



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

SECOND SECTION

**CASE OF N.F. v. ITALY**

*(Application no. 37119/97)*

JUDGMENT

STRASBOURG

2 August 2001

**FINAL**

*12/12/2001*



**In the case of N.F. v. Italy,**

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

Mr C.L. ROZAKIS, *President*,

Mr A.B. BAKA,

Mr B. CONFORTI,

Mr G. BONELLO,

Mr P. LORENZEN,

Mr M. FISCHBACH,

Mrs M. TSATSA-NIKOLOVSKA, *judges*,

and Mr E. FRIBERGH, *Section Registrar*,

Having deliberated in private on 25 November 1999 and 10 July 2001,

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

## PROCEDURE

1. The case originated in an application (no. 37119/97) against the Italian Republic lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Italian national, Mr N.F. (“the applicant”), on 31 July 1997.

2. The applicant was represented by Mr A. G. Lana, a lawyer practising in Rome. The Italian Government (“the Government”) were represented by their Agent, Mr U. Leanza, and by their co-Agent, Mr V. Esposito. The President of the Chamber acceded to the applicant’s request not to have his name disclosed (Rule 47 § 3 of the Rules of Court).

3. In his application the applicant alleged, in particular, that a disciplinary sanction taken against him breached Articles 8, 9, 10 and 11 of the Convention, taken alone or in conjunction with Article 14.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. By a decision of 25 November 1999 the Court declared the application partly admissible [*Note by the Registry*. The Court’s decision is obtainable from the Registry], after a hearing which dealt both with issues of admissibility and the merits (Rule 54 § 4).

7. After the hearing the applicant filed written observations on the merits of the case, but the Government did not (Rule 59 § 1).

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

8. The applicant, who was born in 1942, is a judge. After the summer of 1990 he applied for membership of the *Grande Oriente d'Italia di Palazzo Giustiniani*. On 5 March 1991 he became a member of the Adriano Lemmi Lodge in Milan.

During the summer of 1992 the applicant read in the national press that certain State prosecutors, in particular the state prosecutor of Palmi (Reggio di Calabria), had begun inquiries, which, according to certain rumours, also concerned lodges associated with the *Grande Oriente d'Italia di Palazzo Giustiniani*.

In October 1992 the applicant asked to distance himself from the organisation and on 5 November 1992 he was made a “dormant member”.

9. The Palmi public prosecutor’s office sent the National Council of the Judiciary (*Consiglio Superiore della Magistratura*) a list of judges who were Freemasons. The National Council of the Judiciary then sent it to the Minister of Justice and Principal State Counsel at the Court of Cassation, who instituted disciplinary proceedings against the judges. The list was then made public – at least in part – by the press.

10. In July 1993, after an inquiry had been commenced, the applicant was questioned by an inspector from the General Inspectorate for the Ministry of Justice. Subsequently, in February 1994, he was questioned by Principal State Counsel at the Court of Cassation.

11. In June 1994 he was summoned to appear before the disciplinary section of the National Council of the Judiciary. He was accused of having undermined the prestige of the judiciary by committing a serious breach of his duties, and thus being unworthy of the trust that must be had in a judge.

In his address, counsel for the applicant referred to a decision of the same section, given some ten years earlier, which drew a distinction between secret associations – of which judges were forbidden from being members – and discreet associations. Counsel for the applicant also noted that the guidelines of the National Council of the Judiciary, which stated that judicial office was incompatible with membership of the Freemasons, had been adopted during the summer of 1993, which was one year after the applicant had left the organisation of his own accord.

At the end of the proceedings the disciplinary section found that the applicant had breached Article 18 of Royal Legislative Decree no. 511 of 31 May 1946 (“the 1946 decree”) and gave him a warning.

12. The applicant appealed on points of law to the Court of Cassation, which examined the case in plenary session on 13 June 1996. It dismissed the appeal in a judgment of 10 December 1996.

13. On 17 May 2000 the Fourth Committee of the National Council of the Judiciary indicated again (having already made a similar recommendation on an unknown date) that it was not in favour of the applicant’s promotion – for which the requisite conditions had been fulfilled since 17 October 1997 – in view of the disciplinary sanction that had been imposed on him.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

14. The particular provisions of the Constitution referred to by the Government are the following:

### **Article 54**

“All citizens shall have the duty to be loyal to the Republic and to comply with the Constitution and the laws.

Citizens to whom public offices are entrusted shall perform them with discipline and honour, and take an oath where it is required by law.”

### **Article 98**

“Public officials shall be at the exclusive service of the nation.

If they are members of Parliament they shall be promoted only by seniority.

The right to become members of political parties may be limited by law in the case of members of the judiciary, professional members of the armed forces on active duty, police officials and officers, and diplomatic and consular representatives abroad.”

### **Article 111**

“Reasons shall be stated for all judicial decisions.

An appeal on points of law to the Court of Cassation for a breach of the law shall always be allowed against sentences and measures concerning personal freedom delivered by the ordinary or special courts. The provision may be waived only in the case of sentences pronounced by military courts in time of war.

Appeals to the Court of Cassation against decisions of the *Consiglio di Stato* and the Court of Audit shall be allowed only on grounds inherent to jurisdiction.”

15. Under Article 18 of Royal Legislative Decree no. 511 of 31 May 1946, any judge who “fails to fulfil his duties or behaves, in or outside the office, in a manner unworthy of the trust and consideration which he must enjoy” will incur a disciplinary sanction.

16. Being called upon to judge the constitutionality of Article 18 of the 1946 decree with regard to Article 25 § 2 of the Constitution, the Constitutional Court ruled that, in disciplinary proceedings against judges, the principle of lawfulness applied as a fundamental requirement of the rule of law and was a necessary consequence of the role conferred on the judiciary by the Constitution (judgment no. 100 of 8 June 1981, § 4).

However, with regard to the fact that Article 18 did not specify the types of conduct which might be regarded as unlawful, the Constitutional Court pointed out that it was not possible to give examples of every type of conduct which might undermine the values guaranteed by that provision: trust and consideration which a judge must enjoy and the prestige of the judiciary. Indeed, according to the Constitutional Court, those values constituted principles of professional conduct which could not be included in “pre-prepared guidelines because it [was] not possible to identify and classify every example of inappropriate conduct which might provoke a negative reaction in society” (ibid., § 5). The court subsequently reiterated that the earlier laws governing the same subject matter had included a provision of general scope alongside the provisions penalising specific conduct, that the proposals for reform in this field had always been worded in general terms and that the same was true for other professional categories. It concluded that “the provisions in this area [could] not but be of general scope because a specific directive would have the effect of legitimising conduct which had not been foreseen, but nonetheless attracted society’s opprobrium”. It added that those considerations justified the wide scope of the rule and the wide margin of appreciation conferred on a body which, acting within the guarantees inherent in any judicial procedure, was – by virtue of its composition – particularly well-qualified to judge whether the conduct considered in each case did or did not undermine the protected values (ibid., § 5).

The Constitutional Court stated, lastly, that this interpretation accorded with its case-law on the subject of lawfulness (ibid., § 6).

17. Law no. 17 of 25 January 1982 on the implementing provisions of Article 18 (right of association) of the Constitution concerning secret associations and the dissolution of the association called P2 provides that membership of a secret association is a criminal offence (section 2). With regard to civil servants, section 4 provides that disciplinary proceedings must also be brought against them before a special committee constituted according to very precise rules. However, in respect of judges of the judicial, administrative and military courts, jurisdiction remains vested in the respective disciplinary bodies.

18. On 22 March 1990 the National Council of the Judiciary, which had convened following a message from the Head of State – who is its president – to discuss the incompatibility between the exercise of judicial functions and membership of the Freemasons, passed guidelines. The minutes (discussion and text of the guidelines) of that meeting were published in the Official Bulletin (*Verbali consiliari*, pp. 89-129) and sent to the presidents of the Republic, Senate and Chamber of Deputies.

According to those guidelines, “judges’ membership of associations imposing a particularly strong hierarchical and mutual bond through the establishment, by solemn oaths, of bonds such as those required by Masonic lodges, raises delicate problems as regards observance of the values enshrined in the Italian Constitution”.

The National Council of the Judiciary added that it was “evidently [within its] powers to ensure compliance with the fundamental principle of Article 101 of the Constitution, according to which ‘judges are beholden only to the law’ ”. In its words, “this scrutiny include[d] ... thorough care to ensure that, in the exercise of his functions, every judge respect[ed] – and appear[ed] to respect – the principle of being beholden to the law alone”.

The National Council of the Judiciary subsequently referred to a judgment of 7 May 1981 of the Constitutional Court in which the court had undertaken a balancing exercise between judges’ freedom of thought and their obligation to be impartial and independent.

It added: “it has to be stressed that among the types of conduct of a judge to be taken into consideration for the requirement of the exercise of the administrative activity peculiar to the Council, there is also, beyond the limit laid down by Law no. 17 of 1982, the acceptance of constraints which (a) are superimposed on the obligation of loyalty to the Constitution and of impartial and independent exercise of judicial activity and (b) undermine the confidence of citizens in the judiciary by causing it to lose its credibility”.

Lastly, the National Council of the Judiciary considered it “necessary to suggest to the Minister of Pardons and Justice that it might be advisable to consider including among the restrictions on judges’ rights of association reference to all associations which – for their organisation and ends – impose particularly strong bonds of hierarchy and solidarity on their members”.

19. On 14 July 1993 the National Council of the Judiciary passed further guidelines stating that the exercise of judicial functions was incompatible with membership of the Freemasons.

## THE LAW

20. The applicant alleged a violation of Articles 8, 9, 10 and 11 of the Convention and of Article 14 taken in conjunction with those provisions.

The Court will examine the merits of these complaints, beginning with the one based on Article 11, which, in its view, is the most relevant complaint in the present case.

### I. ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

21. The applicant submitted that the disciplinary sanction in question amounted to an interference with his right to freedom of association. He maintained that there had been a violation of Article 11 of the Convention, which provides:

“1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

#### *1. Whether there was an interference*

22. The Court considers, and the Government did not dispute this, moreover, that there has been an interference with the applicant's right to respect for his freedom of association.

23. In order to be compatible with Article 11, such interference must satisfy three conditions. It must be “prescribed by law”, pursue one or more legitimate aims under paragraph 2 of that provision and be “necessary in a democratic society” to achieve those aims.

#### *2. Was the interference “prescribed by law”?*

24. The applicant pointed out that the disciplinary sanction was imposed on the basis of Article 18 of the 1946 decree. That provision had been criticised for being of general application and its constitutionality had even been disputed before the Constitutional Court. Accordingly, the applicant maintained, it did not qualify as a law within the meaning of paragraph 2 of Article 11 and the interference had not therefore been “prescribed by law”. Furthermore, on the basis of the legislation in force and the case-law at the



material time on the said Article 18, the applicant was entitled to believe that his membership of the Freemasons was not incompatible with the law.

25. For their part, the Government considered that the interference in question was justified under Article 18 of the 1946 decree. They pointed out that this provision implemented Articles 54 § 2, 98 § 1 and 111 of the Italian Constitution, which established an obligation of loyalty by judges to the Republic.

26. The Court reiterates its established case-law, according to which the words “prescribed by law” not only require that the impugned measure should have some basis in domestic law, but also refer to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects (see *Rekvényi v. Hungary* [GC], no. 25390/94, ECHR 1999-III).

27. In the instant case the Court notes that Article 18 of the 1946 decree provides for the possibility of penalising any judge who “fails to fulfil his duties”. Accordingly, the Court can conclude that the disciplinary sanction had a basis in Italian law.

28. As regards the condition of accessibility, the Court considers that this requirement is satisfied because the law was public and accessible to the applicant.

29. With regard to the requirement of foreseeability, the Court reiterates that a law is “foreseeable” if it is formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct (see *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 84, ECHR 2000-XI).

30. It therefore needs to be determined in particular whether domestic law laid down with sufficient precision the conditions in which a judge should refrain from joining the Freemasons.

31. The Court notes first that Article 18 of the 1946 decree does not define whether and how a judge can exercise his or her right of association. Furthermore, the Constitutional Court noted that this provision was of a general nature. That said, the guidelines passed by the National Council of the Judiciary in 1990 had stated that a judge’s membership of lawful associations which, like the Freemasons, were governed by specific rules of conduct could be problematical for him or her (see paragraph 18 above). The Court must therefore determine whether Article 18, combined with the above-mentioned guidelines (see paragraph 15 above) support the proposition that the sanction in question was foreseeable. In that connection the Court notes that these guidelines had been passed in the context of an examination of the specific question of judges’ membership of the Freemasons and that the National Council of the Judiciary, the body responsible for supervising the discipline and independence of judges, had the power to enact such provisions. However, even if the guidelines had primarily been concerned with membership of the Freemasons, the wording

used to refer to it (“membership ... raises delicate problems”) was ambiguous and could give the impression that not all Masonic lodges were being taken into consideration, especially as these guidelines were passed after the big debate in Italy on the illegality of the secret lodge, P2; indeed, the guidelines merely stated that “naturally, members of the judiciary are prohibited by law from joining the associations proscribed by Law no. 17 of 1982”. With regard to other associations, they contained the following passage: “the [National] Council [of the Judiciary] considers it necessary to suggest to the Minister of Pardons and Justice that it might be advisable to consider including among the restrictions on judges’ rights of association reference to all associations which – for their organisation and purposes – impose particularly strong bonds of hierarchy and solidarity on their members.”

Accordingly, the wording of the guidelines of 22 March 1990 was not sufficiently clear to enable the users, who, being judges, were nonetheless informed and well-versed in the law, to realise – even in the light of the preceding debate – that their membership of an official Masonic lodge could lead to sanctions being imposed on them.

The Court’s assessment is confirmed by the fact that the National Council of the Judiciary itself felt the need to come back to the issue on 14 July 1993 (see paragraph 19 above) and state in clear terms that the exercise of judicial functions was incompatible with membership of the Freemasons.

32. In these conditions the Court concludes that the condition of foreseeability was not satisfied and that, accordingly, the interference was not prescribed by law.

33. Having reached that conclusion, the Court does not need to satisfy itself that the other requirements (legitimate aim, necessity of the interference and special limits for certain categories) required by the first and second sentences of paragraph 2 of Article 11 have been complied with.

34. Accordingly, there has been a violation of Article 11 of the Convention.

## II. ALLEGED VIOLATION OF ARTICLES 8, 9 AND 10 OF THE CONVENTION TAKEN ALONE OR IN CONJUNCTION WITH ARTICLE 14, AND OF ARTICLE 11 TAKEN IN CONJUNCTION WITH ARTICLE 14

35. The applicant also alleged a violation of Articles 8, 9 and 10 of the Convention, taken alone or in conjunction with Article 14, and an infringement of Article 11 taken in conjunction with Article 14. His complaints concerned the same fact (disciplinary sanction) as the one examined under Article 11.

36. With regard to Article 8, the applicant complained of a further violation on account of the disclosure by the press – after communication of the list of members by the Palmi public prosecutor’s office to the National Council of the Judiciary – of his membership of the Freemasons.

37. The applicant submitted that this disclosure had to be regarded as a violation of his right to private life, irrespective of the issue whether membership of the Freemasons was lawful (as he thought) or not; indeed, in his submission, any “condition concerning the sphere of an individual’s personality tends to be reserved to the sphere of the individual”.

38. The Government, for their part, submitted that this complaint was concerned more with the limits on the freedom to disclose information, as guaranteed by Article 10 of the Convention.

39. The Court notes that, according to its case-law, “private life, in the Court’s view, encompasses a person’s physical and psychological integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings” (see *Botta v. Italy*, judgment of 24 February 1998, *Reports of Judgments and Decisions* 1998-I, p. 422, § 32). In the instant case the applicant has not proved that the disclosure by the press of his membership of the Freemasons caused him any injury in that regard. However, he acknowledged that “anyone could ascertain who was a member by consulting the register of members”.

Accordingly, there has not been an interference.

40. In the light of the conclusion which it reached in respect of an infringement of Article 11, the Court does not consider it necessary to examine separately the first complaint under Article 8 or those lodged under the other Articles.

### III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

41. 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

42. The applicant asked the Court, firstly, to order the respondent State to adopt any appropriate measure available under domestic law in order to put an end to the violations found. He sought this *restitutio in integrum* on the basis of Recommendation no. R (2000) 2 of the Committee of Ministers to the Council of Europe member States on the re-examination or reopening

of certain cases at domestic level following judgments of the European Court of Human Rights (adopted by the Committee of Ministers on 19 January 2000 at the 694th meeting of the Ministers' Deputies) and requested revision of the disciplinary procedure. He stated that the judgment of the European Court was to be regarded as a "new fact" which, under Article 37 § 6 of the 1946 decree, allowed him to request the reopening of the disciplinary proceedings.

The applicant then claimed 57,000,000 Italian lire (ITL) for pecuniary damage (medical expenses and loss of salary) on account of publication in the press of his membership of the Freemasons, ITL 472,336,500 for non-pecuniary damage (ITL 300,000,000 for the non-pecuniary damage caused by the injury to his reputation, ITL 114,891,000 for physiological damage (*danno biologico*) and ITL 57,445,500 for all other non-pecuniary damage incurred by him).

43. The Government, for their part, submitted that the applicant had not provided any proof of the existence of the damage.

44. With regard to the pecuniary damage alleged, the Court reiterates first its considerations set out in paragraph 39 above. It notes that the applicant has not established the existence of a causal link between the medical costs and the violation found, or that the amount indicated as loss of salary has really been incurred. With regard to non-pecuniary damage, the Court notes that the sanction imposed on him was the least severe of the sanctions available. Nevertheless, the applicant must have suffered some non-pecuniary damage which cannot be sufficiently compensated by the finding of a breach of the Convention. Ruling on an equitable basis as it is required to do under Article 41, the Court awards the applicant ITL 20,000,000 for all heads of damage.

## **B. Costs and expenses**

45. The applicant claimed ITL 60,883,648 in reimbursement of the costs of the proceedings before the Commission and the Court. He also sought ITL 7,372,012 for the cost of the disciplinary proceedings.

46. The Government left the issue to the Court's discretion.

47. The Court reiterates that only legal costs and expenses found to have been actually and necessarily incurred and which are reasonable as to quantum are recoverable under Article 41 of the Convention (see, among other authorities, *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 120, ECHR 2001-V). It observes that in the instant case there was a hearing and that several memorials were filed. The Court considers, however, that the amounts claimed are excessive.

Having regard to those considerations, the Court awards the applicant ITL 20,000,000 for the costs and expenses incurred before the Commission and the Court.

To that sum should be added the costs incurred in the disciplinary proceedings, namely ITL 7,312,012.

### C. Default interest

48. According to the information available to the Court, the statutory rate of interest applicable in Italy at the date of adoption of the present judgment is 3.5%.

### FOR THESE REASONS, THE COURT

1. *Holds*, by four votes to three, that there has been a violation of Article 11 of the Convention;
2. *Holds*, unanimously, that there has not been a violation of Article 8 of the Convention with regard to the complaint based on disclosure of the applicant's membership of the Freemasons;
3. *Holds*, unanimously, that it is not necessary to examine whether there has been a violation of Articles 8 (on account of the imposition of the disciplinary sanction), 9 and 10 of the Convention taken alone or in conjunction with Article 14, or of Article 11 taken in conjunction with Article 14;
4. *Holds*, by four votes to three,
  - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
    - (i) ITL 20,000,000 (twenty million Italian lire) in respect of damage;
    - (ii) ITL 27,312,012 (twenty-seven million three hundred and twelve thousand and twelve Italian lire) in respect of costs and expenses;
  - (b) that simple interest at an annual rate of 3.5% shall be payable on these sums from the expiry of the above-mentioned three months until settlement;
5. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in French, and notified in writing on 2 August 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Erik FRIBERGH  
Registrar

Christos ROZAKIS  
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) partly dissenting opinion of Mr Baka;
- (b) partly dissenting opinion of Mr Bonello;
- (c) partly dissenting opinion of Mrs Tsatsa-Nikolovska.

C.L.R.  
E.F.

## PARTLY DISSENTING OPINION OF JUDGE BAKA

In the present case I am unable to share the view of the majority of the Court that the national law was not foreseeable enough to enable the applicant to regulate his conduct in this matter. That was the reason why the Court found that the restriction was not prescribed by Italian law and that, consequently, there had been a violation of Article 11 of the Convention.

It is true that a norm cannot be regarded as a law unless it is formulated with sufficient precision to enable the citizen to regulate his conduct. On the other hand the Court has pointed out that “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 instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed” (see *Vogt v. Germany*, judgment of 26 September 1995, Series A no. 323, p. 24, § 48).

In my view, whereas certainty is not only highly desirable but is essential, it is practically impossible to define with absolute precision what kind of behaviour and activity is incompatible with the function of a judge. Here I am also taking into account the fact that “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” and that “it is primarily for the national authorities to interpret and apply domestic law” (see *The Sunday Times v. the United Kingdom (no. 1)*, judgment of 26 April 1979, Series A no. 30, p. 31, § 49, and *Chorherr v. Austria*, judgment of 25 August 1993, Series A no. 266-B, pp. 35-36, § 25).

Applying the above principles to the present case, I reached the conclusion that the different legal norms in Italy, especially Article 18 of Royal Legislative Decree no. 511 of 31 May 1946, its interpretation by the Constitutional Court and the 22 March 1990 guidelines of the National Council of the Judiciary, provided sufficiently clear legal rules and background to enable a highly trained member of the judiciary to regulate his conduct accordingly. The applicant should have known that joining a Masonic lodge would lead to disciplinary sanctions. On the basis of the wording of the 1990 guidelines of the National Council of the Judiciary, and especially after the 1982 dissolution of the P2 lodge, he ought to have been aware, as a member of the judiciary, that membership of the Freemasons could jeopardise the prestige and public confidence vested in the judiciary.

Having regard to these considerations, I find that the interference was prescribed by law for the purposes of Article 11 § 2. Consequently, I find no breach of this Article.

## PARTLY DISSENTING OPINION OF JUDGE BONELLO

1. I disagree with the majority's finding that the State's interference with the applicant's enjoyment of his rights under Article 11 was not "in accordance with the law" in so far as that interference lacked the element of foreseeability [See paragraph 32 of the judgment].

2. The applicant, a judge presumed to be versed in the law, knew, or reasonably ought to have known, that joining an Italian Masonic lodge would attract disciplinary sanctions. There were compelling and inescapable pointers scattered throughout the Italian legal system that should have left no doubt in his mind as to the incompatibility of membership of the Italian Freemasons with the exercise of judicial functions.

3. The majority concluded that the terms of the guidelines approved by the National Council of the Judiciary on 22 March 1990 were "not sufficiently clear" to forewarn the applicant of disciplinary sanctions in the event of his joining a Masonic lodge. In reaching this conclusion the majority were compelled to disregard the Court's long-standing case-law and the abundant harvest of factual findings on record.

4. This opinion is solely concerned with establishing whether there existed in Italian law a "sufficient legal basis" on which to discipline the applicant for seeking membership of a Masonic lodge. It refrains from expressing any value judgment on Freemasonry in general or on the propriety, for members of the judiciary, of identifying with Freemasonry's ideas and ideals, or on the peculiarly Italian phenomenon of degenerate Freemasonry at or around the relevant time.

### *The case-law of the Court*

5. The Court has repeatedly held that any interference with the enjoyment of certain fundamental rights must be "in accordance with the law" and that the law in question must be accessible and foreseeable. To that I subscribe without reservation. But the Court, in its case-law, has been attentive to the necessity of tempering this general recital with the inescapable exigencies of practical reason. It has acknowledged that "it may be difficult to frame laws with absolute precision and that a certain degree of flexibility may even be desirable to enable the national courts to develop the law in the light of their assessment of what measures are necessary in the interests of justice" [See *Goodwin v. the United Kingdom*, judgment of 27 March 1996, *Reports of Judgments and Decisions* 1996-II, pp. 497-98, § 33].



6. The level of precision required of domestic legislation, the Court has found, “depends to a considerable degree on the content of the instrument considered, the field it is designed to cover, *and the number and the status of those to whom it is addressed*” [See *Chorherr v. Austria*, judgment of 25 August 1993, Series A no. 266-B, pp 35-36, § 25 (emphasis added)]. In other words, a law aimed at experts need not be as explicit as one addressed to laymen. In the specific field of (military) discipline the Court has observed that “it would scarcely be possible to draw up rules describing different types of conduct in detail” [See *Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria*, judgment of 19 December 1994, Series A no. 302, pp. 15-16, § 31].

7. On the requirement of clarity and foreseeability of the law, the Court has also added that “the mere fact that a legal provision is capable of more than one construction does not mean that it does not meet the requirement implied in the notion ‘prescribed by law’ ” [See *Vogt v. Germany*, judgment of 26 September 1995, Series A no. 323, p. 24, § 48].

8. The Court has, so far, found a “sufficient legal basis” for an interference with a fundamental right in statutes whose wording “is not absolutely precise. The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague” [See *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A no. 260-A, p. 19, § 40].

9. In another leading judgment the Court analysed the element of foreseeability essential in any law relied on as the legal basis for limiting a fundamental right. It observed: “The Swedish legislation applied in the present case is admittedly rather general in terms, and confers a wide measure of discretion ... On the other hand, the circumstances ... in which a care decision may fall to be implemented are so variable that it would scarcely be possible to formulate a law to cover every eventuality... Moreover, in interpreting and applying the legislation, *the relevant preparatory work ... provides guidance as to the exercise of the discretion it confers ...* The Court thus concludes that the interferences in question were ‘in accordance with the law’.” [See *Olsson v. Sweden (no. 1)*, judgment of 24 March 1988, Series A no. 130, pp. 30-31, §§ 62-63 (emphasis added)]

10. The majority, in reading the 1990 guidelines on the Italian judiciary and Freemasonry, failed to take into account any of the many criteria demanded by the Court’s case-law to determine whether the interference with the applicant’s rights had a sufficient legal basis. No weight at all was given to “the status of those to whom the norm is addressed” (in the present case a person presumed to be immersed in legal expertise). More regrettably, nor was any consideration given to the “relevant preparatory work” concomitant with the enactment of that norm. In the present instance, the relevant preparatory work, published in official form, leaves not the flimsiest penumbra of doubt that the norms in question prohibited Italian

judges, in totally unequivocal terms, from being members of Italian Masonic lodges.

*Legal basis of the interference*

11. On 22 March 1990 the National Council of the Judiciary issued guidelines to the effect that “judges’ membership of associations imposing a particularly strong hierarchical and mutual bond through the establishment, by solemn oaths, of ties such as those required by masonic lodges raises delicate problems as regards observance of the values enshrined in the Italian Constitution”.

12. Those guidelines were issued on the initiative of the President of the Italian Republic, the titular head of the National Judiciary Council. The Official Bulletin (*Verbali consiliari*) published the guidelines under the following heading: “Extract of the minutes of the sitting held in the morning of 22 March 1990, concerning *the incompatibility between judicial functions and membership of the Freemasons*.” [Emphasis added]

13. The President of the Italian Republic opened the sitting by reminding members of the President of the Republic’s message “*concerning the incompatibility between the exercise of judicial functions and membership of the Freemasons*” [Emphasis added].

14. The rapporteur on the guidelines (Dr Racheli), tabling the motion, resorted to language that could hardly have been more explicit and forceful. He referred repeatedly, and with approval, to the distressing findings of the report by the Parliamentary Commission of Inquiry into the scandals rocking Italy at and prior to that time as a result of the infiltration of degenerate Freemasonry into all spheres of power, an infiltration which had resulted in a stranglehold of all democratic institutions, including the judiciary, and had compromised every sector of Italian public life and Italian Freemasonry as a whole. The rapporteur left positively no room for equivocation that the guidelines were exclusively aimed at asserting the functional incompatibility between the holding of judicial office and membership of Italian Masonic lodges. “Applying the above standpoint of the Constitutional Court, it is to be excluded that judges can be members of associations that, through the bonds of hierarchy and professed and practised ideologies, may induce citizens to believe that the exercise of judicial power can be distorted to the advantage of the association or its individual members. As far as Freemasonry is concerned, there is no doubt that it is widely agreed that the image of the judiciary is greatly blackened” [*Verbali consiliari*, p. 103].

15. The basis in Italian law on which the guidelines rested was explained in detail by the rapporteur and various other members of the Council who intervened in the debate. Very briefly, the incompatibility of the exercise of judicial power with Italian Freemasonry derives from the violation of the constitutional precept that judges are only to obey the law, whereas a

Freemason is bound to solemnly “swear to obey without hesitation or dissent such orders as are given to me by the Sovereign Tribunal of the 31st degree and by the Council of the 33rd degree of the Ancient and Accepted Scottish Rite” [*Verbali consiliari*, p. 103]. Moreover, the bond of solidarity between Italian Freemasons – confirmed on oath – is incompatible with the independence and impartiality indispensable in the judiciary. The regulations of the Loggia Montecarlo impose on its members a duty “to study and analyse power with the aim of gaining it, exercising it, retaining it and rendering it ever more solid”.

16. The debate and the guidelines by the National Council of the Judiciary were not generated in a vacuum. The applicant knew, and manifestly had the duty to know, that the official report of the Parliamentary Commission of Inquiry into Freemasonry in Italy had laid bare the colossal damage which the image, credibility and authority of official institutions, including the judiciary, had suffered through their infiltration by degenerate Italian Freemasonry. That report should have left absolutely no hesitation in the *bona fide* conscience of any Italian judge about the irresolvable conflict arising between the exercise of judicial power and membership of Masonic lodges. The widely publicised report, as the rapporteur remarked, did not record the feelings of individuals, but “registered the beliefs of the Italian people” about the noxious infestation of degenerate Freemasonry throughout the vital organs of the State. The applicant showed scant regard for the “beliefs of the Italian people”, so publicly and alarmingly expressed by the legislature of the Republic which he had undertaken to serve.

17. It is disingenuous, to say the least, on the part of the applicant to profess that he neither knew nor could have foreseen that membership of a Masonic lodge was incompatible, pursuant to Italian norms, with the exercise of his judicial functions.

18. The rapporteur’s analysis, *published officially together with the guidelines*, stressed that “membership of the Freemasons – as of any association with a strong hierarchical structure and an iron bond of solidarity – brings about, as such, a falling-off, not only in appearances, but also and primarily, in ‘substance’ ... Belonging to the Freemasons appears, then, as an obligation that objectively superimposes itself on the oath of loyalty required by Article 54 of the Constitution and on the primary obligation that every judge shall be subject only to the law” [*Ibid.*, p. 104].

19. The guidelines, put to the vote in the context of the aforementioned preparatory work, were approved by the National Council of the Judiciary, with twenty-four votes in favour and five abstentions.

20. These public, precise and unequivocal forewarnings, disseminated officially alongside the guidelines, could have left the applicant with no residue of hesitation that membership of a Masonic lodge constituted an actionable disciplinary offence. It is risible, in my view, to hold that he

could have believed in good faith that an Italian judge could embrace Freemasonry with the blessing of the law.

21. In fact, the various national adjudicating authorities which were called upon to try the applicant had absolutely no misgivings in finding in the guidelines and in the norms which preceded them a sufficiently clear and foreseeable legal basis on which to establish whether he had infringed his judicial duties. According to the Court's case-law, the national adjudicating authorities are the natural interpreters of domestic law. Applying the principles of the Court's subsidiarity and the margin of appreciation, the Court has consistently held that it should only revise the national courts' interpretation of domestic law in exceptional cases involving a manifest miscarriage of justice. It is a matter of notable concern that the majority elected to disregard the unanimous interpretation of Italian law by the highest Italian adjudicating authorities in a case in which the facts and the law conspired to demonstrate the naivety of the applicant's plea that he did not know, and could not have foreseen, the consequences of his action.

22. One final observation. The Convention stresses the requirement of "clarity" of the law in *two* circumstances: firstly, in the definition of proscribed criminal behaviour in penal statutes (the "void for vagueness" doctrine enshrined in Article 7) [See *Kokkinakis*, cited above, p. 22, §§ 51-53], and secondly, in the interferences permitted with the enjoyment of certain fundamental rights (such as those enshrined in Articles 8 to 11). The requirement of clarity obviously appears necessary to a higher degree in the context of Article 7. And yet the Court has accepted as sufficiently precise, in an Article 7 case, a criminal statute which read: "Any person who is a public officer and abuses his office in any manner other than that defined in this Code ..." (the criminal penalties are then listed) [See *Ugur v. Turkey* (dec.), no. 30006/96, 8 December 1998, unreported]. It is bewildering that this equivocal non-law passed the stringent test of clarity required under Article 7, while the emphatic proscription of Freemasonry for Italian judges now fails the less stringent test of clarity required by Article 8.

PARTLY DISSENTING OPINION  
OF JUDGE TSATSA-NIKOLOVSKA

To my regret, I disagree with the majority of the Court that the interference with the applicant's right to freedom of association under Article 11 of the Convention was not in accordance with the law on the ground of lack of foreseeability.

On the contrary, I am of the opinion that Article 18 of Royal Legislative Decree no. 511 of 31 May 1946, the Constitutional Court's interpretation of this Article and the guidelines of the National Council of the Judiciary are legal rules which provide a sufficiently clear legal basis for the above-mentioned interference. Those rules satisfy the requirements of clarity and foreseeability of the law, especially bearing in mind that the applicant was a trained member of the judiciary.

In my view, the legal rules in question also attain the level of precision required of domestic regulations.

The applicant should have known that joining a Masonic lodge would violate the concept that judges are only to obey the law.

Manifestation of any kind of hierarchy and solidarity, as is required by Masonic lodges – of which the applicant was a member – is incompatible with the exercise of judicial functions.

Taking into account my considerations as regards foreseeability and precision, based on the principles established by case-law (see *Vogt v. Germany*, judgment of 26 September 1995, Series A no. 323, p. 24, § 48, and *Chorherr v. Austria*, judgment of 25 August 1993, Series A no. 266-B, pp. 35-36, § 25) and the incompatibility between judicial functions and membership of the Freemasons, I therefore find no violation of Article 11 of the Convention in this case.

I disagree with the judgment of the majority of the Court with regard to damage, costs and expenses because I find no violation at all in this case.