuing certain activities for up to three years or up to five years' deprivation of liberty, with or without a fine of up to five hundred thousand roubles or up to two years' wages/salary or other income ... with or without up to two years' restriction of liberty with or without a ban on holding certain posts or pursuing certain activities for up to three years."

B. Civil Code

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

Article 50. Commercial and non-profit organisations

"1. Legal entities may be either 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 ..."

Article 424. The price

"A contract shall be performed at the price set by agreement between the parties."

Article 179. Invalidating transactions made under the influence of fraud, coercion, threats, agreement with malicious intent by the representative of one party with the other, or of a combination of adverse circumstances

"A transaction carried out under the influence of fraud, coercion, threats or agreement with malicious intent by the representative of one party with the other, and also a transaction which a person has been forced to make on extremely unfavourable terms because of a combination of adverse circumstances and which has been made use of by the other party (an exploitative deal), can be recognised as invalid by a court upon the claim of the victim."

Article 801. Contract of freight forwarding

"1. Under a contract of freight forwarding, one party (the forwarding agent) shall undertake to perform or organise the performance of services for the carriage of cargo for payment by the other party (the consignor or consignee as client).

A contract of freight forwarding may provide for an obligation on a forwarder to arrange the carriage of cargo by a means of transport and along a route chosen by the forwarding agent or client, an obligation for a forwarding agent to conclude a contract (contracts) for the carriage of cargo on behalf of a client or on his own behalf, to ensure the dispatch and receipt of cargo, and other obligations for carriage.

A contract of freight forwarding may provide for additional services such operations as are necessary for the delivery of cargo such as the receipt of documents required for export or import, the performance of customs and other formalities, the inspection of the quantity and condition of a cargo, its loading and unloading, the payment of duties, fees and other expenses incurred by the client, the storage of cargo, its receipt at the destination, and the fulfilment of other operations and the provision of services stipulated by the contract.

2. The rules of this Chapter shall extend to cases where the contract stipulates that the forwarding agent's obligations shall be discharged by the carrier.

3. The conditions for the fulfilment of a contract of freight forwarding shall be determined by agreement between the parties, unless otherwise stated by the law on freight forwarding, by other laws or other legal acts."

Article 805. Discharge of a forwarding agent's obligations by a third party

"If a contract of freight forwarding does not stipulate that the forwarder should discharge its duties in person, it shall have the right to involve other parties in the discharge of its obligations.

Entrusting a third party with the discharge of its obligation shall not release the forwarder from liability to the client for execution of the contract."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

44. The applicants complained under Article 7 of the Convention that they had been convicted in criminal proceedings of acts that had been lawful at the material time. They argued that the authorities had extended the interpretation of the criminal law applied in their case in such broad and ambiguous terms that it did not satisfy the requirements of foreseeability. Article 7 of the Convention 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

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

1. The parties' submissions

(a) The Government

46. The Government contested the assertion that there had been a breach of Article 7 of the Convention in the present case. They stated that the acts imputed to the applicants had constituted criminal offences at the material time. They referred to a ruling by the Constitutional Court of 27 May 2008, no. 8-P, which stated that the law providing for criminal liability could not be interpreted broadly when being enforced and would not apply to acts it

did not directly prohibit, or by analogy, and could not be applied retroactively.

47. As regards the legal classification of the criminal acts imputed to the applicants, the Government submitted that the charges of fraud and money laundering committed as part of a conspiracy had stemmed from the second applicant's insider's knowledge about Russian Post's contractual relations, which he had possessed as an employee. According to the Government, he had contacted Russian Post's counterparties and deliberately misled them and had induced them to sign an agreement with his own company, GPA. That had resulted in damage to Russian Post's former business partners, in particular MPK, which had amounted to RUB 4,493,186.88. To justify that finding, the court had referred to the difference in prices between what GPA charged and what it had paid to its subcontractors, considering that margin to be indicative of fraud. The fact that GPA had entered into an agreement to provide services but had intended to use subcontractors rather than its own logistics facilities had been considered by the court as constituting an element of fraud.

48. At the time of delivery of the first-instance judgment the court had changed the classification of the defendants' actions under Article 159 § 4 to Article 159.4 §§ 2 and 3 because at that stage it had considered it evident that the fraud was on a commercial scale. The Government submitted that the reclassification had been correct and within the limits of the original charges because commercial fraud was a type of fraud. They also noted that the reclassification had led to a milder punishment. The Government argued that the charges and acts imputed to the applicants had in essence remained within the original scope of the charges and that the applicants' defence had not been put at a disadvantage. The subsequent changes in the Criminal Code had not been relevant to the present case because commercial fraud had not as such been decriminalised.

(b) The applicants

49. The applicants submitted that all the acts of which they had been convicted had constituted acts in the ordinary conduct of business which should not have been punishable as criminal offences. They contended that it had been entirely unforeseeable that they would be prosecuted for such conduct.

50. The applicants referred to the definitions of fraud and commercial fraud contained respectively in Articles 159 and 159.4 of the Criminal Code. In so far as fraud was defined as theft, they also referred to the definition of theft contained in Article 158 of the Criminal Code. The applicants pointed out that those provisions had been inapplicable to the specific acts imputed to them. They argued that the charges and the resulting judgment had not contained the essential elements of the offences in question, in particular a failure to discharge contractual obligations,

unlawfulness of the conduct, an absence of consideration, or the taking or appropriation of property. The applicants also insisted that no damage to the owner or other holder had been demonstrated in the domestic proceedings.

51. The applicants maintained that GPA carried out lawful, financially transparent and otherwise regular commercial activities in accordance with its articles of association and had fully complied with its contractual obligations. As regards the finding that it had used subcontractors for the various services it had undertaken to provide, neither the law nor the contracts had required it to provide services using its own transport or logistics facilities, and nothing had precluded it from using subcontractors, for whose performance it remained responsible. The agreements in question had been renewed over several years, which suggested that GPA's contractual partners had been satisfied with its services.

52. The first applicant pointed out that neither the charges nor the judgment had set out any specific criminal acts allegedly committed by him as a co-founder of GPA's mother company. His role had been limited to founding it and he had not been involved in GPA's operational activities.

53. As regards the charges under Article 174.1, the allegedly criminal acts committed by the applicants had included only ordinary acts and transactions, such as the payment of dividends, office rent and fees for services.

2. The Court's assessment

(a) General principles

54. The Court reiterates that the guarantee enshrined in Article 7 of the Convention is an essential element of the rule of law. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 92, 17 September 2009, and *Huhtamäki v. Finland*, no. 54468/09, § 41, 6 March 2012). Article 7 of the Convention is not confined to prohibiting the retroactive application of criminal law to the disadvantage of an accused. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that criminal law must not be extensively construed to the detriment of an accused, for instance by analogy. From these principles it follows that an offence must be clearly defined in law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable. When speaking of "law", Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability (see, among

other authorities, *C.R. v. the United Kingdom*, 22 November 1995, §§ 32-33, Series A no. 335-C; *S.W. v. the United Kingdom*, 22 November 1995, §§ 34-35, Series A no. 335-B; *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97, 44801/98, § 50, ECHR 2001-II; and *Kafkaris v. Cyprus* [GC], no. 21906/04, § 140, ECHR 2008).

55. In any system of law, including criminal law, however clearly drafted a legal provision may be, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the Convention States, the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition (see *Del Río Prada v. Spain* [GC], no. 42750/09, §§ 91-93, ECHR 2013). Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (see, among others, *S.W. v. the United Kingdom*, cited above, § 36; *Streletz, Kessler and Krenz*, cited above, § 50; *K.-H. W. v. Germany* [GC], no. 37201/97, § 45, ECHR 2001-II; and *Rohlena v. the Czech Republic* [GC], no. 59552/08, § 51, ECHR 2015).

56. A law may still satisfy the requirement of "foreseeability" where the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see *Achour v. France* [GC], no. 67335/01, § 54, ECHR 2006-IV, and *Huhtamäki*, cited above, § 44). Even when a point is ruled on for the first time in an applicant's case, a violation of Article 7 of the Convention will not arise if the meaning given is both foreseeable and consistent with the essence of the offence (see *Jorgic v. Germany*, no. 74613/01, § 114, ECHR 2007-III; *Custers and Others v. Denmark*, nos. 11843/03, 11847/03 and 11849/03, 3 May 2007; *Soros v. France*, no. 50425/06, § 126, 6 October 2011; and *Huhtamäki*, cited above, § 51).

57. Moreover, according to its general approach, the Court does not question the interpretation and application of national law by national courts unless there has been a flagrant non-observance or arbitrariness in the application of that law (see, *inter alia*, *Société Colas Est and Others v. France*, nos. 37971/97, § 43, ECHR 2002-III; *Korbely v. Hungary* [GC], no. 9174/02, §§ 73-95, ECHR 2008; and *Liivik v. Estonia*, no. 12157/05, § 101, 25 June 2009).

(b) Application of these principles in the present case

58. In the light of the above-mentioned principles, the Court notes that it is not its task to rule on the applicants' individual criminal responsibility, that being primarily a matter for the domestic courts, but to consider, from the standpoint of Article 7 § 1 of the Convention, whether the acts the

applicants were convicted of fell within a definition of a criminal offence which was sufficiently accessible and foreseeable.

59. The applicants were convicted of commercial fraud and money laundering committed in concert. Listing the specific acts imputed to them (see paragraph 35 above), the judgment stated that both applicants had set up GPA with the intention to use it for fake commercial activities; that the second applicant had taken advantage of insider information and had convinced two of Russian Post's clients – MPK and Yves Rocher Vostok – to use GPA's services; that in doing so he had misled those clients about GPA's pricing policy and its relationship with Russian Post, thus depriving them of the freedom of choice of service providers; that he had promoted his company's services knowing that it would have to subcontract the individual tasks to other companies; and that GPA had retained the difference between the payments it had received from its customers and the price it had paid to its subcontractors. The courts concluded that the latter margin constituted the amount stolen by the applicants from MPK and Yves Rocher Vostok through GPA and classified it as proceeds from criminal activity; consequently, the use of those proceeds for paying GPA's office rent, for legal services, dividends to the applicants and transfers to affiliated companies constituted money laundering.

60. Initially, the charges of fraud were formulated under Article 159 of the Criminal Code ("Fraud"), and the applicants were indicted and tried on those charges at first instance. In its judgment the first-instance court re-classified the offence as commercial fraud (Article 159.4 of the Code), and that classification was maintained by the appeal instance. It can be noted that the applicants' appeal put forward a defence in relation to both fraud and commercial fraud.

61. The Court observes that Article 159.4 was in force at the material time but has since been repealed. It defined "commercial fraud" as fraud committed in conjunction with deliberate non-compliance with contractual obligations in the commercial sphere. According to Article 159, "fraud" is the "theft of another's property or acquisition of the right to another's property by way of deception or abuse of trust". The courts referred to the applicants' acts as "theft" rather than "acquisition of the right to another's property". The term "theft" is, in turn, defined in the note to Article 158 § 1 as "the unlawful taking or appropriating of another person's property committed for motives of personal gain and in the absence of consideration, which benefits the perpetrator or others and which has caused damage to the owner or other holder of such property".

62. Having regard to the specific criminal acts listed above, the Court notes that the applicants' fraudulent conduct, as defined by the domestic courts, included setting up a fake company, GPA, with the criminal intention to defraud clients of Russian Post. The Court observes that acting against the interests of Russian Post, for example by using insider information to direct subcontracts to a company owned by the applicants

even though one of the applicants was employed by Russian Post, has never been imputed to the applicants: the sole victims of the "theft" were the two client companies. The Court therefore has to examine whether the conclusions reached by the domestic courts concerning the nature of GPA's relationship with its clients, defined as containing elements of deception or abuse of trust, failure to recompense, and non-compliance with contractual obligations, were based on an analysis which could be considered as arguably reasonable and, consequently, whether it was foreseeable that the applicants' acts could constitute commercial fraud against those companies.

63. The Court notes that the second applicant was found liable on account of GPA's agreements with MPK and Yves Rocher Vostok and for the failure to comply with the contractual obligations set out therein. It observes that the terms "contractual obligations" and "commercial sphere", used in Article 159.4 to distinguish this kind of fraud from general fraud, derived from the Civil Code, which regulated the activities of commercial entities and their liability in private-law transactions. As such, Article 159.4 called for an interpretation based on, or concordant with, the principles established by the Civil Code in relation to the functioning of commercial entities and their rights and obligations relating to the conclusion and execution of contracts and for breach of contract. However, in the present case the courts adopted an alternative interpretation of Article 159.4 on the basis of Article 159 as a *lex generalis*, which contained basic definitions and the constituent elements of fraud. Under this alternative interpretation, the courts could find someone liable for fraud on account of non-compliance with a contract, even if there was no breach of contract or it had not been declared null and void or invalid under the civil law. The effect was that the charges formulated under Article 159.4, read in conjunction with Articles 159 and 158, did not distinguish fraudulent conduct in the performance of contractual obligations between commercial entities from inherently lawful conduct.

64. In the present case, the courts established non-compliance with contractual obligations, but did not clarify what conduct had constituted such non-compliance, or indeed which contractual obligations had not been complied with. On the face of the documents, there were no allegations that GPA had failed to perform under the contracts. On the contrary, the services rendered by GPA corresponded to those set out in the contracts. Moreover, the transactions set out in the contacts have actually been executed by all counterparties. As for the use of subcontractors, as a general rule it is open to freight forwarders to subcontract their services (Article 805 of the Civil Code), and there was no suggestion before the domestic courts that the parties had agreed otherwise. Moreover, GPA's clients did not object to third parties providing the services, which was seemingly a common practice in the sector (see paragraphs 9, 11 and 24 above). As a matter of fact, there was no dispute between the parties about the execution of the agreements in question prior to the fraud case.

65. Likewise, the courts' findings of deception and/or abuse of trust on the part of the second applicant appear to have resulted from an extrapolation of the presumption of trust derived from Article 159. According to the courts' interpretation, the second applicant was under an obligation to advise clients of cheaper alternatives to GPA's services, and to offer them the same rates as those charged by the subcontractors. That obligation, however, was not based on the terms of the agreements, or on legal provisions governing confidence, trust and the duty of care in commercial transactions between companies.

66. The Court further notes that the interpretation of Article 159.4 in the light of Article 159 adopted by the courts in the present case required them to establish the presence of another essential element of fraud, in particular "motives of personal gain" by the defendants. However, some "motives of personal gain" may be identifiable in every commercial activity, unless clear criteria exist to distinguish it from the lawful objective of a limited liability company, such as GPA, which is defined as a commercial entity whose main purpose is making a profit (Article 50 of the Civil Code). By all accounts, GPA was set up for profit-making purposes and the applicants thus pursued the same goal as any other founder of a commercial entity. The domestic courts did not refer to a method for identifying a distinctively criminal "motive of personal gain" in what was otherwise a lawful commercial pursuit in relation to MPK and Yves Rocher Vostok.

67. Furthermore, the classification of GPA's profit as "stolen property" without any qualification showed that the boundaries between the criminal offence imputed to the applicants and regular commercial activity were indeed indiscernible.

68. In the light of the foregoing the Court concludes that in the determination of the criminal charges against the applicants the offence set out in Article 159.4 of the Criminal Code, in force at the time of their conviction, was extensively and unforeseeably construed to their detriment. It considers that such an interpretation could not be said to have constituted a development consistent with the essence of the offence (see *Liivik*, cited above, §§ 100-01, and *Huhtamäki*, cited above, § 51; cf. *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, §§ 788 et seq., 25 July 2013). In view of the above, it was not possible to foresee that the applicants' conduct, in their dealings with MPK and Yves Rocher Vostok, would constitute fraud or commercial fraud. Consequently, it was equally unforeseeable that GPA's profits would constitute the proceeds of crime whose use could amount to money laundering under Article 174.1 of the Code.

69. Accordingly, there has been a violation of Article 7 of the Convention as regards both applicants.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

70. 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, in particular on account of the failure to comply with the principles of adversarial proceedings and equality of arms when the evidence and witnesses had been admitted and examined. They complained about their conviction for acts which had not fallen under the legal classification assigned to them. They also alleged that they had been deprived of having the judgment against them delivered in public because the date of delivery had been moved to prevent attendance by the public and press and because only the operative part of the judgment had been delivered at the hearing. Article 6 of the Convention, in so far as relevant, reads as follows:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> 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

71. The Government objected to the admissibility of the complaint on the grounds that the applicants had lodged their application before exhausting domestic remedies, in particular because the appeal instance had not examined their criminal case.

72. According to the Government, the appeal decision should be considered as the final domestic decision for the purposes of Article 35 § 1 of the Convention in this case. The Court notes that that decision had already been taken by the time the Court began its examination: the applicants' appeal on the merits was examined by the Moscow City Court on 17 February 2015, that is before application no. 101/15 was communicated to the Government on 7 March 2015. The Court therefore concludes that the application cannot be dismissed for failure to exhaust domestic remedies.

73. The Court notes that these complaints 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

(a) The Government

74. The Government contested the applicants' allegation that they had been denied a fair hearing in their criminal case. The trial court had examined all the evidence submitted by the parties, had dealt with all the applications lodged by the defence and had given reasoned decisions for dismissing such applications whenever it had done so.

75. As regards the alleged failure of the trial court to secure the attendance of witnesses requested by the applicants, the Government observed that the accused had requested the compulsory appearance of six witnesses. The court had dismissed that request after finding that it had exhausted every possibility of establishing the whereabouts of the witnesses or of compelling them to attend. The court had proof that three of the witnesses had received summonses. Two witnesses, Mr B.L. and Ms B., had been abroad and could not be reached through official channels. Accordingly, the court had been justified in reading out their pre-trial statements during the court hearing and deciding to admit them as evidence. The Government contended that the pre-trial statements had been corroborated by the testimony of thirty-six other witnesses.

76. The Government stated that the partial pronouncement of the judgment had been lawful because one of the two offences of which the applicants had been convicted had fallen under the exception provided by Article 241 of the Code of Criminal Procedure, which had made the whole judgment eligible for abridged delivery. They also submitted that the full text of the judgment had eventually been made public on the court's website. Moreover, they argued that the authorities had not only provided for public access to the hearing at the stage of the pronouncement of the judgment but throughout the whole of the criminal case. The Government submitted that the statutory time-limit of five days for handing the text of the judgment to the parties had been complied with when the holiday period between 1 and 11 January 2015 was taken account of.

77. Finally, the Government denied that there had been any major inconsistencies between the court's verbatim records and the audio recording of the hearing.

(b) The applicants

78. The applicants maintained their complaints that the manner in which the courts had examined their criminal case had been arbitrary and alleged that they had not received a fair and public hearing in the determination of the criminal charges against them. They complained of arbitrary interpretation of the law by the domestic courts and of the unforeseeable legal classification of the criminal offences of which they were convicted. They stated that they had only learned of the change of legal classification from fraud to commercial fraud when they had received the judgment and had therefore not been able to prepare their defence at first instance accordingly. Furthermore, they pointed out that whatever the classification, the offences of which they had been charged were indistinguishable from regular commercial activities and that the courts had failed to indicate the specific acts which had constituted the offence of fraud.

79. The applicants complained about the courts' refusal to obtain, admit and give weight to exonerating evidence, contrary to the principles of equality of arms and adversarial proceedings. Such evidence had included, in particular, financial documents and receipts proving provenance of the applicants' funds and other documents relating to the functioning of GPA and affiliated companies; a letter from Yves Rocher Vostok stating that it had not sustained any damage; and a statement from Russian Post that there were no grounds to impose any disciplinary penalty on the second applicant in relation to his activity concurrent with his employment at Russian Post. They also alleged that in its judgment the court had relied on evidence which had not been examined, or not properly examined, during the court hearing and that defence attempts to challenge the admissibility of certain evidence had not been given a proper assessment. Applications from them had been rejected on the grounds that the court had already heard sufficient evidence proving their guilt.

80. They also maintained their complaints concerning various procedural irregularities in the conduct of the trial. Those concerned the courts' failure to call and examine key witnesses while admitting statements they had made during the investigation, inconsistencies between the court's verbatim records and the official audio recording, the precipitate delivery of the judgment on 30 December 2014 and the fact that only the operative part had been delivered.

2. The Court's assessment

81. The Court has found above that the criminal law was extensively and unforeseeably construed to the detriment of the accused in the determination of the criminal charges against the applicants and that such an interpretation cannot be said to have constituted a development consistent with the essence of the offence, in breach of Article 7 of the Convention (see paragraph 68 above). The applicants' complaint under Article 6 of the

Convention concerning the allegedly arbitrary application of criminal law shall be examined in the light of those findings.

82. The Court has previously examined another case concerning the first applicant, related to his conviction for embezzlement. It found that the acts described as criminal fell entirely outside the scope of the provision under which he had been convicted and that such an interpretation of the law was not concordant with its intended aim. The Court considered in that case that the questions of interpretation and application of national law went 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 (see *Navalnyy and Ofitserov*, cited above, § 115). It found the judicial assessment in that case to be arbitrary and in breach of Article 6 § 1 of the Convention.

83. Similar considerations apply to the present case. The Court observes that the applicants maintained throughout the trial that the specific acts imputable to them under the charges of fraud and commercial fraud had constituted inherently lawful conduct indistinguishable from regular commercial activities provided for by the Civil Code (see paragraph 43 above). However, neither the first-instance court nor the appeal court addressed those objections. The courts did not establish what constituted the "absence of consideration" in relation to the charges of general fraud, just as they did not identify what had constituted non-compliance with contractual obligations, a particular characteristic of commercial fraud. They thus failed to rule on those and other substantive elements of the criminal offence referred to in the Court's analysis under Article 7 of the Convention (see paragraphs 64-67 above) or make a proper assessment of the defence's arguments. Consequently, the decisions reached by the domestic courts in the applicants' criminal case were arbitrary and manifestly unreasonable (see *Khamidov v. Russia*, no. 72118/01, § 174, 15 November 2007, and *Anđelković v. Serbia*, no. 1401/08, § 27, 9 April 2013).

84. The Court finds that the judicial examination of this case was flawed with arbitrariness which was distinct from an incorrect legal classification or a similar error in the application of domestic criminal law. That undermined the fairness of the criminal proceedings in such a fundamental way that it rendered other criminal procedure guarantees irrelevant.

85. In view of this, the Court finds a violation of Article 6 § 1 of the Convention as regards both applicants and 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 18 OF THE CONVENTION

86. The applicants complained that their prosecution and criminal conviction had pursued purposes other than bringing them to justice, in

particular curtailing the first applicant's public and political activity. 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."

87. The Court's case-law states that Article 18 of the Convention can only be applied in conjunction with other Articles of the Convention, and a violation can only arise where the right or freedom concerned is subject to restrictions permitted under the Convention (see *Gusinskiy v. Russia*, no. 70276/01, § 73, ECHR 2004-IV). The applicants alleged that their criminal prosecution and conviction had been brought about for political reasons and that those ulterior motives had affected every aspect of the case. They relied on Article 18 in conjunction with both substantive Articles raised in this case: Articles 6 and 7 of the Convention.

88. The Court observes that the provisions of Articles 6 and 7, 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 (see *Navalnyy and Ofitserov*, cited above, §§ 129-30). In the present case, the gist of the applicants' complaint about the real reason for their prosecution and conviction is essentially the same as in the aforementioned case.

89. For that reason the complaint under Article 18 in conjunction with Articles 6 and 7 of the Convention must be rejected as incompatible *ratione materiae* with the provisions of the Convention.

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

90. The Court has examined the remaining complaints submitted by the second applicant. However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. Accordingly, this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

91. 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

92. In respect of non-pecuniary damage the applicants claimed the following amounts: 70,000 euros (EUR) to the first applicant and EUR 100,000 to the second applicant on account of the stress they had sustained after being subjected to unfair and politically motivated criminal proceedings, the intense media exposure and reputational damage. In respect of pecuniary damage they jointly claimed EUR 61,154 and EUR 7,078, representing the fine imposed as a criminal penalty and the amount they had had to pay in civil claims. The first applicant asked to have any award transferred to his wife's bank account because at the time of making the submissions his own bank accounts were under an injunction in connection with the criminal case.

93. The Government submitted that such sums were unsubstantiated and excessive. They also objected to an award in respect of pecuniary damage on the grounds that that would be tantamount to setting aside the domestic judgments. They argued that acknowledgement of a violation, if the Court found any, would constitute sufficient just satisfaction. The Government stated that in any event any finding by the Court of a violation of Articles 6 or 7 of the Convention 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 if the applicants were acquitted they would be entitled to compensation and would be able to present their claims to the domestic courts at that stage. They referred to *Navalnyy and Ofitserov* (cited above, § 137) and requested that the Court proceed on the same principle.

94. The Court has found violations of Articles 6 and 7 of the Convention in the present case 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 10,000 each in respect of non-pecuniary damage. Those amounts shall be payable to bank accounts to be specified by the applicants.

95. 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 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, § 263, 13 July 2006).

This applies to both applicants in the present case. In that connection, the Court notes that Article 413 of the Code of Criminal Procedure provides a basis for reopening proceedings if the Court finds a violation of the Convention. The Court considers it appropriate to refer to the general principle relating to the re-opening of a criminal case following the Court's judgment, namely that the courts acting in the new proceedings should be under an obligation to remedy the violations of the Convention found by the Court in its judgment. Failure to fulfil this requirement will result in the individual measures to be taken in the execution of a judgment in question remaining outstanding, as follows from the Committee of Ministers' decision (CM/Del/Dec(2016)1265/H46-24), adopted at the 1265th meeting of the Ministers' Deputies on 20-21 September 2016, in relation to the execution of the Court's judgment in *Pichugin v. Russia* (no. 38623/03, 23 October 2012), as well as from its decision (CM/Del/Dec(2017)1294/H46-25), adopted at the 1294th meeting of the Ministers' Deputies on 19-21 September 2017, in relation to the execution of the Court's judgment in *Navalnyy and Ofitserov*, cited above.

96. In view of the above, the Court accepts the Government's assurances concerning the prospects for reopening the applicants' criminal case and notes that the scope of the domestic review will allow the applicants to formulate their pecuniary claims and to have them examined by the domestic courts. For that reason it dismisses the applicants' claims as regards pecuniary damage.

B. Costs and expenses

97. The applicants claimed the following amounts for legal assistance during the domestic criminal proceedings and before the Court. The first applicant claimed a total of EUR 74,812, of which he had paid EUR 44,382 to Ms Mikhaylova and EUR 30,430 to Mr Kobzev. The second applicant claimed EUR 10,971 for Mr Polozov's legal assistance during the domestic criminal proceedings, as well as 460,000 Russian roubles (RUB), the outstanding amount due to Ms Polozova for representing him before the Court.

98. The Government contested the claims on the grounds that the contract of legal assistance had set fees irrespective of the amount of work to be performed under the contract. They also contested the claims for the second applicant's legal assistance in so far as they related to services performed after his criminal conviction. Finally, they alleged that the observations made on behalf of the applicants in the present case were too brief to justify spending the amounts claimed.

99. 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. In the present case, regard being had to the documents in its possession and the above-mentioned criteria, the Court considers it reasonable to award the following amounts in respect of costs and expenses in the domestic proceedings and for proceedings before the Court: EUR 45,000 to the first applicant, and RUB 460,000 and EUR 10,971 to the second applicant. Those amounts shall be payable to bank accounts to be specified by the applicants and split between multiple bank accounts if the applicants so instruct.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Declares*, by a majority, both applicants' complaints under Article 18 in conjunction with Articles 6 and 7 of the Convention inadmissible;

2. *Declares*, unanimously, both applicants' complaints under Articles 6 and 7 of the Convention admissible and the remainder of the application inadmissible;

3. *Holds*, unanimously, that there has been a violation of Article 6 § 1 of the Convention on account of the lack of fair hearing as regards both applicants;

4. *Holds*, unanimously, that there is no need to examine the remaining complaints under Article 6 §§ 1-3 of the Convention as regards both applicants;

5. *Holds*, unanimously, that there has been a violation of Article 7 of the Convention as regards both applicants;

6. *Holds*, unanimously,
   (a) that the respondent State is to pay the applicants, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement and to be payable to bank accounts to be indicated by the applicants:

(i) EUR 10,000 (ten thousand euros) to each applicant, plus any tax that may be chargeable, in respect of non-pecuniary damage;
(ii) to the first applicant, EUR 45,000 (forty-five thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
(iii) to the second applicant, EUR 10,971 (ten thousand nine hundred and seventy-one euros) and RUB 460,000 (four hundred and sixty thousand Russian roubles), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

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

7. *Dismisses*, by five votes to two, the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 17 October 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Registrar

Branko Lubarda
President

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

(a) Joint partly dissenting opinion of Judges Keller and Dedov;
(b) Partly dissenting opinion of Judge Serghides.

B.L.
J.S.P.

JOINT PARTLY DISSENTING OPINION OF JUDGES KELLER AND DEDOV

1. For the reasons set out in paragraphs 58-69 and 81-85 of the present judgment we are in full agreement with the majority of our colleagues that there has been a violation of Articles 6 and 7 of the Convention. However, we are unable to agree with our colleagues' conclusion that the applicants' complaint under Article 18 of the Convention, brought in conjunction with Articles 6 and 7, is inadmissible. The applicants in this case argued that their domestic prosecution and subsequent criminal conviction pursued purposes other than bringing them to justice, specifically to curtail the first applicant's public and political activity (see paragraph 86 of the judgment). The majority dismissed the applicants' complaint under Article 18 as inadmissible, observing that Article 18 can only be applied in conjunction with other Articles of the Convention that permit lawful restrictions. The Court held that because neither Article 6 nor Article 7 contains express or implied restrictions, the complaint brought under Article 18, in conjunction with these two Articles, had to be rejected as inadmissible. We respectfully disagree with this conclusion and argue that, although Article 6 does not contain a textual provision that permits restrictions, the Court's case-law has recognised that this provision does have inherent limitations. As such, complaints brought under Article 18 in conjunction with Article 6 should be admissible.

2. In this opinion, we will first explore the drafting history and purpose of Article 18. We will then briefly review the Court's case-law on Article 18. Next, we will analyse the particular facts of this case, arguing that the applicants established a prima facie case under Article 18 in conjunction with Article 6. Finally, we will draw particular attention to the basic dilemma the Court faces in these types of cases.

A. Drafting history and *ratio conventionis*

3. We believe that the majority underestimate the significance and scope of Article 18 of the Convention. While the provision does refer specifically to restrictions on Convention rights, stating 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", the preparatory works on the provision show that it was drafted with a much broader scope[1]. According to the preparatory works, the Convention system

[1] The *travaux préparatoires*, or preparatory works, of a treaty are often consulted when interpreting the provisions of a treaty. According to Article 32 of the Vienna Convention, recourse may be had to supplementary means of interpretation, including the preparatory works of a treaty, when the interpretation of a treaty provision is ambiguous or obscure or it

was designed to preserve democracy and to protect the rights and freedoms enshrined in it from the dangers posed by totalitarian regimes[2]. The drafters believed that States could, and would, always find excuses to limit and restrict individual rights and freedoms. The public interest in "morality, order, public security and above all democratic rights" can all be abused for this purpose[3]. Article 18, drafted in this context, was intended to prevent abusive and illegitimate limitations of Convention rights and freedoms, as well as to act as a deterrent to the resurgence of undemocratic regimes in Europe. A preliminary version of this Article, initially part of the universal limitations clause that was intended to apply to all Convention rights and freedoms[4], prohibited "any restriction on a guaranteed freedom for motives based, not on the common good or general interest, but on reasons of State"[5]. Today, the role of Article 18 remains to protect individuals from limitations of their rights through State actions, such as politically motivated prosecutions, which run counter to the very spirit of the Convention and can be misused to hollow out the values of democracy.

B. The Court's inconsistent jurisprudence on Article 18

4. A large part of the Court's case-law supports this understanding. Although for a few decades after the enactment of the Convention Article 18 remained fairly dormant, it resurfaced after the establishment of the permanent Court, when a more vigorous approach to the examination of claims under this provision emerged. The Court's modern practice reflects the drafters' original understanding that Article 18 was designed to protect individuals from the perils of totalitarianism, and confirms the application of Article 18 to politically motivated proceedings. In recent years, the Court has been applying the provision with even greater frequency. While findings of violations of Article 18 have been quite rare, in part because of the exacting standard applied by the Court as a result of the presumption that

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leads to a manifestly absurd or unreasonable result. Although the wording of Article 18 seems clear, reading it the way the majority do would create dissonance within the Convention and run counter to its original purpose, which can be gleaned from the preparatory works.

2. Statement of Lynn Ungoed-Thomas (United Kingdom) 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. 1 (Martinus Nijhoff, The Hague 1975), pp. 59-60.

3. 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. 1 (Martinus Nijhoff, The Hague 1975), pp. 179-80.

4. *Collected Edition of the "Travaux Préparatoires"*, op. cit., Vol. 1: Preparatory Commission of the Council of Europe; Committee of Ministers, Consultative Assembly, 11 May-8 September 1949, p. 200.

5. Ibid.

States generally comply with their Convention obligations in good faith (see *Lutsenko v. Ukraine*, no. 6492/11, §§ 106-07, 3 July 2012), the Court has nevertheless found violations of Article 18 of the Convention in a number of cases.

5. In *Gusinskiy v. Russia* (no. 70276/01, § 77, ECHR 2004-IV), for example, the Court held that "the restriction of the applicant's liberty permitted under Article 5 § 1 (c) was applied not only for the purpose of bringing [the applicant] before the competent legal authority on reasonable suspicion of having committed an offence, but also for other reasons". The Court based its findings on an agreement signed between the applicant and the acting Federal Minister for Press and Mass Communications that made it clear that the applicant's detention had been ordered to force the applicant to sell his medial company to the State (ibid., § 76). In *Lutsenko* (cited above, §§ 106-09), the Court again found that the criminal prosecution of the applicant had been initiated not only to bring him to justice for a suspected offence, but also "for other reasons", *inter alia* to punish him for asserting his innocence and for going to the media in order to contest the allegations made against him. The Court once again found a violation of Article 18 in *Ilgar Mammadov v. Azerbaijan* (no. 15172/13, § 27, 22 May 2014). In that case the applicant was called in for police questioning the day after posting a blog entry providing information about riots which the authorities wanted to keep from the public. Criminal proceedings were then brought against the applicant for organising and participating in actions that caused a breach of order and for violence or resistance against officials. Given the absence of "objective information giving rise to a *bona fide* suspicion against the applicant," the Court held that it was 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" (ibid., § 143). There are also two separate cases currently pending before the Grand Chamber in which applicants have brought complaints under Article 18: *Merabishvili v. Georgia* (no. 72508/13, 14 June 2016) and *Navalnyy and Ofitserov v. Russia* (nos. 46632/13 and 28671/14, 4 April 2016). Neither case will, however, resolve the issue brought before the Court in the present case.

6. The issue facing the Court 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. The Court is called upon to apply the accessory protection of Article 18 *solely* in conjunction with Article 6 and 7 of the Convention. In this case, the majority followed the reasoning set out in *Navalnyy and Ofitserov* (cited above) and held that a violation of Article 18 can only arise in conjunction with another Article of the Convention which contains an express or implied restriction. Thus, because the applicants relied on Article 18 in conjunction only with Articles 6 and 7,

neither of which contains such restrictions, their complaint was found to be incompatible *ratione materiae* with the provisions of the Convention and thus inadmissible (see paragraphs 87-89 of the judgment).

7. We believe that the majority in this case have, once again, unnecessarily and unjustifiably limited the scope of application of Article 18. Although the text of Article 18 makes clear that the Article enshrines an accessory right that must be invoked with another Article of the Convention, there is nothing to suggest that this other Article must have *express* or *implied* restrictions built into the text of the provision. In fact, the drafting history of Article 18 indicates that its application was never intended to be limited to those provisions of the Convention containing a restriction clause. Instead, as per its *ratio conventionis*, Article 18 applies to limitations on *all* Convention rights, with the exception of those absolute rights, like Article 3 for example, that do not permit limitations and to which it therefore cannot logically be applied. Article 6, unlike Article 3, does not protect an absolute right, and according to both its wording and the Court's case-law the provision does include *inherent* or *implied* restrictions (see *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).

8. In its previous cases the Court has explicitly permitted the invocation of Article 18 together with Article 5 of the Convention (see *Ilgar Mammadov*, cited above, §§ 137-44), with Article 8 of the Convention (see *Handyside v. the United Kingdom*, 7 December 1976, § 64, Series A no. 24), and with Article 1 of Protocol No. 1 to the Convention (see *OAO Neftyanaya Kompaniya Yukos v. Russia*, no. 14902/04, §§ 659-66, 20 September 2011). The Court has also allowed Article 18 to be invoked together with one of these three provisions and other Convention provisions, like Article 6. For example, in *Khodorkovskiy and Lebedev v. Russia* (nos. 11082/06 and 13772/05, 25 July 2013), the Court allowed the applicants to bring a complaint under Article 18 in conjunction with Articles 5, 6, 7 and 8. Although the Court cautioned that when allegations of improper State motives are made the Court must show particular diligence, it nevertheless scrutinised the State's motives and undertook an assessment of the criminal proceedings in order to determine whether the State had violated Article 18 (ibid., §§ 897-909). While the Court held that the evidence was insufficient to find a violation of Article 18, nowhere did it suggest that Article 18 could not be invoked in conjunction with just Article 6. In short, although Article 6 does not provide for restrictions in a separate paragraph analogous to those contained in Articles 8-11 of the Convention, there is no *a priori* reason why Article 18 should apply in

conjunction with Article 5, for example, but not in conjunction with Article 6.

C. Arguable claim in the present case

9. To hold that applicants cannot bring complaints under Article 18 and Article 6, or Article 7, is to limit Article 18's importance and diminish its relevance. Article 18's relevance is particularly significant when examining the present case, and especially with regard to the first applicant. The Court already agreed that the interpretation of the criminal offence the applicants had been charged with was "extensively and unforeseeably construed" (see paragraph 68 of the judgment) and that the "judicial examination of this case was flawed with arbitrariness which was distinct from an incorrect legal classification or similar error in the application of domestic criminal law" (see paragraph 84), in violation of Article 6 § 1. This process "undermined the fairness of the criminal proceedings in such a fundamental way that it rendered other criminal procedure guarantees irrelevant" (ibid). These domestic criminal proceedings subjected a prominent and politically active individual critical of the government to fundamentally unfair and arbitrary criminal prosecution. Singling out dissidents in order to silence them by means of criminal proceedings is precisely the sort of abuse Article 18 of the Convention is intended to prevent. This is a separate issue from those under Articles 6 and 7, and it is an issue in respect of which the applicants raised an arguable claim in Strasbourg. They argued that, in one particular instance, after the first applicant had investigated the off-duty activities of the chief of the Investigating Committee of the Russian Federation ("the Investigative Committee"), Mr Bastrykin, criminal proceedings had been instituted against the first applicant on the direct orders of Mr Bastrykin (see paragraph 17 of the judgment). Mr Bastrykin later made a public statement expressing his determination to have the first applicant prosecuted (ibid.). In another instance, on the same day that the first applicant made a public plea for the people to participate in the Freedom March, an opposition rally at Lubyanskaya Square, the Investigative Committee decided to open a criminal file based on material severed from the Kirovles case (see paragraphs 19 and 20 of the judgment).

D. The Court's dilemma in these cases

10. Given the inconsistency of the Court's case-law concerning the applicability of Article 18 in conjunction with Article 6, any Chamber facing this issue should relinquish the case to the Grand Chamber under Article 30 of the Convention. This, however, presents a dilemma for the Court. In all of these circumstances the applicant is in detention and the Court has strong reasons to believe that the detention is based on an unfair

trial (see, in the present case, paragraph 6 of the judgment as regards the second applicant; see also *Ilgar Mammadov v. Azerbaijan (no. 2)*, no. 919/15, pending at the time of writing this dissenting opinion). It goes without saying that the Court should resolve these cases as soon as possible in order possibly to put an end to the allegedly unjustified detention. However, a relinquishment to the Grand Chamber would delay the proceedings for at least a year, which in turn would be detrimental to the applicants.

E. Conclusion

11. As these facts illustrate, there is at least a colourable claim that the proceedings in the present case were not simply unforeseeably construed and fundamentally unfair, in violation of Articles 6 and 7, but that they also contained an abusive element and may have served an illegitimate and undemocratic purpose: to silence a government critic and prevent him from engaging in political activities. Considering the purpose of Article 18, discussed in paragraphs 2 and 3 above, we believe that the Court was under a duty to at least examine the allegations made and not simply dismiss the complaint as inadmissible. Rejecting the complaint as incompatible *ratio materiae*, as the majority did, is contrary to the *ratio conventionis* and the Court's previous case-law concerning Article 18. Although it is not our place to make a determination on the merits of the applicants' complaint in this context, we do consider that the Court should have declared the complaint under Article 18, in conjunction with Article 6, admissible.

PARTLY DISSENTING OPINION OF JUDGE SERGHIDES

1. My only disagreement with the majority is that, unlike them (see paragraph 89 of the judgment), I do not find that the complaint under Article 18 of the Convention taken in conjunction with Article 6 § 1 should have been rejected as being incompatible *ratione materiae* with the provisions of the Convention.

2. From the wording of Article 18 it is clear that it applies only to rights and freedoms which are subject to restrictions permitted in the Convention (see *Gusinskiy v. Russia*, no. 70276/01, § 73, ECHR 2004-IV). The possible explanation for this is that an abuse or misuse of power is more likely to occur when a prescribed restriction is placed on a right. Such a restriction may open an outlet or a window for the national authorities to use the restriction for some purpose other than that for which it has been prescribed. Thus, such a restriction is prone to be manipulated. By contrast, absolute rights do not have such an Achilles' heel.

3. The provisions of Article 6 § 1 regarding the public delivery of judgments have some restrictions or limitations expressly prescribed therein.

4. The applicants alleged that they had been deprived of their right under Article 6 § 1 to have their judgment delivered in public (see paragraph 70 of the judgment). This provision of Article 6 § 1, as mentioned above, contains express restrictions as to when a judgment does not have to be pronounced publicly. To that extent, the right in question is not an absolute one, but is a relative or limited right in conjunction with which Article 18 can be applied. Therefore, the complaint based on Article 18 taken in conjunction with Article 6 § 1 should not have been rejected *ratione materiae.*

5. It is irrelevant that it was eventually decided that it was not necessary to address separately the remainder of the applicant's complaints under Articles 6 §§ 1 to 3 of the Convention, including the complaint in question (see paragraph 85 of the judgment). This is so because a breach of Article 18 can be found even if there has been no breach of the Article in conjunction with which it applies (see, *inter alia*, *Gusinskiy*, cited above, § 73, and *Cebotari v. Moldova*, no. 35615/06, § 49, 13 November 2007).

6. The present case can be distinguished from *Navalnyy and Ofitserov v. Russia* (nos. 46632/13 and 28671/14, 23 February 2016), on which the judgment is based, since in that case there was no allegation similar to that raised in the present case and referred to in paragraph 4 above.

7. Had I not been in the minority, the above finding would have led me to examine the Article 18 complaint on the merits, and had I found a violation of Article 18 I would probably have awarded non-pecuniary damage to the applicants for that violation. However, it is not my task to engage in any further speculation.