3 marzo 2017

La Corte di Strasburgo assesta un duro colpo alla disciplina italiana delle misure di prevenzione personali, *di Francesco Viganò*

Corte Edu, Grande Camera, sent. 23 febbraio 2017, de Tommaso c. Italia

1. Trentasette anni dopo *Guzzardi c. Italia*, che aveva in pratica decretato la morte del 'confino' di poliziesca memoria, la Grande Camera Corte europea dei diritti dell'uomo torna con la sentenza qui pubblicata a sferrare un **duro colpo alla disciplina delle misure di prevenzione personale fondate sulle fattispecie di pericolosità 'generica' di cui alla legge n. 1423/1956, oggi trasfuse nell'art. 1 della legge n. 159/2011 (il c.d. codice antimafia)**, dichiarando tale disciplina incompatibile – in particolare – con la libertà di circolazione, riconosciuta dall'art. 2 Prot. 4 Cedu.

Con ciò la sentenza solleva serissimi interrogativi sul futuro di tali misure di prevenzione nel nostro ordinamento, nonché su quello delle misure di prevenzione patrimoniali fondate sulle medesime fattispecie di pericolosità.

2. Anzitutto, il **fatto**.

Il ricorrente – con varie condanne alle spalle, una delle quali appena scontata a quattro anni di reclusione per traffico di droga – viene colpito nell'aprile 2008 dalla misura di prevenzione personale della **sorveglianza speciale con obbligo di soggiorno** nel proprio comune di residenza ai sensi dell'allora vigente legge n. 1423/1956, avendo il Tribunale di Bari ritenuto che egli fosse **abitualmente dedito a traffici delittuosi** e che **vivesse abitualmente con i proventi di attività delittuose**.

Nel gennaio dell'anno seguente, tuttavia, la Corte d'appello di Bari revoca la misura, ritenendo che – sulla base degli elementi acquisiti nel fascicolo – non risultasse una pericolosità attuale del ricorrente al momento dell'imposizione della misura, evidenziando in particolare come le recenti segnalazioni di polizia su cui il Tribunale aveva tra l'altro fondato il proprio convincimento si riferissero in realtà ad un omonimo.

3. Nel luglio 2009 il de Tommaso propone **ricorso** avanti alla Corte europea, lamentando la **violazione degli artt. 5, 6 e 13 Cedu nonché dell'art. 2 Prot. 4 Cedu** in relazione ai nove mesi trascorsi in regime di sorveglianza speciale con obbligo di soggiorno.

Nel 2014 la camera cui il ricorso era stato originalmente assegnato decide di **rinunciare alla propria giurisdizione in favore della Grande Camera**: ciò che – conviene rammentare – è possibile in forza dell'art. 30 Cedu allorché "*la questione oggetto del ricorso solleva gravi problemi di interpretazione o se la sua soluzione rischia di dar luogo a un contrasto con una sentenza pronunciata anteriormente dalla Corte*".

4. A larga maggioranza – con il solo dissenso sul punto dei giudici Pinto de Albuquerque, Sajó e Küris – la Corte ritiene anzitutto **inammissibile la doglianza relativa all'art. 5 Cedu**, che tutela l'individuo contro le arbitrarie ***privazioni* della *libertà personale***.

La Corte sottolinea qui come successivamente al già citato *Guzzardi c. Italia* – in cui la misura della sorveglianza speciale con *obbligo di soggiorno in comune diverso dalla residenza* applicata al ricorrente era stata effettivamente giudicata lesiva del diritto di cui all'art. 5 Cedu – le sentenze

concernenti l'Italia relative all'obbligo di soggiorno nel *comune di residenza* dell'interessato abbiano sempre ritenuto che tale misura non abbia carattere privativo della libertà di movimento, e comporti invece una **mera *limitazione* della *libertà di circolazione***, riconosciuta dall'**art. 2 Prot. 4 Cedu** (cfr., sul punto, Viganò, *Art. 2 Prot. 4*, in Ubertis, Viganò, *Corte di Strasburgo e giustizia penale*, 2016, p. 353 ss.). La Corte non ritiene di discostarsi da tale giurisprudenza, sottolineando che il ricorrente era rimasto **libero di lasciare la propria abitazione durante le ore diurne e di mantenere relazioni con il mondo esterno** (§ 79-91).

5. Quanto invece all'**art. 2 Prot. 4 Cedu**, la Corte è chiamata a valutare se la limitazione della libertà di circolazione realizzata con la misura *a)* sia stata "**prevista dalla legge**" e *b)* potesse giudicarsi "**necessaria in una società democratica**" per il perseguimento di uno degli scopi menzionati dalla disposizione convenzionale: tutela della sicurezza nazionale o della pubblica sicurezza, mantenimento dell'ordine pubblico, prevenzione dei reati, protezione della salute o della morale, protezione dei diritti e libertà altrui.

5.1. Ora, secondo la consolidata giurisprudenza della Corte il requisito della **previsione per legge** – cui è subordinata la liceità di ogni ipotesi di restrizione di un diritto convenzionale – comporta non soltanto la necessità di individuare, nell'ordinamento nazionale, una specifica **base legale** della restrizione, ma anche la necessità che tale base legale sia **accessibile** per l'interessato, e sia soprattutto tale da consentirgli di ragionevolmente **prevedere** la restrizione del diritto convenzionale in conseguenza delle propria condotta.

Non essendo controverso tra le parti che la **base legale** della misura in questione fosse rappresentata dalla **legge n. 1423/1956**, né che tale base legale fosse agevolmente **accessibile** per il cittadino, la prima questione problematica nella specie era se essa fosse tale da soddisfare lo standard di **prevedibilità** richiesto dalla Corte.

Un'ampia maggioranza di dodici giudici della Grande Camera – esclusi il Presidente Raimondi e altri quattro giudici, che firmano sul punto l'opinione concorrente di cui si dirà – **conclude nel senso dell'*insufficiente prevedbilità* delle conseguenze della propria condotta per il soggetto colpito dalla misura di prevenzione personale in parola**, e dunque nel senso dell'**inadeguatezza agli standard convenzionali della legislazione italiana in materia**.

La Corte premette che nei casi italiani sinora giunti alla sua attenzione il requisito in parola non era mai stato oggetto di esame specifico, esame che viene ora per la prima volta sollecitato dal ricorrente (§ 114-115).

A tale scopo, i giudici di Strasburgo focalizzano la propria attenzione sulla **giurisprudenza della Corte costituzionale italiana**, dettagliatamente ricostruita nelle premesse in fatto della sentenza (§ 43-61). In particolare, un esame dettagliato è dedicato alla **sentenza n. 177/1980**, che dichiarò l'illegittimità costituzionale, per contrasto con gli art. 13 e 25 terzo comma Cost., della disposizione allora vigente della legge n. 1423/1956 che consentiva l'applicazione delle misure di prevenzione a coloro che "*per le manifestazioni cui abbiano dato luogo, diano fondato motivo di ritenere che siano proclivi a delinquere*", proprio sulla base dell'argomento che tale 'fattispecie di pericolosità' non consentiva di individuare con sufficiente precisione i casi in cui la misura potesse trovare applicazione, né di offrire all'autorità giudiziaria e di polizia alcuna indicazione circa la base probatoria in grado di supportare un tale accertamento.

Tali censure vengono ora in sostanza **estese dalla Corte di Strasburgo alle due fattispecie di pericolosità 'generica' qui oggetto di scrutinio**: **né la legge né la giurisprudenza della Corte costituzionale** – osservano i giudici di Strasburgo nel passaggio decisivo della motivazione – "***hanno chiaramente identificato gli 'elementi fattuali' né le specifiche tipologie di condotta che devono essere prese in considerazione per valutare la pericolosità sociale dall'individuo***", che costituisce il presupposto per l'applicazione della misura di prevenzione in parola; "*la Corte,*

pertanto, ritiene che ***la legge in questione non contenga previsioni sufficientemente dettagliate su che tipo di condotta sia da considerare espressiva di pericolosità sociale***" (§ 117).

L'esame in concreto delle motivazioni che avevano sorretto l'imposizione della misura da parte del Tribunale di Bari conferma, del resto, la fondatezza delle censure che la Corte muove alla legge italiana: la misura era stata imposta senza che venisse dato conto di alcuna condotta criminosa compiuta attualmente dall'interessato, ed essendosi piuttosto fatto leva sulle circostanze che egli fosse sprovvisto di occupazione regolare, che frequentasse abitualmente esponenti della criminalità locale, e che avesse in passato commesso reati. Elementi, questi, tutt'al più espressivi – secondo la Corte – di quella "proclività a delinquere" che la Corte costituzionale aveva giustamente espunto dal novero dei presupposti legittimi delle misure di prevenzione, ma alla quale di fatto continuano ad alludere anche le fattispecie di pericolosità oggi in vigore, le quali "***non indicano con sufficiente chiarezza lo scopo e le modalità di esercizio dell'amplissima discrezionalità conferita alle corti nazionali"***, e che ***"non sono formulate con precisione sufficiente a garantire al singolo tutela contro interferenze arbitrarie e a consentirgli di prevedere in maniera sufficientemente certa l'imposizione di misure di prevenzione***" (§ 118).

5.2. Le disposizioni che costituiscono la base legale della misura di prevenzione imposta al ricorrente sono peraltro censurate anche sotto il diverso profilo della **vaghezza e imprecisione relativa al contenuto delle prescrizioni** che devono, o possono, essere imposte all'interessato.

In primo luogo, la Corte rileva che tra le prescrizioni che obbligatoriamente debbono essere imposte all'interessato (cfr., oggi, l'art. 8 del codice antimafia) rientrano quelle di "**vivere onestamente**" e di "**rispettare le leggi**" – prescrizioni alle quali si aggiungeva, nella versione allora vigente della legge n. 1423/1956, quella di "non dare ragione alcuna di sospetto in ordine alla propria condotta".

Tali prescrizioni appaiono alla Corte EDU formulate in termini "***estremamente vaghi e indeterminati***". La Corte riferisce, invero, del contrario avviso espresso sul punto dalla sentenza n. 232/2010 della Corte costituzionale, che aveva ritenuto non fondata la questione di illegittimità costituzionale della disposizione (oggi trasfusa nell'art. 75 del codice antimafia) che sanziona penalmente l'inosservanza di tutti gli obblighi inerenti alla sorveglianza speciale, tra cui per l'appunto quelli di vivere onestamente, di rispettare le leggi e non dare adito a sospetti. Osserva tuttavia la Corte europea che nemmeno l'interpretazione di tale norma proposta dalla Consulta risulta in grado di fornire all'interessato indicazioni sufficienti circa la condotta richiestagli: quel che la Corte costituzionale aveva in quell'occasione definito come il "*dovere, imposto al prevenuto, di rispettare tutte le norme a contenuto precettivo, che impongano cioè di tenere o non tenere una certa condotta; non soltanto le norme penali, dunque, ma qualsiasi disposizione la cui inosservanza sia ulteriore indice della già accertata pericolosità sociale*" si risolve in realtà, ad avviso dei giudici di Strasburgo, in un "***illimitato richiamo all'intero ordinamento giuridico italiano****, e non fornisce alcuna chiarificazione sulle norme specifiche la cui inosservanza dovrebbe essere considerata quale ulteriore indicazione del pericolo per la società rappresentato dall'interessato*" (§§ 119-122).

In secondo luogo, la Corte Edu osserva che la normativa qui all'esame consente al tribunale di adottare "*tutte quelle prescrizioni che ravvisi necessarie, avuto riguardo alle esigenze di difesa sociale*", senza in alcun modo specificarne il contenuto (§ 121).

Infine, la Corte esprime le proprie preoccupazioni in merito alla prescrizione obbligatoria di "**non partecipare a pubbliche riunioni**", che **non pone alcun limite temporale e spaziale alla restrizione di questa libertà fondamentale**, la cui concreta entità viene pertanto interamente affidata alla discrezionalità del giudice (§ 123).

Inevitabile la conclusione: la legge n. 1423/1956 in esame era formulata in termini "*vaghi ed eccessivamente ampli. Né la categoria di persone a cui le misure di prevenzione erano applicabili, né il contenuto di alcune di queste misure erano definite dalla legge con precisione e chiarezza sufficienti. Conseguentemente, **la legge non rispondeva ai requisiti di prevedibilità fissati dalla giurisprudenza della Corte***" (§ 125).

5.3. **Non essendo la misura stata applicata "conformemente alla legge"** (*scilicet*, ad una legge nazionale in linea con i requisiti di qualità richiesti dalla giurisprudenza di Strasburgo), la maggioranza della Corte si astiene dall'esaminare l'ulteriore questione se la misura potesse ritenersi "necessaria in una società democratica" per il perseguimento di una delle legittime finalità menzionate dall'**art. 2 Prot. 4 Cedu**, e conclude senz'altro nel senso della **violazione della disposizione convenzionale** in parola.

6. Il ricorrente aveva poi allegato la violazione del proprio **diritto a un equo processo di cui all'art. 6 Cedu nel suo *volet pénal***: ossia in relazione all'insieme delle **garanzie specificamente previste per i giudizi in materia penale**, e non solo a quelle genericamente previste dalla disposizione convenzionale ogniqualvolta si disputi di un "diritto" (il c.d. *volet civil*, o *civil limb*, dell'art. 6 Cedu). L'allegazione difensiva riposava, evidentemente, sull'affermazione della natura **sostanzialmente penale** della misura, indipendentemente dalla qualificazione della stessa nel diritto italiano, in applicazione dei criteri *Engel*.

La maggioranza della Corte, tuttavia, **respinge tale prospettazione**, affermando (come già aveva ritenuto in *Guzzardi*) che **la sorveglianza speciale non è equiparabile a una sanzione penale**, dal momento che il procedimento che conduce alla sua applicazione non comporta la valutazione su un'accusa penale (§ 143).

Resta tuttavia **applicabile l'art. 6 Cedu nel suo *volet civil***. Sotto questo specifico profilo, il Governo italiano aveva espressamente riconosciuto nel corso del procedimento avanti alla Grande Camera la violazione del diritto del proposto a una pubblica udienza, già ritenuto violato dalla Corte in una serie di altri casi concernenti le misure di prevenzione patrimoniali; violazione alla quale peraltro l'ordinamento italiano ha ormai posto rimedio in termini generali, per effetto della sentenza n. 93/2010 della Corte costituzionale.

Nessuna difficoltà, dunque, incontra qui la Corte nel dichiarare per l'appunto la **violazione dell'art. 6 Cedu sotto lo specifico profilo dell'assenza di una pubblica udienza** nel procedimento che aveva condotto all'applicazione della misura al ricorrente.

7. La Corte **respinge** invece, ancora a maggioranza, **la censura relativa alla violazione dell'art. 13 Cedu** (diritto a un rimedio effettivo), evidenziando come il ricorrente abbia goduto già nell'ordinamento domestico del rimedio rappresentato dall'impugnazione dell'originario provvedimento avanti la Corte d'appello, la cui effettività è dimostrata proprio dal suo esito favorevole per l'interessato; ed accorda all'unanimità al ricorrente la somma di **5.000 euro a ristoro dei danni non patrimoniali subiti**, oltre alla rifusione delle spese processuali.

* * *

8. Particolarmente nutrita è la schiera di **opinioni concorrenti e dissenzienti** annesse alla presente sentenza.

8.1. Va anzitutto segnalata l'**opinione concorrente del Presidente Raimondi e di altri quattro giudici**, che **concordano con la maggioranza sulla violazione dell'art. 2 Prot. 4 Cedu** da parte dello Stato italiano, **dissentendo** però – e il punto è di particolare rilevanza per l'osservatore italiano – **sulla motivazione della decisione**.

A parere dei cinque giudici concorrenti, infatti, la ragione della violazione **non va individuata nell'assenza di "previsione per legge" della restrizione del diritto convenzionale** – e dunque nell'insufficiente chiarezza e precisione della base legale –, **bensì nel carattere "non necessario in una società democratica" della sua applicazione nel caso concreto**.

I giudici concorrenti ritengono, in particolare, che la legislazione italiana, interpretata alla luce della giurisprudenza costituzionale in materia, consentisse all'interessato di prevedere l'applicazione della misura nei propri confronti; e che il contenuto dell'ordine di vivere onestamente, di rispettare le leggi e non dare ragione alcuna di sospetti potesse considerarsi sufficientemente determinato alla luce di tutte le altre prescrizioni impostegli, così come ritenuto dalla poc'anzi menzionata sentenza n. 232/2010 della Corte costituzionale.

L'applicazione concreta della misura da parte del Tribunale di Bari si risolse però effettivamente in una **restrizione sproporzionata della libertà di circolazione del ricorrente**, dal momento che la sua pericolosità sociale (il suo essere "abitualmente dedito a traffici delittuosi" e il suo "vivere abitualmente, anche in parte, con i proventi di attività delittuose") fu dimostrato dai giudici di prime cure – tra l'altro – sulla base di materiale probatorio riferito in realtà ad un omonimo, e senza che sussistesse alcuna evidenza concreta di contatti con criminali abituali. D'altra parte, il ritardo della Corte d'appello nell'esame dell'impugnazione – intervenuto ben oltre i trenta giorni prescritti dalla legge – aggravò ulteriormente la sproporzione della limitazione della libertà di circolazione causata della misura.

Insomma: secondo i cinque giudici concorrenti, la violazione vi fu; ma la colpa fu dei giudici di prima istanza, non del legislatore.

8.2. La brevissima **opinione concorrente del giudice Dedov** sembra per contro affermare – ma la cautela è d'obbligo, stante la laconicità delle sue osservazioni – che la ragione della violazione dell'art. 2 Prot. 4 Cedu andrebbe ricercata non solo nel difetto di qualità della legge evidenziato nella maggioranza, ma anche nel **carattere invariabilmente sproporzionato di misure come quelle in esame**, che si prefiggono di assicurare la pace sociale attraverso un **uso della coazione pubblica non funzionale allo scopo della risocializzazione dell'interessato**.

8.3. Assai corposa è invece l'**opinione parzialmente dissenziente del giudice Pinto de Albuquerque**: anche in questo caso, una sorta di piccolo trattato (denso di riferimenti alla giurisprudenza e alla dottrina italiana) sulle misure di prevenzione personali italiane e su quello che dovrebbe essere il loro statuto convenzionale, del quale è possibile qui dar conto solo per sommi capi.

Il giudice Pinto muove da una **durissima critica al nostro sistema delle misure di prevenzione personali**, così come disciplinate dalla legge del 1956 (trasfuse con pochissime modifiche nel codice antimafia oggi vigente), e alla loro stessa qualificazione come misure 'preventive'.

Ad avviso di Pinto, in effetti, **le misure di prevenzione altro non sono che "pene di seconda classe", basate sul sospetto**. Nel sistema disegnato dal legislatore, "*una* probatio minus plena *è sufficiente a porre l'individuo sotto il radar del sistema di giustizia criminale, con il suo arsenale di*

misure restrittive previste dalla legge del 1956"; misure, dunque, **applicabili durante le indagini, o anche dopo che sia stata pronunciata una sentenza di assoluzione *ex* art. 530 co. 2 c.p.p., sulla base delle stesse evidenze raccolte nell'ambito del procedimento penale** (§ 4). Le misure di prevenzione personali possiedono d'altra parte un evidente **potenziale criminogeno**, in relazione al loro **effetto desocializzante** per la persona che ne è colpita, e in relazione all'**effetto di criminalizzazione indiretta** che deriva dalla previsione quale reato dell'inosservanza di ognuna delle prescrizioni inerenti alla misura: meccanismo, quest'ultimo che – come già Bricola osservava nel 1974 – finisce per fornire una base legale all'azione penale esercitata nei confronti di chi inizialmente non poteva essere perseguito per mancanza di prove utilizzabili in giudizio. Dalla loro applicazione deriva, ancora, un **effetto discriminatorio**, determinato dall'aggravamento di pena legislativamente previsto per numerosi reati allorché il fatto sia commesso da chi sia sottoposto ad una misura di prevenzione (§ 5). Ancora, le misure di prevenzione personali consentono una **violazione surrettizia del *ne bis in idem***, applicandosi pacificamente anche a chi abbia già scontato o stia scontando la pena per gli stessi fatti che il giudice della prevenzione valorizzerà poi come sintomatici della sua persistente pericolosità sociale (§ 6). Tali misure costituiscono, infine, un **surrogato delle misure cautelari durante le indagini**, cui le autorità inquirenti possono ricorrere ogniqualvolta siano scaduti i termini o comunque per qualsiasi ragione queste ultime non siano applicabili (§ 7).

Insomma, e con le parole di Leopoldo Elia, testualmente citate dal giudice Pinto: il giudizio di prevenzione squalifica socialmente una persona, senza prima poter squalificare un fatto; **le misure in parola finiscono per colpire una persona, senza che sia richiesta la prova di sue specifiche condotte criminose compiute nel passato, sulla base della sua mera appartenenza a una "tipologia d'autore"** – ciò che rende le stesse garanzie giurisdizionali che ne assistono il procedimento applicativo null'altro che un'illusione (§ 8).

Rispetto alle violazioni allegate dal ricorrente, tre sono i principali punti di contrasto tra il giudice Pinto e la maggioranza, concernenti rispettivamente *a)* il **carattere privativo della libertà personale** dell'interessato (anziché meramente limitativo della libertà di circolazione), *b)* la **natura sostanzialmente penale** delle misure in questione, e *c)* l'**ineffettività dei rimedi assicurati al ricorrente nell'ordinamento italiano**.

a) Quanto al **primo profilo**, Pinto osserva che l'analisi delle prescrizioni inerenti alla sorveglianza speciale con obbligo di soggiorno, considerate nel loro insieme, restituisce un **quadro comparabile a quello che nel 1980 aveva condotto la Corte, nel caso *Guzzardi*, a considerare violato l'art. 5 Cedu:** vero è che il ricorrente, nel caso ora all'esame, non è stato costretto a risiedere in una piccola isola; ma gli obblighi cui era sottoposto non erano dissimili a quello inerenti agli arresti domiciliari o alla detenzione domiciliare accompagnati dall'autorizzazione ad assentarsi dall'abitazione per ragioni lavorative o di studio durante le ore diurne, che pure la costante giurisprudenza della Corte considera misure privative della libertà personale e non meramente limitative della libertà di circolazione (§ 12-20).

Dal riconoscimento che la misura comporta una **limitazione dell'art. 5 Cedu** – e non meramente dell'art.2 Prot. 4 Cedu – discende d'altra parte, secondo Pinto, una **ragione di illegittimità della misura *ulteriore* a quella ravvisata dalla Corte**, che come abbiamo visto è relativa al difetto di qualità della legge che ne costituisce la base giuridica. Il problema è anche, più in radice, che **l'art. 5 Cedu non consente misure privative della libertà personale aventi il generico scopo di prevenire la commissione di reati**, le quali non rientrano in alcuna delle sei tassative ipotesi di legittime restrizione del diritto in parola previste dal § 1 della disposizione convenzionale (§ 21-31).

b) Quanto poi alla **natura sostanzialmente penale** (*scilicet*: punitiva) delle misure in parola, essa deve essere affermata – secondo Pinto – per una pluralità di ragioni, tra le quali: la circostanza che la loro applicazione dipende anch'essa dalla formulazione di un'accusa penale, quanto meno nel senso dell'allegazione che la situazione del proposto sia sussumibile in una delle 'fattispecie di

pericolosità' previste dalla legge; la pesante incidenza della misura sui diritti fondamentali dell'interessato; il riconoscimento da parte della stessa Corte costituzionale italiana (nella già menzionata sent. n. 177/1980) dell'identità di funzione delle misure di prevenzione rispetto alle misure di sicurezza, e della conseguente loro sottoposizione al medesimo quadro di garanzie costituzionali; lo scopo general- e specialpreventivo perseguito da queste misure, parallelo a quello delle pene; la previsione di sanzioni penali per l'ipotesi della violazione delle relative prescrizioni.

Dal riconoscimento della natura sostanzialmente penale delle misure dovrebbe allora discendere l'applicabilità ad esse dell'**intero quadro delle garanzie previste dall'art. 6 Cedu**, ivi comprese quelle del **processo equo in materia penale**, non rispettate nel caso di specie.

c) Quanto, infine, all'**ineffettività dei rimedi interni**, il giudice Pinto osserva come da un lato la Corte d'appello sia intervenuta con grande **ritardo** a correggere l'errore compiuto dai giudici di prima istanza; e, dall'altro, come l'ordinamento italiano non preveda alcuna forma di **indennizzo pecuniario** nei confronti di chi sia stato ingiustamente sottoposto a una misura di prevenzione, indennizzo che sarebbe stato invece indispensabile per riparare le conseguenze della violazione – con conseguente **violazione**, a suo avviso, anche **dell'art. 13 Cedu**.

8.4. L'ulteriore, vivace **opinione parzialmente dissenziente del giudice Küris** sposa *in toto* le conclusioni del giudice Pinto, insistendo peraltro in modo particolare più sull'erroneità dell'applicazione della misura nel caso concreto – in ragione, in particolare, dell'errore sull'identità del proposto nel quale erano incorsi i giudici di prima istanza – che non sulla contrarietà della disciplina legislativa ai requisiti convenzionali, sulla quale si concentrano invece i giudici di maggioranza e lo stesso Pinto de Albuquerque.

8.5. Completano il quadro, infine, le **opinioni parzialmente dissenzienti dei giudici Sajó** – che avrebbe considerato violato anche l'art. 5 Cedu – e **Vučinić** – che avrebbe invece considerato violato anche l'art. 6 Cedu nel suo *volet pénal* -: l'uno e l'altra per le medesime ragioni espresse da Pinto nella parte di volta in volta rilevante della sua complessa opinione parzialmente dissenziente.

* * *

9. Non può essere questo il luogo per una valutazione critica di questa sentenza, che ha già suscitato vive reazioni e richiederà la più attenta riflessione da parte degli studiosi e della prassi italiana.

Siano qui semplicemente consentite alcune **brevissime osservazione 'a caldo'**, tutte da approfondire nel prossimo futuro.

10. Anzitutto: la sentenza è particolarmente importante, perché pronunciata – in prima e unica istanza – dalla Grande Camera, cui il caso era stato devoluto proprio in considerazione della speciale importanza dei principi di diritto in gioco. La Grande Camera – e ne sono ben consapevoli *tutti* i giudici, anche i cinque concorrenti che cercano invece di riportare l'attenzione sulle specificità del caso concreto – **ha qui giudicato non tanto sulle violazioni commesse dai giudici del Tribunale di Bari nei confronti del signor de Tommaso, quanto sulla legislazione italiana**

in materia di misure di prevenzione, sotto il profilo della sua compatibilità con gli standard convenzionali.

E l'**esito** – quanto meno secondo l'opinione di dodici dei diciassette giudici – è stato **pesantemente negativo per il nostro paese**: **tanto la disciplina delle c.d. fattispecie di pericolosità generica di cui (oggi) all'art. 1 lett. *a)* e *b)* del codice antimafia, quanto la disciplina delle prescrizioni inerenti alla sorveglianza speciale, sono stati ritenute incompatibili con gli standard di qualità della legge richiesti per giustificare qualsiasi limitazione di un diritto convenzionale** (sia esso identificato, come ritengono quattordici giudici, nella libertà di circolazione, ovvero – come opinano tre giudici dissenzienti – nella stessa libertà personale).

11. Seconda considerazione: **la posizione della Grande Camera è oggi il punto fermo con cui dovremo confrontarci**, non essendo qui praticabile la via di fuga rappresentata dall'eventuale negazione del carattere di "giurisprudenza consolidata" dei principi di diritto espressi da questa pronuncia – la stessa sent. n. 49/2015 della Corte costituzionale, cui si deve notoriamente la formula in parola, avendo riconosciuto espressamente tale carattere alle sentenze della Grande Camera.

12. Terza considerazione: la sentenza *de Tommaso* darà prevedibilmente origine a una **valanga di ricorsi a Strasburgo contro lo Stato italiano**, provenienti da tutti coloro che siano stati sottoposti a una misura di prevenzione personale sulla base di un apprezzamento della loro 'pericolosità generica', ai sensi dell'art. 1 lett. *a)* e *b)* del codice antimafia o della norma corrispondente nella legislazione previgente. E tali ricorsi saranno presumibilmente accolti, ai sensi dell'art. 28 Cedu, in modo seriale da comitati di tre giudici della Corte, che si limiteranno a prendere atto della sentenza della Grande Camera e a riconoscere, conseguentemente, la violazione dell'art. 2 Prot. 4 Cedu (nonché dell'art. 6 Cedu, in tutti i casi anteriori alla sentenza n 93/2010 della Corte costituzionale).

Ciò – quanto meno – sino a quando lo Stato italiano non si doterà di uno strumento per riconoscere un diritto ad un **indennizzo pecuniario** nei confronti di tutti costoro, in grado di operare come rimedio interno idoneo ad assicurar loro ristoro a livello domestico, precludendone così l'accesso alla Corte europea.

13. Uno spinoso problema concerne invece la **sorte dei provvedimenti ancora in corso di esecuzione**, nonché quella dei **procedimenti già avviati**.

Ancorché *convenzionalmente illegittime*, le misure di prevenzione personali in essere continuano infatti ad essere **legittimate – dal punto di vista dell'ordinamento italiano – da una legge che resta valida e in vigore, almeno sino alla sua eliminazione da parte della Corte costituzionale**. Parimenti, i procedimenti già avviati continueranno a fondarsi su presupposti normativi ancora validi e in vigore, che – in presenza dei relativi presupposti – legittimerebbero, dal punto di vista interno, l'adozione della misura.

D'altra parte, **non pare che l'antinomia tra diritto convenzionale e diritto interno possa qui essere risolta tramite l'interpretazione conforme del secondo, ovvero la diretta applicazione del diritto convenzionale**: l'esecuzione degli obblighi discendenti dalla Cedu e dai suoi protocolli incontra qui un ostacolo invalicabile per del giudice comune, rappresentato da un dato normativo che consente proprio ciò che Strasburgo vieta.

In queste condizioni, l'unica soluzione plausibile a disposizione del giudice comune per risolvere l'antinomia – e per non continuare a produrre provvedimenti che sarebbero fatalmente censurati poi da Strasburgo, con conseguente esposizione dello Stato italiano alle relative responsabilità internazionali – mi parrebbe allora quella di **sollecitare l'intervento della Corte costituzionale**, alla quale dovrebbe essere sottoposta una **duplice questione di legittimità costituzionale degli artt. 1 lett. *a)* e *b)* e 8 co. 3 ss. del codice antimafia, per contrasto con l'art. 117 co. 1 Cost. in riferimento all'art. 2 Prot. 4 Cedu**.

Spetterà poi alla Corte costituzionale valutare se accogliere la questione, uniformandosi ai principi espressi dalla Corte di Strasburgo, ovvero se tentare la strada – verosimilmente assai impervia – di un confronto dialogico con questa giurisprudenza, insistendo sulle buone ragioni dell'ordinamento italiano in materia di prevenzione personale, anche rispetto alle fattispecie di pericolosità 'generica'.

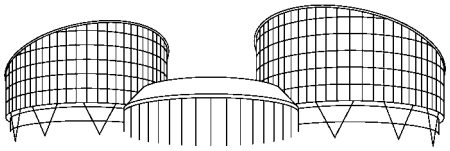
14. Un secondo, e ancora più spinoso, problema concernerà infine i veri convitati di pietra di tutta questa discussione, e cioè le **misure di prevenzione *patrimoniali* fondate sulle fattispecie di pericolosità 'generica'**, che parrebbero destinate a cadere sotto la medesima scure che ha colpito oggi le parallele misure personali.

Vero è, infatti, che le misure patrimoniali incidono – per definizione – su un diverso diritto convenzionale: il diritto di proprietà, riconosciuto dall'art.. 1 prot. add. Cedu. Ma anche **le limitazioni al diritto di proprietà sono legittime in quanto "previste dalla legge"**; e **anche rispetto all'art. 1 prot. add. Cedu la consolidata giurisprudenza di Strasburgo richiede che la base legale risponda ai medesimi requisiti di qualità** – in termini, in particolare, di idoneità della normativa a consentire all'interessato di prevedere la misura limitativa del diritto – **che valgono per la limitazione di qualsiasi diritto convenzionale** (cfr., sul punto, Finocchiaro, *Art. 1 Prot. add.*, in Ubertis, Viganò, *Corte di Strasburgo*, cit., p. 327 ss.).

Di talché è del tutto ragionevole ritenere che la Corte possa giudicare in futuro incompatibili con gli standard convenzionali anche le misure di prevenzione patrimoniali emesse nei confronti dei soggetti di cui all'art. 1 lett. *a)* e *b)*, per il tramite di cui all'art. 4 lett. *c)*, del codice antimafia.

15. Di tutti questi problemi converrà, al più presto, discutere: in sede giurisprudenziale e, ancor più, in sede legislativa, nella speranza che il parlamento non intenda lasciare ancora una volta che siano soltanto i giudici, comuni e costituzionali, a porre qualche rimedio alle inadeguatezze della disciplina legislativa ora evidenziatesi in sede internazionale.

Inadeguatezze, per il vero, che la dottrina più sensibile da tempo denunciava, e rispetto alle quali forse la stessa Corte costituzionale avrebbe potuto intervenire con assai maggiore decisione di quanto non abbia fatto nel recente passato – da ultimo con la sentenza, giustamente criticata dai giudici di Strasburgo, con la quale ha fortunosamente salvato la legittimità di un reato imperniato, tra l'altro, sulla violazione della prescrizione di "*honeste vivere*": un reato in tutto e per tutto indistinguibile da quel famigerato 'paragrafo del briccone', di cui già parlava il buon vecchio Beling all'inizio del novecento come esempio paradigmatico di norma incompatibile con la logica del *nullum crimen*.



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

GRAND CHAMBER

CASE OF DE TOMMASO v. ITALY

(Application no. 43395/09)

JUDGMENT

STRASBOURG

23 February 2017

This judgment is final but it may be subject to editorial revision.

In the case of de Tommaso v. Italy,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

András Sajó, *President,*
Guido Raimondi,
Josep Casadevall,
Işıl Karakaş,
Mark Villiger,
Boštjan M. Zupančič,
Ján Šikuta,
Ledi Bianku,
Nebojša Vučinić,
Kristina Pardalos,
Paulo Pinto de Albuquerque,
Helen Keller,
Ksenija Turković,
Dmitry Dedov,
Egidijus Kūris,
Robert Spano,
Jon Fridrik Kjølbro, *judges,*

and Johan Callewaert, *Deputy Grand Chamber Registrar,*

Having deliberated in private on 20 May 2015, 24 August 2016 and 23 November 2016,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 43395/09) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Italian national, Mr Angelo de Tommaso ("the applicant"), on 28 July 2009.

2. The applicant was represented by Mr D. Conticchio, a lawyer practising in Casamassima. The Italian Government ("the Government") were represented by their co-Agents, Ms P. Accardo and Mr G. Mauro Pellegrini.

3. The applicant alleged, in particular, that the preventive measures to which he had been subjected for a period of two years were in breach of Articles 5, 6 and 13 of the Convention and Article 2 of Protocol No. 4.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court).

5. On 18 October 2011 the Government were given notice of the application.

6. On 25 November 2014 a Chamber of the Second Section, composed of Işıl Karakaş, President, Guido Raimondi, András Sajó, Nebojša Vučinić, Helen Keller, Egidijus Kūris, Robert Spano, judges, and Stanley Naismith, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected (Article 30 of the Convention and Rule 72).

7. The composition of the Grand Chamber was determined in accordance with Article 26 §§ 4 and 5 of the Convention and Rule 24.

8. The applicant and the Government each filed written observations on the admissibility and merits of the application.

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 20 May 2015 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Ms P. ACCARDO,
Mr G. MAURO PELLEGRINI, *co-Agents*;

(b) *for the applicant*
Mr D. CONTICCHIO, *Counsel,*
Ms L. FANIZZI,
Ms M. CASULLI, *Advisers*.

The Court heard addresses by Ms Accardo and Mr Conticchio, and also their replies to questions from judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant, Mr Angelo de Tommaso, is an Italian national who was born in 1963 and lives in Casamassima.

11. On 22 May 2007 the Bari public prosecutor recommended that the Bari District Court place the applicant under special police supervision (*sorveglianza speciale di pubblica sicurezza*) for two years, on the basis of Act no. 1423/1956, and impose a compulsory residence order on him during that time. The public prosecutor submitted that the applicant's previous convictions for drug trafficking, absconding and unlawful possession of weapons showed that he associated with criminals and was a dangerous

individual. He also noted that the applicant had been given a "warning" by the police but had persisted in his criminal conduct.

12. In submissions of 6 March 2008 the applicant challenged the prosecutor's recommendation. He argued that there had been a case of mistaken identity and that the alleged breaches of the terms of his special supervision concerned a person who shared his first name and surname but had been born in 1973. He further submitted that no criminal charges had been brought against him since a conviction dating back to 2002. Although he had been convicted of absconding in 2004, that was not a decisive factor for the imposition of the measure in question. He argued that there was no need to place him under special supervision.

13. In a decision of 11 April 2008, served on 4 July 2008, the Bari District Court placed the applicant under special supervision for two years. It rejected his arguments, finding that the statutory requirements for the imposition of the measure were indeed satisfied, there being no doubt that he was dangerous.

14. The District Court found that the applicant had "active" criminal tendencies and that the evidence before it showed that he had derived most of his means of subsistence from criminal activity.

15. The court observed, in particular:

> "The subject was issued with a 'verbal warning for public safety' on 18 September 2006, but this did nothing to improve his conduct; he continued to associate regularly with key figures in the local underworld (*malavita locale*) and carried on committing offences (see statement of charges pending: breach of supervision order on 25 April 2007; breach of supervision order on 29 April 2007)."

16. The District Court further held:

> "The findings of the investigation (see documents and certificates in the case file) show that Mr Angelo de Tommaso remains personally involved in various criminal activities, among which the greatest threat to public order and safety is posed by offences against property and weapon- and drug-related offences.
>
> This negative picture is compounded by the contents of the recent report issued by the Gioia del Colle *carabinieri* on 26 January 2008, from which it appears that far from having receded, the subject's criminal tendencies are still thought to be active and operational. The evidence in the file indicates that he has no fixed and lawful occupation (having declared himself available for employment from February 2008) and that the serious offences under consideration are such as to warrant the conclusion that he has, up until now, derived a significant part of his means of subsistence from criminal activity, by repeatedly resorting to crime either alone or in association with habitual offenders (whether in his municipality of residence or elsewhere). To ensure more thorough monitoring, it is therefore necessary to order not only special police supervision for a period of two years (a measure deemed reasonable on account of the subject's character as clearly emerges from the acts attributed to him), but also compulsory residence for the same duration."

17. The preventive measure imposed the following obligations on the applicant:

– to report once a week to the police authority responsible for his supervision;

– to start looking for work within a month;

– to live in Casamassima and not to change his place of residence;

– to lead an honest and law-abiding life and not give cause for suspicion;

– not to associate with persons who had a criminal record and who were subject to preventive or security measures;

– not to return home later than 10 p.m. or to leave home before 6 a.m., except in case of necessity and only after giving notice to the authorities in good time;

– not to keep or carry weapons;

– not to go to bars, nightclubs, amusement arcades or brothels and not to attend public meetings;

– not to use mobile phones or radio communication devices; and

– to have with him at all times the document setting out his obligations (*carta precettiva*), and to present it to the police authority on request.

18. On 14 July 2008 the applicant appealed to the Bari Court of Appeal.

19. On 31 July 2008 the Bari prefecture ordered the withdrawal of the applicant's driving licence.

20. In a decision of 28 January 2009, served on the applicant on 4 February 2009, the Court of Appeal allowed his appeal and quashed the preventive measure *ex tunc*.

21. The Court of Appeal observed, firstly, that for a preventive measure to be imposed it was necessary to establish that the individual posed a "current danger", which was not necessarily linked to the commission of a specific offence, but rather to the existence of a complex situation of a certain duration indicating that the individual had a particular lifestyle that prompted alarm for public safety.

22. In the Court of Appeal's view, the requirement of a "current" danger to society implied that the relevant decision should relate to the time of the assessment and should remain valid throughout its implementation; any previous circumstances could be taken into account only in relation to their impact on the "current" element.

23. The court found that at the time the measure had been imposed, the applicant's dangerousness could not have been inferred from any criminal activity.

24. It then observed that in several final judgments delivered between September 1995 and August 1999 the applicant had been convicted of tobacco smuggling. He had subsequently changed his sphere of activity and until 18 July 2002 had been involved in drug trafficking and handling illegal weapons, offences for which he had been sentenced to four years' imprisonment in a judgment of 15 March 2003, which had become final on

10 March 2004; he had served his sentence from 18 July 2002 to 4 December 2005.

25. The Court of Appeal accordingly noted that the applicant's most recent illegal activities relating to drugs dated back to more than five years before the preventive measure had been imposed. All that the court could hold against him was an offence of absconding, committed on 14 December 2004 (while he had been subject to a compulsory residence order).

26. The court also pointed out that the breaches of the terms of special supervision committed on 25 and 29 April 2007 concerned a different person, who had the same first name and surname as the applicant but had been born in 1973.

27. The Court of Appeal held that the District Court had omitted to assess the impact of the rehabilitation purpose of the sentence on the applicant's personality.

It observed in particular:

> "While it is true that the application of special supervision is compatible with the status of detention, which relates solely to the time of the execution of the sentence, the assessment of dangerousness is inevitably even more significant in the case of an individual who has fully served his sentence and has committed no further offences after his release, as is the case for Mr de Tommaso.
>
> The note of 26 January 2008 in which the *carabinieri* mentioned that Mr de Tommaso associated with convicted offenders (to whom he had been caught speaking) does not appear sufficient to establish his dangerousness, bearing in mind that Mr de Tommaso has not been the subject of any further judicial proceedings since the decision to impose the preventive measure.
>
> Lastly, the Court of Appeal notes that the material produced by the defence before the District Court and at the hearing before this division indicates that, notwithstanding the typically casual nature of work as a farm labourer, the subject has, at least since his release from prison in 2005 up to the present day, consistently been in lawful employment providing him with a respectable source of income.
>
> In conclusion, in March 2008 there were no specific facts from which to infer persistent dangerousness on the part of the subject, who, after serving his lengthy sentence of imprisonment, has not displayed any conduct justifying the assessment made in the judgment appealed against, which is therefore to be quashed."

II. THE GOVERNMENT'S PARTIAL UNILATERAL DECLARATION

28. On 7 April 2015 the Government submitted a letter containing a friendly-settlement proposal in respect of the part of the application concerning the complaint of a lack of a public hearing in the Bari District Court and Court of Appeal (Article 6 § 1 of the Convention), as well as a unilateral declaration under Rule 62A of the Rules of Court in relation to that complaint.

29. In their declaration the Government, referring to the Court's well-established case-law (*Bocellari and Rizza v. Italy*, no. 399/02, 13 November 2007; *Perre and Others v. Italy*, no. 1905/05, 8 July 2008; and *Bongiorno and Others v. Italy*, no. 4514/07, 5 January 2010), acknowledged that there had been a violation of Article 6 § 1 of the Convention on account of the lack of a public hearing, offered to pay a specified sum in respect of the costs relating to this part of the application and requested that this part of the application be struck out.

III. RELEVANT DOMESTIC LAW AND PRACTICE

A. Act no. 1423/1956

30. *Praeter delictum* preventive measures against individuals date back to the nineteenth century in Italy. They were already in existence prior to the unification of Italy in 1861, and were subsequently reincorporated in the legislation of the Kingdom of Italy by the Pica Act (no. 1409/1863), and later by the 1865 Consolidated Public Safety Act (*Testo Unico di Pubblica Sicurezza*).

31. In 1948 the Italian Constitution came into force, placing emphasis on protection of fundamental freedoms, in particular personal liberty (Article 13) and freedom of movement (Article 16), as well as the principle of legality in relation to criminal offences and security measures (Article 25, paragraphs 2 and 3).

32. Nevertheless, preventive measures against individuals were not abolished altogether; following the introduction of the new Act no. 1423/1956, they were adapted to comply with the fundamental criteria referred to in judgments of the Constitutional Court, requiring judicial intervention and observance of the principle of legality in their application.

33. Act no. 1423 of 27 December 1956, as in force at the material time, provides for the imposition of preventive measures against "persons presenting a danger for security and public morality".

34. Section 1 of the Act provides that preventive measures apply to:

> "(1) individuals who, on the basis of factual evidence, may be regarded as habitual offenders;
>
> (2) individuals who, on account of their behaviour and lifestyle and on the basis of factual evidence, may be regarded as habitually living, even in part, on the proceeds of crime; and
>
> (3) individuals who, on the basis of factual evidence, may be regarded as having committed offences endangering the physical or mental integrity of minors or posing a threat to health, security or public order."

35. Under section 3, a measure entailing special police supervision, combined if need be with a prohibition on residence in a named district or

province or an order for compulsory residence in a specified district (*obbligo del soggiorno in un determinato comune*), may be imposed on individuals referred to in section 1 who have not complied with an official police warning under section 4 and pose a threat to public safety.

36. Before the measure of police supervision is imposed, the police issue an official warning urging the individual concerned to behave lawfully. If, despite the warning, the individual does not change his or her behaviour and poses a threat to public safety, the police may recommend that the judicial authorities impose the measure in question.

37. Section 4 of the Act provides that the district court, sitting *in camera*, must give a reasoned decision within thirty days, after hearing submissions from the public prosecutor and the individual concerned, who has the right to file written pleadings and to be assisted by counsel. The preventive measures fall within the exclusive competence of the district court sitting in the provincial capital.

38. The public prosecutor and the individual concerned may appeal within ten days; the appeal does not have suspensive effect. The Court of Appeal, sitting *in camera*, has to give a reasoned decision within thirty days (section 4(5) and (6)). Subject to the same conditions, an appeal on points of law may then be lodged with the Court of Cassation, which, sitting *in camera*, must give its ruling within thirty days (section 4(7)).

39. When adopting one of the measures provided for in section 3, the district court must specify how long it is to remain in force – between one and five years (section 4(4)) – and must lay down the rules to be observed by the individual concerned (section 5(1)).

40. Section 5 provides that when imposing the measure of special supervision, the district court orders the person suspected of living on the proceeds of crime to look for work and housing within a short space of time and inform the authorities accordingly. The individual will not be allowed to travel away from the designated address without permission. The court also orders the individual: to lead an honest and law-abiding life and not give cause for suspicion; not to associate with individuals who have a criminal record and are subject to preventive or security measures; not to return home later than a specified time in the evening or to leave home before a specified time in the morning, except in case of necessity and only after giving notice to the authorities in good time; not to keep or carry weapons; not to go to bars, nightclubs, amusement arcades or brothels; and not to attend public meetings. In addition, the district court may impose any other measures it deems necessary in view of the requirements of protecting society, in particular a ban on residing in certain areas.

41. Section 6 provides that where special supervision is combined with a compulsory residence order or an exclusion order, the president of the district court may in the course of the proceedings make an order (*decreto*) for the temporary withdrawal of the individual's passport and the

suspension of the validity of any equivalent document entitling the holder to leave the country. Where there are particularly serious grounds, the president may also direct that the compulsory residence or exclusion order should be enforced provisionally in respect of the individual concerned until the preventive measure has become final.

42. In accordance with section 9, a breach of the above rules is punishable by a custodial sentence.

B. Case-law of the Constitutional Court

43. Act no. 1423/1956 initially provided for the possibility of imposing preventive measures against individuals in certain cases of "ordinary dangerousness" only – in other words, when it was established that the individual posed a danger to public safety.

Its scope was later extended to cover other situations of "special dangerousness", a notion applicable to individuals suspected of belonging to Mafia-type organisations (Act no. 575/1965) or involved in subversive activities (Act no. 152/1975, introduced in response to the emergence of extreme left-wing and right-wing political terrorism during the "years of lead" ("*anni di piombo*"). Finally, the categories of "ordinary dangerousness" were amended and reduced to three by Act no. 327/1988.

44. The Constitutional Court has found on several occasions that the preventive measures provided for in Act no. 1423/1956 were compatible with fundamental freedoms.

45. In judgment no. 2 of 1956 it held:

> "Article 16 of the Constitution remains to be examined: 'Every citizen has the right to reside and travel freely in any part of the national territory, subject to the general restrictions that may be laid down by law for health or security reasons. No restrictions may be imposed for political reasons.'
>
> ...
>
> It is a more delicate matter to determine whether the grounds of 'public order and safety and public morality' referred to in section 157 of the Public Safety Act constitute 'health or security reasons' within the meaning of Article 16.
>
> ...
>
> An interpretation of 'security' as concerning solely physical integrity must be rejected, as this would be too restrictive; it thus appears rational and in keeping with the spirit of the Constitution to interpret the term 'security' as meaning a situation in which the peaceful exercise of the rights and freedoms so forcefully safeguarded by the Constitution is secured to citizens to the greatest extent possible. Security therefore exists when citizens can carry on their lawful activities without facing threats to their physical and mental integrity. 'Living together in harmony' is undeniably the aim pursued by a free, democratic State based on the rule of law.
>
> That being so, there is no doubt that 'persons presenting a danger to public order and safety or public morality' (section 157 of the Public Safety Act) constitute a threat to 'security' as defined above and as contemplated by Article 16 of the Constitution.

With regard to morality, it is true that this does not entail having regard to individuals' personal convictions, which in themselves are uncontrollable, or moral theories, the manifestation of which, like any other manifestation of thought, takes place freely or is governed by other legal rules. Nevertheless, citizens have the right not to be disturbed and offended by immoral conduct where this also endangers health – as referred to in Article 16 of the Constitution – or creates an environment conducive to common crime.

With regard to public order, without entering into a theoretical debate on the definition of this concept, it is sufficient to point out that, for the purposes of Article 16 of the Constitution and section 157 of the Public Safety Act, danger to public order cannot result merely from conduct of a social or political nature – which is governed by other legal rules – but must result from outward signs of intolerance or rebellion *vis-à-vis* legislative rules and legitimate orders issued by the public authorities, since such conduct could easily give rise to situations of alarm and to violence indisputably posing a threat to the 'security' of all citizens, whose freedom of movement would become limited as a result.

To sum up, the expression 'health or security reasons' in the text of Article 16 of the Constitution must be interpreted as referring to facts posing a danger to citizens' security as defined above.

This conclusion is also accepted in the virtually uniform case-law of the Court of Cassation and by many legal authors. It has been observed that the generic wording of Article 16 applies to an infinite number of cases which are difficult to foresee and which can be encompassed by the summary expression 'health or security reasons', and that the purpose of this provision of the Constitution is to reconcile the need not to allow unrestricted freedom of movement for individuals posing a danger to society with the need to avoid sweeping, uncontrolled policing power."

46. In judgment no. 27 of 1959 the Constitutional Court held that despite the restrictions on fundamental freedoms which they entailed, preventive measures satisfied the legitimate requirement laid down in the Constitution of guaranteeing "the orderly and peaceful course of social relations, not only through punitive criminal legislation, but also through a system of preventive measures intended to prevent the commission of future offences". It added that such measures were necessary and proportionate to the aim pursued, because the categories of individuals concerned were sufficiently restricted and specific. Accordingly, it concluded that the measures were compatible with the principle of legality set forth in Articles 13 and 16 of the Constitution in the case of restrictions on rights relating to personal liberty.

47. In judgment no. 45 of 1960 the Constitutional Court held that the Constitution permitted administrative authorities to take measures restricting freedom of movement, such as an "order to leave a district", as provided for in Act no. 1423/1956. It also specified that measures restricting personal liberty were to be taken by the judiciary alone.

48. In judgment no. 126 of 1962, reiterating its previous definition of "public morality", the Constitutional Court noted that this concept was an aspect of public safety, a ground on which citizens' freedom of movement could be restricted in accordance with Article 16 of the Constitution.

49. In judgment no. 23 of 1964 the Constitutional Court held that preventive measures did not breach either the principle of legality or the presumption of innocence. In particular, it observed that the principle of legality, enshrined in the Constitution in relation both to restrictions on personal liberty (Article 13) and to criminal offences and security measures (Article 25), was applicable to preventive measures. However, observance of that principle had to be reviewed in accordance with special criteria taking into account the nature and purposes of the measures concerned. Their preventive aims meant that they were not imposed on the basis of a specific finding that a particular act had been committed, but rather on a pattern of behaviour indicating a danger to society.

50. The Constitutional Court held that as a result, when determining the different categories of individuals concerned, the legislature had to use different criteria from those employed to define the constituent elements of a criminal offence (and could also have recourse to elements of presumption); the criteria applied had to correspond to objectively identifiable types of behaviour. The approach to be adopted in defining preventive measures was different from, but no less strict than, the approach to defining criminal offences and penalties. Nevertheless, the Constitutional Court concluded that the Act contained a sufficiently precise description of which types of conduct were held to represent a "danger to society" in the case of "idlers, those who are unfit for work and vagrants" and other categories of individuals.

51. Next, concerning the principle of presumption of innocence, the Constitutional Court held, firstly, that this principle did not apply, since preventive measures were not based on guilt and had no bearing on an individual's criminal responsibility. Nor did the measures amount to a departure from this principle, given that an acquittal on grounds of insufficient evidence could never in itself justify a finding that a person posed a danger to society, since other factual indications of dangerousness had to be present.

52. In judgment no. 32 of 1969 the Constitutional Court pointed out that simply belonging to one of the categories of individuals designated by the Act was not a sufficient ground for imposing a preventive measure. On the contrary, it was necessary to establish the existence of specific conduct indicating that the individual concerned posed a real and not merely theoretical danger.

53. The Constitutional Court has found a violation of the Constitution on only three occasions on account of certain procedural or substantive aspects of the system for the application of preventive measures.

54. In judgment no. 76 of 1970 it declared section 4 of Act no. 1423/1956 unconstitutional in that it did not provide for the compulsory presence of counsel during proceedings for the application of preventive measures.

55. In judgment no. 177 of 1980 the Constitutional Court found that one of the categories of individuals laid down in section 1 of the 1956 Act as in force at the time, namely those "whose outward conduct gives good reason to believe that they have criminal tendencies", was not defined in sufficient detail by the law and did not make it possible to foresee who might be targeted by the preventive measures or in what circumstances, since too much discretion was left to the authorities. The Constitutional Court also concluded that there had been a breach of the principle of legality, which was applicable in relation to preventive measures by virtue of Article 13 (personal liberty) and Article 25 (security measures).

Summarising its entire body of case-law in this area, the Constitutional Court held:

> "(3) The question of preventive measures and associated issues have been brought before this court ever since its inception.
>
> As early as judgment no. 2 of 1956, the court set forth certain important principles, such as the requirement of judicial intervention for all measures restricting personal liberty and the outright rejection of suspicion as a condition for the imposition of such measures, which must be based on specific facts in order to be lawful.
>
> In judgment no. 11 of the same year (1956) the court held that 'the great difficulty in ensuring a balance between the two fundamental requirements – not hindering the activity of crime prevention, and guaranteeing respect for the inviolable rights of the human being – appears to have been resolved through recognition of the traditional rights of *habeas corpus* in the sphere of the principle of strict legality'. In the same judgment the court further noted: 'Consequently, the person concerned cannot in any circumstances be subjected to a deprivation or restriction of his or her (personal) liberty unless the deprivation or restriction is provided for in abstract terms by the law, proceedings have been lawfully instituted to that end and there has been a reasoned decision by a judicial body.'
>
> The constitutionality of a 'system of measures for the prevention of unlawful acts' designed to guarantee 'orderly and peaceful relations between citizens' has been confirmed by subsequent judgments of this court (judgments no. 27 of 1959; no. 45 of 1960; no. 126 of 1962; nos. 23 and 68 of 1964; no. 32 of 1969; and no. 76 of 1970) concerning Articles 13, 16 and 17 and Article 25 § 3 of the Constitution. Sometimes the court has emphasised the parallel with security measures (as provided for in Article 25 § 3 of the Constitution), while at other times it has played it down; sometimes it has confirmed that these two types of measures, both relating to the danger posed to society by the individual, pursue the same aim – crime prevention – while at other times it has on the contrary highlighted the differences between them.
>
> Reference should be made here not only to the observation in judgment no. 27 of 1959 as to the 'restricted and qualified' nature of the 'categories of individuals who may be placed under special supervision (section 1 of the Act)' (no. 1423/1956), but also and above all to this court's judgment no. 23 of 1964, in which it declared ill-founded 'the question of the constitutionality of section 1 of Act no. 1423 of 27 December 1956, having regard to Articles 13, 25 and 27 of the Constitution'. The reasoning of that judgment states that 'in determining the circumstances (requiring a preventive measure), the legislature should normally use different criteria from those employed to define the constituent elements of a criminal offence; it may also have recourse to elements of presumption, although these must always correspond to

objectively identifiable types of behaviour. This does not mean less rigour, but a different type of rigour in defining and adopting preventive measures in comparison with the definition of criminal offences and the imposition of sentences.' With regard specifically to subsections 2, 3 and 4 of section 1 of Act no. 1423/1956, the court ruled out the possibility that 'preventive measures could be adopted on the basis of mere suspicion', instead requiring 'an objective assessment of the facts revealing the individual's habitual behaviour and standard of living, or specific outward signs of his or her criminal tendencies, which must have been established in such a way as to preclude purely subjective and unverifiable assessments by the authority ordering or applying the preventive measures'.

(4) In accordance with previous decisions of this court, it should be noted that the constitutionality of preventive measures – in so far as they restrict personal liberty to varying degrees – is necessarily subject to observance of the principle of legality and the existence of judicial safeguards (judgment no. 11 of 1956). These two conditions are equally essential and closely linked, since the absence of one deprives the other of all effect by rendering it purely illusory.

The principle of legality in the context of prevention – that is, the reference to the 'cases provided for by law' – as deriving from Article 13 or Article 25 § 3 of the Constitution means that although in the majority of cases the application of the measure is linked to a prospective assessment, it must be based on 'cases of dangerousness' provided for – described – by law, forming both the framework of the judicial examination and the basis of a finding of prospective danger, which can only be lawfully founded on that basis.

Indeed, while jurisdiction in criminal matters means applying the law through an examination of the factual requirements in proceedings affording the necessary safeguards, among them the reliability of evidence, it is undeniable that even in proceedings relating to preventive measures the prospective assessment of dangerousness (which is entrusted to a judge and undoubtedly involves elements of discretion) is necessarily based on factual requirements that are 'provided for by law' and hence open to judicial scrutiny.

Judicial intervention (and likewise the presence of defence counsel, the need for which has been unequivocally affirmed) in proceedings for the application of preventive measures would have little meaning (or indeed would dangerously distort the judicial function in the sphere of personal liberty) if it did not serve to guarantee the examination, in adversarial proceedings, of the cases provided for by law.

Lastly, it should be noted that the imposition of preventive measures against individuals, which are likewise designed to prevent the commission of (other) offences (and do not always presuppose the commission of a – previous – offence; Article 49 §§ 2 and 4 and Article 115 §§ 2 and 4 of the Criminal Code), to the extent that they can be considered two species of the same genus, is linked to an examination of the cases provided for by law, and the assessment of dangerousness is based on this examination, whether such dangerousness is presumed or must be established in the precise circumstances.

(5) Thus, for preventive measures too the emphasis is on whether or not the factual requirements are defined sufficiently precisely by the law to allow a prospective assessment of the danger to society posed by the individual.

The questions put to this court require it to examine whether the 'indicators of danger to society' – to use the term commonly employed by legal authors – defined in the impugned legislative provisions are sufficient for the purposes outlined above.

To that end, it should be noted that in terms of precision, the fact that the definition in the legislation refers to a single type of behaviour or a pattern of behaviour is not decisive, since the only thing that can be assessed is an individual's behaviour or conduct in relation to the outside world, as reflected in his or her acts and omissions.

Similarly, for preventive measures it is also crucial that the legislative definition – the cases provided for by law – should make it possible to identify the type(s) of behaviour whose presence in the specific circumstances of the case may form a basis for a prospective, that is to say forward-looking, assessment.

It should also be observed that the types of behaviour required for the imposition of preventive measures – since their aim is to prevent criminal offences – cannot be defined without an explicit or implicit reference to the offence, offences or categories of offences sought to be prevented, so that the description of the type(s) of behaviour concerned becomes all the more crucial in that it can be inferred from their presence in the specific circumstances that there is a reasonable prospect (of the risk) that such offences will be committed by the individuals in question.

(6) In the light of the foregoing considerations, the question of the constitutionality of the final point of section 1(3) of Act no. 1423/1956 must be declared well-founded.

The provision in question (unlike, for example, the first subsection of the same section 1) does not describe one or more types of behaviour, or any 'outward conduct', that could automatically prompt a judicial examination. The question as to what forms of 'outward conduct' are relevant is referred to the judge (and prior to that, to the appropriate prosecution and police authorities) when the factual circumstances are being established, even before the examination on the merits. The conditions for the assessment of 'criminal tendencies' have no conceptual autonomy *vis-à-vis* the assessment itself. The legal formulation does not therefore have the function of properly defining the circumstances, that is, identifying the particular 'cases' concerned (as required both by Article 13 and by Article 25 § 3 of the Constitution), but it leaves an uncontrollable margin of discretion to those involved.

... The expression 'criminal tendencies' used in the 1956 legislation may appear to evoke the concept of 'propensity for crime' in Article 108 of the Criminal Code, but the comparison does not hold true in substantive terms, since the wording of the latter provision requires the following to be established: an intentional offence against life or limb, motives indicating a particular propensity for crime, and the especially bad character of the guilty party. In the instant case, however, the expression 'criminal tendencies' is to be understood as a synonym of danger to society, with the result that the entire legislative provision, which allows for the adoption of measures restricting personal liberty without identifying either the requirements or the specific aims justifying them, must be declared unconstitutional."

56. In judgment no. 93 of 2010, relying on Article 6 of the Convention and on the *Bocellari and Rizza v. Italy* judgment (no. 399/02, 13 November 2007), in which the European Court had found a violation of Article 6 in relation to proceedings for the application of measures involving property under the 1956 Act, the Constitutional Court declared section 4 of Act no. 1423/1956 unconstitutional in that it did not afford the person concerned the opportunity to request a public hearing during the proceedings for the application of preventive measures, whether at first instance or on appeal. However, in judgment no. 80 of 2011 the Constitutional Court clarified that

it was unnecessary to provide for the possibility of requesting a public hearing in the Court of Cassation.

57. In judgment no. 282 of 2010 the Constitutional Court was called upon to determine whether or not section 9(2) of Act no. 1423 of 27 December 1956 was compatible with Article 25, paragraph 2, of the Constitution in so far as it provided for criminal penalties in the event of failure to observe the requirement laid down in section 5(3), first part, of the same Act no. 1423/1956, namely "to lead an honest and law-abiding life and not give cause for suspicion", and whether or not it infringed the principle that the situations in which criminal-law provisions are applicable must be exhaustively defined by law (*principio di tassatività*).

58. In the submission of the court that had referred the question to the Constitutional Court, the obligation to lead an honest and law-abiding life and not give cause for suspicion, although included within the conditions imposed on the person subject to special supervision, constituted an obligation of a general nature applicable to the entire community, and not specifically to the individual concerned. Accordingly, the referring court contended that precisely because of its general scope, the obligation in question could not constitute a requirement, with prescriptive, typical and specific content, of the measure of special supervision, in that it was not possible to determine with any precision what conduct was capable of giving rise to the offence of breaching the terms of special supervision, given the vague and indeterminate nature of the elements used to characterise that offence.

59. In the Constitutional Court's view, the inclusion in the description of the offence in question of summary expressions, words with multiple meanings, general clauses or elastic concepts did not entail a breach of Article 25, paragraph 2, of the Constitution in so far as the overall description of the act alleged to have been committed nevertheless enabled the trial court – having regard to the aim pursued by the relevant criminal provision and to the wider legislative context in which it was to be viewed – to establish the meaning of that element by means of an interpretative process not extending beyond its ordinary task: in other words, in so far as that description enabled it to express a judgment as to the correspondence between the concrete circumstances and the abstract definition of the offence, underpinned by a verifiable hermeneutic basis, and, correspondingly, enabled the person to whom the provision applied to have a sufficiently clear and immediate perception of its relative prescriptive value. In that context, the requirement to "lead an honest life", assessed in isolation, in itself appeared generic and capable of taking on multiple meanings. However, if it was viewed in the context of all the other requirements laid down in section 5 of Act no. 1423/1956, its content became clearer, entailing a duty for the person concerned to adapt his or her own conduct to a way of life complying with all of the above-mentioned

requirements, with the result that the wording "lead an honest life" became more concrete and geared to the individual.

60. The Constitutional Court also found that the requirement to be "law-abiding" referred to the duty for the person concerned to comply with all the prescriptive rules requiring him or her to behave, or not to behave, in a particular way; not only the criminal laws, therefore, but any provision whose non-observance would be a further indication of the person's danger to society as already established.

61. Lastly, regarding the requirement to "not give cause for suspicion", the Constitutional Court noted that this too should not be seen in isolation but in the context of the other requirements set out in section 5 of Act no. 1423/1956, such as the obligation for the person under special supervision not to frequent certain places or associate with certain people.

C. Case-law of the Court of Cassation

62. In judgment no. 10281 of 25 October 2007 the plenary Court of Cassation noted that the prerequisite for imposing a preventive measure in respect of a specified individual was a finding that the individual posed a "current danger", which was not necessarily linked to the commission of an offence, although this might be a relevant factor. What was important, in the Court of Cassation's view, was the existence of a complex situation of a certain duration indicating that the individual's lifestyle raised an issue in terms of public safety. The assessment of this "current danger" was therefore "an assessment on several levels, taking into account various types of behaviour noted in the individual, which do not necessarily constitute grounds for a prosecution but nevertheless provide an indication of his or her danger to society".

63. In judgment no. 23641 of 2014 the Court of Cassation held that the assessment of dangerousness for the purposes of applying a preventive measure did not involve a mere assessment of subjective danger but corresponded to the assessment of "facts" which could be examined from a historical perspective and were themselves "indicators" of whether the individual concerned could be included in one of the criminological categories defined by law.

Accordingly, in the Court of Cassation's view, an individual "being examined in proceedings for the application of a preventive measure" was not found "guilty" or "not guilty" of a specific offence, but was deemed "dangerous" or "not dangerous" in the light of his or her previous conduct (as established on the basis of various sources of information), which was regarded as an "indicator" of the possibility of future conduct likely to disrupt social or economic order; this assessment was to be made on the basis of precise legislative provisions "categorising" the various forms of dangerousness.

64. The Court of Cassation held that falling into one of the categories thus established was a precondition, but was not sufficient in itself, for the imposition of a preventive measure on an individual, since the categories in question represented indicators of the danger to society posed by the individual, as emerged clearly from section 1(3) of Enabling Act no. 136 of 13 August 2010, on the basis of which Legislative Decree no. 159/2011 was introduced.

D. Legislative Decree no. 159 of 6 September 2011

65. The new "Anti-Mafia Code", consolidating the legislation on anti-Mafia action and preventive measures concerning individuals and property, came into force in September 2011. It repealed Act no. 1423/1956 but did not alter the categories of individuals concerned. Among the applicable measures, the only one abolished by the new legislation is the requirement not to go to bars, nightclubs, amusement arcades or brothels.

As regards the procedure for the imposition of preventive measures, section 7 of the Legislative Decree provides that, at the request of the individual concerned, a public hearing may be held.

66. Lastly, in February 2015 the Italian Government adopted Legislative Decree no. 7, which subsequently became Act no. 43 of 17 April 2015, containing urgent measures to combat international terrorism. As a result, new terrorist offences have been included in the Criminal Code, notably one relating to travel by foreign fighters for terrorist purposes. In addition, the scope of preventive measures concerning individuals (and property) has been extended. A new measure involving confiscation of passports and identity cards has been introduced.

E. Act no. 117 of 13 April 1988 on compensation for damage caused in the exercise of judicial functions and the civil liability of judges

67. Section 1(1) of Act no. 117/1988 provides that the Act is applicable "to all members of the ordinary, administrative, financial, military and special judiciary exercising a judicial function of any type, and to any other persons involved in the exercise of a judicial function".

Section 2 of the Act provides:

> "(1) Any person who has sustained unjustifiable damage as a result of judicial conduct, acts or measures on the part of a judge who is guilty of intentional fault or serious misconduct in the exercise of his or her functions, or as a result of a denial of justice, may bring proceedings against the State for compensation for any pecuniary damage sustained or for non-pecuniary damage resulting from deprivation of personal liberty.
>
> (2) In the exercise of judicial functions the interpretation of provisions of law or the assessment of facts and evidence shall not give rise to liability.

(3) The following shall constitute serious misconduct:

(a) a serious breach of the law resulting from inexcusable negligence;

(b) the assertion, due to inexcusable negligence, of a fact whose existence is indisputably refuted by documents in the case file;

(c) the denial, due to inexcusable negligence, of a fact whose existence is indisputably established by documents in the case file; or

(d) the adoption of a measure concerning personal liberty in a case other than those provided for by law or without due reason."

The first sentence of section 3(1) of Act no. 117/1988 states that a denial of justice may also occur in the event of "a refusal, omission or delay by a judge with regard to the taking of measures within his or her competence where, after expiry of the statutory time-limit for taking the measure in question, the party concerned has applied to have the measure taken and, without valid reason, no action has been taken within thirty days following the date on which the application was lodged with the registry".

68. The subsequent provisions of Act no. 117/1988 lay down the conditions and procedure for bringing a claim for compensation under sections 2 or 3 of the Act, and also specify the actions which may be brought retrospectively against a judge guilty of intentional fault or serious misconduct in the exercise of his or her functions, or of a denial of justice.

IV. COMPARATIVE-LAW MATERIAL

69. According to the information available to the Court on the legislation of thirty-four member States, the vast majority of the countries surveyed (twenty-nine countries[1] out of thirty-four) do not have any measures comparable to those applied in Italy in the present case. Measures of this kind can be found in only five countries (Austria, France, Russia, Switzerland and the United Kingdom).

70. Austria, France and Switzerland have adopted measures of this kind to deal with hooliganism: preventive measures are used against potentially violent individuals at sports events. France also makes provision for other types of measure (such as banning meetings, events or shows, or making a compulsory treatment order) falling within the responsibility of the administrative authorities. In the United Kingdom similar measures were introduced in 2011 in the context of terrorism prevention.

71. In Russia various laws provide for preventive measures in respect of former prisoners convicted of a serious crime, a repeat offence or other

1. Armenia, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Finland, Georgia, Germany, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, Republic of Moldova, Montenegro, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, "the former Yugoslav Republic of Macedonia", Turkey and Ukraine.

specified types of offence, abandoned minors, juvenile offenders, drug addicts and alcoholics who represent a danger to others, persons implicated in household crimes, persons breaching public order during public events, persons taking part in unofficial youth organisations pursuing illegal activities and persons involved in drug dealing or illegal drug-taking.

72. As far as European legislation is concerned, Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States provides for the possibility for States to restrict this freedom of movement and residence on grounds of public policy, public security or public health (Article 27). However, expulsion on grounds of public policy or public security must comply with the principle of proportionality and be based exclusively on the personal conduct of the individual concerned, which must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. As regards the duration of such a measure, the Directive states that after a reasonable period – and, in any event, after a three-year period from enforcement of the exclusion order – the person concerned must be able to submit an application for lifting of the order.

73. At Council of Europe level, the Additional Protocol to the Convention on the Prevention of Terrorism (CETS no. 217) was adopted by the Committee of Ministers on 19 May 2015 and was opened for signature in Riga on 22 October 2015. The Protocol lays down an obligation for States to make it a criminal offence to travel, or attempt to travel, to a State other than the State of residence or nationality for the purpose of perpetrating, planning, preparing or participating in terrorist acts, or providing or receiving terrorist training, and to adopt such measures as may be necessary to cooperate in efforts to prevent anyone from travelling abroad to join terrorists.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION AND ARTICLE 2 OF PROTOCOL No. 4

74. The applicant complained that the preventive measure imposed on him had been arbitrary and excessive in its duration. He relied on Article 5 of the Convention and Article 2 of Protocol No. 4.

The relevant part of Article 5 provides:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

Article 2 of Protocol No. 4 provides:

"1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society."

75. The Government contested that argument.

A. Admissibility

1. The parties' submissions

(a) The Government

76. The Government submitted that Article 5 of the Convention was not applicable in the present case. They pointed out that, in accordance with the Court's settled case-law (referring to *Raimondo v. Italy*, 22 February 1994, § 39, Series A no. 281-A; *Villa v. Italy*, no. 19675/06, §§ 41-43, 20 April 2010; and *Monno v. Italy* (dec.), no. 18675/09, §§ 21-23, 8 October 2013), obligations resulting from preventive measures did not amount to deprivation of liberty within the meaning of Article 5 of the Convention, but merely to restrictions on liberty of movement. They submitted that the complaint was thus incompatible *ratione materiae* with the Convention.

(b) The applicant

77. The applicant submitted that special police supervision fell within the ambit of Article 5 of the Convention and pointed out that failure to observe the rules of conduct attaching to that measure was punishable by a custodial sentence (section 9 of the 1956 Act). The restrictions imposed on him during the period from 4 July 2008 to 4 February 2009 had deprived him of his personal liberty. In his submission, the present case was comparable to *Guzzardi v. Italy* (6 November 1980, Series A no. 39), in which the Court had found that in view of the particular circumstances of the case, the applicant – who had been subjected to similar measures to those imposed on the applicant in the present case – had been deprived of his liberty, and that there had been a violation of Article 5.

78. The applicant submitted that the fact that he had been unable to leave home between 10 p.m. and 6 a.m. amounted to a deprivation of liberty resembling house arrest.

2. The Court's assessment

79. The Court must first determine whether Article 5 of the Convention is applicable in the present case.

80. It reiterates at the outset that in proclaiming the "right to liberty", paragraph 1 of Article 5 contemplates the physical liberty of the person. Accordingly, it is not concerned with mere restrictions on liberty of movement, which are governed by Article 2 of Protocol No. 4. In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting-point must be his or her specific situation and account must be taken of a whole range of factors such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation and restriction of liberty is one of degree or intensity, and not one of nature or substance (see *Guzzardi*, cited above, §§ 92-93; *Nada v. Switzerland* [GC], no. 10593/08, § 225, ECHR 2012; *Austin and Others v. the United Kingdom* [GC], nos. 39692/09, 40713/09 and 41008/09, § 57, ECHR 2012; *Stanev v. Bulgaria* [GC], no. 36760/06, § 115, ECHR 2012; and *Medvedyev and Others v. France* [GC], no. 3394/03, § 73, ECHR 2010). Furthermore, an assessment of the nature of the preventive measures provided for by the 1956 Act must consider them "cumulatively and in combination" (see *Guzzardi*, cited above, § 95).

81. As the Court has also held, the requirement to take account of the "type" and "manner of implementation" of the measure in question (ibid., § 92) enables it to have regard to the specific context and circumstances surrounding types of restriction other than the paradigm of confinement in a cell. Indeed, the context in which the measure is taken is an important factor, since situations commonly occur in modern society where the public

may be called on to endure restrictions on freedom of movement or liberty in the interests of the common good (see, *mutatis mutandis*, *Austin and Others*, cited above, § 59).

82. The Convention institutions' body of case-law concerning preventive measures imposed against individuals dates back to the Commission's decision of 5 October 1977 in *Guzzardi v. Italy* (no. 7960/77, unreported). The applicant in that case alleged that an order for his compulsory residence in the district of Force amounted to a deprivation of liberty. In dismissing his complaint, the Commission concluded that the conditions for the implementation of the compulsory residence order imposed on him, together with the associated obligations, did not entail any deprivation of liberty within the meaning of Article 5 of the Convention but solely restrictions on his liberty of movement and freedom to choose his residence.

83. Subsequently, in a separate case brought by the same applicant, the Court referred to the above-mentioned Commission decision in noting that special supervision accompanied by an order for compulsory residence in a specified district did not of itself come within the scope of Article 5 (see *Guzzardi*, judgment cited above, § 94). However, it concluded that in view of the particular circumstances of the case, the applicant had been "deprived of his liberty" within the meaning of Article 5 and could therefore rely on the guarantees under that provision. The applicant, who was suspected of belonging to a "band of mafiosi", had been forced to live on an island within an (unfenced) area of 2.5 sq. km, mainly together with other residents in a similar situation and supervisory staff. The requirement to live on the island was accompanied by other restrictions similar to the measures imposed on Mr de Tommaso. The Court attached particular significance to the extremely small size of the area where the applicant had been confined, the almost permanent supervision to which he had been subjected and the fact that it had been almost completely impossible for him to make social contacts (ibid., § 95).

84. The Court notes that since the *Guzzardi* case, it has dealt with a number of cases (*Raimondo*, cited above, § 39; *Labita v. Italy* [GC], no. 26772/95, § 193, ECHR 2000-IV; *Vito Sante Santoro v. Italy*, no. 36681/97, § 37, ECHR 2004-VI; see also, *mutatis mutandis*, *Villa*, cited above, §§ 43-44, and *Monno*, cited above, §§ 22-23) concerning special supervision together with a compulsory residence order and other associated restrictions (not leaving home at night, not travelling away from the place of residence, not going to bars, nightclubs, amusement arcades or brothels or attending public meetings, not associating with individuals who had a criminal record and who were subject to preventive measures). As none of those cases involved special circumstances comparable to those in *Guzzardi*, the Court examined the preventive measures in question under Article 2 of Protocol No. 4.

85. The Court observes that in the present case the applicant was subjected to similar measures to those which it examined in the cases cited above and that, unlike the applicant in the *Guzzardi* case, he was not forced to live within a restricted area and was not unable to make social contacts.

86. Nor can the Court accept the applicant's argument that the fact of being unable to leave home, except in case of necessity, between 10 p.m. and 6 a.m. amounts to house arrest and hence deprivation of liberty.

87. It reiterates that house arrest is considered, in view of its degree and intensity (see *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, § 104, ECHR 2016), to amount to deprivation of liberty within the meaning of Article 5 of the Convention (see *N.C. v. Italy*, no. 24952/94, § 33, 11 January 2001; *Nikolova v. Bulgaria (no. 2)*, no. 40896/98, §§ 60 and 74, 30 September 2004; *Danov v. Bulgaria,* no. 56796/00, §§ 61 and 80, 26 October 2006; and *Ninescu v. the Republic of Moldova*, no. 47306/07, § 53, 15 July 2014). It further notes that under Italian law, a person under house arrest is deemed to be in pre-trial detention (see *Ciobanu v. Romania and Italy*, no. 4509/08, § 22, 9 July 2013, and *Mancini v. Italy*, no. 44955/98, § 17, ECHR 2001-IX).

88. The Court observes, however, that in all the cases it has examined that are similar to the present case, the applicants were under an obligation not to leave home at night (see paragraph 84 above), and this was found to constitute interference with liberty of movement. It cannot find any sufficiently relevant grounds for changing this approach, especially as it appears that in the present case, having regard to the effects of the applicant's special supervision and the manner of its implementation, there were no restrictions on his freedom to leave home during the day and he was able to have a social life and maintain relations with the outside world. The Court further notes that there is no indication in the material before it that the applicant ever applied to the authorities for permission to travel away from his place of residence.

89. The Court considers that the obligations imposed on the applicant did not amount to deprivation of liberty within the meaning of Article 5 § 1 of the Convention, but merely to restrictions on liberty of movement.

90. It follows that the complaint under Article 5 of the Convention is incompatible *ratione materiae* with the Convention and must be rejected in accordance with Article 35 §§ 3 (a) and 4.

91. Since Article 5 is not applicable, the applicant's complaint falls to be examined under Article 2 of Protocol No. 4, the applicability of which in the present case has not been disputed by the parties.

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

B. Merits

1. The parties' submissions

(a) The applicant

93. The applicant submitted that the special supervision and compulsory residence order constituted a restriction of his right under Article 2 of Protocol No. 4. He noted firstly that from 1956, by passing the Act in question, Parliament had conferred on the judiciary the power to determine what factual elements were symptomatic of an individual's dangerousness. He accepted that the Constitutional Court's judgments had laid down strict criteria for imposing such measures and finding that individuals were dangerous, but contended that the judiciary had an "unquestionable discretion" in reaching that finding, on the basis of factual elements that were not defined by law and hence were not foreseeable by citizens.

94. The applicant also emphasised the vague nature of the measures imposed on him, for example the obligation to lead an honest life and not give cause for suspicion as regards his behaviour. He added that a custodial sentence could be imposed on anyone breaching or disregarding those requirements.

95. He submitted that the measure in issue had been imposed on him because of a case of mistaken identity, as the Court of Appeal had acknowledged in its judgment. The Court of Appeal had declared the preventive measure unlawful *ab origine* in finding that it had been unnecessary in the absence of any danger to society.

96. The applicant further submitted that despite the favourable outcome of the proceedings, he had been placed under special supervision for 221 days. This was a lengthy period and resulted from the Bari Court of Appeal's failure to comply with the thirty-day time-limit for giving its decision. In conclusion, he contended that this was not a problem linked to length of proceedings.

(b) The Government

97. The Government stated that preventive measures were subject to two guarantees: they had to be foreseeable and be imposed as a result of a judicial procedure. The procedure drew on objective factors demonstrating that the individual posed a danger to society and justifying the need to apply such measures to prevent and avoid the commission of criminal offences.

98. As to the lawfulness of the measure, the Government referred in particular to the reasons given by the Court of Cassation in its judgment no. 23641 of 2014 (see paragraph 63 above).

99. They pointed out that preventive measures had been reviewed by the Constitutional Court, which on several occasions had emphasised the need for a statutory provision based on objective circumstances, the exclusion of

mere suspicion as a basis for such measures, and the balance to be struck between respect for individual rights and the requirements of protecting society.

100. They informed the Court that the new "Anti-Mafia Code", consolidating the legislation on anti-Mafia action and preventive measures concerning individuals and property, had come into force in 2011, repealing Act no. 1423/1956. The register containing information about preventive measures was confidential and was kept by the courts.

101. The Government also pointed out that the domestic courts had held that only a substantive breach of a preventive measure could lead to the application of section 9 of the Act in issue, and thus to a custodial sentence.

102. The Government added that the interference with the right to liberty of movement had been in accordance with law, had pursued a legitimate aim – namely preservation of the public interests referred to in paragraph 3 of Article 2 of Protocol No. 4 – and had been proportionate. According to the domestic case-law, failure by the Court of Appeal to comply with the statutory time-limit (of thirty days) did not automatically upset the requisite fair balance (they referred to *Monno*, cited above, § 27). Moreover, under section 3 of Act no. 117/1988 (see paragraph 67 above), once the statutory time-limit for taking the measure in question had expired, the applicant could have asked the Court of Appeal to rule on his application and could subsequently have brought a claim for compensation.

103. The Government submitted that the applicant had been able to submit evidence and also to attend the hearings and file observations, which had then been included in the case file. The Bari Court of Appeal had not acknowledged that there had been a case of mistaken identity, but had simply reassessed all the evidence on which the District Court's decision had been based, concluding that the applicant did not pose a danger to society. The Government contended that the applicant had had access to a remedy and had been successful in using it. Accordingly, the requisite fair balance had not been upset.

2. The Court's assessment

(a) Whether there was an interference

104. The Court reiterates that Article 2 of Protocol No. 4 guarantees to any person a right to liberty of movement within a given territory and the right to leave that territory, which implies the right to travel to a country of the person's choice to which he or she may be admitted (see *Khlyustov v. Russia*, no. 28975/05, § 64, 11 July 2013, and *Baumann v. France*, no. 33592/96, § 61, ECHR 2001-V). According to the Court's case-law, any measure restricting the right to liberty of movement must be in accordance with law, pursue one of the legitimate aims referred to in the third paragraph of Article 2 of Protocol No. 4 and strike a fair balance between the public

interest and the individual's rights (see *Battista v. Italy*, no. 43978/09, § 37, ECHR 2014; *Khlyustov*, cited above, § 64; *Raimondo*, cited above, § 39; and *Labita*, cited above, §§ 194-195).

105. In the present case the Court has found that the restrictions imposed on the applicant fall within the scope of Article 2 of Protocol No. 4 (see paragraph 91 above). It must therefore determine whether the interference was in accordance with law, pursued one or more of the legitimate aims referred to in the third paragraph of that Article and was necessary in a democratic society.

(b) Whether the interference was "in accordance with law"

(i) General principles

106. The Court reiterates its settled case-law, according to which the expression "in accordance with law" not only requires that the impugned measure should have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the persons concerned and foreseeable as to its effects (see *Khlyustov*, cited above, § 68; *X v. Latvia* [GC], no. 27853/09, § 58, ECHR 2013; *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 140, ECHR 2012; *Rotaru v. Romania* [GC], no. 28341/95, § 52, ECHR 2000-V; and *Maestri v. Italy* [GC], no. 39748/98, § 30, ECHR 2004-I).

107. One of the requirements flowing from the expression "in accordance with law" is foreseeability. Thus, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable citizens to regulate their conduct; they must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Such consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity, and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see Sunday Times *v. the United Kingdom (no. 1)*, 26 April 1979, § 49, Series A no. 30; *Kokkinakis v. Greece*, 25 May 1993, § 40, Series A no. 260-A; *Rekvényi v. Hungary* [GC], no. 25390/94, § 34, ECHR 1999-III; and *Centro Europa 7 S.r.l. and Di Stefano*, cited above, § 141).

108. The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the law in question, the field it is designed to cover and the number and status of those to whom it is addressed (see *RTBF v. Belgium*, no. 50084/06, § 104, ECHR 2011; *Rekvényi*, cited above, § 34; *Vogt v. Germany*, 26 September 1995, § 48, Series A no. 323; and

Centro Europa 7 S.r.l. and Di Stefano, cited above, § 142). It is, moreover, primarily for the national authorities to interpret and apply domestic law (see *Khlyustov*, cited above, §§ 68-69).

109. The Court reiterates that a rule is "foreseeable" when it affords a measure of protection against arbitrary interferences by the public authorities (see *Centro Europa 7 S.r.l. and Di Stefano*, cited above, § 143, and *Khlyustov*, cited above, § 70). A law which confers a discretion must indicate the scope of that discretion, although the detailed procedures and conditions to be observed do not necessarily have to be incorporated in rules of substantive law (see *Khlyustov*, cited above, § 70, and *Silver and Others v. the United Kingdom*, 25 March 1983, § 88, Series A no. 61).

(ii) Application of these principles in the present case

110. The Court observes in the present case that Act no. 1423/1956, as interpreted in the light of the Constitutional Court's judgments, formed the legal basis for the individual preventive measures imposed on the applicant. It therefore concludes that the preventive measures in issue had a legal basis in domestic law.

111. The Court must therefore ascertain whether the Act was accessible and foreseeable as to its effects. This factor is especially important in a case such as the present one, where the legislation in question had a very significant impact on the applicant and his right to liberty of movement.

112. The Court considers, firstly, that Act no. 1423/1956 satisfied the requirement of accessibility; indeed, this was not disputed by the applicant.

113. The Court must next determine whether the Act was foreseeable as to its effects. To that end, it will first examine the category of individuals to whom the preventive measures were applicable, and then their content.

114. The Court notes that to date, it has yet to conduct a detailed examination of the foreseeability of Act no. 1423/1956. It observes, however, that in *Labita* (cited above, § 194) it found that the preventive measures were based on Acts nos. 1423/1956, 575/1965, 327/1988 and 55/1990 and were therefore "in accordance with law" within the meaning of the third paragraph of Article 2 of Protocol No. 4. In *Monno* (cited above, § 26) the Act in issue was examined in the light of the Court of Appeal's decision acknowledging that there had been a procedural defect in the proceedings at first instance. In the Court's view, the mere fact that the District Court's decision had subsequently been quashed had not as such affected the lawfulness of the interference during the prior period. By contrast, in *Raimondo* and *Vito Sante Santoro* (both cited above), the Court found that the interference with the applicants' liberty of movement had been neither "in accordance with law" nor "necessary" on account of the delay in serving the decision revoking the special supervision (see *Raimondo*, cited above, § 40) and on account of the unlawful prolongation of the special supervision for a period of two months and twenty-two days

without any compensation for the damage sustained (see *Vito Sante Santoro*, cited above, § 45).

115. In the present case the applicant complained specifically of the lack of precision and foreseeability of Act no. 1423/1956. Accordingly, the Court is called upon to examine whether the Act was foreseeable as regards the individuals to whom the preventive measures were applicable (section 1 of the 1956 Act), in the light of the Constitutional Court's case-law.

116. In this connection, the Court notes that the Italian Constitutional Court set aside the law in respect of one category of individuals which it found not to be defined in sufficient detail, namely those "whose outward conduct gives good reason to believe that they have criminal tendencies" (see judgment no. 177 of 1980, paragraph 55 above). The relevant provision was no longer in force at the time when the impugned measures were applied to the applicant. In respect of all other categories of individuals to whom the preventive measures are applicable, the Constitutional Court has come to the conclusion that Act no. 1423/1956 contained a sufficiently detailed description of the types of conduct that were held to represent a danger to society. It has found that simply belonging to one of the categories of individuals referred to in section 1 of the Act was not a sufficient ground for imposing a preventive measure; on the contrary, it was necessary to establish the existence of specific conduct indicating that the individual concerned posed a real and not merely theoretical danger. Preventive measures could therefore not be adopted on the basis of mere suspicion, but had to be based on an objective assessment of the "factual evidence" revealing the individual's habitual behaviour and standard of living, or specific outward signs of his or her criminal tendencies (see the Constitutional Court's case-law set out in paragraphs 45-55 above).

117. The Court observes that, notwithstanding the fact that the Constitutional Court has intervened on several occasions to clarify the criteria to be used for assessing whether preventive measures are necessary, the imposition of such measures remains linked to a prospective analysis by the domestic courts, seeing that neither the Act nor the Constitutional Court have clearly identified the "factual evidence" or the specific types of behaviour which must be taken into consideration in order to assess the danger to society posed by the individual and which may give rise to preventive measures. The Court therefore considers that the Act in question did not contain sufficiently detailed provisions as to what types of behaviour were to be regarded as posing a danger to society.

118. The Court notes that in the present case the court responsible for imposing the preventive measure on the applicant based its decision on the existence of "active" criminal tendencies on his part, albeit without attributing any specific behaviour or criminal activity to him. Furthermore, the court mentioned as grounds for the preventive measure the fact that the applicant had no "fixed and lawful occupation" and that his life was

characterised by regular association with prominent local criminals ("*malavita*") and the commission of offences (see paragraphs 15-16 above).

In other words, the court based its reasoning on the assumption of "criminal tendencies", a criterion that the Constitutional Court had already considered insufficient – in its judgment no. 177 of 1980 – to define a category of individuals to whom preventive measures could be applied (see paragraph 55 above).

Thus, the Court considers that the law in force at the relevant time (section 1 of the 1956 Act) did not indicate with sufficient clarity the scope or manner of exercise of the very wide discretion conferred on the domestic courts, and was therefore not formulated with sufficient precision to provide protection against arbitrary interferences and to enable the applicant to regulate his conduct and foresee to a sufficiently certain degree the imposition of preventive measures.

119. As regards the measures provided for in sections 3 and 5 of Act no. 1423/1956 that were applied to the applicant, the Court observes that some of them are worded in very general terms and their content is extremely vague and indeterminate; this applies in particular to the provisions concerning the obligations to "lead an honest and law-abiding life" and to "not give cause for suspicion".

In this connection, the Court notes that the Constitutional Court has come to the conclusion that the obligations to "lead an honest life" and to "not give cause for suspicion" did not breach the principle of legality (see paragraph 59 above).

120. The Court observes that the interpretation performed by the Constitutional Court in its judgment no. 282 of 2010 was subsequent to the facts of the present case and that it was therefore impossible for the applicant to ascertain, on the basis of the Constitutional Court's position in that judgment, the precise content of some of the requirements to which he had been subjected while under special supervision. Such requirements, indeed, can give rise to several different interpretations, as the Constitutional Court itself admitted. The Court notes, moreover, that they are couched in broad terms.

121. Furthermore, the interpretation by the Constitutional Court in 2010 did not solve the problem of the lack of foreseeability of the applicable preventive measures since under section 5(1) of the Act in issue, the district court could also impose any measures it deemed necessary – without specifying their content – in view of the requirements of protecting society.

122. Lastly, the Court is not convinced that the obligations to "lead an honest and law-abiding life" and to "not give cause for suspicion" were sufficiently delimited by the Constitutional Court's interpretation, for the following reasons. Firstly, the "duty for the person concerned to adapt his or her own conduct to a way of life complying with all of the above-mentioned requirements" is just as indeterminate as the "obligation to lead an honest

and law-abiding life", since the Constitutional Court simply refers back to section 5 itself. In the Court's view, this interpretation does not provide sufficient guidance for the persons concerned. Secondly, the "duty of the person concerned to comply with all the prescriptive rules requiring him or her to behave, or not to behave, in a particular way; not only the criminal laws, therefore, but any provision whose non-observance would be a further indication of the danger to society that has already been established" is an open-ended reference to the entire Italian legal system, and does not give any further clarification as to the specific norms whose non-observance would be a further indication of the person's danger to society.

The Court therefore considers that this part of the Act has not been formulated in sufficient detail and does not define with sufficient clarity the content of the preventive measures which could be imposed on an individual, even in the light of the Constitutional Court's case-law.

123. The Court is also concerned that the measures provided for by law and imposed on the applicant include an absolute prohibition on attending public meetings. The law does not specify any temporal or spatial limits to this fundamental freedom, the restriction of which is left entirely to the discretion of the judge.

124. The Court considers that the law left the courts a wide discretion without indicating with sufficient clarity the scope of such discretion and the manner of its exercise. It follows that the imposition of preventive measures on the applicant was not sufficiently foreseeable and not accompanied by adequate safeguards against the various possible abuses.

125. The Court therefore concludes that Act no. 1423/1956 was couched in vague and excessively broad terms. Neither the individuals to whom preventive measures were applicable (section 1 of the 1956 Act) nor the content of certain of these measures (sections 3 and 5 of the 1956 Act) were defined by law with sufficient precision and clarity. It follows that the Act did not satisfy the foreseeability requirements established in the Court's case-law.

126. Accordingly, the interference with the applicant's liberty of movement cannot be said to have been based on legal provisions complying with the Convention requirements of lawfulness. There has therefore been a violation of Article 2 of Protocol No. 4 on account of the lack of foreseeability of the Act in question.

127. Having regard to the foregoing conclusion, the Court is not required to deal with any other submissions made by the applicant or to examine the question whether the measures imposed on him pursued one or more legitimate aims and were necessary in a democratic society.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

128. The applicant alleged a violation of Article 6 § 1 of the Convention on account of the lack of a public hearing in the District Court and the Court of Appeal, and also complained that the proceedings had been unfair. The relevant part of Article 6 § 1 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."

129. The Government acknowledged that the applicant had been the victim of a violation of Article 6 § 1 on account of the lack of a public hearing in the domestic courts, and disputed his other allegations.

A. The Government's partial unilateral declaration

130. On 7 April 2015 the Government sent the Court a letter containing a proposal for a friendly settlement in respect of the part of the application concerning the complaint of a lack of a public hearing in the Bari District Court and Court of Appeal (Article 6 § 1 of the Convention), as well as a unilateral declaration within the meaning of Rule 62A of the Rules of Court in relation to that complaint. The Government also asked the Court to strike the complaint out in part should the friendly settlement not be accepted (see paragraph 29 above).

131. On 22 April 2015 the applicant stated that he was not satisfied with the terms of the proposed friendly settlement. He did not comment on the unilateral declaration.

132. The relevant parts of Article 37 § 1 of the Convention read:

> "1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that
>
> ...
>
> (c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.
>
> However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires."

133. The Court notes at the outset that this is the first case before the Grand Chamber in which a request has been made to strike out part of an application. However, there have been cases where Sections have agreed to strike out parts of an application following a unilateral declaration and to examine the remaining complaints (see *Bystrowski v. Poland*, no. 15476/02, § 36, 13 September 2011; *Tayfur Tunç and Others v. Turkey* (dec.), no. 22373/07, §§ 20-21, 24 March 2015; *Pubblicità Grafiche Perri S.R.L v. Italy* (dec.), no. 30746/03, 14 October 2014; *Frascati v. Italy* (dec.), no. 5382/08, §§ 21-22, 13 May 2014; *Ramazan Taş v. Turkey* (dec.),

no. 5382/10, 14 October 2014; *Pasquale Miele v. Italy* (dec.), no. 37262/03, 16 September 2014; *Aleksandr Nikolayevich Dikiy v. Ukraine* (dec.), no. 2399/12, 16 December 2014; and *Ielcean v. Romania* (dec.), no. 76048/11, §§ 18-19, 7 October 2014).

134. The Court reiterates that in certain circumstances it may be appropriate to strike out an application under Article 37 § 1 (c) of the Convention on the basis of a unilateral declaration by the respondent Government even where the applicant wishes the examination of the case to be continued. It has pointed out in this connection that such a procedure is not in itself designed to circumvent the applicant's opposition to a friendly settlement. It must be ascertained from the particular circumstances of the case whether the unilateral declaration offers a sufficient basis for finding that respect for human rights as defined in the Convention does not require the Court to continue its examination of the case (see *Baudoin v. France*, no. 35935/03, § 78, 18 November 2010).

135. Relevant factors in this regard include the nature of the complaints made, whether the issues raised are comparable to issues already determined by the Court in previous cases, the nature and scope of any measures taken by the respondent Government in executing judgments delivered by the Court in such cases, and the impact of these measures on the case under consideration (see *Tahsin Acar v. Turkey* (preliminary objections) [GC], no. 26307/95, § 76, ECHR 2003-VI).

136. Other factors are also of importance. In particular, the Government's unilateral declaration must, on the basis of the complaints raised, contain an acknowledgment of responsibility in relation to the alleged violations of the Convention, or at the very least some kind of admission in this regard. In the latter case, it is necessary to determine the scope of such admissions and the manner in which the Government intend to provide redress to the applicant (see, among other authorities, *Tahsin Acar*, cited above, §§ 76-82, and *Prencipe v. Monaco*, no. 43376/06, §§ 57-62, 16 July 2009).

137. Turning to the present case, the Court observes that the Government have acknowledged in their unilateral declaration that the applicant has suffered a violation of Article 6 § 1 of the Convention on account of the lack of a public hearing, and that they have undertaken to pay him a sum of money in respect of procedural costs. As to the manner of providing redress, it notes that the Government have not proposed any award in respect of non-pecuniary damage.

138. The Court reiterates that, as it has consistently held, the exclusion of the public from proceedings for the application of preventive measures concerning property amounts to a violation of Article 6 § 1 (see *Bocellari and Rizza*, cited above, §§ 34-41; *Perre and Others*, cited above, §§ 23-26; *Bongiorno and Others*, cited above, §§ 27-30; *Leone v. Italy*, no. 30506/07, §§ 26-29, 2 February 2010; and *Capitani and Campanella v. Italy*,

no. 24920/07, §§ 26-29, 17 May 2011). However, it notes that there are no previous decisions relating to the applicability of Article 6 § 1 to proceedings for the application of preventive measures concerning individuals, and thus to the question of public hearings in such proceedings, which, moreover, are conducted in the same way as those for the application of preventive measures in respect of property.

139. Having regard to the foregoing and to all the circumstances of the case, the Court considers that the conditions for striking out part of the application are not satisfied.

140. It therefore rejects the Government's request for part of the application to be struck out under Article 37 § 1 (c) of the Convention.

B. Admissibility

1. The parties' submissions

(a) The applicant

141. The applicant submitted that the criminal limb of Article 6 § 1 was applicable to proceedings for the application of preventive measures in respect of individuals in that they related to the citizen's personal liberty and were governed by the provisions of the Code of Criminal Procedure. He added that Article 6 § 1 was applicable since the Court had already held that the civil limb of Article 6 applied to proceedings for the application of preventive measures in respect of property.

(b) The Government

142. The Government made no submissions on this point.

2. The Court's assessment

143. The Court observes at the outset that the criminal aspect of Article 6 § 1 of the Convention is not applicable, since special supervision is not comparable to a criminal sanction, given that the proceedings concerning the applicant did not involve the determination of a "criminal charge" within the meaning of Article 6 of the Convention (see *Guzzardi*, cited above, § 108, and *Raimondo*, cited above, § 43). It remains to be determined whether Article 6 § 1 of the Convention is applicable in its civil aspect.

144. The Court reiterates that for Article 6 § 1 in its "civil" limb to be applicable, there must be a dispute ("*contestation*" in the French text) over a "right" which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether that right is protected under the Convention. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its

exercise; and finally, the result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play (see, among many other authorities, *Mennitto v. Italy* [GC], no. 33804/96, § 23, ECHR 2000-X; *Micallef v. Malta* [GC], no. 17056/06, § 74, ECHR 2009; and *Boulois v. Luxembourg* [GC], no. 37575/04, § 90, ECHR 2012).

145. In this regard, the character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law, and so on) and that of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, and so forth) are not of decisive consequence (see *Micallef*, cited above, § 74).

146. The Court notes that unlike the *Guzzardi* case, the present case is characterised by the fact that the preventive measures imposed on the applicant did not amount to a deprivation of liberty within the meaning of Article 5 § 1 of the Convention but to restrictions on his liberty of movement. Accordingly, the question whether the right to liberty is "civil" in nature does not arise in the present case (see *Guzzardi*, cited above, § 108, and also *Aerts v. Belgium*, 30 July 1998, § 59, *Reports of Judgments and Decisions* 1998-V, and *Laidin v. France* (no. 2), no. 39282/98, § 76, 7 January 2003).

147. However, the question of the applicability of the civil limb of Article 6 arises in another respect. The Court has held – in the context of imprisonment – that some restrictions on detainees' rights, and the possible repercussions of such restrictions, fall within the sphere of "civil rights". By way of example, the Court observes that it has found Article 6 to be applicable to certain types of disciplinary proceedings relating to the execution of prison sentences (see *Gülmez v. Turkey*, no. 16330/02, §§ 27-31, 20 May 2008, in which the applicant was prohibited from receiving visits for one year).

148. In the cases of *Ganci v. Italy* (no. 41576/98, §§ 20-26, ECHR 2003-XI), *Musumeci v. Italy* (no. 33695/96, § 36, 11 January 2005) and *Enea v. Italy* ([GC], no. 74912/01, § 107, ECHR 2009) the Court found that Article 6 § 1 was applicable to the high-security regime under which some prisoners could be placed in Italy. In these cases the restrictions imposed on the applicants mainly entailed a prohibition on receiving more than a certain number of visits from family members each month, the ongoing monitoring of correspondence and telephone calls and limits on outdoor exercise time. For example, in *Enea* (cited above, § 107) the Court held that the complaint concerning the restrictions to which the applicant had allegedly been subjected as a result of being placed in a high-security unit was compatible *ratione materiae* with the provisions of the Convention since it related to Article 6 under its civil head. It found that some of the restrictions alleged by the applicant – such as those restricting his contact

with his family – clearly fell within the sphere of personal rights and were therefore civil in nature (ibid., § 103).

149. The Court also concluded that any restriction affecting individual civil rights had to be open to challenge in judicial proceedings, on account of the nature of the restrictions (for instance, a prohibition on receiving more than a certain number of visits from family members each month, or the ongoing monitoring of correspondence and telephone calls) and of their possible repercussions (for instance, difficulty in maintaining family ties or relationships with non-family members, or exclusion from outdoor exercise) (ibid., § 106).

150. In *Stegarescu and Bahrin v. Portugal* (no. 46194/06, §§ 37-38, 6 April 2010) the Court applied Article 6 § 1 to disputes concerning the restrictions (visits limited to one hour per week and only behind a glass partition, outdoor exercise limited to one hour per day, and the first applicant's inability to pursue studies and sit examinations) to which detainees in high-security cells were subjected.

151. The Court therefore observes that there has been a shift in its own case-law towards applying the civil limb of Article 6 to cases which might not initially appear to concern a civil right but which may have direct and significant repercussions on a private right belonging to an individual (see *Alexandre v. Portugal*, no. 33197/09, § 51, 20 November 2012, and *Pocius v. Lithuania*, no. 35601/04, § 43, 6 July 2010).

152. In the Court's view, the present case has similarities with the cases cited above: although the restrictions imposed in a prison context in those cases concerned contact with family members, relations with others or difficulties in maintaining family ties, they resemble those to which the applicant was subjected. The Court refers in particular to the requirement not to leave the district of residence, not to leave home between 10 p.m. and 6 a.m., not to attend public meetings and not to use mobile phones or radio communication devices.

153. The Court notes that in the present case, a "genuine and serious dispute" arose when the District Court placed the applicant under special supervision, dismissing his arguments. The dispute was then conclusively settled by the judgment of the Bari Court of Appeal, which acknowledged that the preventive measure imposed on the applicant was unlawful.

154. The Court further observes that some of the restrictions complained of by the applicant – such as the prohibition on going out at night, leaving the district where he lived, attending public meetings or using mobile phones or radio communication devices – clearly fall within the sphere of personal rights and are therefore civil in nature (see, *mutatis mutandis*, *Enea*, cited above, § 103, and *Ganci*, cited above, § 25).

155. In view of the foregoing, the Court concludes that the applicant's complaint concerning the restrictions to which he was allegedly subjected as a result of being placed under special supervision is compatible *ratione*

materiae with the provisions of the Convention, since it relates to Article 6 in its civil aspect. As this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and is not inadmissible on any other grounds, the Court declares it admissible.

C. Merits

1. The parties' submissions

(a) The applicant

156. The applicant complained of a violation of his right to a fair hearing. He submitted firstly that he had been unable to have a public hearing as this had not been permitted under the law at the time and the Constitutional Court's subsequent intervention had not made it possible to remedy that violation.

157. The applicant further alleged that the Bari District Court had found that he was dangerous because he had committed offences against individuals and property, whereas it was clear from his criminal record certificate – which had been included in the case file – that the judgments in which he had been convicted with final effect between September 1995 and August 1999 concerned tobacco smuggling. He had later been convicted of drug trafficking in 2003 and absconding in 2004.

158. In addition, the criminal record certificate included in the case file showed that the alleged breaches of the terms of his special supervision in fact concerned an individual who shared his first name and surname but had been born in 1973.

159. In support of his allegation of a violation of the right to a fair hearing, the applicant further contended that the District Court had not taken into account the evidence in the case file showing that he was engaged in honest employment and did not have a notable standard of living. The District Court had not even considered the documents certifying that he had worked as a farm labourer. Although it was true that the Court of Appeal had subsequently quashed the measure in issue, it had taken seven months to give its decision, whereas the law prescribed a time-limit of thirty days (see paragraph 96 above).

(b) The Government

160. The Government pointed out that in judgment no. 93 of 12 March 2010 the Constitutional Court, applying the principles set forth in the European Court's case-law, had declared section 4 of Act no. 1423/1956 and section 2 *ter* of Act no. 575/1965 unconstitutional in that they did not afford individuals the opportunity to request a public hearing in proceedings for the application of preventive measures.

161. The Government acknowledged that the applicant was the victim of a violation of Article 6 § 1 on account of the lack of a public hearing in the domestic courts.

162. As regards the complaint that the proceedings had been unfair, the Government pointed out that the applicant had been able to produce evidence and also to attend the hearings and file submissions, which had then been included in the case file. They contended that the Bari Court of Appeal had not acknowledged that there had been a case of mistaken identity, but had simply reassessed all the evidence on which the District Court's decision had been based, concluding that the applicant did not pose a danger to society. In the Government's submission, the applicant had had access to a remedy and had been successful in using it. Accordingly, they argued that there had been no violation of Article 6 in that respect.

2. The Court's assessment

(a) Lack of a public hearing in the District Court and Court of Appeal

163. The Court reiterates that while a public hearing constitutes a fundamental principle enshrined in Article 6 § 1, the obligation to hold such a hearing is not absolute since the circumstances that may justify dispensing with a hearing will essentially depend on the nature of the issues to be determined by the domestic courts (see *Jussila v. Finland* [GC], no. 73053/01, §§ 41-42, ECHR 2006-XIV).

164. The Court notes firstly that in the present case the Government have acknowledged that there has been a violation of Article 6 § 1 in that the hearings in the Bari District Court and Court of Appeal were not public.

165. It further observes that the Constitutional Court has declared section 4 of Act no. 1423/1956 and section 2 *ter* of Act no. 575/1965 unconstitutional in that they did not afford individuals the opportunity to request a public hearing in proceedings for the application of preventive measures (see paragraph 56 above).

166. The Court also refers to its relevant case-law regarding the lack of a public hearing in proceedings concerning preventive measures in respect of property (see *Bocellari and Rizza*, cited above, §§ 34-41; *Perre and Others*, cited above, §§ 23-26; *Bongiorno and Others*, cited above, §§ 27-30; *Leone*, cited above, §§ 26-29; and *Capitani and Campanella*, cited above, §§ 26-29).

167. Furthermore, in the Court's view, the circumstances of the case dictated that a public hearing should be held, bearing in mind that the domestic courts had to assess aspects such as the applicant's character, behaviour and dangerousness, all of which were decisive for the imposition of the preventive measures (see, *mutatis mutandis*, *Jussila*, cited above, § 41).

168. Accordingly, having regard to the foregoing, the Court considers that there has been a violation of Article 6 § 1 of the Convention in this respect.

(b) Complaint concerning the alleged unfairness of the proceedings

169. With regard to the complaints specifically concerning the proceedings in the Bari District Court, the Court reiterates that its duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention.

170. In particular, it reiterates that it is not its function to deal with alleged errors of law or fact committed by the national courts unless and in so far as they may have infringed rights and freedoms protected by the Convention (see, for example, *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I, and *Perez v. France* [GC], no. 47287/99, § 82, ECHR 2004-I), for instance where they can be said to amount to "unfairness" in breach of Article 6 of the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way in which evidence should be assessed, these being primarily matters for regulation by national law and the national courts. In principle, issues such as the weight attached by the national courts to particular items of evidence or to findings or assessments submitted to them for consideration are not for the Court to review. The Court should not act as a fourth-instance body and will therefore not question under Article 6 § 1 the national courts' assessment, unless their findings can be regarded as arbitrary or manifestly unreasonable (see, for example, *Dulaurans v. France*, no. 34553/97, §§ 33-34 and 38, 21 March 2000; *Khamidov v. Russia*, no. 72118/01, § 170, 15 November 2007; *Anđelković v. Serbia*, no. 1401/08, § 24, 9 April 2013; and *Bochan v. Ukraine* (no. 2) [GC], no. 22251/08, §§ 64-65, ECHR 2015).

171. The Court's sole task in connection with Article 6 of the Convention is to examine applications alleging that the domestic courts have failed to observe specific procedural safeguards laid down in that Article or that the conduct of the proceedings as a whole did not guarantee the applicant a fair hearing (see, among many other authorities, *Donadze v. Georgia*, no. 74644/01, §§ 30-31, 7 March 2006).

172. In the instant case, the proceedings as a whole were conducted in accordance with the requirements of a fair hearing. The applicant's main complaint was that the Bari District Court's assessment of the evidence had been arbitrary, but the Court points out that the Court of Appeal found in his favour (see paragraphs 26-27 above) and consequently quashed the preventive measure.

173. There has therefore been no violation of Article 6 in this respect.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

174. The applicant also complained that he had no effective remedy by which to seek redress in the domestic courts and alleged a violation of Article 13 of the Convention, which provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

175. The Government contested that argument.

A. Admissibility

176. The Court observes that this complaint, to the extent that it concerns the existence of a domestic remedy whereby the applicant could have raised his grievance under Article 2 of Protocol No. 4, 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 and must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The Government

177. The Government submitted that the applicant's complaint was not an arguable one (relying on *Monno*, cited above, § 30). They further pointed out that the applicant had won his case in the Court of Appeal.

(b) The applicant

178. The applicant alleged that he had not had an effective remedy by which to seek redress for the violation of Article 5 of the Convention and Article 2 of Protocol No. 4.

2. The Court's assessment

(a) Applicable principles

179. The Court reiterates that Article 13 guarantees the availability at national level of a remedy by which to complain of a breach of the Convention rights and freedoms. Therefore, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision, there must be a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief. The scope of

the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention, but the remedy must in any event be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the State (see *Nada*, cited above, §§ 208-209; see also *Büyükdağ v. Turkey*, no. 28340/95, § 64, 21 December 2000, and the references cited therein, in particular *Aksoy v. Turkey*, 18 December 1996, § 95, *Reports* 1996-VI). In certain circumstances, the aggregate of remedies provided for under domestic law may satisfy the requirements of Article 13 (see, among other authorities, *Leander v. Sweden*, 26 March 1987, § 77, Series A no. 116).

180. However, Article 13 requires that a remedy be available in domestic law only in respect of grievances which can be regarded as "arguable" in terms of the Convention (see, for example, *Boyle and Rice v. the United Kingdom*, 27 April 1988, § 54, Series A no. 131). It does not compel States to allow individuals to challenge domestic laws before a national authority on the ground of being contrary to the Convention (see *Costello-Roberts v. the United Kingdom*, 25 March 1993, § 40, Series A no. 247-C), but seeks only to ensure that anyone who makes an arguable complaint of a violation of a Convention right will have an effective remedy in the domestic legal order (ibid., § 39).

(b) Application of those principles in the present case

181. The Court observes that, in view of its above finding of a violation of Article 2 of Protocol No. 4 (see paragraph 126 above), this complaint is arguable. It therefore remains to be ascertained whether the applicant had an effective remedy under Italian law by which to complain of the breaches of his Convention rights.

182. The Court reiterates that where there is an arguable claim that a measure taken by the authorities might infringe an applicant's freedom of movement, Article 13 of the Convention requires the national legal system to afford the individual concerned the opportunity to challenge the measure in adversarial proceedings before the courts (see, *mutatis mutandis*, *Riener*, cited above, § 138).

183. However, a domestic appeal procedure cannot be considered effective within the meaning of Article 13 of the Convention unless it affords the possibility of dealing with the substance of an "arguable complaint" for Convention purposes and granting appropriate relief. In this way, by giving direct expression to the States' obligation to protect human rights first and foremost within their own legal system, Article 13 establishes an additional guarantee for individuals in order to ensure that they effectively enjoy those rights (ibid., § 142; see also *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI, and *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 107, ECHR 2001-V).

184. The Court observes that the applicant was able to appeal to the Bari Court of Appeal, arguing that the special supervision and compulsory residence order had been imposed unlawfully. After reviewing the terms and proportionality of the special supervision order, the Court of Appeal quashed it.

185. Having regard to the foregoing, the Court considers that the applicant therefore had an effective remedy under Italian law affording him the opportunity to raise his complaints of Convention violations. There has therefore been no violation of Article 13 taken together with Article 2 of Protocol No. 4.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

186. 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

187. The applicant sought an award in respect of pecuniary damage, leaving it to the Court to determine the amount.

188. With regard to non-pecuniary damage, he claimed 20,000 euros (EUR) for the period which he had spent under special supervision.

189. The Government did not submit any observations under Article 41.

190. The Court notes that the claim in respect of pecuniary damage has not been quantified; it therefore rejects this claim. On the other hand, it considers it appropriate to award the applicant EUR 5,000 in respect of non-pecuniary damage.

B. Costs and expenses

191. The applicant also claimed EUR 6,000 for the costs and expenses incurred before the domestic courts and EUR 5,525 for those incurred before the Court.

192. The Government did not comment on this claim.

193. 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 were actually and necessarily incurred and are reasonable as to quantum. In the present case, having regard to the documents in its possession and to its case-law, the Court considers it reasonable to award the full amount claimed by the applicant covering costs under all heads.

C. Default interest

194. 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. *Rejects*, unanimously, the Government's request to strike the application out in part on the basis of their unilateral declaration regarding the complaint about the lack of a public hearing in the Bari District Court and Court of Appeal;

2. *Declares*, by a majority, the complaint under Article 5 of the Convention inadmissible;

3. *Declares*, unanimously, the complaint under Article 2 of Protocol No. 4 admissible;

4. *Holds*, unanimously, that there has been a violation of Article 2 of Protocol No. 4;

5. *Declares*, unanimously, the complaint under Article 6 § 1 of the Convention admissible;

6. *Holds*, unanimously, that there has been a violation of Article 6 § 1 on account of the lack of a public hearing in the Bari District Court and Court of Appeal;

7. *Holds*, by fourteen votes to three, that there has been no violation of Article 6 § 1 as regards the right to a fair hearing;

8. *Holds*, by twelve votes to five, that there has been no violation of Article 13 of the Convention;

9. *Holds*, unanimously,
   (a) that the respondent State is to pay the applicant, within three months, the following amounts:
      (i) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 11,525 (eleven thousand five hundred and twenty-five euros), 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;

10. *Dismisses*, by sixteen votes to one, the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 23 February 2017.

Johan Callewaert	András Sajó
Deputy to the Registrar	President

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

(a) joint concurring opinion of Judges Raimondi, Villiger, Šikuta, Keller and Kjølbro;

(b) concurring opinion of Judge Dedov;

(c) partly dissenting opinion of Judge Sajó;

(d) partly dissenting opinion of Judge Vučinić;

(e) partly dissenting opinion of Judge Pinto de Albuquerque;

(f) partly dissenting opinion of Judge Kūris.

A.S.
J.C.

JOINT CONCURRING OPINION OF JUDGES RAIMONDI, VILLIGER, ŠIKUTA, KELLER AND KJØLBRO

(Translation)

1. We concur with the Grand Chamber's conclusion that there has been a violation of Article 2 of Protocol No. 4 in the present case. However, we do not agree with the legal basis put forward for this conclusion, namely the lack of foreseeability of the special supervision and compulsory residence order, in other words the deficient quality of Act no. 1423/1956, the instrument in the Italian legal system that enabled the measure in question to be applied.

2. This approach is not consistent with a whole series of cases in which the Court has had to deal with the preventive measures provided for by Italian law in respect of individuals.

3. The Convention institutions' body of case-law in this area dates back to the Commission's decision of 5 October 1977 in *Guzzardi v. Italy* (no. 7960/77, unreported). In a subsequent case brought by the same applicant, the Court concluded that in view of the particular circumstances of the case, the applicant had been "deprived of his liberty" within the meaning of Article 5 of the Convention (see *Guzzardi v. Italy*, 6 November 1980, § 95, Series A no. 39).

4. Since the *Guzzardi* judgment, the Court has dealt with a number of cases (see *Raimondo v. Italy*, 22 February 1994, § 39, Series A no. 281-A; *Labita v. Italy* [GC], no. 26772/95, § 193, ECHR 2000-IV; *Vito Sante Santoro v. Italy*, no. 36681/97, § 37, ECHR 2004-VI; and also, *mutatis mutandis*, *Villa v. Italy*, no. 19675/06, §§ 43-44, 20 April 2010, and *Monno v. Italy* (dec.), no. 18675/09, §§ 21-23, 8 October 2013) concerning special supervision together with a compulsory residence order and other associated restrictions (not leaving home at night, not travelling away from the place of residence, not going to bars, nightclubs, amusement arcades or brothels or attending public meetings, not associating with individuals who had a criminal record and who were subject to preventive measures). As none of those cases involved special circumstances comparable to those in *Guzzardi*, the Court examined the preventive measures in question under Article 2 of Protocol No. 4.

5. In those cases the Court did not find any deficiencies – in terms of foreseeability and, more generally, quality of the law – in the applicable legislation, in particular Act no. 1423/1956. Admittedly, in *Vito Sante Santoro* (cited above, § 46) the Court found that the measure in issue was neither *necessary* nor "in accordance with law". However, that particular case involved the imposition of a measure outside the relevant statutory framework, namely a measure that had affected the applicant's liberty of

movement but was time-barred; hence, even in that case the Court did not express any criticisms as to the quality of the law in question.

6. Conversely, the judgment in the present case finds, firstly, that Act no. 1423/1956 did not define the individuals to whom preventive measures were applicable with sufficient clarity to satisfy the requirement of foreseeability of the law and, secondly, that the same Act was couched in vague, general terms which did not define with sufficient precision and clarity the content of certain preventive measures, and consequently that the Act did not satisfy the foreseeability requirements established in the Court's case-law (see paragraph 125 of the judgment).

7. In our opinion there was no need to abandon an approach that had become settled over a number of years, especially as the Italian courts, and notably the Constitutional Court, had developed a precise line of case-law on the very issue of whether domestic legislation on the imposition of preventive measures was sufficiently clear and foreseeable in its application, declaring unconstitutional, where appropriate, the parts of the legislation that did not satisfy those criteria. Thus, in judgment no. 177 of 1980 the Constitutional Court found that one of the categories of individuals laid down in section 1 of the 1956 Act as in force at the time, namely those "whose outward conduct gives good reason to believe that they have criminal tendencies", was not defined in sufficient detail by the law and did not make it possible to foresee who might be targeted by the preventive measures or in what circumstances, since too much discretion was left to the authorities. The Constitutional Court also concluded that there had been a breach of the principle of legality, which was applicable in relation to preventive measures by virtue of Article 13 (personal liberty) and Article 25 (security measures).

8. Extensive reference is made in the present judgment (see paragraphs 43-61) to the long series of Italian Constitutional Court judgments dealing with this issue. We would draw attention in particular to the above-mentioned judgment no. 177 of 1980, which summarises the case-law as it stood at the time in relation to matters including the identification of the individuals targeted by the preventive measures, and to judgment no. 282 of 2010, which deals in particular with the applicable measures.

9. To our mind, this body of case-law provides satisfactory evidence that, notwithstanding the somewhat general nature of the legislative requirements, no problems in terms of foreseeability arose regarding the identification of the individuals to whom the preventive measures could be applied or the applicable measures themselves.

10. As regards such measures, in the case forming the subject of judgment no. 282 of 2010, the Constitutional Court was called upon to determine whether section 9(2) of Act no. 1423 of 27 December 1956 was compatible with Article 25, paragraph 2, of the Constitution in so far as it

provided for criminal penalties in the event of failure to observe the requirement laid down in section 5(3), first part, of the same Act, namely "to lead an honest and law-abiding life and not give cause for suspicion", and whether it infringed the principle that the situations in which criminal-law provisions are applicable must be exhaustively defined by law (*principio di tassatività*).

11. The 2010 judgment explained, convincingly in our opinion, why the requirement to "lead an honest life", if assessed in isolation, in itself appeared generic and capable of taking on multiple meanings; and why, on the contrary, if it was viewed in the context of all the other requirements laid down in section 5 of Act no. 1423/1956, its content became clearer, entailing a duty for the person concerned to adapt his or her own conduct to a way of life complying with all of the above-mentioned requirements, with the result that the wording "lead an honest life" became more concrete and geared to the individual. The judgment in question also specified that the requirement to "not give cause for suspicion" should likewise not be seen in isolation but in the context of the other requirements set out in section 5 of Act no. 1423/1956, such as the obligation for the person under special supervision not to frequent certain places or associate with certain people.

12. The Grand Chamber's judgment observes that the interpretation performed by the Constitutional Court in judgment no. 282 of 2010 was subsequent to the facts of the present case and that it was therefore impossible for the applicant to ascertain, on the basis of the Constitutional Court's position in that judgment, the precise content of some of the requirements to which he had been subjected while under special supervision (see paragraph 120 of the judgment). In our opinion, the position taken by the Constitutional Court remains entirely valid in the present case, given that it merely confirms a situation that already existed at the time of the events.

13. The fact that the scope and content of Act no. 1423/1956 had been clarified by the domestic courts – which had introduced important safeguards and specified the conditions that had to be satisfied for the imposition of preventive measures – is clearly illustrated by the Bari Court of Appeal's decision of 22 January 2009. The Court of Appeal's reasoning and its application of Act no. 1423/1956, as interpreted in the relevant case-law, show that there were important safeguards and conditions to be observed. This can be seen from the Court of Appeal's reasoning in relation to the "current danger" posed by the individual concerned. It noted that several different factors had to be taken into consideration, including previous criminal record, ongoing investigations and current activities, the individual's standard of living and means of subsistence, and the persons with whom he or she associated. It follows that the assessment required objective aspects, a sufficient factual basis and up-to-date evidence and information. It was precisely by applying the requirements as established in

the case-law that the Bari Court of Appeal was able to quash the Bari District Court's judgment. This amounts to clear recognition of the foreseeability of the application of Act no. 1423/1956. In any event, the applicant – by seeking appropriate advice if need be – was in a position to foresee, to a degree that was reasonable in the circumstances, whether he might belong to one of the categories of individuals to whom the preventive measures could be applied, as well as the nature and duration of the applicable measures.

14. We therefore consider that the measures in issue were indeed "in accordance with law".

15. We also take the view that the measures entailing restrictions on liberty of movement pursued legitimate aims, in particular "the maintenance of *ordre public*" and "the prevention of crime" (see *Monno*, cited above, § 26, and *Villa*, cited above, § 46).

16. However, we believe that the measures in issue were not "necessary in a democratic society", for the following reasons.

17. An interference will be considered "necessary in a democratic society" for a legitimate aim if it meets a "pressing social need" and is proportionate to the legitimate aim pursued. To that end, the reasons adduced by the national authorities to justify it must be "relevant and sufficient". While it is for the national authorities to make the initial assessment in all these respects, the final evaluation of whether the interference is necessary remains subject to review by the Court for conformity with the requirements of the Convention (see, for example, *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 101, ECHR 2008, and *Coster v. the United Kingdom* [GC], no. 24876/94, § 104, 18 January 2001).

18. Furthermore, with regard to the proportionality of an impugned measure, the measure will be justified only as long as it effectively furthers the aim initially pursued (see *Villa*, cited above, § 47, and, *mutatis mutandis*, *Napijalo v. Croatia*, no. 66485/01, §§ 78-82, 13 November 2003, and *Gochev v. Bulgaria*, no. 34383/03, § 49, 26 November 2009). Furthermore, even if it may have been justified at the outset, a measure restricting an individual's freedom of movement may become disproportionate and breach that individual's rights if it is automatically extended over a lengthy period (see *Luordo v. Italy*, no. 32190/96, § 96, ECHR 2003-IX; *Riener v. Bulgaria*, no. 46343/99, § 121, 23 May 2006; and *Földes and Földesné Hajlik v. Hungary*, no. 41463/02, § 35, ECHR 2006-XII).

19. In any event, the domestic authorities are under an obligation to ensure that any breach of an individual's right under Article 2 of Protocol 4 is, from the outset and throughout its duration, justified and proportionate in view of the circumstances. Such review should normally be carried out, at least in the final instance, by the courts, since they offer the best guarantees

of the independence, impartiality and lawfulness of the procedures (see *Gochev*, cited above, § 50, and *Sissanis v. Romania*, no. 23468/02, § 70, 25 January 2007). The scope of the judicial review should enable the court to take account of all the factors involved, including those concerning the proportionality of the restrictive measure (see, *mutatis mutandis*, *Le Compte, Van Leuven and De Meyere v. Belgium*, 23 June 1981, § 60, Series A no. 43).

20. In the present case it may be noted that the Bari District Court decided to place the applicant under special supervision on the basis of certain indications that had led it to conclude that he was engaged in criminal activity. The Court of Appeal, however, found that some of the offences attributed to the applicant had in fact been committed by another person with the same first name and surname as him. In addition, the Court of Appeal pointed out in its judgment that the District Court had not taken into account the fact that the applicant had been working as a farm labourer since 2005 and that no specific evidence of any links with habitual offenders had been uncovered. It added that the District Court had omitted to carry out a detailed assessment of the applicant's dangerousness in the light of the fact that he had served his sentence in full and had not committed any further offences after his release.

21. It can be inferred from the Bari Court of Appeal's judgment that the reasons relied on by the District Court in imposing the preventive measure on the applicant were not relevant or sufficient. As the Court of Appeal noted, there were no specific facts from which it could be established that the applicant still posed a danger. Accordingly, the preventive measure should not have been applied. This observation is sufficient for a finding of a violation of Article 2 of Protocol No. 4.

22. It must also be noted that the Court of Appeal should have given its decision within the thirty-day time-limit laid down in domestic law. However, it took until 4 February 2009 to serve the decision on the applicant, six months and twenty-one days after the appeal was lodged on 14 July 2008, the date on which the relevant period began to run. Accordingly, we consider that the violation found above was aggravated by the lengthy delay between the lodging of the appeal and the decision given by the Bari Court of Appeal.

23. Special diligence and promptness were required in adopting a decision affecting the rights secured by Article 2 of Protocol No. 4 in circumstances such as those of the present case, where the applicant was subjected to the preventive measure from 4 July 2008, when he was served with the District Court's decision, until 4 February 2009, when he was served with the Court of Appeal's decision – that is, for a duration of seven months, including a period of six months and twenty-one days while waiting for a decision from the Court of Appeal. We consider that this lapse of time was sufficient to render the restrictions on the applicant's liberty of

movement disproportionate. As to the Government's argument that the applicant could have brought an action for damages against the judges, we note that the Government have not produced any examples to show that such a remedy has been used successfully in circumstances similar to those of the present case.

24. In the light of the foregoing, we consider that the restrictions on the applicant's liberty of movement cannot be regarded as having been "necessary in a democratic society".

25. These factors are sufficient for us to conclude that there has been a violation of Article 2 of Protocol No. 4 on account of the lack of proportionality of the special supervision and compulsory residence order.

CONCURRING OPINION OF JUDGE DEDOV

I wholeheartedly support the legitimate aim set out by the Italian Constitutional Court in its judgment no. 2 of 1956: "Living together in harmony is undeniably the aim pursued by a free, democratic State based on the rule of law." If social peace is established, fundamental rights and freedoms are respected in full. We know, however, that it is not so easy to find one's place in society, to find a way of integrating into society, to make use of one's talents and qualities in order to find a suitable profession and to participate in the division of labour in a friendly and peaceful manner. This is always difficult, and personal psychological crises are inevitable along the way. Not everyone has enough culture and self-restraint to avoid offensive, violent or other kinds of anti-social behaviour, or marginalisation in general terms.

The problem is that the aforementioned aim cannot be achieved solely by coercive measures. I would like to encourage the national authorities to develop the national system. I believe that more emphasis should be put on social and psychological rehabilitation (besides the punishment itself). This approach could be applied in the first place to former offenders, but other people could also become subject to such measures on a voluntary basis. To that end, the analysis of the quality of the law set out in the present judgment could have been supplemented by a conclusion that the coercive measures in issue are not proportionate as they themselves cannot achieve the legitimate aim pursued. House arrest or instructions to find a job will not convince the individual to change his or her way of life. Also, this means that the conclusion on proportionality would have referred to the art of law-making rather than to the implementation of measures in practice.

PARTLY DISSENTING OPINION OF JUDGE SAJÓ

I voted in favour of finding of a violation of Article 6 and I agree that there has been a violation of Article 2 of Protocol No. 4 (lack of foreseeability of both the list of persons to whom the measures can be applied (section 1 of the 1956 Act) and the measures themselves (sections 3 and 5 of the 1956 Act)). However, to my regret I cannot follow the position of the majority as far as Articles 5 and 6 (criminal limb) are concerned, principally for the reasons expressed in the separate opinion of Judge Pinto de Albuquerque.

PARTLY DISSENTING OPINION OF JUDGE VUČINIĆ

I voted in favour of finding a violation of Articles 6 and 13, for the reasons set out in part 2 of the separate opinion of Judge Pinto de Albuquerque.

PARTLY DISSENTING OPINION OF JUDGE PINTO DE ALBUQUERQUE

Table of Contents

I. Introduction (§ 1) 52
Part 1 (§§ 2-31) 53
II. The nature of deprivation of liberty in the context of preventive measures (§§ 2-11) 53
A. *Prius ergo est suspicio* (§§ 2-8) 53
B. The *frode delle etichette* in the context of preventive measures (§§ 9-11) 58
III. Substantive guarantees in relation to preventive measures (§§ 12-31) 59
A. Applicability of Article 5 of the Convention (§§ 12-20) 59
B. Application of Article 5 to the case: no Convention ground for deprivation of liberty (§§ 21-31) 62
Part 2 (§§ 32-58) 64
IV. Procedural guarantees in relation to preventive measures (§§ 32-48) 64
A. Applicability of Article 6 § 1 (criminal limb) of the Convention (§§ 32-43) 64
B. Application of Article 6 to the case: no public and fair hearing (§§ 44-48) 67
V. Domestic remedies in the case at hand (§§ 49-58) 68
A. Lack of speedy judicial review (§§ 49-53) 68
B. Lack of compensation for unlawful preventive measure (§§ 54-58) 69
VI. Conclusion (§§ 59-60) 71

I. Introduction (§ 1)

1. I disagree with the decision to declare inadmissible the complaints under Articles 5 and 6 (criminal limb) of the European Convention on Human Rights ("the Convention"). In my view, the measures applied to the applicant under Act no. 1423/1956 ("the 1956 Act")[1], namely special police supervision together with a two-year compulsory residence order and other restrictive measures, are criminal in nature and entailed a deprivation of the applicant's right to liberty. For the reasons below, they should have been subject to the substantive and procedural guarantees of Article 5 and of Article 6 (criminal limb) of the Convention.

1. In 2011 the new "Anti-Mafia Code" came into force, bringing together the legislation on anti-Mafia action and preventive measures concerning individuals and property and repealing Act no. 1423/1956.

Having voted against the decision of inadmissibility, I voted on the merits in favour of finding a breach of Article 2 of Protocol No. 4, on account of the lack of foreseeability of both the list of subjects to whom the measures could be applied (section 1 of the 1956 Act) and the measures themselves (sections 3 and 5 of the 1956 Act). I agree entirely with the reasoning of the judgment on the specific point of the lack of foreseeability of these provisions.

The purpose of this opinion is to justify my vote on the inadmissibility decision and, consequently, to draw the appropriate conclusions on the merits from the applicability of Articles 5 and 6 (criminal limb) to the facts of the case. I also voted in favour of finding a violation of Article 13, for reasons relating to the deficiencies of the domestic remedies in the case at hand.

Part 1 (§§ 2-31)

II. The nature of deprivation of liberty in the context of preventive measures (§§ 2-11)

A. *Prius ergo est suspicio* (§§ 2-8)

2. The Italian Constitution does not provide for personal preventive measures (*misure di prevenzione personali*)[2]. The relevant provisions of Articles 25 and 27 on afflictive measures only set out rules on penal sanctions (*pene*) and security measures (*misure di sicurezza*).

In a fundamental judgment of 1964, the Constitutional Court affirmed "the principle according to which the orderly and peaceful development of social relations must be guaranteed not only by a system of norms punishing illicit acts but also by a system of preventive measures against the danger of such acts in the future" (*[il] principio secondo cui l'ordinato e pacifico svolgimento dei rapporti sociali deve essere garantito, oltre che dal sistema delle norme repressive di fatti illeciti, anche da un sistema di misure preventive contro il pericolo del loro verificarsi in avvenire*). Thus, *il giudice delle leggi* found the provisions of the 1956 Act compatible with the

2. The silence of the founding fathers of the Italian Republic was intentional. They had in mind the previous use of these measures by the fascist regime as an instrument of political repression (see Fiandaca, "Misure di prevenzione (fondamenti costituzionali)", in *Dig. Pub*., IX, 1994, and *voce* "Misure di prevenzione", in *Digesto delle Discipline Penalistiche*, Torino, 1994; Barile, *Diritto dell'uomo e libertà fondamentali*, Bologna, 1984; and Amato, "Commento all' art.13", in Branca (ed.), *Commentario della Costituzione*, Bologna, 1977).

Italian Constitution, namely with the principle of legality under Article 13 as regards personal liberty and Article 25 § 3 as regards security measures[3].

In other decisions, the Constitutional Court has been less precise and has examined appeals under Articles 13 and 25 in general, without specifying whether it was dealing with the aspect relating to criminal offences or the aspect relating to security measures. In any event, *la Consulta* has always pursued a more flexible approach in examining observance of the principle of legality regarding preventive measures than in relation to the provisions of criminal law *stricto sensu.* In an elliptical statement, it set the standard of precision for provisions governing preventive measures as not entailing "less rigour, but a different type of rigour" (*non vuol dire minor rigore, ma diverso rigore*) in relation to the standard required for criminal-law provisions[4].

The Constitutional Court has also held that preventive measures did not breach the principle of presumption of innocence. The reasoning is odd. The judges of the *Palazzo della Consulta* argued that the presumption of innocence did not apply to preventive measures, because they were not based on guilt and had no bearing on the individual's criminal responsibility. Yet at the same time, they considered that preventive measures did not derogate from this principle either, given that "mere suspicions" (*semplici sospetti*) based on "purely subjective and unverifiable assessments" (*valutazioni puramente soggettive e incontrollabili*) would not suffice for the applicability of these measures[5].

The legislature reacted to this case-law with Act no. 327/1988, which abolished two categories of suspected persons in the 1956 Act – on the one hand, "*oziosi e i vagabondi abituali validi al lavoro*" and, on the other, "*coloro che svolgono abitualmente altre attività contrarie alla morale pubblica e al buon costume*" – and required that the three remaining

3. See the Italian Constitutional Court judgment no. 23 of 1964 which rejected the question of the constitutional legitimacy of section 1 of the 1956 Act with reference to Articles 13, 25 and 27 of the Italian Constitution.

4. The entire relevant passage of the 1964 judgment reads as follows: "*nella descrizione delle fattispecie (di prevenzione) il legislatore debba normalmente procedere con diversi criteri da quelli con cui procede nella determinazione degli elementi costitutivi di una figura criminosa, e possa far riferimento anche a elementi presuntivi, corrispondenti, però, sempre, a comportamenti obiettivamente identificabili. Il che non vuol dire minor rigore, ma diverso rigore nella previsione e nella adozione delle misure di prevenzione rispetto alla previsione dei reati e dalla irrogazione delle pene*."

5. With reference to points 2, 3 and 4 of section 1 of the 1956 Act, the Constitutional Court judgment no. 23 of 1964 excluded the possibility that "*le misure di prevenzione possano essere adottate sul fondamento di semplici sospetti*", demanding that "*una oggettiva valutazione di fatti da cui risulti la condotta abituale e il tenore di vita della persona o che siano manifestazioni concrete della sua proclività al delitto, e siano state accertate in modo da escludere valutazioni puramente soggettive e incontrollabili da parte di chi promuove o applica le misure di prevenzione*."

categories of individuals to whom the Act applied should be determined "on the basis of factual evidence" (*sulla base di elementi di fatto*).

3. In constitutional terms, nothing has changed in Italy since 1964 with regard to the compatibility of the system of personal preventive measures with the Constitution. It is true that later on, *il giudice delle leggi* also found a violation of the Constitution on a few occasions, in relation to very specific issues[6]. As referred to in the Grand Chamber judgment, in 1970 it held that the persons concerned should be assisted by counsel during the proceedings for the application of such measures. In 1980 it found that one of the categories of persons concerned by the measures, namely those "whose outward conduct gives good reason to believe that they have criminal tendencies", was not defined in sufficient detail by the law. In 2010 it held that the fact that the person concerned did not have the opportunity to request a public hearing in proceedings for the imposition of preventive measures, either at first instance or on appeal, was unconstitutional. But the essence of the 1956 regime has remained untouched, with the agreement of the judges of the *Palazzo della Consulta*.

4. In reality, personal preventive measures were applied under the 1956 Act against persons suspected of crimes before their conviction and in the event of their acquittal[7] or of a *sentenza di proscioglimento* pronounced in accordance with Article 530 § 2 of the Code of Criminal Procedure for insufficient or contradictory evidence[8]. Despite the formal separation between criminal proceedings, governed by the Code of Criminal Procedure, and proceedings for the application of preventive measures, governed by the 1956 Act, evidence collected in the former proceedings could be used in the latter proceedings as indicative of the need for preventive measures[9]. This obviously provided scope for the instrumentalisation of preventive measures for the purposes of "punishing" those who had been cleared of accusation in criminal proceedings. In these circumstances, preventive measures were nothing but a "second-class" criminal punishment, "penalties based on suspicion" (*pene del sospetto*[10]).

---

6. See paragraphs 53-56 of the judgment.

7. See *Labita v. Italy* [GC], no. 26772/95, § 195, ECHR 2000-IV; *Raimondo v. Italy*, 22 February 1994, § 39, Series A no. 281-A; and *Ciancimino v. Italy*, no. 12541/86, Commission decision of 27 May 1991, Decisions and Reports 70. In the domestic case-law, see, for example, Court of Cassation, United Sections, 3 July 1996, *Simonelli*, and Court of Cassation, Section I, 17 January 2008, no. 6613. Between 2005 and 2013 these preventive measures were applied to 30,511 persons, according to the statistical information in the file. Although asked to provide information on how many of them had been acquitted in criminal proceedings, the Government did not provide the required information.

8. Court of Cassation, Section I, 28 April 1995, *Lupo*.

9. See *Labita*, cited above, § 196, and *Ciancimino*, cited above. In the domestic case-law, see, for instance, Court of Cassation, Section II, 20 April 2013, no. 26774.

10. Corso, "Profili costituzionale delle misure di prevenzione: aspetti teorici e prospettivi di riforma", in AA.VV., *La legge antimafia tre anni dopo*, Milan, 1986.

Even after the reform approved by Act no. 327/1988, a *probatio minus plena*[11] sufficed to put people under the radar of the criminal justice system, with its arsenal of restrictive measures under the 1956 Act.

5. Worse still, preventive measures under the 1956 Act were in substance highly desocialising, as a result of the stringent restrictions imposed on the personal, professional and social life of the suspected person, in addition to deprivation of liberty for part of the day. They had an inherent anti-resocialising nature. This in turn increased the probability of the suspected person committing criminal offences whenever he or she breached the regime of restrictions imposed, since such a breach was punishable in itself as a criminal offence carrying a severe prison sentence. Hence, as Bricola quite rightly put it as far back as 1974, the application of personal measures for the purposes of crime prevention resulted in the commission of new criminal offences which provided a legal basis for the criminal prosecution of someone who initially could not be prosecuted because of lack of evidence[12]. As a matter of fact, the tortuous logic of the 1956 Act did indeed have a great criminogenic potential[13].

Adding to their anti-resocialising nature, such measures also had a discriminatory effect, since their application was considered by law to be an aggravating factor in the context of sentencing for various criminal offences[14]. In fact, such aggravation had nothing to do with the subject matter of the basic offence, and therefore the aggravating factor resulted exclusively from the negative labelling attached by the legislature to the suspected person who had been subjected to preventive measures[15]. Among the many adverse personal effects of such measures, their inherent name-and-shame effect impacted therefore not only sociologically, but also on the application of the law.

6. Furthermore, the accumulation of personal preventive measures and criminal-law penalties was not even limited by the *ne bis in idem* principle,

---

11. See, among many other authorities, Court of Cassation, Section VI, 19 January 1999, *Consolato*, which specifies that the evidentiary requirements of Article 192 § 2 of the Code of Criminal Procedure do not apply in proceedings for the application of preventive measures.

12. Bricola, "Forme di tutela 'ante delictum' e profili costituzionali della prevenzione", in AA.VV., *Le misure di prevenzione*, Atti del Convegno C.N.P.D.S., 26-28.4.1974, Milan, 1975.

13. See Balbi, "Le Misure di Prevenzione Personali", contribution at the Annual Meeting of the Italian Association of Criminal Law Professors, 18 November 2016, Milan, p. 5. See also Gallo, "Misure di prevenzione", in *Enc. Giur. Treccani*, Rome, 1990, vol. XX, and Guerrini et al., *Le misure di prevenzione*, Padua, 2004.

14. For example, Article 644 of the Criminal Code: "*Le pene per i fatti di cui al primo e secondo comma sono aumentate da un terzo alla metà: ... se il reato è commesso da persona sottoposta con provvedimento definitivo alla misura di prevenzione della sorveglianza speciale durante il periodo previsto di applicazione e fino a tre anni dal momento in cui è cessata l'esecuzione*."

15. See Balbi, cited above, p. 12.

in view of the so-called principle of the logical compatibility between both, distilled by the case-law from certain provisions of the law[16]. The law does in fact favour such case-law. Article 166 § 2 of the Criminal Code allows the application of preventive measures even in the case of the suspension of the penalty established in a criminal judgment, if other evidence can be found *aliunde*[17]. As a result of the aforementioned principle of logical compatibility, preventive measures were even combined with a sentence delivered in a plea-bargaining procedure (*sentenza di patteggiamento*)[18] or with a life sentence (*condanna all'ergastolo*)[19].

7. The punitive effect of preventive measures under the 1956 Act was exacerbated by their application while criminal proceedings were still pending, on the basis of the facts being investigated in these proceedings. In this context, preventive measures served the purpose of circumventing stricter time requirements for the applicability of interim measures (*misure cautelari*) according to the ordinary rules of criminal procedure[20]. In practice, the interchangeability between preventive measures and interim measures, whose nature, regime and effects are different, became an *escamotage* of the law contained in books[21]. Pending criminal proceedings, preventive measures under the 1956 Act functioned, in reality, as a powerful endo-procedural bargaining chip of the police and the prosecutors. To put it in crude terms, the tactical ascendancy of the police and the public prosecution service over the defence was much enhanced by the use of preventive measures as a means of putting pressure on a presumably innocent defendant to cooperate in the pending criminal proceedings.

8. Ultimately, the *misure di prevenzione personali* abandoned the principle of personal responsibility for acts. In the words of Elia, the preventive judgment "disqualifies a person socially, without previously disqualifying a fact" (*un giudizio quale si squalifia socialmente una persona, senza prima poter squalificare un fatto*)[22]. In fact, the measures under the 1956 Act applied *ante o praeter delictum*. Being based on a highly indeterminate, probabilistic judgment on the future conduct of the

16. Court of Cassation, Section I, 10 February 2009, *M.M*.
17. Court of Cassation, Section I, no. 6285/97, *Capizzi*.
18. Court of Cassation, Section I, 16 April 1998, *Castellano*.
19. Court of Cassation, United Sections, 25 March 1993, no. 6, dep. 14 July 1993, imp. *Tumminelli*, Rv. 194062.
20. The revocation of *misure cautelari* for lack of *gravi indizi* of culpability required by Article 273 of the Code of Criminal Procedure does not hinder the application of *misure di prevenzione personali* (Court of Cassation, Section I, no. 5760/99, *Iorio*).
21. See Balbi, cited above, p. 17.
22. Elia, *Libertà personale e misure di prevenzione*, Milan, 1962, and "Libertà personale tra l'articolo 13 e l'articolo 25 della Costituzione", in *Giur. Cost*. 1964, Petrini, *La prevenzione inutile. Illegittimità delle misure praeter delictum*, Naples, 1996, and Moccia, "La lotta alla criminalità organizzata", in Vallefuoco and Gialanella (eds.), *La difficile antimafia*, Rome, 2002.

suspected person (*Prius ergo est suspicio*[23]), they targeted the suspected person regardless of any evidence of past criminal offence, on the basis of alleged "typologies of offenders" (*tipologie d'autore*). In this context the guarantee of judicial review was nothing but an illusion[24]. The 1956 Act became the instrument of a *Täter-Typus*-based criminal policy which betrayed the fundamental rule that Bettiol once so eloquently stated for criminal law: *Im Anfang ist die Tat*[25].

B. The *frode delle etichette* in the context of preventive measures (§§ 9-11)

9. Until now, Strasbourg has provided little help to counter this "mislabelling of reality" (*frode delle etichette*). When assessing the compatibility of preventive measures with the Convention, the Court has focused its attention on the proceedings for their application, in which the dangerousness of the person concerned was assessed, reviewing whether the rights of the defence had been respected[26]. As will be demonstrated below, since the seminal *Guzzardi v. Italy* judgment[27], the Court has always evaded a thorough analysis of the substantive features of preventive measures under the 1956 Act, merely assuming their lawfulness. The most recent opportunity it had to engage in such an exercise was in *Monno* and it failed to take that opportunity, declaring the application inadmissible by a majority[28].

10. Furthermore, according to the Court, the setting aside of a preventive measure by the Court of Appeal does not as such affect the lawfulness of the interference during the prior period, the first-instance court's decision having been prima facie valid and effective until the point at which it was set aside by the higher court[29]. In addition, failure to comply with a statutory time-limit has been found not to mean that the fair balance has been upset[30].

11. Moreover, the Court has consistently held that the exclusion of the public from proceedings for the imposition of pecuniary preventive

23. Translation: "In the beginning there is the suspicion". The expression comes from medieval criminal procedure. See Balbi, cited above, p. 17.
24. Amodio, "Il processo di prevenzione: l'illusione della giurisdizionalità", in *Giust. pen.*, 1975, III.
25. Translation: "In the beginning there is the act". See Bettiol, "Il problema penale", 1945, in *Scritti giuridici*, I, p. 678.
26. See *Raimondo*, *Labita*, both cited above, and *Vito Sante Santoro v. Italy*, no. 36681/97, ECHR 2004-VI.
27. *Guzzardi v. Italy*, 6 November 1980, Series A no. 39.
28. *Monno v. Italy* (dec.), no. 18675/09, 8 October 2013.
29. Ibid., § 26.
30. Ibid., § 27.

measures amounts to a violation of Article 6 § 1 of the Convention[31]. However, no similar case-law has existed until now in respect of personal preventive measures.

In a word, the Court has until now failed to secure the minimum guarantees of substantive legality and procedural fairness in the highly intrusive field of personal preventive measures. The present judgment changes that course.

III. Substantive guarantees in relation to preventive measures (§§ 12-31)

A. Applicability of Article 5 of the Convention (§§ 12-20)

12. The applicant's complaint under Article 5 is that he was subjected to an arbitrary and excessive deprivation of liberty. In determining whether Article 5 of the Convention is applicable, the Court must apply the criteria set out in the *Guzzardi v. Italy* judgment[32]. In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting-point must be the applicant's specific situation and account must be taken of a whole range of factors such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation and restriction of liberty is nevertheless one of degree or intensity, and not one of nature or substance[33]. Furthermore, an assessment of the nature of the preventive measures provided for by the 1956 Act must consider them "cumulatively and in combination"[34]. Finally, the Court has also held that the requirement to take account of the "type" and "manner of implementation" of the measure in question enables it to have regard to the specific context and circumstances surrounding types of restriction other than the paradigm of confinement in a cell[35].

13. In the *Guzzardi* case, the Court was called upon to examine the personal preventive measures imposed on the applicant. It held that the applicant had been deprived of his liberty and there had been a violation of

---

31. See *Bocellari and Rizza*, no. 399/02, §§ 34-41, 13 November 2007; *Perre and Others v. Italy*, no. 1905/05, §§ 23-26, 8 July 2008; *Bongiorno and Others v. Italy*, no. 4514/07, §§ 27-30, 5 January 2010; *Leone v. Italy*, no. 30506/07, §§ 26-29, 2 February 2010; and *Capitani and Campanella v. Italy*, no. 24920/07, §§ 26-29, 17 May 2011.

32. *Guzzardi*, cited above, § 95.

33. Ibid., §§ 92-93; see also *Nada v. Switzerland* [GC], no. 10593/08, § 225, ECHR 2012; *Austin and Others v. the United Kingdom* [GC], no. 39692/09, 40713/09 and 41008/09, § 57, ECHR 2012; *Stanev v. Bulgaria* [GC], no. 36760/06, § 115, ECHR 2012; and *Medvedyev and Others v. France* [GC], no. 3394/03, § 73, ECHR 2010.

34. *Guzzardi*, cited above, § 95.

35. Ibid., § 92; see also *Engel and Others v. the Netherlands*, 8 June 1976, § 59, Series A no. 22, and *Amuur v. France*, 25 June 1996, § 43, *Reports of Judgments and Decisions* 1996-III.

Article 5. The applicant, who was suspected of belonging to a "band of *mafiosi*", had been forced to live on an island within an (unfenced) area of 2.5 sq. km, mainly together with other residents in a similar situation and supervisory staff. The requirement to live on the island was accompanied by other restrictions similar to the measures imposed on the applicants in the cases mentioned above[36].

14. All the other cases examined subsequently were similar to *Guzzardi* because the restrictions imposed were similar: reporting once a week to the police authority responsible for supervision; looking for work within a month; not changing the place of residence; leading an honest and law-abiding life and not giving cause for suspicion; not associating with persons who had a criminal record and who were subject to preventive or security measures; not returning home later than 10 p.m. or leaving home before 6 a.m., except in case of necessity and only after giving notice to the authorities in good time; not keeping or carrying weapons; not going to bars, nightclubs, amusement arcades or brothels and not attending public meetings. The sole difference with regard to the situation in *Guzzardi* was that the applicants were not forced to live on an island. On that basis, these cases were examined under Article 2 of Protocol No. 4 alone[37].

15. This case-law is contradictory. On the one hand, in *Guzzardi* the Court held that the preventive measures imposed on the applicant in accordance with the 1956 Act involved a deprivation of liberty. On the other hand, in the post-*Guzzardi* Italian cases, starting with the unfortunate judgment in *Raimondo*, the Court found that the measures in question did not amount to deprivation of liberty, but merely to a restriction on freedom of movement[38]. I am of the view that the Court should revert to the fundamental principles of the *Guzzardi* approach, as reiterated explicitly in *Ciulla*[39].

16. In my view, a comparison of the measures imposed on the respective applicants in the *Guzzardi* and *De Tommaso* cases shows the following: the applicants in both cases were subjected to similar restrictions. Even though

---

36. See footnote 26.

37. See *Ciancimino*; *Raimondo*; *Labita*; *Vito Sante Santoro* and *Monno*, all cited above.

38. The basis of the Court's present case-law is a passage from *Raimondo* (§ 39), which simply affirmed, without any attempt to provide justification, that these measures were to be assessed as restrictions on the liberty of movement under Article 2 of Protocol No. 4 and "did not amount to a deprivation of liberty within the meaning of Article 5 para. 1 of the Convention", citing "*Guzzardi v. Italy* judgment, cited above, p. 33, para. 92", while ignoring all the subsequent reasoning of *Guzzardi*, which had reached the exact opposite conclusion: "The Court considers on balance that the present case is to be regarded as one involving deprivation of liberty".

39. *Ciulla v. Italy*, 22 February 1989, § 40, Series A no. 148. This case referred to a provision on *detenzione provvisoria*, which was later repealed. I further note that this approach was also confirmed *mutatis mutandis* in a recent German case (see *Ostendorf v. Germany*, no. 15598/08, 7 March 2013).

the applicant in the present case, unlike the applicant in *Guzzardi*, was not forced to live on an island within an (unfenced) area of 2.5 sq. km, the accumulation and combination of measures imposed in the present case entailed a deprivation – and not simply a restriction – of liberty, especially in view of the requirement not to return home after 10 p.m. and not to leave home before 6 a.m.

In practice, this requirement remained in place for 221 days, coupled with the following other obligations: to live in a particular town; to report once a week to the police authority responsible for his supervision; not to associate with persons who had a criminal record and who were subject to preventive or security measures; not to keep or carry weapons; not to go to bars, nightclubs, amusement arcades or brothels (*osterie*, *bettole*, *sale giochi* and *luoghi onde si esercita il meretricio*); not to attend public meetings of any kind (*di qualsiasi genere*); and to lead an honest life (*vivere onestamente*). Lastly, the applicant was also subjected to a restriction relating to telephone communications.

17. However, in the present case – unlike in *Guzzardi*, where the applicant had to notify the authorities in advance of the telephone number and name of the person being called or calling each time he wished to make or receive a long-distance call – the applicant was unable to use mobile phones or electric communication devices, a measure which evidently made his situation even worse.

18. Having said that, it should be stressed that the surface area of the place where the applicant is required to live should not form the sole basis for finding that Article 5 is applicable. With reference to the applicant's "concrete situation"[40], I observe that the compulsory residence order was imposed on the applicant for 221 days (from 4 July 2008 to 4 February 2009), that is, 1,768 hours (221 days x 8 hours per day). In this context, attention should be drawn to the fact that the Court's case-law is abundant as regards situations where the deprivation of the right to liberty lasted for a much shorter time than in the present case[41].

19. Additionally, it is also useful to refer to the Court's own jurisprudence on house arrest. In the light of *Buzadji*, house arrest is a form

40. See *Guzzardi*, cited above § 92.

41. Contrast with eleven hours in *Quinn v. France*, 22 March 1995, § 42, Series A no. 311; twelve hours in *Labita*, cited above, § 166; three days in *Mancini v. Italy*, no. 44955/98, § 25, ECHR 2001-IX; and six months in *Brand v. the Netherlands*, no. 49902/99, § 60, 11 May 2004. For other short periods of deprivation of liberty, see *Murray v. the United Kingdom*, 28 October 1994, §§ 49 et seq., Series A no. 300-A, concerning custody at an army centre for less than three hours for questioning; *Novotka v. Slovakia* (dec.), no. 47244/99, 4 November 2003, concerning one hour spent in police custody; *Shimovolos v. Russia*, no. 30194/09, §§ 49-50, 21 June 2011, concerning questioning in police custody for forty-five minutes; see also *Witold Litwa v. Poland*, no. 26629/95, § 46, ECHR 2000-III, concerning confinement for six and a half hours in a sobering-up centre.

of deprivation of liberty under Article 5 of the Convention[42]. House arrest consists in the prohibition on the suspect leaving his or her home without permission from the relevant authorities. Pursuant to Article 284 of the Code of Criminal Procedure, as a rule the person concerned may not leave home while he is under *arresto domiciliario*. But the court may authorise a defendant to leave home for work or other "indispensable business" (*indispensabili esigenze di vita*). The provision does not specify how many hours the person can spend away from home, leaving this determination to the court's discretion. The provision on *detenzione domiciliare* (section 47 *ter* (4) of Act no. 354/1975) refers to the above-mentioned Article 284 as for the regime governing the penalty. A breach of these provisions is punishable under Article 385 of the Criminal Code, which provides for a prison sentence of up to one year, and in cases involving the use of violence, up to five years.

In substance, the situation in the present case was no different. The applicant was not free to leave his house between 10 p.m. and 6 a.m., unless he had given "notice in due time" (*tempestiva notizia*) to the supervisory authorities and only in cases of "proven necessity" (*comprovata necessità*). Failure to fulfil this legal obligation could be punished with a term of imprisonment for up to five years.

20. Hence, Article 5 is applicable to this form of deprivation of liberty, as in the cases of *Guzzardi* and *Ciulla* (both cited above). There would be a case of "mislabelling of reality" (*frode delle etichette*) if Article 5 § 1 were found not to apply to the measures provided for by the 1956 Act, in view of their very intrusive nature in terms of restricting liberty, both in general and in the present case.

B. Application of Article 5 to the case: no Convention ground for deprivation of liberty (§§ 21-31)

21. I subscribe entirely to the Grand Chamber's assessment of the deficient quality of the law under scrutiny, with regard both to the list of subjects to whom the measures can be applied (section 1 of the 1956 Act) and to the measures themselves (sections 3 and 5 of the 1956 Act).

22. The laudable efforts of the Constitutional Court of Italy to restrict the breadth of the concepts used in these provisions do not save them from the reproach of lack of foreseeability. The ordinary citizen could not foresee what particular forms of behaviour might be encompassed by the relevant provision of the 1956 Act and what specific measure would be applied to his or her conduct, simply because the Act was too broadly worded and plagued with vague, indeterminate concepts, sometimes with moralistic overtones. Since the Act did not establish a clear and foreseeable

42. *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, § 104, ECHR 2016.

relationship between particular forms of behaviour and specific criminal measures, too much discretion was left to the police and prosecutors.[43]

23. But the matter does not end here. The Grand Chamber should have gone further in its analysis. In addition to the deficient quality of the law, the *ante o praeter delictum* deprivation of the right to liberty for the purposes of crime prevention does not accord with any of the grounds set out exhaustively in Article 5 § 1 of the Convention.

24. I repeat what the *Guzzardi* judgment has already stated quite convincingly: the compulsory residence order and the requirement for the applicant to remain at home for eight hours per day for the purposes of crime prevention cannot be regarded as coming under any of the situations exhaustively listed in Article 5 § 1[44].

25. Article 5 § 1 (a) of the Convention does not apply[45]. The order for the applicant's compulsory residence was not a punishment for a specific offence but a preventive measure taken on the strength of indications of a propensity to commit crime. Its nature was not that of a detention that "follows and depends upon" or occurs "by virtue of" the "conviction"[46].

26. Article 5 § 1 (b) of the Convention does not apply[47]. The applicant's detention did not result from non-compliance with a court order[48], or the need to secure the fulfilment of a specific obligation prescribed by law[49].

27. Article 5 § 1 (c) of the Convention does not apply[50]. The applicant was not in any of the situations covered by sub-paragraph (c). There was no "reasonable suspicion of [his] having committed an offence", nor was it "reasonably considered necessary to prevent his committing an offence" or "fleeing after having done so". The reason is simple: in accordance to the Court's firmly established case-law, the suspicion for the purposes of

---

43. *Legge-delega* no. 136 of 13 August 2010 required the categories of persons to whom the measures were applied to be established on the basis of "clearly defined conditions, referring to the existence of factual circumstances" ("*che venga definita in maniera organica la categoria dei destinatari delle misure di prevenzione personali e patrimoniali, ancorandone la previsione a presupposti chiaramente definiti e riferiti in particolare all'esistenza di circostanze di fatto che giustificano l'applicazione delle suddette misure di prevenzione e, per le sole misure personali, anche alla sussistenza del requisito della pericolosità del soggetto*"). This cannot but be read as an implicit acknowledgment on the part of the domestic authorities of the lack of clarity of the 1956 Act.

44. Contrast *Danov v. Bulgaria*, no. 56796/00, 26 October 2006; *Mancini*, cited above, § 20; *Nikolova v. Bulgaria (no. 2)*, no. 40896/98, 30 September 2004; and *Vachev v. Bulgaria*, no. 42987/98, § 64, ECHR 2004-VIII.

45. See *Guzzardi*, cited above, § 100.

46. Contrast *Van Droogenbroeck v. Belgium*, 24 June 1982, § 35, Series A no. 50.

47. See *Guzzardi*, cited above, § 101.

48. Contrast *Steel and Others v. the United Kingdom*, 23 September 1998, § 66, *Reports* 1998-VII; *Nowicka v. Poland*, no. 30218/96, § 60, 3 December 2002; *Harkmann v. Estonia*, no. 2192/03, § 30, 11 July 2006; and *Gatt v. Malta*, no. 28221/08, § 36, ECHR 2010.

49. Contrast *Vasileva v. Denmark*, no. 52792/99, § 36, 25 September 2003, and *Epple v. Germany*, no. 77909/01, § 36, 24 March 2005.

50. See *Guzzardi*, cited above, § 102.

Article 5 § 1 (c) must refer to a "concrete and specific offence"[51], which was not the case in the Italian 1956 Act.

28. Article 5 § 1 (d) does not apply[52], since the applicant was not a minor.

29. Article 5 § 1 (e) does not apply[53]. The applicant does not fall into any the categories of persons referred to by that provision.

30. Lastly, Article 5 § 1 (f) is not relevant here either[54].

31. To sum up, the applicant's deprivation of liberty must be reproached for two main reasons: firstly, it was not compatible with the principle of legality set forth in Article 5 § 1 of the Convention, and secondly it was not covered by any of the exceptional provisions of Article 5 § 1 (a)-(f). The judgment of the Court only dealt with the former aspect. In my view, it was imperative for the Court to take a step further and address the delicate issue of the Convention compatibility of the *ante o praeter delictum* deprivation of the right to liberty for the purposes of crime prevention.

In view of the above, the conclusion is imperative: the Convention does not provide a ground for *ante o praeter delictum* deprivation of the right to liberty for the purposes of crime prevention.

Part 2 (§§ 32-58)

IV. Procedural guarantees in relation to preventive measures (§§ 32-48)

A. Applicability of Article 6 § 1 (criminal limb) of the Convention (§§ 32-43)

32. According to the *Engel and Others* case-law[55], the relevant criteria for the applicability of the criminal limb of Article 6 are the legal classification of the offence in question in national law, the very nature of the offence and the nature and degree of severity of the penalty to which the person concerned is liable. Furthermore, these criteria are alternative and not cumulative ones: for Article 6 to apply in respect of the words "criminal charge", it suffices that the offence in question should by its nature be "criminal" from the point of view of the Convention, or should have made the person concerned liable to a sanction which, by virtue of its nature and degree of severity, belongs in general to the "criminal" sphere. This does

51. Ibid.; see also *Lawless v. Ireland (no 3)*, 1 July 1961, Series A no. 3, and *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, Series A no. 182.
52. See *Guzzardi*, cited above, § 103.
53. Ibid., § 98.
54. Ibid., § 103.
55. *Engel and Others*, cited above, §§ 82-83.

not preclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a "criminal charge"[56].

33. A number of arguments support the finding that the various preventive measures under the 1956 Act are criminal measures in the light of the above-mentioned criteria.

Firstly, the preventive measures against individuals under the 1956 Act were based on a "criminal charge" within the meaning of the Convention. The charge consisted in the imputation of dangerous behaviour or a dangerous personality prompting suspicions of future criminal activity. As was emphasised in *Deweer*[57], the Court must assess whether "the situation of the [suspect] has been substantially affected". This corresponds entirely to the situation under the 1956 Act, since the person concerned by such proceedings became a "suspect" (see the corresponding language in section 4 of the Act: *sospetti*; section 5: *persona sospetta di vivere, di non dare ragione di sospetti*).

34. Secondly, as soon as proceedings were instituted under the 1956 Act, the suspect could be subjected to temporary restrictions of his or her rights under section 6 of the Act.

35. Thirdly, if the suspicion was confirmed by a judgment, the suspect was subjected to highly restrictive measures affecting a wide range of fundamental freedoms, for a period of up to five years. This limit could be extended further if the suspect committed a crime during the period of special supervision, in accordance with section 11 of the 1956 Act. The severity of these measures was unquestionable.

36. Fourthly, as a matter of principle, the Constitutional Court itself considers the preventive measures provided for in the 1956 Act to be criminal in nature, in the same way as security measures. The Constitutional Court itself noted "*il fondamento commune e la commune finalità*" between security measures (*misure di sicurezza*) and preventive measures (*misure di prevenzione*) long ago, in its judgment no. 68 of 1964[58]. In its judgment no. 177 of 1980, the Constitutional Court equated the personal preventive measures under the 1956 Act with the security measures provided for in the Criminal Code, as if they were "two species of the same genus"[59].

---

56. See *Jussila v. Finland* [GC], no. 73053/01, §§ 30-31, ECHR 2006-XIII, and *Zaicevs v. Latvia*, no. 65022/01, § 31, 31 July 2007.

57. *Deweer v. Belgium*, 27 February 1980, § 46, Series A no. 35.

58. From sections 10 and 12(3) of the 1956 Act, a principle could be derived to the effect that a security measure prevailed over a preventive measure, when they were both applied, but they could, in certain circumstances, be applied in conjunction (Court of Cassation, Section I, 7 February 2011, *Macri*).

59. The relevant passage is the following: "*l'applicazione delle misure di sicurezza personali, finalizzate anche esse a prevenire la commissione di (ulteriori) reati (e che non sempre presuppongono la commissione di un precedente reato; art. 49, secondo e quarto*

Consequently, it applies the guarantees of the principles of legality and the presumption of innocence to them[60]. But like security measures, preventive measures are not limited by the principle of prohibition of retroactive law[61].

37. Fifthly, these measures had a general and special preventive purpose, like any ordinary criminal penalties. In practice, they were also based on the socially reprehensible nature of the suspect's conduct, a factor that likewise forms the basis for any criminal penalties. Italian legal scholars have always emphasised the close link between personal preventive measures and criminal law and its purposes[62].

38. Sixthly, a breach of the criminal measures provided for in the 1956 Act was punishable by a sentence of up to five years' imprisonment[63]. The highly repressive nature of the preventive measures was further compounded by the fact that the application of such measures was considered an aggravating factor in the context of sentencing for various criminal offences under the Criminal Code.

39. Seventhly, section 4 of the 1956 Act provided that the general Articles 636 and 637 of the Code of Criminal Procedure, governing criminal procedure, were also applicable to personal preventive measures. The Constitutional Court itself admitted, in its judgment no. 306 of 1997, that in spite of the differences which separated ordinary criminal proceedings and proceedings concerning preventive measures, "the latter are modelled according to the forms of the former" (*quest'ultimo si trova ad essere modellato sulle forme del primo*). The notice for the hearing in proceedings concerning preventive measures resembled a true *vocatio in iudicium* similar to the *decreto di citazione* in ordinary criminal proceedings, and the judicial order imposing a preventive measure resembled a true *sentenza*, which had to contain reasons[64].

40. Eighthly, if the guarantees of a public and fair trial apply to preventive measures of a pecuniary nature, as the Court has already found in the cases of *Bocellari and Rizza* and *Capitani and Campanella* (both cited

---

comma e art. 115, secondo e quarto comma del codice penale), talché possono considerarsi una delle due species di un unico genus."

60. See the above-mentioned judgments nos. 23/1964 and 177/1980 of the Constitutional Court.

61. Court of Cassation, Section I, 17 May 1984, no. 1193.

62. See, among other authorities, Nuvolone, "La prevenzione nella teoria generale del diritto penale", in *Rivista Italiana di Diritto e Procedura Penale*, 1956; Piroddi, *Le misure di prevenzione di pubblica sicurezza*, 1971; Vassalli, "Misure di prevenzione e diritto penale", in *Studi in onore di B. Petrocelli*, vol. III, 1972.

63. Between 2005 and 2014, 16,461 persons were convicted of breaching the preventive measures applied to them, according to the statistical information in the file. Although asked, the Government did not provide information on how many of them were sentenced to jail.

64. Cairo and Forte, *Codice delle misure di prevenzione annotato*, Rome, 2014, p. 23.

above), they should also apply *a fortiori* to personal preventive measures (*misure di prevenzione personali*).

41. Ninthly, in view of the seriousness of the applicable measures, it would be inconceivable for suspects in proceedings under the 1956 Act not to have the right to be informed of the accusation against them (Article 6 § 3 (a)), the right to have adequate time and facilities for the preparation of their defence, the right to defend themselves and to present evidence in their defence (Article 6 § 3 (b) and (c)), and the right to legal assistance of their own choosing (Article 6 § 3 (c)). These basic requirements of criminal proceedings are likewise applicable under the 1956 Act: for example, "the person concerned may submit observations and be represented by counsel" (Constitutional Court judgment no. 76/1970).

42. Tenthly, the Court has found that disciplinary offences come under the criminal head of Article 6 of the Convention, particularly on account of the severity of the penalty[65]. In the abstract, the applicable measures in proceedings under the 1956 Act were more severe than the usual disciplinary sanctions. The preventive measures imposed on the applicant confirm this general assessment. Hence, the criminal limb of Article 6 should *a fortiori* be applicable in the present case[66].

43. In the light of the above, preventive measures concerning individuals, as provided for in the 1956 Act, are criminal in nature. All the traditional criteria deriving from the *Engel and Others* line of case-law are satisfied[67]. This case visibly reflects the excessively punitive nature of the preventive measures under the 1956 Act, in so far as the list of applicable measures is too broad and not exhaustive and the duration for which they may be applied is too long (five years, but subject to extension). Furthermore, the interference with the suspect's fundamental freedoms is so severe that the guarantees of the criminal limb of Article 6 are necessary. The situation is particularly acute in Italy since these measures could be imposed even after an acquittal in criminal proceedings.

B. Application of Article 6 to the case: no public and fair hearing (§§ 44-48)

44. The complaints submitted under Article 6 (criminal limb) may be summarised as follows: lack of a public hearing; failure to carry out a proper assessment of the evidence; and lack of a remedy. Since Article 6

65. See *Engel and Others*, cited above, § 85; *Campbell and Fell v. the United Kingdom*, 28 June 1984, § 73, Series A no. 80; *Ezeh and Connors v. the United Kingdom* [GC], nos. 39665/98 and 40086/98, § 130, ECHR 2003-X; and, *mutatis mutandis*, *Dacosta Silva v. Spain*, no. 69966/01, §§ 46-50, ECHR 2006-XIII.

66. In *Guzzardi* (cited above, § 108) the Court held that the criminal limb of Article 6 was not applicable, but it considered none of the above-mentioned arguments.

67. *Engel and Others*, cited above, §§ 82-83.

(criminal limb) is applicable, it remains to be determined whether it has been breached. In my opinion, there has been a violation of this Article on three accounts.

45. As the Constitutional Court has recognised in judgment no. 93/2010, a public hearing is a fundamental requirement for proceedings of this kind. The Government have acknowledged that the applicant was the victim of a violation of Article 6 § 1 on account of the lack of a public hearing before the domestic courts.

46. Two serious errors in the assessment of evidence occurred: regarding the applicant's farm work since 2005, as acknowledged by the Court of Appeal (following his release from prison in 2005, the applicant had consistently been in lawful employment providing him with a respectable source of income) ("*dopo la sua scarcerazione del 2005 si è costantemente dediato sino ad oggi ad attività lavorativa lecita che gli assicura una fonte dignitosa di sostentamento*"), contrary to the first-instance assessment; and regarding the alleged breaches of the terms of special supervision ("*violazioni agli obblighi di sorveglianza*"). A serious case of mistaken identity was acknowledged by the Court of Appeal, which explicitly stated that the breaches of the obligations resulting from the imposition of the special supervision measure concerned a different person.

47. Although the Court does not normally oversee errors committed in the assessment of the evidence, it does so when they are blatant and flagrant, as in this case. Indeed, these errors were of such magnitude that they impinged on the basic fairness of the proceedings. I further note that the court of first instance justified the measure in just two short paragraphs.

48. In sum, Article 6 (criminal limb) is applicable and has been breached.

V. Domestic remedies in the case at hand (§§ 49-58)

A. Lack of speedy judicial review (§§ 49-53)

49. Having voted against the decision of inadmissibility of the Article 5 complaint, I voted on the merits in favour of finding a breach of Article 13, for the following reasons.

The applicant was subjected to an excessive number of wide-ranging and varied criminal measures for an overly long time, out of all proportion to the vague and unfounded suspicions against him. It should be emphasised that the measures were imposed on the applicant for 221 days, notwithstanding the thirty-day statutory time-limit within which the Court of Appeal was required to give its ruling. This time-limit, prescribed by domestic law itself, was not complied with.

50. In the present case, the measures were quashed *ex tunc*, calling into question their legal basis[68]. The applicant had to bear an excessive burden, because it took seven months to determine the lawfulness of the measures, whereas the law lays down a thirty-day time-limit, and the fair balance was therefore upset.

51. Having said this, it is clear to me that there was a lack of an appropriate remedy, as results from the *ratio* of the Constitutional Court's judgment no. 93/2010 on the lack of a public hearing in proceedings before the Court of Appeal and the excessively delayed response of the court of second instance.

52. Furthermore, in guaranteeing to detained persons a right to institute proceedings to challenge the lawfulness of their deprivation of liberty, Article 5 § 4 also proclaims their right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of detention and ordering its termination if it proves unlawful. In addition, the question whether the right of detained persons to a speedy decision has been respected must – as is the case for observance of the "reasonable time" requirement in Article 5 § 3 and Article 6 § 1 of the Convention – be determined in the light of the circumstances of each case[69].

53. The proceedings instituted in the Court of Appeal were not compatible with Article 5 § 4, because they did not meet the speediness requirement. There has therefore been a violation of Article 5 § 4 of the Convention[70]. Since the complaint under Article 5 was found to be inadmissible by the majority, I voted in favour of finding a violation of Article 13, on the basis of the above-mentioned deficiency of the national remedy in the event of a lack of a speedy judicial review.

B. Lack of compensation for unlawful preventive measure (§§ 54-58)

54. As the Court has consistently held, the right to compensation set forth in Article 5 § 5 of the Convention presupposes that a violation of one of the other paragraphs of that Article has been established, either by a domestic authority or by the Convention institutions[71]. In the present case, as a result of the violation of Article 5 § 1, paragraph 5 should have been applied. Accordingly, the Court should have examined whether the

68. There was no legal and factual basis for the criminal measures imposed, as the Court of Appeal acknowledged by its declaration of the *ex tunc* invalidity of the measures. The measures were annulled (*annullato*), not revoked, for failing to comply with the legal requirements since the day of the delivery of the judgment by the court of first instance.

69. See, among other authorities, *Rehbock v. Slovenia*, no. 29462/95, § 84, ECHR 2000-XII; *Mamedova v. Russia*, no. 7064/05, § 96, 1 June 2006; *G.B. v. Switzerland*, no. 27426/95, § 33, 30 November 2000; and *Kadem v. Malta*, no. 55263/00, § 44, 9 January 2003.

70. See *Rizzotto v. Italy*, no. 15349/06, §§ 30-36, 24 April 2008.

71. See *N.C. v. Italy* [GC], no. 24952/94, § 49, ECHR 2002-X.

applicant had a remedy available under Italian law for the purposes of Article 5 § 5 of the Convention.

55. Article 314 of the Code of Criminal Procedure provides for a right to compensation in two distinct cases: where an accused person is acquitted in criminal proceedings on the merits (compensation for "substantive" injustice, provided for in paragraph 1) or where it is established that a suspect has been placed or kept in pre-trial detention in breach of Articles 273 and 280 of the Code of Criminal Procedure (compensation for "procedural" injustice, provided for in paragraph 2).

56. In its judgment no. 310 of 1996, the Constitutional Court held that, in addition to the cases provided for in Article 314 of the Code of Criminal Procedure, individuals were also entitled to compensation where they had been unjustly detained as a result of an unlawful order for the execution of a sentence. Furthermore, in its judgment no. 284 of 2003, the Constitutional Court specified that the right to compensation for unjust detention was not precluded by the mere fact that the order was lawful or that the detention was the result of lawful conduct on the part of the domestic authorities. What mattered was the objective injustice (*obiettiva ingiustizia*) of the deprivation of liberty.

57. In the light of the foregoing, it is clear that there were no provisions entitling the applicant to bring a claim for compensation in the national courts for a special supervision measure. From a reading of Article 314 of the Code of Criminal Procedure and the pertinent case-law of the Constitutional Court, it appears that the possibility of claiming compensation for damage sustained as a result of a special supervision measure is not provided for in any of the scenarios referred to above. In fact, the Government themselves have already acknowledged this deficiency in *Vito Sante Santoro* (cited above)[72].

58. Accordingly, there has also been a violation of paragraph 5 of Article 5 of the Convention[73]. Having regard to the majority's conclusions under Article 5, I voted in favour of finding a violation of Article 13 of the Convention, on account of the failure of the national remedies to provide compensation for the damage sustained by the applicant, in addition to the lack of a speedy judicial review.

72. *Vito Sante Santoro*, cited above, § 45.

73. See *Seferovic v. Italy*, no. 12921/04, § 49, 8 February 2011; *Pezone v. Italy*, no. 42098/98, §§ 51-56, 18 December 2003; and *Fox, Campbell and Hartley*, cited above, § 46.

VI. Conclusion (§§ 59-60)

59. Articles 5 and 6 (criminal limb) of the Convention are applicable to the present case. The applicant has been the victim of a violation of his Articles 5 and 6 rights as a result of a series of draconian criminal measures. These measures are an outdated remnant of liberticidal legal structures, *un reliquato superato di strutture giuridiche liberticide*, which are, in the light of present-day conditions[74], totally at variance with the rule of law inherent in a democratic State, the right to liberty and the basic requirements of a fair and public hearing, as enshrined in Articles 5 and 6 of the Convention, not to mention other fundamental rights and freedoms such as the freedom of assembly.

60. The way ahead is clear: the Italian legislature evidently has to draw all the logical conclusions from the present judgment with regard to the recent Legislative Decree no. 159/2011, and the sooner the better.

74. See *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A no. 26.

PARTLY DISSENTING OPINION OF JUDGE KŪRIS

1. Like Judge Pinto de Albuquerque, I am of the opinion that Article 5 of the Convention was applicable in the instant case. I earnestly subscribe to my distinguished colleague's arguments, laid out in his partly dissenting opinion, as to the criminal nature of the "preventive" measures imposed on the applicant. I put the word "preventive" in quotation marks, since, as it unambiguously transpires from the case file, for the purposes of the domestic law applied there was nothing at all to "prevent" in the applicant's conduct. (I shall expand on this issue in due course.) I also agree as to the argument that, in the circumstances of the case, these measures would have equated to deprivation of liberty had they been assessed "cumulatively and in combination", as required by the *Guzzardi* standard. In particular, the applicant in the instant case, unlike the one in *Guzzardi* (6 November 1980, § 108, Series A no. 39), was indeed not forced to live on an island, but the "preventive" measures were imposed on him for a much longer period – 221 days (and nights) as against 165 days in *Guzzardi*. In the instant case, a "cumulative" assessment of the impugned measures would have required undertaking a much more detailed examination of all the relevant factual circumstances, including the essence of each restrictive measure, individually and in "combination", as well as the fact that they had been imposed on the applicant under the (most realistic) threat of imprisonment. The need for such a thorough examination of the factual circumstances presupposed the examination of the complaint under Article 5.

Thus, while subscribing to the doctrine that "in proclaiming the 'right to liberty', paragraph 1 of Article 5 contemplates the physical liberty of the person", that "[i]n order to determine whether someone has been 'deprived of his liberty' within the meaning of Article 5, the starting-point must be his or her specific situation and account must be taken of a whole range of factors such as the type, duration, effects and manner of implementation of the measure in question" and that "[t]he difference between deprivation and restriction of liberty is one of degree or intensity, and not one of nature or substance" (see paragraph 80 of the judgment), I cannot agree that the "assessment of the nature of the preventive measures provided for by the 1956 Act", as imposed on the applicant in the instant case, has considered them "cumulatively and in combination" (ibid.).

2. In *Guzzardi* (cited above), decided at a time when Protocol No. 4 had not yet been ratified by Italy, the Court found that "there was ... deprivation of liberty within the meaning of Article 5" (see point 4 of the operative part; see also point 8, wherein it is "sum[med] up ... that ... the applicant was the victim of a breach of Article 5 par. 1") and that this deprivation of liberty was not justified under various sub-paragraphs of Article 5 § 1 (see points 5, 6 and 7 of the operative part). In the light of this finding, the majority's conclusion in the instant case that Article 2 of Protocol No. 4 is applicable

to the applicant's situation, whereas Article 5 is not, means no less than that at least one form of deprivation of liberty is considered to be deprivation of liberty until the member State becomes a fully-fledged party to Protocol No. 4 and that the same form of deprivation of liberty ceases to be deprivation of liberty once Protocol No. 4 enters into force for the member State concerned (or, at the earliest date, once it ratifies this Protocol). By extension, this would mean that what may be deprivation of liberty in one State may not be deprivation of liberty in another. Is the Court ready to accept that in hypothetical identical cases against Switzerland, Turkey or the United Kingdom, which have not ratified Protocol No. 4, Article 5 would be applicable, while it is not applicable in identical cases against, say, Italy, France or Lithuania, which have ratified it?

This would be a very interesting and thought-provoking stance in right-to-liberty cases. The only problem with such a "pluralistic" and "flexible" (not in the most attractive sense of these words) interpretation of the Convention and its Protocols is that it has little (if anything at all) to do either with the canons of legal interpretation in general or with the human right to liberty, as enshrined in the Convention, in particular.

3. I am also convinced that not only is Article 5 applicable in the instant case but that there has also been a violation of this Article. The "preventive" measures imposed on the applicant (under the threat of imprisonment) amounted, in their totality and magnitude and regard being had to the lengthy period of their imposition, to a deprivation of liberty, both in terms of the everyday usage of the word "liberty" as dictated by common sense and in terms of Article 5, the jurisprudential construction of which, I would like to believe, should tend not to distance itself from common sense.

For what else if not a deprivation of liberty were these "preventive" measures, imposed on the applicant in a manner which was nothing but a mechanical and indiscriminate copy-paste of the statutory provisions? That they were imposed indiscriminately, that is to say, without any regard being paid to the applicant's concrete situation, is obvious from the fact that he was obliged "to start looking for work within a month", although, as was later established by the Bari Court of Appeal, he had "consistently been in lawful employment providing him with a respectable source of income" (see paragraph 27 of the judgment). Some of these measures were *very* restrictive and included an element of deprivation of liberty in its most direct – "physical"! – sense. To wit, the applicant was obliged "not to return home later than 10 p.m. or to leave home before 6 a.m., except in case of necessity and only after giving notice to the authorities in good time", which effectively included an element of house arrest and in this sense amounted to "interrupted", or "incomplete", house arrest (on this issue, again, I concur with the arguments of Judge Pinto de Albuquerque). The majority's argument that this measure was not house arrest on the basis that "under Italian law, a person under house arrest is deemed to be in pre-trial

detention" (see paragraph 87 of the judgment) runs counter to the fundamental canons of interpretation of the Convention: it may well be that the measure discussed here – "not to return home later than 10 p.m. or to leave home before 6 a.m., except in case of necessity and only after giving notice to the authorities in good time" – is not considered to be house arrest *under Italian law*, but is it not house arrest *under the Convention*? In my opinion, *Buzadji v. the Republic of Moldova* ([GC], no. 23755/07, ECHR 2016) speaks to the contrary. Firstly, the Convention is an instrument which is *autonomous* of domestic (in this case, Italian) law and has always been treated as such by the Court. Not any longer? Secondly, the 221 nights which the applicant spent while subjected to this measure (under the threat of imprisonment) indicate that the "degree and intensity" (ibid., § 104) of the measure was far from negligible.

But there is more to the content of the impugned measures.

4. Some of these measures were patently irrational and difficult to explain in the twenty-first century, such as the prohibition on the applicant's use of "mobile phones or radio communication devices" – but not the Internet and in particular not Skype (the law applied was from the pre-Internet era). This is sort of funny. It would have been more understandable had the courts prohibited the applicant from communicating with certain persons, but they chose to prohibit him from communicating by certain means.

5. Also, some measures were mutually exclusive. For instance, the applicant was obliged "to start looking for work within a month" – an almost futile enterprise from the outset, given that, in addition to the general prohibition imposed on him not to leave home before 6 a.m. and not to return home later than 10 p.m., he was forbidden to "use mobile phones", to "attend public meetings" or to drive a vehicle (since his driving licence had been withdrawn). In Casamassima, a town with a population of less than eighteen thousand at the material time, there were probably not so many employers who would have embraced with great eagerness the prospect of hiring such an "awkward" – if not "useless" – employee.

6. All this, coupled with the prohibition on the applicant's "associat[ing] with persons who had a criminal record and who were subject to preventive or security measures" (all? even if they were, say, his relatives? or even if he did not know that the persons with whom he happened to associate in one way or another had an old criminal record of some kind?) and "go[ing] to bars, nightclubs, amusement arcades ... and ... attend[ing] public meetings" (all meetings? including those organised by, say, trade unions, had he succeeded in finding employment and become a member of one of them? or could he go to theatres or shows, which are also both "public" and "meetings"?) may leave the readership wondering what the majority have in mind when they state that "the applicant ... *was not unable to make social*

contacts" (emphasis added), since he "was not forced to live within a restricted area" (see paragraph 85 of the judgment).

7. Had the majority decided in favour of the applicability of Article 5 and found that there had been a violation of that Article, this would have made it unnecessary for the Grand Chamber to go into the examination of the alleged violation of Article 2 of Protocol No. 4 to the Convention and thus to produce reasoning which unjustifiably puts (clearly too) little emphasis on the essential factual feature of this case, namely that the case is one of *mistaken identity*. To be sure, Article 2 of Protocol No. 4 has also been violated, but – because *any* interference with a person's right to liberty always includes, by definition, an interference with his or her freedom of movement – the finding of a violation of Article 2 of Protocol No. 4 would have been "covered" by the "more general" finding of a violation of Article 5.

However, since Article 5 was found, by the majority, to be inapplicable, I had no other choice but to vote for the finding of a violation of Article 2 of Protocol No. 4 (see point 4 of the operative part).

8. I also concur with Judge Pinto de Albuquerque as to the applicability of Article 6 § 1 in its criminal limb and share his view that this Article has been violated in precisely that aspect. In the opinion of the majority, "the criminal aspect of Article 6 § 1 of the Convention is not applicable, since special supervision is not comparable to a criminal sanction, given that the proceedings concerning the applicant did not involve the determination of a 'criminal charge' within the meaning of Article 6 of the Convention" (see paragraph 143 of the judgment). To substantiate this, the majority refer to *Guzzardi* (cited above, § 108) and *Raimondo v. Italy* (no. 12954/87, 22 February 1994, § 43, Series A no. 281-A). Not a very successful reference. The paragraph from *Guzzardi* (a case decided as long ago as 1980) referred to in paragraph 143 of the judgment contains little (if any) definitive doctrinal principles of a general nature. It is explicitly indeterminate as to the nature of the right to liberty. The paragraph from *Raimondo* referred to in the same paragraph 143 in its turn sheds no further light on the matter, since it only refers to the paragraph from *Guzzardi* mentioned above, although without the provisos which the original paragraph from *Guzzardi* contains.

9. By the way, the Government made no submissions as to the applicant's assertion that the criminal limb of Article 6 § 1 was applicable "to proceedings for the application of preventive measures in respect of individuals in that they related to the citizen's personal liberty and were governed by the provisions of the Code of Criminal Procedure" (see paragraphs 141 and 142 of the judgment).

This abstention must mean something.

10. In the context of the applicability (turned by the majority into inapplicability) of the criminal limb of Article 6 § 1, yet another aspect has

to be mentioned. In fact, it *is* mentioned in paragraph 14 of the judgment, but then it is completely *overlooked* in the reasoning.

In paragraph 14 of the judgment it is stated that the "District Court found that the applicant had *'active' criminal tendencies* and that the evidence before it showed that he had derived most of his means of subsistence from *criminal activity*" (emphasis added).

Thus, the impugned measures were an official reaction and a judicial response to the alleged "criminal tendencies" and "criminal activity" attributed to the applicant and in that sense were not only "preventive" but also "punitive".

11. This, consequently, also speaks against the majority's finding that there has been no violation of Article 6 § 1 "as regards the right to a fair hearing" (see point 7 of the operative part).

Thus, the right to a fair hearing is considered not to have been violated in a situation where (i) the authorities take the "wrong" person and, in non-public court proceedings, impose severe and long-lasting "preventive" measures on him, even though he asserts that he is not the person against whom the "factual evidence" has been collected; (ii) that person is not able to have the obvious fact of mistaken identity acknowledged, let alone addressed, by a higher court for more than seven months, in blatant disregard of the statutory time-limit of thirty days; and (iii) when, at last, the mistake is discovered, that person is granted no compensation for being victimised. Not even an apology.

No prejudice at all?

In other words, if the right to a fair hearing has not been violated in such a situation, then that hearing was fair.

Fair?!

12. The Government submitted that "the applicant had had access to a remedy and had been *successful* in using it" (see paragraph 162 of the judgment – emphasis added; see also paragraph 103).

The majority seem to agree with such an approach.

Well, in the end the applicant was "successful" in the sense that the "preventive" measures were quashed. But can the Court close its eyes to the fact that the applicant had been unsuccessful on so many other occasions? He had not been successful in preventing the imposition of the impugned measures on him during the first set of court proceedings. He had not been successful in bringing his case to the higher court's attention for a period which was more than seven times in excess of the statutory time-limit. He had not been successful in the appellate court proceedings in the sense that he had not been granted any compensation or at least an apology from the authorities. In fact, what he did receive was the complete opposite of an apology: the Government averred that the Bari Court of Appeal "had *not* acknowledged that there had been a case of mistaken identity", but had "simply reassessed all the evidence on which the District Court's decision

had been based [and concluded] that the applicant did not pose a danger to society" (see paragraph 103; emphasis added).

Is this what from now on will be called "success"?

Maybe in jurisprudence, but not in life. Which would be to the detriment of jurisprudence.

13. As to the alleged violation of Article 13, some arguments in favour of finding a violation have already been set out above. The fact that the time-limit for the judicial review to which the applicant was entitled under the domestic legislation was exceeded to such an extent speaks for itself. But the fact that the applicant was not awarded any compensation for the "preventive" measures that were imposed on him and then quashed *ex tunc* by the Bari Court of Appeal (see paragraph 20 of the judgment) speaks even more strongly in favour of a violation of Article 13. Had these measures had *any* basis in law at the time of their imposition, they probably would not have been quashed *ex tunc*.

14. Now I come to the fundamental divergence between the approaches of the majority and myself. This divergence pertains to the reasoning which leads to the finding of a violation of Article 2 of Protocol No. 4. And it has a lot to do with the use, in this opinion, of the word "preventive" in quotation marks.

15. In paragraph 110 of the judgment it is stated that "Act no. 1423/1956, as interpreted in the light of the Constitutional Court's judgments, formed the legal basis for the individual preventive measures imposed on the applicant" and that "therefore ... the preventive measures in issue *had a legal basis in domestic law*" (emphasis added).

No, no, no, and again no.

The Act in question, whatever its deficiencies (many of them are rightly noted in the judgment, and, as a matter of principle, I do agree with this assessment), speaks of the "preventive" measures which can be applied to three types of *individuals*: (i) "who, *on the basis of factual evidence*, may be regarded as habitual offenders"; (ii) "who, on account of their behaviour and lifestyle and *on the basis of factual evidence*, may be regarded as habitually living, even in part, on the proceeds of crime"; and (iii) "who, *on the basis of factual evidence*, may be regarded as having committed offences endangering the physical or mental integrity of minors or posing a threat to health, security or public order" (emphasis added). The cumulative name for these three types of individuals is "persons presenting a danger for security and public morality" (see paragraphs 33 and 34 of the judgment).

Neither the said cumulative category, nor any of the three sub-categories constituting it include, even indirectly, an individual who has been *mistaken*, by the authorities, *for another person*, whom the authorities rightly or wrongly consider to "[present] a danger for security and public morality". For the purposes of the Act, the "factual evidence" collected against Mr Roe cannot mechanically be held to have been collected against

Mr Doe who had been *mistaken* for Mr Roe. And this is so irrespective of whether or not Mr Doe has a criminal record or a history of other offences. Of course, it may happen that while collecting factual evidence against Mr Roe the authorities come across something which would also incriminate Mr Doe, but even in such an event not only must the latter be identified directly and properly, but also what has been collected against Mr Roe cannot be automatically and indiscriminately held against Mr Doe.

And the Constitutional Court, moreover, had never interpreted the Act (at least directly, but also, it appears, implicitly) in such a way that it would allow the "wrong" person to be treated as someone who "[presents] a danger for security and public morality" within the meaning of section 1 of the Act.

16. Thus, *the Act was not at all applicable to the applicant*.

The "preventive" measures imposed on him resulted from a mistake. This was acknowledged by the Bari Court of Appeal, which quashed the impugned measures *ex tunc* (see paragraphs 20 and 26 of the judgment).

It is as plain as that. They got the wrong man.

Mistaken identity is mistaken identity. Period.

17. Again, I must repeat myself (see paragraph 1 above). "*Preventive*" measures *proper* can be lawfully applied only to someone who has to be "prevented" from doing something. If there is no factual basis justifying the need for "prevention" with regard to a particular person, the restrictive measures imposed on that person can hardly be considered "preventive" in the true sense of this term.

18. Not only the rule of law, but also common decency requires that when a mistake is discovered whereby serious restrictions are imposed on a person mistaken for another person against whom "factual evidence" had been collected, the authorities say "oops!", apologise, close the case a.s.a.p. and compensate the "wrong" person for whatever damage he or she may have sustained. This should be so unless we live in some alternate reality, where the law applied has nothing to do with the facts to which it is applied.

Needless to say, that parallel world would not be one governed by the rule of law.

19. However (as has already been mentioned in paragraph 12 above), the Government averred that the Bari Court of Appeal "had not acknowledged that there had been a case of mistaken identity", but had "simply reassessed all the evidence on which the District Court's decision had been based [and concluded] that the applicant did not pose a danger to society" (see paragraph 103 of the judgment), as if *that* evidence could have any connection to the applicant. From this assertion it transpires that the respondent Government still have some way to go until they ascertain for themselves the simple truths commanding what the authorities should do in a case of mistaken identity.

20. In view of the gross mistake underpinning everything that ensued in the applicant's situation, jurisprudential considerations as to whether the

Act was "accessible" or sufficiently "foreseeable" to the applicant, whether or not it was "vague", "precise" or "clear", and whether the guidance for the applicant as to what his conduct should be was "sufficient" are completely immaterial. They are not needed for holding that the impugned "preventive" measures were imposed on the applicant without any legal basis.

21. Thus, although I concur with the majority that there has been a violation of Article 2 of Protocol No. 4, I strongly disagree with the reasoning leading to that finding. This reasoning replaces the issue of the application of the Act *to the applicant's concrete situation* with that of the "quality of the law". The latter problem is then "solved" in such a way as if this Court were a constitutional court whose task is to examine the compliance of statutes with some higher law, irrespective of to whom and how these statutes are applied and even irrespective of whether or not they are applied at all. In other words, this reasoning replaces the *real* problem which *this* applicant *indeed* encountered and which was presented before the Court with the general problem of the pros and cons of the legal regulations as such. Although (again) I cannot but concur with the majority in their critical assessment of the insufficient foreseeability of the provisions applied (a finding which could be useful for deciding on the hypothetical claims of other persons to whom this Act might be applied), all this has little to do with *this* applicant's case. *This* applicant's freedom of movement has been violated not because an "insufficiently foreseeable" or "insufficiently clear" law, "couched in vague and excessively broad terms", was applied to his situation, but because of the very fact that that law, which allowed for restrictions on freedom of movement (not to mention deprivation of liberty as such), *was applied to this* person when it should – under its own terms – not have been applied to him.

22. The majority state, in paragraph 125 of the judgment, that the law in question was not sufficiently clear and foreseeable to the "*individuals to whom preventive measures were applicable*" (emphasis added).

One could ask: by saying "applicable", do they *also* mean *the applicant*?!

I am afraid that the answer to this question, as suggested by the majority's reasoning, is anything but sanguine.