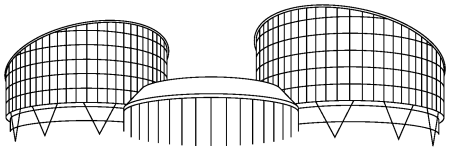

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF SINKOVA v. UKRAINE

(Application no. 39496/11)

JUDGMENT

STRASBOURG

27 February 2018

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

In the case of Sinkova v. Ukraine,

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

Vincent A. De Gaetano, *President,*
Ganna Yudkivska,
Faris Vehabović,
Egidijus Kūris,
Iulia Motoc,
Georges Ravarani,
Péter Paczolay, *judges,*
and Marialena Tsirli, *Section Registrar,*

Having deliberated in private on 19 December 2017,

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

PROCEDURE

1. The case originated in an application (no. 39496/11) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Ms Anna Olegovna Sinkova ("the applicant"), on 21 June 2011.

2. The applicant, who had been granted legal aid, was represented by Mr Arkadiy Bushchenko, Ms Yana Zayikina and Ms Tetiana Zhurba, lawyers practising in Kharkiv. The Ukrainian Government ("the Government") were represented by their Agent, most recently Mr Ivan Lishchyna, of the Ministry of Justice.

3. The applicant alleged that her detention had been in breach of Article 5 §§ 1, 3 and 5 of the Convention. She also complained of a violation of her right to freedom of expression under Article 10.

4. On 1 December 2014 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1991 and lives in Kyiv.

6. At the time of the events she belonged to an artistic group called the St Luke Brotherhood, which was known for its provocative public performances.

7. On 16 December 2010 the applicant, together with three other members of the above-mentioned union, made what she described as an "act of performance", which, according to both parties' accounts, consisted of the following. They went to the Eternal Glory Memorial to those who perished in the Second World War, which contained the tombs of thirty-two soldiers, including that of an Unknown Soldier. The applicant took a frying pan prepared in advance, broke some eggs into it and fried them over the Eternal Flame at the Tomb of the Unknown Soldier. Two of her friends joined her and fried sausages on skewers over the flame. Another member of the group filmed the event. Two police officers approached them and made a remark that their behaviour was inappropriate, without further interference. On the same day the applicant posted the video on the Internet on behalf of the St Luke Brotherhood. It was accompanied by the following statement:

> "Precious natural gas has been being burned, pointlessly, at the Glory Memorial in Kyiv for fifty-three years now. This pleasure costs taxpayers about 300,000 hryvnias [UAH] per month. And this is only one 'eternal flame' pagan temple, whereas there are hundreds or even thousands of them throughout Ukraine. On 16 December the St Luke Brotherhood reacted to this by an act of protest in the Glory Park in the capital. It showed that people should use the 'eternal flame'.
>
> We suggest to the outraged representatives of the Communist Party of Ukraine to follow the example of ancient Roman vestal virgins and to carry out around-the-clock duty at the 'eternal flames', keeping the fire lit manually by wood. There is no doubt that communists will have no problems with fulfilling this task, because they already have experience of taking care of the Lenin monument in Kyiv and their financing is much better than that which the vestal virgins had."

8. While the parties did not provide a copy of the video in question to the Court, it was possible to view it on several publicly available websites. In addition to the factual account from the parties summarised above, the Court notes that the soundtrack to the video was a famous 1974 Soviet song "The battle is going on again" (devoted to the victory of the 1917 revolution and optimism about the future of the communist regime). The video started with the following opening titles: "The St Luke Brotherhood presents", "Recipe of the day", "Eternal fried eggs on the eternal flame". The participants in the performance did not make any public address and their conversation was not audible. They had no posters or other visual aids, apart from the food and cooking utensils. It could be seen on the video that once the applicant had broken the eggs in the frying pan and was about to approach the fire, while her friends held skewers with sausages, the two police officers appeared and the applicant explained something to them and they left. In order to reach the flame the applicant had to step over a sculpture of a wreath of oak leaves and step on the words "Glory to the Unknown Soldier".

9. There were several complaints to the police that the action on the video had amounted to desecration of the Tomb of the Unknown Soldier and called for criminal prosecution.

10. On 21 December 2010 the police questioned D., one of the women who had participated in the performance. She submitted that she had not known the other members of the group and that she had met them by chance. As they had allegedly explained to her, they had been hungry and had intended to cook food in order to eat it.

11. On the same day criminal proceedings were instituted against D. and three unidentified persons on suspicion of hooliganism.

12. On 23 December 2010 D. wrote a confession that she had participated in a protest against inappropriate use of natural gas and that she regretted it. She knew only the first names of the other participants.

13. On 24 December 2010 another criminal case was opened against her and three unidentified persons in respect of the same event, this time on suspicion of desecration of a tomb. It was joined to that opened earlier. Subsequently the charge of hooliganism was dropped.

14. The police retrieved photos of several persons who might have been involved in the incident from the passport office's database and showed them to D. She recognised the applicant.

15. On 5 February 2011 the investigator questioned the applicant's grandmother and mother, who lived at the address of the applicant's registered residence. They submitted that they knew nothing about her involvement in the event in question. They also stated that the applicant did not in fact live there and denied knowing her whereabouts or having her contact details. They only knew that she had left for western Ukraine, without further details. The grandmother stated that the applicant had visited her about two weeks earlier. The applicant's mother had seen her about a week earlier and had received a telephone call from her two days earlier.

16. On 18 February 2011 the investigator severed the criminal case in respect of the applicant and two unidentified persons on suspicion of desecration of the Tomb of the Unknown Soldier by a group following a prior conspiracy.

17. On the same day the applicant was declared wanted by the police.

18. On 17 March 2011 the investigator applied to the Pecherskyy District Court of Kyiv ("the Pecherskyy Court") for the applicant's detention as a preventive measure pending trial. His arguments were as follows: the offence of which the applicant was suspected was punishable by a prison term of more than three years; the applicant had absconded, as a result of which she had been declared wanted by the police; and she could reoffend or hinder the establishment of the truth if at liberty.

19. On 25 March 2011 a judge of the Pecherskyy Court allowed that application in part: he ordered the applicant's arrest with a view to bringing her before the court for examination.

20. On 29 March 2011 at 9 p.m. the applicant was arrested at the flat of a certain Z. in Kyiv. As the latter subsequently stated during her questioning, the applicant had been living there from 25 March 2011 at the request of an acquaintance.

21. On 31 March 2011 the applicant was questioned as an accused in the presence of her lawyer. While insisting that her only intention had been to protest against the inappropriate use of natural gas, she confessed to the offence and expressed remorse.

22. On the same day the investigator once again applied to the Pecherskyy Court for the applicant's detention as a preventive measure. His reasoning was the same as before.

23. On 31 March and 1 April 2011 two deputies of the Kyiv Regional Council applied to the Pecherskyy Court for the applicant's release in exchange of their personal guarantee of her adequate procedural behaviour.

24. On 1 April 2011 the Pecherskyy Court remanded the applicant in custody as a preventive measure pending trial. It noted that she was accused of a serious offence punishable by imprisonment of from three to five years. Furthermore, the judge referred to the fact that the applicant had absconded and had therefore been put on the wanted list. It was also considered that she might hinder establishing the truth if at liberty. In so far as the applicant's lawyer relied on her positive character references from various sources, the court noted that those could not guarantee her compliance with all the procedural requirements. While having noted that the applicant also relied on the letters of personal guarantee from the people's deputies, the judge did not further comment on them. It was specified in the ruling that the term of the applicant's detention was to be calculated from 29 March 2011. Under the applicable legislation, the duration of pre-trial detention was limited to two months, with the possibility of further extensions.

25. The applicant's lawyer appealed. He submitted that his client was willing to cooperate with the investigation and that there were no reasons for her detention. It was further pointed out in the appeal that the applicant had been declared wanted by the police on the very same day the criminal case against her had been opened. The lawyer noted that there had not been a single summons sent by the investigation to the applicant's address prior to her arrest. According to her, she had found out about the charge against her only on the day of her arrest on 29 March 2011. Lastly, the lawyer submitted that the first-instance court had not considered any less intrusive preventive measures as an alternative to detention and that it had left without consideration the people deputies' letters of guarantee.

26. On 11 April 2011 the Kyiv City Court of Appeal rejected the above appeal. It noted that the Pecherskyy Court had already duly examined all the arguments raised in it.

27. On 25 May 2011 the applicant was indicted. On the same day the case was sent to the Pecherskyy Court for trial.

28. On 10 June 2011 the applicant applied to the court for release under an undertaking not to abscond. She submitted that she enjoyed positive character references, had no criminal record and had cooperated with the investigation. Furthermore, the applicant observed that by that time the investigation had already been completed and could not therefore be hampered. She emphasised that her actions had been nothing else than a protest driven by good motives. Several members of parliament and other prominent figures joined her in that application and expressed their wish to act as her personal guarantors.

29. On 17 June 2011 the Pecherskyy Court held a preparatory hearing, during which it rejected the applicant's application for release with reference to the seriousness of the charge against her, "the nature and the circumstances of the offence of which she [was] accused", as well as the fact that she had been declared wanted by the police. The judge also stated, in general terms, that there were no grounds for the applicant's release under a personal guarantee.

30. On 30 June 2011 the applicant applied once again to be released. On the same day the Pecherskyy Court allowed that application and released her under an undertaking not to leave the town.

31. On 4 October 2012 the Pecherskyy Court found the applicant guilty of the desecration of the Tomb of the Unknown Soldier, acting as part of a group of persons following a prior conspiracy. The court noted that the applicant had convinced D. and two other people, whose identities remained unestablished, to carry out a performance at the "Eternal Glory" memorial aimed at protesting against the waste of natural gas caused by the burning of the Eternal Flame. D., who was questioned in court, confirmed that account of events. The court also questioned the memorial keeper, who had witnessed the performance from a distance, and the two police officers who had spoken to the applicant and her friends (see paragraph 7 above). Furthermore, the court examined the video-recording of the performance as material evidence.

32. The judgment mentioned the statement made by the applicant during the hearing that in her opinion people bringing flowers to the memorial did not really understand what exactly it was dedicated to. She insisted that she had not committed any crime as her performance had not been meant to desecrate the Tomb of the Unknown Soldier. Furthermore, she maintained that there could not be a tomb beneath the Eternal Flame because of the gas pipe.

33. The Pecherskyy Court held that the applicant's arguments had no impact on the legal classification of her actions and that they were refuted by the evidence as a whole. The judgment further stated in that regard:

> "... the court considers that by committing deliberate acts in a group which showed disrespect for the burial place of the Unknown Soldier and for the public tradition of honouring the memory of soldiers who perished defending or liberating Kyiv and the

> lands of Ukraine from the fascist hordes, and by subsequently presenting those actions as a protest, [the applicant] has tried to escape social condemnation of her conduct and criminal liability for the offence."

34. Relying on local authority documents, the court dismissed the applicant's submission that there was no established location for the Tomb of the Unknown Soldier.

35. The court did not discern any aggravating or mitigating circumstances in the case. At the same time, in deciding on the penalty, it took into account, on the one hand, the fact that the applicant did not have a criminal record, that she was working as a political analyst and got positive character references by her place of residence and work. On the other hand, the court noted that the criminal offence in question was of medium gravity and that the applicant did not show any remorse for what she had done. As a result, she was sentenced to three years' imprisonment, suspended for two years.

36. On the same date the Pecherskyy Court exempted D. from criminal liability under the surety of her employer.

37. The applicant appealed. Relying on the definition of the desecration of a burial place under the Burial and Funeral Business Act (see paragraph 47 below), she maintained that in the absence of any intention by her to "defile the family or social memory of a deceased or to show contempt for a burial place, or social and religious principles and traditions", there were no constituent elements of a crime in her actions. The applicant reiterated her argument that her performance had been nothing more than a protest. Lastly, she submitted that the criminal proceedings against her had violated her right to freedom of expression under Article 10 of the Convention.

38. The prosecutor also appealed, considering the sentence to be too lenient.

39. On 18 December 2012 the Kyiv City Court of Appeal upheld the judgment of the first-instance court. It stated that desecration of a tomb could have different expressions, indicating an insulting attitude, mockery or disrespect towards a tomb or the person buried therein, regardless of the stated motives. As regards the applicant's argument on her right to freedom of expression, the court noted that that right was not unlimited and that the restriction in the applicant's case was in accordance with the law and pursued a legitimate aim. The appellate court also rejected the prosecutor's appeal.

40. The applicant further reiterated her arguments in an appeal on points of law lodged by her, which was, however, rejected by the Higher Specialised Court for Civil and Criminal Matters on 11 April 2013.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Applicable legislation and relevant legal opinions

41. Article 9 § 1 of the Constitution of Ukraine provides that international treaties which are in force and agreed on as binding by the Verkhovna Rada (parliament) of Ukraine are part of the national legislation.

42. Article 34 of the Constitution, enshrining the right to freedom of expression, can be found in the Court's judgment in the case of *Lykin v. Ukraine* (no. 19382/08, § 15, 12 January 2017).

43. The relevant provisions of the Code of Criminal Procedure of 1960 (in force and as worded at the material time) concerning preventive measures are quoted, in particular, in the Court's judgment in the case of *Strogan v. Ukraine* (no. 30198/11, § 45, 6 October 2016).

44. Article 297 of the Criminal Code of 2001 (as amended on 19 March 2009) read as follows:

> "1. Desecration of a tomb or other burial place, as well as defilement of a corpse (remains, ashes), desecration of an urn containing ashes of a deceased, or illegal seizure of a corpse (remains, ashes, of an urn containing ashes of a deceased, of objects from a tomb or from any other burial place or on a corpse (remains, ashes), shall be punished with a fine in the amount of up to two hundred non-taxable minimum [monthly salaries] or with arrest for up to six months, or with restriction of liberty for up to three years or imprisonment for that period.
>
> 2. The same actions committed repeatedly, or following a prior conspiracy by a group of persons, or driven by lucrative or hooligan motives, or committed in respect of a common tomb or a Tomb of the Unknown Soldier, or combined with violence or its threat, shall be punishable with restriction of liberty for from three to five years or imprisonment for the same period.
>
> 3. Actions referred to in the above paragraphs, if they led to serious consequences, shall be punished with imprisonment from five to twelve years."

45. Article 66 of the Criminal Code contains a non-exhaustive list of mitigating circumstances. It also states that a court may consider any other mitigating circumstance not indicated in that list when imposing a penalty. Under Article 69, a court may impose a more lenient penalty than that envisaged by law subject to several mitigating circumstances reducing the gravity of the offence and having regard to the offender's character.

46. The "Scientific and Practical Commentary on the Criminal Code of Ukraine" (*Науково-практичний коментар Кримінального кодексу України, 7-ме вид., перероблене та доповнене / За ред. М.І. Мельника та М.І. Хавронюка. – Київ: Юридична думка*, 2010) states, in respect of Article 297, in particular, as follows:

> "The object (target) of the crime is the moral foundations of society as regards respect towards the dead and their burial places. This crime causes non-pecuniary damage, in particular, to those who are close to the deceased, it violates public order, can entail interethnic and inter-confessional conflict, and has a negative impact on the

education of teenagers. The attitude of people towards the dead is probably one of the most telling illustrations of the difference between civilisation and savagery, which also reflects a person's attitude to other social values. ...

The *actus reus* of the criminal offence is ... desecration of a tomb or other burial place ...

Desecration is an insulting attitude, brutal mockery, or a demonstration of contempt towards a burial place or the ashes of the deceased. The law does not specify the ways in which desecration can be committed. It could be: profanation, including the placing of indecent inscriptions or drawings or soiling [the tomb] with excrement, the destruction of sepulchral constructions; the excavation of burial places, corpse dissection or destruction or tearing off its clothing. Desecration is characterised by an objective element – that is, the commission of certain acts in respect of a deceased or a burial place, and by a subjective element – that is, realising that those acts amount to contempt for the memory of the deceased which violate the principles of public life in that area. Most often, desecration takes the form of an action. However, it cannot be ruled out that it could stem from an omission – for example, not interfering with the behaviour of domestic animals digging into a tomb or relieving themselves on it.

The *mens rea* of the crime is characterised by guilt in the form of intent. The guilty person realises that he/she: (a) is committing an infringement in relation to a tomb, other burial place or a corpse; (b) foresees that his/her actions will cause moral suffering to others and violate the moral foundations of society in respect of attitudes to the dead; (c) wishes to show his/her contempt for the memory of the deceased and to demonstrate his/her negative attitude towards the public principles prevailing in that area (that is, acts of direct intention); or is conscious of such an assumption (that is, acts of indirect intention).

This crime is classified as aggravated if it has been committed:

...

- following a prior conspiracy by a group of persons;

- for hooligan ... motives. ... Hooligan motives arise where the guilty person wishes to demonstrate his/her contempt for the generally recognised norms and rules of people's attitudes towards the dead and their burial places, boasts of his/her pseudo-bravery, or seeks to assert himself/herself in the eyes of surrounding people by humiliating others and their feelings. In other words, they are motives which are considered, from the viewpoint of public morality, as disgraceful and ignoble, aiming to create conflict between an individual and society. Hooligan motives also stem from racial, ethnic or religious intolerance, different approaches to assessing historical events and so on;

- in respect of ... a Tomb of an Unknown Soldier. ... A Tomb of an Unknown Soldier is a military memorial dedicated to those who perished in an armed conflict. It includes the place of burial itself and a memorial sign. 'Soldier' is a generic term referring to any military official, officer, sailor, or law-enforcement agent who died in action or in armed conflict. [It does not matter] on whose side the deceased participated in the events leading to their deaths. Nor is it of relevance how society or particular individuals assess the respective wars or other social cataclysms and the role of participants in them ..."

47. Section 2 of the Burial and Funeral Business Act of 2003 (with further amendments) defines the desecration of a tomb or other burial place as follows:

"- the placing of unauthorised inscriptions, drawings, symbols or other images at cemetery facilities designated for burial and commemoration ceremonies, on sepulchral constructions, vaults, urns with ashes, tombs and other burial places;

- wilfully damaging, the excavation, demolition or destruction by other means of cemetery facilities designated for burial and commemoration ceremonies, sepulchral constructions, vaults, urns with ashes, tombs and other burial places;

- the use of cemetery facilities designated for burial and commemoration ceremonies, sepulchral constructions, vaults, urns with ashes, tombs and other burial places for a purpose not envisaged by the legislation in force, their unauthorised use, or the commission of any other acts intended to defile the family or public memory of the deceased or to show contempt for the burial place, or the social and religious principles and traditions in that area; ..."

48. Under section 32 of the law, persons guilty of desecrating a tomb or other burial place are held liable in accordance with the law.

49. Under the Law On the Procedure for the Compensation of Damage caused to Citizens by the Unlawful Actions of Bodies in charge of Operational Enquiries, Pre-trial Investigation Authorities, Prosecutors or Courts of 1994 (as worded at the material time, also known as "the Compensation Act"), a person was entitled to compensation for damage on account of, in particular, unlawful detention (section 1). A precondition for the entitlement to compensation was "a finding of ... unlawfulness of arrest and detention in a guilty verdict or other judicial decision" (section 2).

B. Case-law of domestic courts cited by the applicant

50. The applicant submitted to the Court copies of seven judgments delivered by local courts on various dates between 2007 and 2013, by which people had been found guilty of desecrating tombs after taking metal parts and trading them as scrap. The sentences were as follows (from the most lenient to the harshest):

- two years' restriction of liberty, suspended for two years;
- three years' restriction of liberty, suspended for one year;
- one year and six months' restriction of liberty;
- one year and six months' imprisonment, suspended for one year;
- three years' imprisonment, suspended for two years and six months;
- three years' imprisonment; and
- three years and six months' imprisonment.

III. RELEVANT INTERNATIONAL TEXTS

51. The summary of the position of the Supreme Court of the United States of America in respect of the controversial conduct of cross burning, as formulated in its decision on the case of *Virginia v. Black*, can be found

in the Court's judgment in the case of *Fáber v. Hungary*, no. 40721/08, § 18, 24 July 2012.

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 5 OF THE CONVENTION

52. The applicant complained that her initial arrest and subsequent detention had been in breach of Article 5 §§ 1, 3 and 5 of the Convention. The provisions relied on read as follows in the relevant parts:

> "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:
>
> ...
>
> (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;
>
> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
>
> ...
>
> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

A. Admissibility

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

B. Merits

1. Alleged violation of Article 5 § 1 of the Convention

(a) The parties' submissions

54. The applicant argued that there had been neither any legal basis nor practical need for her arrest. Given the vague wording of Article 297 of the Criminal Code, it was far from obvious that her actions amounted to

desecration of a tomb. Accordingly, her arrest could not be regarded as based on a reasonable suspicion that she had committed a crime.

55. The applicant next contended that she had never absconded. As she had been nineteen years old, she had been free not to live with her parents or grandparents. She considered that there had been no genuine attempt by the investigation to contact her before declaring her wanted by the police. Thus, according to her, it had been open for the investigator to contact her as the author of the video in question via the indicated site. In the alternative, he could have asked the applicant's relatives or friends for her email address. Furthermore, as she had been a university student, she could have easily been reached through her university contacts. Lastly, the investigator could have summonsed her through her mother or grandmother. However, none of those actions had been undertaken.

56. Furthermore, the applicant complained that her detention from 29 May to 17 June 2011 had not been covered by any judicial decision.

57. The Government maintained that the applicant's arrest had been in compliance with national legislation and accompanied by all the requisite safeguards. They argued that the authorities had had good reasons to believe that she had been absconding given the fact that she had not been living at her registered address and her whereabouts had not been known.

58. The Government further submitted that the arrest order with a view to bringing the applicant to court had been aimed at ensuring compliance with the equality-of-arms principle and enabling her to respond to the investigator's arguments.

59. Lastly, as regards the particular period of the applicant's pre-trial detention from 29 May to 17 June 2011, the Government observed that it had been based on the applicable legal provisions and could not be regarded arbitrary.

(b) The Court's assessment

(i) General case-law principles

60. The Court reiterates that in order to comply with Article 5 § 1, the detention in issue must first of all be "lawful", including the observance of a procedure prescribed by law; in this respect the Convention refers back essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof. It requires in addition, however, that any deprivation of liberty should be consistent with the purpose of Article 5, namely to protect individuals from arbitrariness. Furthermore, the detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is in conformity with national law; it

must also be necessary in the circumstances (see *Hadžimejlić and Others v. Bosnia and Herzegovina*, nos. 3427/13 and 2 others, § 52, 3 November 2015, with further references).

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

(α) Lawfulness of the applicant's arrest

61. In assessing the lawfulness of the applicant's arrest, the Court attaches weight, firstly, to the fact it was based on a judicial order, and, secondly, to the limited scope of that order, which was aimed at ensuring her presence at the hearing with a view to examination of the investigator's application for her detention.

62. As regards the necessity of that measure in the circumstances, the Court notes that one of the main reasons for the applicant's arrest was the fact that she had been declared wanted by the police.

63. The Court has held in its case-law that the mere fact of being on a "wanted list" does not mean that the person has gone into hiding. The important factor in measuring the risk of absconding is the actual behaviour of the suspect, and not his formal status as a "person on a wanted list" (see *Yevgeniy Gusev v. Russia*, no. 28020/05, § 85, 5 December 2013).

64. The Court is not convinced by the applicant's argument that the decision to put her on a wanted list was hasty and unnecessary and that the police had not made sufficient efforts to contact her. It is not in dispute that her actual whereabouts were unknown to the police. Her family members living at the address of her registered residence denied having that information when questioned on 5 February 2011. It is unclear how the police could have been more efficient in their attempts to reach her by email or through her university contacts. Even less convincing is the applicant's suggestion that she could have been directly contacted as the author of the video on the Internet, given that her identity had first to be established through investigation (see, for example, paragraph 14 above). The Court also has doubts as regards the applicant's submission that she had not been aware of the criminal proceedings against her until her arrest on 29 March 2011. As confirmed by the case-file material, she was in touch with her family members, who had been questioned by the police on 5 February 2011 in respect of her involvement in the incident under investigation.

65. Accordingly, having regard to all the circumstances of the present case, the Court does not see any indication of unlawfulness or arbitrariness as regards the applicant's arrest.

66. There has therefore been no violation of Article 5 § 1 of the Convention in this regard.

(β) Lawfulness of the applicant's detention from 29 May to 17 June 2011

67. The Court observes that the applicant's detention, which had been ordered by the judicial decision of 1 April 2011, expired on 29 May 2011. Meanwhile, on 25 May 2011, the case had been referred to the first-instance court for trial. On 17 June 2011 the Pecherskyy Court held its preparatory hearing, at which it ordered the applicant's further detention as a preventive measure. It follows that her detention between 29 May and 17 June 2011 was not covered by any judicial decision.

68. The Court has already found a violation of Article 5 § 1 of the Convention in a number of cases concerning the practice of holding defendants in custody solely on the basis of the fact that a bill of indictment has been submitted to the trial court. It has held that the practice of keeping defendants in detention without a specific legal basis or clear rules governing their situation – with the result that they may be deprived of their liberty for an unlimited period without judicial authorisation – is incompatible with the principles of legal certainty and the protection from arbitrariness, which are common threads throughout the Convention and the rule of law (see, for example, *Yeloyev v. Ukraine*, no. 17283/02, § 50, 6 November 2008). The Court has also concluded that this issue seemed to stem from a legislative lacuna in Ukraine (see *Kharchenko v. Ukraine*, no. 40107/02, §§ 70-72 and 98, 10 February 2011).

69. Having regard to its well-established case-law, the Court finds that there has been a violation of Article 5 § 1 of the Convention in respect of the applicant's detention from 29 May to 17 June 2011.

2. Alleged violation of Article 5 § 3 of the Convention

70. The applicant complained that her continued pre-trial detention had been unjustified.

71. The Government contended that it had been based on relevant and sufficient reasons. They observed that, once that preventive measure had no longer been required, the applicant had been released under an undertaking not to abscond.

72. The Court notes that the applicant's pre-trial detention in the present case lasted from 29 March to 30 June 2011, that is to say for three months.

73. The Court reiterates that the issue of whether a period of detention is reasonable cannot be assessed *in abstracto*. This must be assessed in each case according to its special features, the reasons given in the domestic decisions and the well-documented matters referred to by the applicant in his applications for release. Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty (see, among others, *Labita v. Italy* [GC], no. 26772/95, § 153, ECHR 2000-IV).

74. Turning to the present case, the Court observes that, in extending the applicant's detention and rejecting her applications for release, the domestic courts mainly referred to the reasoning for her initial placement in detention, without any updated details. Furthermore, no consideration seemed to be given to the numerous letters of personal guarantee in support of her release. At no stage in the period under consideration did the domestic courts consider applying any alternative preventive measures, and by relying essentially on the seriousness of the charge and the hypothetical risk of the applicant's absconding, the authorities maintained her detention on grounds which cannot be regarded as sufficient.

75. The Court notes that eventually, on 30 June 2011, the applicant was released under an undertaking not to leave the town. In the Court's opinion, this or a less intrusive preventive measure could have been applied to her earlier; at least, the reasons given by the domestic courts in justifying her continued detention did not suggest any indication to the contrary.

76. The foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of Article 5 § 3 of the Convention.

3. Alleged violation of Article 5 § 5 of the Convention

77. The applicant complained that, under the existing legislation, she could not claim compensation in respect of the breach of her rights under Article 5 §§ 1 and 3 of the Convention.

78. The Government submitted that the Ukrainian legislation provided for the possibility to claim compensation for unlawful detention subject to a judicial decision acknowledging such unlawfulness. It was not, however, applicable to the circumstances of the present case, because the applicant's detention had been lawful.

79. The Court reiterates that Article 5 § 5 guarantees an enforceable right to compensation to those who have been the victims of arrest or detention in contravention of the other provisions of Article 5 (see *Stanev v. Bulgaria* [GC], no. 36760/06, § 182, 17 January 2012, with further references, and *Lelyuk v. Ukraine*, no. 24037/08, § 50, 17 November 2016).

80. In the present case the Court has found a violation of Article 5 §§ 1 and 3, in conjunction with which the present complaint is to be examined. It follows that Article 5 § 5 of the Convention is applicable. The Court must therefore establish whether Ukrainian law afforded or now affords the applicant an enforceable right to compensation for that violation in her case.

81. The Court observes that the issue of compensation for unlawful detention is regulated in Ukraine by the Compensation Act. The right to compensation arises, in particular, where the unlawfulness of the detention has been established by a judicial decision (see paragraph 49 above).

82. The Court notes that, as long as the applicant's detention is in formal compliance with the domestic legislation, it is impossible for her to claim compensation in that regard at the national level. Furthermore, there is no

legally envisaged procedure in Ukraine for bringing proceedings to seek compensation for the deprivation of liberty found to be in breach of one of the other paragraphs by the Strasbourg Court (see *Nechiporuk and Yonkalo v. Ukraine*, no. 42310/04, § 233, 21 April 2011).

83. This means that one of the principles of Article 5 § 5 – namely, that the effective enjoyment of the right to compensation guaranteed by it must be ensured with a sufficient degree of certainty (see *Stanev*, cited above, § 182) – does not appear to have been met in the present case.

84. There has therefore been a violation of Article 5 § 5 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

85. The applicant complained of a violation of her right to freedom of expression. Although she relied on Articles 7, 10, 11 and 18 of the Convention, the Court considers it appropriate to examine her complaint only under Article 10, which reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. Admissibility

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

B. Merits

1. The parties' submissions

(a) The applicant

87. The applicant submitted that she had protested against wasteful use of natural gas and had tried to attract public attention to that issue. In her opinion, the funds used for maintaining eternal flames throughout the

country would better serve their purpose if used to improve the living standards of war veterans.

88. She emphasised that in no case she had meant to insult the memory of the dead or demonstrate a disrespectful attitude towards the tomb. The applicant observed that she had neither damaged the memorial nor breached public order. She also drew the Court's attention to the fact that she had not tried to conceal her actions. To the contrary, she had immediately posted the video on the Internet.

89. The applicant's lawyers further stated her position as follows:

> "The applicant believes that any impartial individual who would watch the abovementioned video and who would familiarise [himself] with the statement of the "St. Luke Brotherhood" would understand that the applicant performed an act that was intended to protest [against] the wasteful up-keep of the eternal flame, and was not an expression of contempt to the gravesite."

90. The applicant next argued that there was no conclusive evidence that the Tomb of the Unknown Soldier was located exactly beneath the Eternal Flame, on which she had fried eggs.

91. Overall, the applicant considered that she had wrongly been convicted of a criminal offence which she had not committed. She argued that the interference with her right to freedom of expression could not be regarded as lawful given the lack of clarity in the definition of that offence in the Criminal Code. As regards the definition of "desecration of a tomb" under the Law "On burial and funeral business", the applicant contended that it did attribute weight to the existence of respective criminal intentions, such as "to defile the family or public memory of the deceased or [to manifest] contempt towards the burial place, the social and religious principles and traditions in this area" (see paragraph 47 above). However, she maintained, no such intentions from her side had ever been established.

92. The applicant also submitted, in broad terms, that the judicial decisions taken in her case ran contrary to "the established jurisprudence on the subject". She cited in that regard several domestic judgments on tomb desecration cases (see paragraph 50 above).

93. Furthermore, the applicant maintained that her criminal conviction had not pursued any legitimate aim. According to her, its sole purpose was to punish her for the expression of her views.

94. The applicant also argued that the impugned interference had not been necessary in a democratic society given that the performance had already taken place and had not led to any negative consequences for anybody.

(b) The Government

95. The Government accepted that there had been an interference with the applicant's right to freedom of expression, but argued that it had been in compliance with paragraph 2 of Article 10 of the Convention.

96. They contended that Article 297 § 2 of the Criminal Code, under which the applicant had been convicted, was worded with sufficient precision. As stated therein, desecration of a tomb could consist of different actions and the motives behind were not essential.

97. In the Government's opinion, there were no reasons to doubt that the applicant's actions amounted to desecration of the Tomb of the Unknown Soldier. They noted that the Eternal Flame, on which the applicant had fried eggs, was a part of the memorial comprising thirty-two tombs of soldiers who had lost their lives during the Second World War. It was a sacred and symbolic place where every year war veterans gathered to commemorate their fallen comrades. Accordingly, the Government maintained that, regardless of her stated motives, the applicant's action had demonstrated disrespect and mockery and had been insulting for veterans and for those whose relatives had perished during the war.

98. The Government therefore argued that the applicant's conviction had pursued a legitimate aim, namely protection of morals and others' rights.

99. As to whether it was necessary in a democratic society, the Government drew the Court's attention to the fact that the applicant's prison sentence had been suspended. Accordingly, the interference with her rights under Article 10 could not be regarded as disproportionate to the aim pursued.

2. The Court's assessment

100. It is not in dispute that there has been an interference with the applicant's right to freedom of expression in the present case. It remains to be seen whether that interference was prescribed by law, pursued a legitimate aim and was necessary in a democratic society.

(a) Prescribed by law

101. According to the Court's case-law, the expression "prescribed by law" entails, in particular, a requirement of foreseeability. A norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the person concerned to regulate his or her conduct: he or she needed to be able – if need be with appropriate advice – to foresee, to a degree that was reasonable in the circumstances, the consequences that a given action could entail. However, the Court has held that these consequences do not need to be foreseeable with absolute certainty, as experience showed that to be unattainable. Even in cases in which the interference with the applicants' right to freedom of expression had taken the form of a criminal "penalty", the Court has recognised the impossibility of attaining absolute precision in the framing of laws, especially in fields in which the situation changes according to the prevailing views of society, and has accepted that the need to avoid rigidity and keep pace with changing circumstances means that many laws are couched in terms which are to some extent vague and whose

interpretation and application are questions of practice (see, for example, *Perinçek v. Switzerland* [GC], no. 27510/08, §§ 131 and 133, ECHR 2015 (extracts), with further references).

102. In the present case the applicant was criminally prosecuted for desecrating the Tomb of the Unknown Soldier under Article 297 of the Criminal Code (see paragraph 44 above). The Court is not convinced by her argument that that legal provision was worded so vaguely that she could not foresee its applicability to her case. Indeed, it is neither possible nor reasonable to specify the behaviour that might be considered as amounting to desecration of a tomb in different circumstances. The Court therefore considers that the interference with the applicant's right to freedom of expression complied with the requirement of lawfulness.

(b) Legitimate aim

103. The Court also subscribes to the Government's view that the measure applied to the applicant pursued a legitimate aim of protecting morals and the rights of others.

(c) Necessary in a democratic society

(i) General principles

104. Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society" (see *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24, and, for a more recent reference, *Bédat v. Switzerland* ([GC], no. 56925/08, § 48, 29 March 2016). Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence the obligation on the State not to encroach unduly on their freedom of expression. Artists and those who promote their work are certainly not immune from the possibility of limitations as provided for in paragraph 2 of Article 10. Whoever exercises his or her freedom of expression undertakes, in accordance with the express terms of that paragraph, "duties and responsibilities"; their scope will depend on his or her situation and the means he or she uses (see, for example, *Vereinigung Bildender Künstler v. Austria*, no. 68354/01, § 26, 25 January 2007).

105. The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered in the exercise of their

discretion. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts (see *Bédat*, cited above, § 48).

106. Lastly, the fairness of the proceedings, the procedural guarantees afforded and the nature and severity of the penalties imposed are factors to be taken into account when assessing the proportionality of an interference with the freedom of expression guaranteed by Article 10 (see, among many other authorities, *Bestry v. Poland*, no. 57675/10, § 58, 3 November 2015, and *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], no. 17224/11, § 118, 27 June 2017).

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

107. Turning to the facts of the present case, the Court notes that the applicant carried out what she considered to be an artistic performance aimed at protesting against wasteful use of natural gas by the State while turning a blind eye to poor living standards of veterans (see paragraph 87 above). More specifically, she fried eggs on the Eternal Glory Memorial, had her actions filmed, prepared a statement explaining her position and posted the video with that statement on the Internet. However, the applicant was criminally prosecuted and convicted only on account of frying eggs over the Eternal Flame, which the domestic courts considered to have amounted to desecration of the Tomb of the Unknown Soldier, an offence under the Ukrainian Criminal Code. The charge against her concerned neither the subsequent distribution by her of the respective video nor the contents of the rather sarcastic and provocative text accompanying that video (see, in particular, paragraph 7 above).

108. In other words, the applicant was not convicted for expressing the views that she did or even for expressing them in strong language. Her conviction was a narrow one in respect of particular conduct in a particular place (compare *Maguire v. the United Kingdom* (dec.), no. 58060/13, 3 March 2015). Moreover, it was based on a general prohibition of contempt for the Tomb of the Unknown Soldier forming part of ordinary criminal law.

109. As regards the fairness of the proceedings and the procedural guarantees afforded, the Court notes that there is nothing in the case file which would suggest that the domestic courts erred in their assessment of the relevant facts or incorrectly applied domestic law. Moreover, while the

domestic courts paid little attention to the applicant's stated motives given their irrelevance for the legal classification of her actions, the Court notes that they did take into account the applicant's individual circumstances in deciding on her sentence. As regards the applicant's reference to domestic cases concerning factually different incidents of desecration (see paragraph 50 above), the Court does not see how her conviction was in contradiction with that case-law.

110. The Court cannot agree with the applicant's submission that her conduct at the memorial could not be reasonably interpreted as contemptuous towards those in whose honour that memorial had been erected. According to her logic, the only thing that mattered about the Eternal Flame was the natural gas required to keep it burning. However, eternal flames are a long-standing tradition in many cultures and religions most often aimed at commemorating a person or event of national significance, or serving as a symbol of an enduring nature. The one on which the applicant fried eggs is part of a monument commemorating soldiers who gave their lives defending their and the applicant's country during the Second World War. There were many suitable opportunities for the applicant to express her views or participate in genuine protests in respect of the State's policy on the use of natural gas or responding to the needs of war veterans, without breaking the criminal law and without insulting the memory of soldiers who perished and the feelings of veterans, whose rights she had ostensibly meant to defend.

111. In assessing the nature and severity of the penalty, the Court notes its conclusion in the case concerning imprisonment for pouring paint over statues of Atatürk that peaceful and non-violent forms of expression in principle should not be made subject to the threat of a custodial sentence (see *Murat Vural v. Turkey*, no. 9540/07, § 66, 21 October 2014). The Court observes, however, that in contrast to that case, where the applicant was imprisoned for over thirteen years, the applicant in the present case was given a suspended sentence and did not serve a single day of it (see paragraph 35 above).

112. Having regard to all the circumstances of the case, the Court considers that the restriction complained of is reconcilable with the applicant's freedom of expression.

113. The Court therefore concludes that there has been no violation of Article 10 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

114. 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

115. The applicant claimed 30,000 euros (EUR) in respect of non-pecuniary damage.

116. The Government contested that claim as unsubstantiated and exorbitant.

117. Having regard to all the circumstances of the present case and the nature of the violations found, the Court considers it appropriate to award the applicant EUR 4,000 in respect of non-pecuniary damage.

B. Costs and expenses

118. The applicant did not submit any claims under this heading apart from her request for legal aid. The Court therefore makes no award.

C. Default interest

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

FOR THESE REASONS, THE COURT

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

2. *Holds*, unanimously, that there has been no violation of Article 5 § 1 of the Convention in respect of the applicant's arrest;

3. *Holds*, unanimously, that there has been a violation of Article 5 § 1 of the Convention in respect of the applicant's detention from 29 May to 17 June 2011;

4. *Holds*, unanimously, that there has been a violation of Article 5 § 3 of the Convention;

5. *Holds*, unanimously, that there has been a violation of Article 5 § 5 of the Convention;

6. *Holds*, by four votes to three, that there has been no violation of Article 10 of the Convention;

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

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

Done in English, and notified in writing on 27 February 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli
Registrar

Vincent A. De Gaetano
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint partly dissenting opinion of Judges Yudkivska, Motoc and Paczolay is annexed to this judgment.

V.D.G.
M.T.

JOINT PARTLY DISSENTING OPINION OF JUDGES YUDKIVSKA, MOTOC AND PACZOLAY

We fully share the reasoning and conclusions in the judgment on all points related to Article 5 of the Convention. We respectfully dissent, however, from the majority's finding that Article 10 of the Convention was not violated in the present case.

Undoubtedly, the applicant's performance was extremely provocative, given the sensitive nature of war memorials. However, it is a firm stance of this Court, expressed more than forty years ago in *Handyside v. the United Kingdom* (7 December 1976, Series A no. 24), that freedom of expression "is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population".

Although we acknowledge that decisions concerning attacks on "a long-standing tradition in many cultures and religions ... aimed at commemorating a person or event of national significance" (paragraph 110) are hard for all courts, the reasons adduced by the national authorities to justify the restriction imposed on the applicant were not, in our view, "relevant and sufficient". In particular, we cannot agree that the national judicial authorities applied the principles embodied in Article 10 and that they based their decisions on a satisfactory assessment of the relevant facts.

First of all, we find that the analysis by the domestic courts was deficient for its failure to address the purpose of the applicant's performance and its satirical nature. The majority believe that since the applicant was convicted only on account of frying eggs over the Eternal Flame, and not for the subsequent distribution of the respective video and accompanying text, it cannot be said that she was convicted for expressing her views (see paragraph 107 of the judgment). We cannot share this view – she was convicted precisely for the performance as a whole. Two police officers who commented to her and her associates that their behaviour was inappropriate *did not* pursue the matter until after the subsequent posting of the video online and the relevant complaints.

The applicant belonged to an artistic group called the St Luke Brotherhood, which was known for its provocative public performances (paragraph 6). Their performance, as she explained, was aimed at drawing public attention to the incompatibility of the official pathos when it came to remembrance of the Second World War with the miserable situation of surviving war veterans. Together with other participants, she sought to highlight what they perceived as the superfluous nature of an eternal flame which, whilst honouring the sacrifices of those who fell in the service of their country, did little to support war veterans who desperately needed the State's limited resources. *Satura quidem tota nostra est* is the famous saying

of Quilitian describing the composite nature of this literary genre. Satire extended rapidly to all form of artistic expression mainly in the social and political arena. As Stanisław Jerzy Lec wittily mentioned in his *Unkempt Thoughts*, "there are times when satire has to restore what pathos has destroyed". This satirical performance necessarily included *filming* the process of frying eggs to be later put on the Internet with the relevant commentary. By filming and subsequently disseminating the video, supplemented by the song and text, the applicant and other participants chose to express their criticism through a rude and irreverent satire.

This Court's approach to freedom of artistic protests is clearly established in its case-law. In *Vereinigung Bildender Künstler v Austria* (no. 68354/01, § 33, 25 January 2007) the Court stated that:

> "satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Accordingly, any interference with an artist's right [or anyone else's right] to such expression should be examined with particular care."

(see also *Eon v. France*, no. 26118/10, § 60, 14 March 2013, and *Alves da Silva v. Portugal*, no. 41665/07, § 27, 20 October 2009). Such careful examination has not been afforded to the applicant, whose claim before the domestic courts that the criminal proceedings against her were contrary to Article 10 was not adequately considered. The majority dismissed the applicant's protest stating – in a surprisingly edificatory manner – that "there were many suitable opportunities for the applicant to express her views ... on the use of natural gas or responding to the needs of war veterans" (at paragraph 110), thus ignoring its intended message and purpose.

The applicant's satire had done exactly what this art frequently does: it transferred the viewer's attention from an object to its social context. An artistic gesture might demonstrate the conditionality of established value boundaries, but it does not reject them. In the context of freedom of speech, the US Supreme Court noted in the famous case of *Texas v. Johnson*, when holding that the desecration of the American Flag was protected speech under the First Amendment, that "symbolism is a primitive but effective way of communicating ideas"[1]. In a fast-moving world, it is not surprising that those who wish to highlight a particular cause or voice an opinion would have recourse to those symbolic acts and demonstrations which are

1. 491 U.S. 397, 405 (1989), citing *West Virginia State Board of Education v. Barnette* 319 U.S. 624, 632 (1943). In *Johnson*, the petitioner had been convicted for desecration of a venerated object under Texas state law (Tex. Penal Code Ann. § 42.09(a)(3) (1989)). Under the law, "'desecrate' means to deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action".

likely to gather a greater degree of attention and trigger a wider debate than might have been achievable with more conventional and established forms of protest. The relationship between art and the conveyance of opinions is a complicated one; and whilst art should not be reduced to an opinion, art quite often relates to the expression of an opinion.

In the present case, the Soviet song with a repeated refrain ("The battle is going on again and again") as a soundtrack to the video also underlines the satirical nature of the protest, and is self-explanatory – the protesters were criticising, in their view, the hypocritical behaviour of authorities who do not want to accept that the battle is already over and that it is time to propose real and not illusory care of those who handed the victory. The applicant's actions, and those of her associates, undoubtedly generated significant controversy and offence among many of those who became aware of it, due perhaps to its perceived bad taste, but their aim was the opposite: in the words of George Orwell, "the aim of the joke is not to degrade the human being, but to remind him that he is already degraded".

The matter received extensive coverage in the media and online. Yet it must be emphasised that it is not the applicant's opinions which have shocked and angered others, but rather the manner in which she chose to communicate them. To our regret, neither domestic courts nor this Court commented on the satirical nature of the performance. Moreover, the domestic courts paid little attention to the applicant's stated motives given their irrelevance for the legal classification of her actions, although a little scope under Article 10 § 2 for restrictions on freedom of expression in the area of political speech or debate required them to give consideration to the structure of the performance as a whole and to conduct a sufficiently careful balancing exercise on the basis of the criteria laid down in the Court's case-law. In *Murat Vural v. Turkey*, cited in the judgment, the Court stated:

> "in deciding whether a certain act or conduct falls within the ambit of Article 10 of the Convention, an assessment must be made of the nature of the act or conduct in question, in particular of its expressive character seen from an objective point of view, as well as of the purpose or the intention of the person performing the act or carrying out the conduct in question."

This approach must surely be relevant not simply in determining the applicability of Article 10, but also in assessing whether there has been a violation of that provision.

Finally, this Court has already mentioned that criminal penalties for conduct such as that of the applicant in the present case are likely to have a chilling effect on satirical forms of expression relating to topical issues. Such forms of expression can themselves play a very important role in open discussion of matters of public concern, an indispensable feature of a democratic society (see *Eon v France*, cited above, § 61).

As the Court stated in *Murat Vural*, "peaceful and non-violent forms of expression should not be made subject to the threat of imposition of a

custodial sentence". In that case, even the infliction of criminal damage, specifically the pouring of paint onto a statue, were not viewed as being "of a gravity justifying a custodial sentence". In *Dmitriyevskiy v. Russia* (no. 42168/06, § 117, 3 October 2017), the Court considered that the conviction of a journalist for incitement to hatred or enmity and his two-year suspended sentence and four months' probation had violated Article 10 as "both the applicant's conviction and the severe sanction imposed were capable of producing a chilling effect on the exercise of journalistic freedom of expression". We find some inconsistency in the Court's concern over the "severe sanction" of a suspended sentence in *Dmitriyevskiy*, and the position of the majority as to the same sanction in the present case, where the applicant committed no criminal damage, nor any breach of the peace.

In sum, given the lack of adequate assessment by the national authorities of the applicant's performance from the standpoint of Article 10 of the Convention, and the complete disregard of its satirical nature, in addition to the disproportionate sentence, we believe that Article 10 was violated in the present case.

As a general remark, the present judgment inevitably gives rise to the question of how far a contracting State may criminalise insults to memory and designate certain spaces and structures as "off-limits" for individuals to exercise their right to protest and express their opinions, in a manner consistent with Article 10[2]. There is a real risk of eroding the right of individuals to voice their opinions and protest through peaceful, albeit controversial, means.

2. For a discussion on this topic see the concurring opinions of Judge Sajo in the case of *Murat Vural v. Turkey* and Judge Pinto de Albuquerque in the case of *Faber v. Hungary*.