IN THE EUROPEAN COURT OF HUMAN RIGHTS **App. No. [ ]**

CARME FORCADELL

Applicant

v.

SPAIN

Respondent

APPENDIX TO APPLICATION

Represented by

Jessica Simor QC
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Matrix Chambers
London WC1R 5LN

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18 January 2019

I OVERVIEW

1. The Applicant was born on 29 May 1955 and her home is in Sabadell in Catalonia, Spain. She is currently detained in Tarragona Prison, having been transferred from Madrid Prison at her request in order to be able to receive visits from her elderly mother, husband, children and grandson. On 27 September 2015 she was elected to Parliament and from 26 October 2015 to 17 January 2018, she was President (Speaker) of the Parliament and (in consequence) a member of the Parliamentary Board, which is responsible for organising Parliamentary work and overseeing Parliamentary procedure. On 21 December 2017 she was elected again to Parliament until 22 March 2018, when she resigned her position in Parliament.

2. The Applicant performed her functions as President against the background of a series of actions initiated by the Parliamentary majority with a view to understanding and expressing the views of the Catalan people on the issue of independence. This process, which had been ongoing for a number of years before the Applicant took up her position, culminated in the holding of an independence referendum on 1 October 2017.

3. In late October 2017, a criminal complaint was filed against the Applicant, along with five other members of the Parliamentary Board, in the Spanish Supreme Court. Despite never having been involved in, called for or in any way endorsed acts of violence, and despite the actions of those supporting independence having been overwhelmingly peaceful, the Applicant was charged with the offence of 'rebellion' – an offence that <u>requires</u> involvement in a "violent and public uprising." Further, sedition and misuse of public funds were raised (both of which were later dropped). The complaint was accepted by the Court, and on 9 November 2017 it ordered the Applicant's pre-trial detention but granted her bail on conditions. She posted bond the next day, and went on to observe the applicable conditions in full (the obligation to appear weekly in court and whenever she was called; the express prohibition of leaving the national territory, the retention of her passport). Four months and two weeks later, on 23 March 2018, the Applicant was called before the Court. Despite the prosecutor not having applied for revocation of her bail, the Court called her and asked the Prosecutor to apply for revocation of her bail. The Court then ordered that bail be revoked, that her bond returned and that she be unconditionally detained. Her appeal for release to the Supreme Court and the Constitutional Court have been rejected. She is now detained and awaiting trial fixed for 2019.

4. The Applicant submits that her rights under Article 5(1)(c) and/or 5(3) have been violated because her detention cannot be justified as necessary and proportionate. The judicial authorities have moreover, failed to provide "relevant and sufficient" reasons for her detention, as required. In particular, and contrary to the well-established principles of this Court's jurisprudence, her bail was: (i) unjustifiably revoked in the absence of any relevant change in circumstances; (ii) the courts placed excessive reliance on the severity of the potential penalty in assessing the risk of absconding; (iii) relied on a range of generic considerations said to demonstrate a risk of absconding and/or offending, without any or any adequate regard to the Applicant's individual circumstances; (iv) failed properly to have regard to the Applicant's compliance with her conditions of bail, relying instead on speculation as to 'her will' in the future; (v) wrongly concluded that her refusal to admit guilt increases the risk of her absconding, so ignoring the presumption of innocence; and (vi) wrongly required her to establish that she should be released on the basis that she has "clearly and definitively" changed her political views, in clear breach of Article 10 of the Convention.

5. It is clear that unconditional pre-trial detention is not (and has never been) necessary and proportionate, having regard to the conduct that is alleged to constitute the offence (namely discharging her duties in Parliament to allow debate and voting); the lack of any evidence of a risk of absconding, and indeed evidence that that was not likely in light of her conduct on bail and her family and professional circumstances; and the lack of any risk of 're-offending' in light of her having resigned her position in Parliament and taken up a post in her home-town.

6. Further, it is submitted that pre-trial detention for offences relating to the discharge of functions in Parliament raises serious issues under Articles 10 and 11 and Article 3 of Protocol No. 1 to the Convention that are relevant both to the assessment of necessity and proportionality under Article 5 and in their own right.

7. **Section II** below sets out the factual background in more detail. **Section III** sets out the domestic legal framework. **Section IV** develops the Applicant's legal submissions.

II STATEMENT OF THE FACTS

A Catalonia and its institutions

8. Catalonia is an autonomous region of the Kingdom of Spain.[1] The Constitution describes the Spanish nation as "indissoluble", while also "recognising and guaranteeing" the "right to self-government of the nationalities". Catalonia's basic institutional regulations are contained in its Statute of Autonomy. It is governed by the "Generalitat de Catalunya", which consists of the President of the Generalitat (i.e. of the Government), the Executive Council or Government, and the Parliament, which exercises legislative power and is the seat for the expression of pluralism and political debate.

B The events giving rise to the charges against the Applicant

9. On 26 October 2015, the Applicant took up her position as President of the Parliament after the elections. According to the electoral programs of the parties, on 9 November 2015 Parliament adopted a resolution – **Resolution 1/XI** – calling for a series of steps toward the creation of an independent State, beginning with a citizens' "constituent process", which was to be a process of investigation and analysis of options and alternatives. Resolution 1/XI was suspended soon afterwards (following a constitutional challenge by the Spanish Government), and was found unlawful in a judgment dated 2 December 2015 (**STC 259/2015**).

10. On 20 January 2016, the Parliament – by **Resolution 5/XI** – established a Commission for the study of the Constituent Process ("the Constituent Process Commission") to study and progress the "constituent process". On 19 July 2016, the Constitutional Court held in "enforcement decision" **ATC 141/2016** that Resolution 5/XI was unconstitutional and in contempt of STC 259/2015, as it amounted to an "*attempt to bypass or evade the duty of all public powers to fulfil resolutions of the Constitutional Court*".[2] By enforcement decision STC 141/2016 the Court warned "*the authorities involved and their representatives especially the Board of the Parliament…of its duty to stop or suspend any initiative that represents a disregard or avoidance of the orders set-forth*" in the decision. In that regard, the Court held that it was "*not constitutionally permissible that the parliamentary activity of analysis or study be aimed at continuing or supporting the objective proclaimed in resolution 1/XI – the opening of a constituent process in Catalonia with the aim of the creation of a future Catalan constitution and independent Catalan state in the form of a*

[1] Articles 137 and 143 of the Spanish Constitution of 1978.

[2] This obligation derives from Article 87.1 of the "Organic Law of the Constitutional Court" ("the LOTC"), which provides that "all public authorities are obliged to comply with the resolutions of the Constitutional Court." Article 87.2 further provides that "the judgments and resolutions of the Constitutional Court shall be instruments of enforcement."

Republic." Put shortly, the Court purported to prevent Parliament carrying out research or analysis connected with the possibility or objective of securing Catalonian independence.

11. On 27 July 2016, the Board of Parliament (of which the Applicant is a member) – applying the Parliament's rules of procedure – allowed Parliament to vote on the conclusions of the Constituent Process Commission. These set out a possible series of steps that could be taken in relation to consideration of the separation of Catalonia from Spain. By **Resolution 263/XI** Parliament ratified the Commission's findings. The resolution was promptly suspended following an application to the Constitutional Court. In response to the suspension, the Applicant made submissions to the Court (i) highlighting the enormous legal uncertainty that flowed from the Court's decision, which purported to prevent votes on non-binding resolutions relating to study activities and (ii) explaining that her role on the Parliamentary Board was limited by the Rules of Procedure, which had required her to allow a vote on Resolution 263/XI.

12. On 6 October 2016 the Constitutional Court, by "enforcement decision" **ATC 170/2016**, found Resolution 263/XI to be in contempt of its earlier decision STC 259/2015. The Court notified its decision to the Applicant and other members of the Parliamentary Board, warning them that they must "*refrain from carrying out any actions to give effect to Resolution 263/XI*" and suspend or stop any initiative that ignored or circumvented the decision of the Court. Non-compliance could lead to criminal charges.

13. The Court also decided to take witness statements in order for the Public Prosecutor to determine whether the conduct of the Applicant and others may have amounted to a criminal offence.[3] On 19 October 2016 the Prosecutor filed a criminal complaint against the Applicant for the crimes of breach of public duties and serious disobedience, leading to a preliminary investigation before the Civil and Criminal Chamber of the Catalan High Court of Justice.

14. On 6 October 2016, the Catalan Parliament adopted **Resolution 306/XI,** which provided for a referendum on independence to be held no later than September 2017. The decision to allow the motions (37714 and 37713) to go onto the agenda was taken by the Parliamentary

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[3] The Court's powers in this regard derive from Article 92.4 LOTC, which allows the Constitutional Court – where one of its previous decisions has not been complied with – to (i) require relevant individuals to comply within a specified timeframe, and (ii) if non-compliance persists, take a range of measures including imposing financial penalties; suspending those responsible from their duties; or requiring the taking of witness statements in order to establish potential criminal liability.

Board by way of a vote in accordance with the Parliamentary Rules of Procedure. On 14 February 2017, the Constitutional Court, by "enforcement decision" **ATC 24/2017**, held that Resolution 306/XI was in contempt of STC 259/2015 and ATC 141/2016. The Court invited the Public Prosecutor to file a criminal complaint against the Applicant and other members of the Board for their actions in "*allowing votes to be held on the aforementioned motions for the decision in the Plenary session that later led to their approval*." The decision of the Court was to be notified to the Applicant and to other member of the Parliamentary Board, warning them to refrain from carrying out any measure to give effect to Resolution 306/XI. On 23 February 2017, the Public Prosecutor filed a further criminal complaint against the Applicant and others for the crimes of breach of public duties and disobedience.

15. On 28 August 2017, Parliamentary groups put forward a bill providing for an independence vote to be held on 1 October 2017 and envisaging the potential establishment of an independent State. On 6 September 2017, the Catalan Parliament as a whole voted as to whether to put this bill forward to be voted on by Parliament. A majority of members voted in favour of including the Bill and the Bill was approved the same day as the **Law on the Referendum of Self-Determination (Law 19/2017)** and the **Law on the Legal and Foundational Transition of the Republic (Law 20/2017)**. The legislative procedure used is similar to one called *lectura unica* ("one reading"), which exists in all other regional Spanish Parliaments and the Spanish Parliament.

16. Around the same time, enforcement proceedings were filed with the Constitutional Court. In response, the Applicant sought the recusal of the judges of the Constitutional Court on the basis that their prior judgments on key issues led to serious concerns under (*inter alia*) Articles 6 and 13 of the Convention. The application was ultimately rejected (on the basis that recusal was unavailable where no substitute judges existed).

17. On or about 7 September 2017 Law 19/2017 was suspended by the Constitutional Court following a challenge by the Spanish Government. It was ultimately ruled unconstitutional on 17 October 2017.[4] On 19 September 2017 the Constitutional Court held that the decision to allow a vote on Law 19/2017 was in contempt of STC 259/2015. It therefore invited the Public Prosecutor to consider filing yet further criminal complaints against members of the Board.[5]

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[4] Decision STC 114/2017.

[5] In particular the Court considered that the Applicant, as President, could have prevented the proposals from proceeding in accordance with the Rules of Parliamentary Procedure, as these fell to be interpreted and applied

18. On 1 October 2017 the referendum took place at the instigation and under the organisation of the Government. The Applicant, who is not a member of the Government, was not involved. Voter turnout was around 43%, with some 90% voting in favour of independence. On 4 October 2017, Parliamentary groups requested that the Parliamentary Board schedule a Plenary Session of Parliament to assess the results of the referendum. The Board accepted this request, and the Applicant (as President) scheduled a Plenary Session for 9 October 2017.

19. On 5 October 2017, the Constitutional Court granted an injunction preventing the Plenary Session from proceeding. This was the first time the Court had ever taken this step; indeed, in earlier decisions it had suggested that such an injunction would be inappropriate.[6] An appeal against the decision was promptly filed, but without effect.

20. On 10 October 2017, a text declaring the independence of Catalonia was signed by pro-independence Members of Parliament; however, it was agreed to suspend any effects of this declaration in order to reach a negotiated resolution with the Government of Spain.

21. On 26 and 27 October 2017 a general debate was held in Parliament regarding the political situation and on 27 October it adopted a resolution that in the preamble reproduced the declaration of 10 October. In the operative part, which had been voted on, Parliament requested that the Government take measures to achieve independence, including by way of negotiations with the Spanish Government.

22. On 28 October 2017, the President of Spain approved a range of measures including the dismissal of key members of the Catalan Government and the dissolution of the Parliament. At the same time, the Spanish Government called elections that were held normally on December 21, 2017.

C The Applicant's involvement and the charges laid

23. From October 2015 onward, the Applicant took procedural decisions that allowed Resolutions 1/XI and 5/XI to be put to a vote. In all cases this was as a member of the Board, on which she had no casting vote. In relation to Resolution 263/XI and Law 19/2017,

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in compliance with decisions of the Constitution Court. As such, the Applicant had been entitled to "refuse leave to proceed any motions or legal propositions presented by parliamentary groups whose contradiction of the law or unconstitutionality are 'clear and evident'." This was not an option the Applicant believed was available to her.

[6] For example, in Decision ATC 190/2015 the Court had reasoned that a similar injunctive request went *"beyond the proper function of the remedy as it seeks to review of constitutionality of a resolution that has not been adopted and whose final content is unknown."*

however, the decision to table the law and vote was made by the majority of Parliament as a whole, which voted to include the proposal in the agenda.

24. The Applicant was at all times bound by Parliament's Rules of Procedure and was only one member of a Board that took the relevant decisions. In each case, the Applicant ensured that the rules of Parliament were applied, as was required by her post; her goal was to preserve the right to freedom of expression, the separation of powers, and the right to political initiative.

25. As a result of the Applicant's actions, and of the various enforcement decisions described above, criminal complaints were filed in the Catalan High Court on 19 October 2016, 23 February 2017 and 8 September 2017. These involved the offences of "disobedience" (under Article 410 of the Spanish Criminal Code), "administrative malfeasance" (Article 404), and "misappropriation of public funds" (Article 432). These have now been added to the charges referred to below and transferred to the Spanish Supreme Court.

26. On 30 October 2017 the Public Prosecutor filed a further criminal complaint with the Criminal Chamber of the Spanish Supreme Court against the Applicant, along with five other members of the Parliamentary Board **[Doc 1]**.[7] The complaint concerned "*the possible offences of rebellion, sedition, misuse of public funds, and related offences*." It relied on essentially the same facts outlined above, but in relation to these facts, a conspiracy was alleged in relation to a larger number of parties including the Government of Catalonia[8] and civil society organisations.

D The Applicant's detention

27. On 9 November 2017, the Supreme Court accepted competency in the matter and ruled on an application by the prosecuting authorities for pre-trial detention of the Applicant and her co-defendants **[Doc 2]**. The Court granted the Applicant bail on conditions.[9] On 10

[7] The Applicant has consistently disputed the jurisdiction of the Supreme Court. Under Article 57.2 of the Statute of Autonomy, the Catalan High Court has jurisdiction over cases brought against Members of Parliament save "outside of the territory of Catalonia". There is no sound basis for concluding that any of the acts on which the charges against her are founded occurred anywhere other than Catalonia: see e.g. Appeal to the Constitutional Court of 26 June 2018, pp 17-28 (pp. 755-766).

[8] A few days before the presentation of the complaint, members of the Government of Catalonia, including President Mr. Carles Puigdemont, travelled to Belgium and made themselves available to the Belgian courts. European arrest warrants were issued, but were later withdrawn by Spain before the Belgian courts ruled on their admission.

[9] The relevant conditions were the payment of a bond in the sum of 150,000 euros, appearance before the courts whenever summoned, weekly reporting requirements, a prohibition on leaving Spain, and the surrender of the Applicant's passport.

November 2017, the Applicant posted the required bond and was duly released. She proceeded to comply with all relevant conditions for a period of over four months.

28. On **21 March 2018** the Supreme Court committed the Applicant and her co-defendants for trial, the Applicant being indicted for rebellion with the charge of misappropriation of public funds being dropped [**Doc 3**][10]. By contrast, the other members of the Board were charged only with the lesser offence of "disobedience" for which there is no custodial sentence. The Court ordered that the Applicant appear before it on **23 March 2018** for a hearing, as envisaged by Article 505 of the Spanish Criminal Law (see [37] below), to consider the potential tightening of pre-trial measures. The hearing was listed despite no application for such a change in pre-trial detention conditions having been made by the prosecuting authorities (as required by Article 539, see [37] below). Notably, the summons, which also required six members of Parliament to attend, including the Applicant, Jordi Turull (former Government spokesperson), Josep Rull (former Catalan development minister), Raul Romeva (former Catalan foreign affairs chief), Dolors Bassa (former Catalan labour minister), Marta Rovira (Member of Parliament) was made on the same day that Jordi Turull had been proposed for President of the Government, the Parliament being required to vote on **22 and 24 March**. Accordingly, the Court's timing appeared to be intended to prevent his investiture by removing Jordi Turull and the others from Parliament.

29. On **22 March 2018**, the Applicant, fearful for her liberty following receipt of the summons resigned her position in Parliament with a view to taking up an academic post at Sabadell Industrial College in Catalonia. The following day the Applicant appeared before the Court as directed. The Court ordered the removal of bail, citing risks of absconding and reoffending, and ordered that the Applicant be detained unconditionally **[Doc 4]**. The Court's reasoning, and the resulting violation of Articles 5(1)(c) and 5(3), is discussed in Section IVB below.

E Subsequent appeals and applications

30. On 27 March 2018, the Applicant appealed her pre-trial detention to the Supreme Court **[Doc 5]**. She submitted, in particular, that:

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[10] According to the content of the Indictment, the Supreme Court issued European arrest warrants regarding the members of the Government who were in European countries (Germany in relation to Mr. Carles Puigdemont, Belgium in relation to former Ministers Mr. Antoni Comín, Mrs. Meritxell Serret and Mr. Lluis Puig, Scotland regarding former Minister Mrs. Clara Ponsati and Switzerland regarding Members of Parliament Mrs. Marta Rovira and Mrs. Anna Gabriel). The different European courts did not agree to the precautionary measure of imprisonment of any of those people.

30.1. there was no reasonable basis for considering that she had committed the core offence charged (rebellion), as the facts set out in the indictment of 21 March 2018 showed no involvement in a "violent and public uprising";[11]

30.2. the severity of the sentence she faced had in fact diminished as a result of the indictment, as she had not been committed for trial for misappropriation of public funds;

30.3. her compliance with conditions of bail since 9 November 2017 confirmed that she was not at risk of absconding;

30.4. her recent resignation of public office indicated that she was not at risk of offending; and

30.5. in any event, the Court's reasoning as to the risk of reoffending was of only the most generic and vague character.

31. On 17 May 2018 the Supreme Court dismissed the appeal **[Doc 6]**. Its reasoning is discussed in Section IVB below. On 26 June 2018 the Applicant appealed that decision to the Constitutional Court and sought interim suspension of the pre-trial detention order pending the outcome of the appeal **[Doc 8] [Doc 10]**.

32. On 23 July 2018 the Constitutional Court accepted the appeal **[Doc 9]**. On 18 September 2018, the Constitutional Court rejected the Applicant's request for release on the grounds that only in "*categorically exceptional*" circumstances would it grant release in advance of determining the full merits of the appeal, including in circumstances such as these where the full merits could would not be determined until after the trial, such that irreparable harm would be caused by its refusal to grant release **[Doc 11]**. Accordingly, the Applicant remains in unconditional detention able only to make seven seven-minute calls per week, unable to have internet access, and with restricted visiting controls. No final date has been set for her trial, and there is no compulsory time-limit for consideration of her substantive appeal; in consequence, no further domestic court will consider the legality of her pre-trial detention prior to the trial.

[11] By a ruling of July 12, 2018 the Court for Criminal Matters of the Oberlandesgericht, Schleswig-Holstein rejected the European Arrest Warrant ("EAW") by which Spain sought the extradition of Catalan President Carles Puigdemont in so far as it related to the offence of 'rebellion', holding the necessary acts of violence did not exist. The Supreme Court in Spain then withdrew all the European arrest warrants issued in respect of other persons as set out in footnote 10 above and did not execute the European arrest warrant of Mr. Carles Puigdemont for the crime of misappropriation of public funds.

33. As regards the indictment and trial, the Applicant has challenged the original decision to commit her for trial on the basis of illegality, including manifest lack of elements giving rise to the alleged offence as a result of (in particular) her having carried out Parliamentary functions, there having been no violence and no collusion, and breach of freedom of expression rights. Her application for reconsideration was dismissed on 9 May 2018; her subsequent appeal to the Supreme Court was dismissed on 26 June 2018 **[Doc 7].**

III DOMESTIC LEGAL FRAMEWORK

A The substantive offence

34. It is not a crime at Spanish law to hold a referendum. An offence of this kind was added by the Spanish Parliament to the Criminal Code in 2003 but removed again in 2005[12].

35. As noted above, the Applicant has been charged primarily with the offence of rebellion. Under Article 472 of the Spanish Criminal Code, this applies to those who "*violently and publicly rise up*" for any of a number of specified purposes, including "*to declare the independence of any part of the national territory*."

B Pre-trial detention

36. Pre-trial detention is governed by Articles 502ff of the Criminal Procedure Law.[13] It may be ordered only where less onerous measures do not exist (Article 502); its aim is to ensure the presence of the accused at trial, avoid the destruction of evidence, and prevent further crimes from being committed (Article 503).

37. Pre-trial detention falls to be considered at a hearing under Article 505. Article 539 further provides that, in order to "*remove or increase the conditions of bail*" (including by ordering unconditional detention), "*a petition will be required from the Attorney General or… the prosecution, which shall be decided after the hearing cited in Article 505*." In the alternative, if a court or judge concludes that pre-trial detention has become necessary, it may order the reconsideration of bail and summon the defendant to appear within 72 hours.

IV STATEMENT OF ALLEGED VIOLATIONS OF THE CONVENTION

A Overview of the relevant principles in relation to Article 5(1)((c) and 5(3)

38. The pre-trial detention of the Applicant is in violation of her rights under Article 5(1)(c) and/or Article 5(3) of the Convention. Article 5(1)(c) permits deprivation of liberty for the

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[12] Amended by Organic Law 20/2003 of 23 December 2003 and removed by Organic Law 2/2005 of 22 June 2005.

[13] Amended by LO 13/2003 of 24 December.

purposes of bringing an individual "*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*." Article 5(3) provides that everyone arrested or detained in accordance with Article 5(1)(c) "*shall be brought promptly before a judge… and shall be entitled to trial within a reasonable time or to release pending trial*."

39. The Court's case-law establishes a number of clear principles which are directly relevant to the present case.

40. ***First***, detention under Article 5(1)(c) is subject to a proportionality requirement and must be "strictly necessary" to achieve the relevant aims: *Ladent v Poland* (App. No. 11036/03, 18 March 2008), [55]; *S, V and A v Denmark* [GC] (App. Nos. 35553/12, 36678/12 and 36711/12, 22 October 2018), [77].

41. ***Secondly***, it is for the domestic authorities to ensure that pre-trial detention does not exceed a "reasonable time". Put another way, Article 5(3) requires the state (the domestic courts) to grant provisional release "*once his or her continuing detention ceases to be reasonable*": see e.g. *Buzadji v Moldova* [GC] (App. No. 23755/07, 5 July 2016), [89], [91]; *Bykov v Russia* [GC] (App. No. 4378/02, 10 March 2009), [63]; *McKay v United Kingdom* [GC] (App. No. 543/03, 3 October 2006), [41], [43].

42. ***Thirdly***, reasonable suspicion of having committed an offence is "a condition *sine qua non* for the validity of continued detention". However, once detention is formally examined by the judicial authorities it is no longer sufficient to justify detention: see e.g. *Merabishvili v Georgia* [GC] (App. No. 72508/13, 28 November 2017), [222]; *Buzadji v Moldova*, [87]; *Idalov v Russia* [GC] (App. No. 5826/03, 22 May 2012), [140]; *McKay v United Kingdom*, [44]. Rather, the domestic courts must satisfy themselves that there are other grounds sufficient to justify the continued pre-trial detention and the European Court of Human Rights will establish "*whether the other grounds cited by the judicial authorities continued to justify the deprivation of liberty*", and whether these grounds were "relevant and sufficient": ibid. In that regard, the justification for any period of detention, "*no matter how short, must be convincingly demonstrated*": *Buzadji v Moldova*, [87]; *Idalov v Russia*, [140]. Continued detention "*can be justified in a given case only if there are actual indications of a genuine requirement of public interest which… outweighs the rule of respect for individual liberty laid*

down in Article 5": *Buzadji v Moldova*, [90]; *McKay v United Kingdom*, [42]; *Idalov v Russia*, [139].

43. ***Fourthly***, and in order for the reasons given by the authorities to be "sufficient":

    43.1. the reasons must not be *"general and abstract"*, but must contain references to the specific facts of the case and the personal circumstances of the individual (see e.g. *Merabishvili v Georgia*, [222]; *Buzadji v Moldova*, [90]; *McKay v United Kingdom*, [44]; *Idalov v Russia*, [139]);

    43.2. any risks relied on must be *"duly substantiated"* (see e.g. *Merabishvili v Georgia*, [222]); and

    43.3. the key evidence and arguments made on behalf of the individual must be considered and dealt with (see e.g. *Boicenco v Moldova* (App. No. 41088/05, 11 October 2006), [142]).

44. ***Fifthly***, the onus is on the authorities to demonstrate why detention is (and remains) necessary, and not on the applicant to demonstrate why release is warranted: see e.g. *Bykov v Russia*, [64].

45. ***Sixthly***, the authorities must display *"special diligence"* in the conduct of proceedings where the subject is held in pre-trial detention: *Buzadji v Moldova*, [87]; *McKay v United Kingdom*, [44]; *Idalov v Russia*, [140]; *Bykov v Russia*, [64].

46. ***Seventhly***, when the only substantial reason for continued detention is the risk that the accused will abscond (as was the case here) he must be released if he is in a position to provide adequate guarantees to ensure that he will so appear, for example by posting bail, again as was the case here: see e.g. *Wemhoff v Germany*, 27 June 1968, [15], Series A no. 7, or more recently *Luković v Serbia* (App. No. 43808/07), [54].

B Application to the present case

47. The Applicant's detention has at no point been in compliance with these principles. She has never been convicted of any offence; was released on bail and complied with all bail conditions (including the posting of a significant bond); had seen a subsequent reduction in the charges against her; had employment and old and young family in Catalonia; and posed no risk of absconding. Further, the Applicant submits that special regard should be had in the context of pre-trial detention to the fact that the acts that gave rise to the charges with which she is faced, involved her exercising a public function in Parliament, to which both

Parliamentary immunity and the right to freedom of expression/assembly necessarily apply. The Applicant has raised this issue in the domestic pre-trial detention proceedings.

48. The reasons given by the judicial authorities for ordering and maintaining the Applicant's detention focused, in essence, on three matters: (a) whether there were serious reasons for believing the Applicant had committed the offence charged; (b) the risk that the Applicant would abscond if not detained; and (c) the risk that the Applicant would commit offences if at liberty.

49. In a formal sense, these matters were "relevant" both at domestic law (see [36] above) and under the Convention.[14] However, they were on no view "sufficient". Nor were they capable of establishing that the Applicant's detention was necessary and proportionate.

50. Most notably, the approach adopted by the judicial authorities between 9 November 2017, when bail was granted, and 23 March 2018, when it was revoked, is wholly inconsistent. No proper reasons or justification for the change of approach have been provided.

51. In its decision of 9 November 2017 the Supreme Court considered the risk of absconding and the risk of the Applicant committing offences on bail. It had regard to a range of factors and arguments, including (relevantly): **[Doc 2, pp 280-281]**

    51.1. the potential severity of the sentence;

    51.2. the nature of the Applicant's involvement in the events surrounding the referendum;

    51.3. the allegation that the Applicant and her co-defendants had previously ignored decisions of the Constitutional Court;

    51.4. the fact that one of the defendants had fled the jurisdiction; and

    51.5. the allegation that the Applicant had shown a "determination to surpass the limits of the national sovereignty of the Spanish Constitution", leading to a risk of reoffending.

52. The Court concluded that a grant of bail on conditions <u>was</u> appropriate. As noted above, the Applicant complied scrupulously with these conditions up to and including the date on which bail was revoked.

53. In ordering the Applicant's unconditional detention on 23 March 2018, the Supreme Court relied on factors known (indeed expressly considered) at the time bail was granted. These included, notably, the severity of the potential sentence and the allegation of previous non-compliance with the orders of the Constitutional Court **[Doc 4, pp 438-441]**. See also **[Doc**

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[14] See e.g. *Merabishvili v Georgia*, [222] and *Buzadji v Moldova*, [88], identifying justifications which have been deemed "relevant" as including the danger of absconding and the risk of reoffending.

5, **pp 518-519 and 523-524]**. However, it gave no explanation as to why factors that had previously been held not to give rise to risks of absconding and reoffending were suddenly considered to give rise to such risks. The only potential change of circumstances referred to in its decision was the progress of the criminal investigation, leading to the indictment of 21 March 2018 **[Doc 4**, **p 439]**. However, as the Applicant noted, the indictment in fact reduced the potential severity of the penalty she faced, as it confirmed that she would not stand trial for misappropriation of public funds. As regards the other charges, these had been known from the outset of the investigation. **[Doc 5, pp 518-521]**

54. There were therefore no new factors since her release on bail on 9 November 2017 that increased the risk of absconding or reoffending **[Doc 5, pp 494, 520]**. Indeed, the case against pre-trial detention and in favour of bail strengthened: **[Doc 5, pp 494-495, 522, 526]** (see also **[Doc 8, pp 769-781]**

54.1. The Applicant had fully complied with bail conditions for four months;

54.2. The Applicant no longer held her position in Parliament, having resigned it on 22 March 2018; and

54.3. The Applicant had attended the hearing on 23 March 2018 and weekly attendance at court to sign bail. Had she intended to abscond, she would have done so on 21 March 2018 when summoned to Court *inter alia* for review of her bail.

55. The Supreme Court, in dismissing her appeal against revocation of bail, simply repeated its previous reasoning **[Doc 6, pp 561, 564-565]**. In respect of the asserted change in circumstances since 9 November 2017, it reasoned that: **[Doc 6, p 561]**

> "*although it is valued that until now [the defendants] have not attempted to avoid the action of Justice, nonetheless there is a possibility that their will may change under different circumstances arising, among other reasons, from the procedural progression of the case, with a progressive materialisation and solidification of the initial evidence of crimes committed*." (Emphasis added.)

56. Such generic and speculative reasoning – that the Applicant's *"will may change"* – provides no rational basis (let alone a "sufficient" basis) for finding a risk of absconding. Indeed, such a claim could be made in any case. Here however, it is particularly unreasonable having regard to the fact that the charges against the Applicant had been reduced since she bail was originally granted in March 2017. On no account can it be said that the Court provided reasons *"convincingly to demonstrate"* the need for pre-trial detention: see *Buzadji v Moldova* (where the Grand Chamber, in finding a violation of Article 5(3), had regard to the

fact that, in prolonging the applicant's detention, the judicial authorities relied on risks they had discounted in their initial decision: [117]-[118]). The Court noted that there was "*no explanation in the court decisions… as to why those reasons became relevant and sufficient only later*" (at [118]), and at [122] reasoned that the inconsistency of the Court's approach meant that the domestic authorities had not been able *"convincingly demonstrate that the detention is necessary."* See further *Aleksanyan v Russia* (App. No. 46468/06, 5 June 2009)[15] and *Panchenko v Russia* (App. No. 45100/98, 8 May 2005), [16] in which the Court found pre-trial detention not to have been justified where the judicial authorities justified such detention by reference to factors previously known to them, but <u>not</u> previously considered sufficient to necessitate detention.

57. Applying the same approach to the present case, the reasons given for detaining the Applicant on 23 March 2018, and for dismissing her appeal on 17 May 2018, were plainly insufficient either to secure compliance with Article 5(3) or to demonstrate the necessity and proportionality of detention for the purposes of Article 5(1)(c). In that regard, the Applicant reiterates that all of the conduct which forms the basis of the allegations, involved the exercise of her public functions in Parliament and as such gives rise to issues of both Parliamentary immunity and the right to free expression/assembly as guaranteed by Articles 10 and 11 of the Convention. This too is relevant to any assessment of the necessity and proportionality of pre-trial detention.

58. Quite apart from these impermissible and manifest inconsistencies, the reasons given for concluding that the Applicant was at risk of absconding were not "sufficient" and the risk was not "duly substantiated".

59. ***First***, the authorities relied repeatedly and overwhelmingly on the severity of the potential sentence (again something that did not change or that was reduced between March and November 2017). **[Doc 4, pp 439-440] [Doc 6, p 561**]

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15 In this case, the Court observed that some of the factors relied on by the judicial authorities to justify detention had been known to them from the outset of the criminal investigation – but had not been considered sufficient to warrant detention at an earlier stage: [188]. This was relevant in finding that there had been a violation of Article 5(3).

16 In this case, the Court noted that the applicant had been granted permission to visit his parents in another state several months after a district court had held that pre-trial detention was "the only certain means to prevent him from absconding", and a further permit six months after his release: [106]. This demonstrated that the domestic authorities "considered the flight risk to be negligible"; and, as "no new factors" enhancing this risk had emerged between the applicant's release and the issuing of the permits, the authorities "cannot have had reasonable grounds to keep him in custody in order to prevent his absconding": ibid.

60. The Court has repeatedly held that this alone is not a basis for assessing the risk of absconding and that this "*must be assessed with reference to a number of other relevant factors which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify detention pending trial*":*Khudoyorov v Russia* (App.No. 6847/02 [181]; see also *Merabishvili v Georgia*[223]; *Panchenko v Russia*,[106].

61. ***Secondly***, the pre-trial detention decisions looked at a number of defendants at the same time, such that many of the factors relied upon were highly generic: for example, the asserted strength of the case against the 'defendants' (said generally to have increased as the investigation progressed) **[Doc 4, pp 439, 441] [Doc 6**, **p 561]**; the defendants' asserted non-compliance with previous decisions of the Constitutional Court **[Doc 4**, **p 441] [Doc 6, p 561]**; and the fact that other defendants had fled the jurisdiction with the assistance of "international contacts" **[Doc 6, p 565]**. No evidence was relied on or referred to that suggested that these factors gave rise to a risk of absconding by the Applicant.[17]

62. Such an approach is impermissible for obvious reasons; a decision under Article 5(3), concerning the fundamental right to liberty must be assessed on an individualised basis, any other approach being intrinsically incompatible with the protections in Article 5(3): see principles set out in Section IVA above and further: *Khudoyorov v Russia*, [186] (where the Court deprecated the practice of issuing "*judicial decisions extending the period of detention of several co-defendants at the same time, thereby ignoring the personal circumstances of individual detainees*").

63. This is in line with the Convention principle that facts cited to justify an interference in fundamental rights must be linked to the interference. Thus, in *Aleksanyan v Russia*, the Court found that the domestic authorities had failed to link the facts cited in their decision "*with the specific risks they were using to justify detention*": [184]. In particular, as in this case, the authorities had placed reliance on the applicant's alleged connections abroad, without supporting this by reference to *"any concrete facts"*. In reality, the key facts concerning the applicant's employment situation, permanent residence, and family life "*militated in favour of [his] release rather than the reverse*": [186]. The same applies here (see further [65] below).

64. ***Thirdly***, the authorities ignored the Applicant's compliance with bail conditions, instead speculating about future compliance. This can be seen in the Supreme Court's decision of

[17] An issue specifically raised by the Applicant in her appeal to the Constitutional Court: [Doc 8].

23 March 2018, which acknowledged full prior compliance but then wholly discounted that fact on the basis of a truism (rather than reasoned decision), namely that it was "*impossible to know what the internal will of the defendants may be*" **[Doc 4**, **p 440]**. Similarly, in its decision of 17 May 2018, the Supreme Court again acknowledged prior compliance, but then dismissed its relevance on the basis of the same truism; that there was "*a possibility*" that the defendants' intentions might "*change under different circumstances*" arising from the progress of the case **[Doc 6, p 561]**.

Accordingly, the removal of bail was based on the "possibility" that something "might" change that could increase the risk of absconding, rather than on any evidence that a real risk of absconding had arisen since bail was granted, which was sufficient to justify its revocation. The Court should have given significant weight to the Applicant's conduct on bail: see e.g. *Buzadji v Moldova*, [117] (describing the applicant's conduct between the beginning of the criminal investigation and his remand in custody as an *"important factor"* to which the judicial authorities were required to have regard). As in the recent case of *Demirtas v Turkey* (App. No. 14305/17, 20 November 2018), the Court is invited to conclude that such a *"formulaic enumeration of the grounds of general scope, such as the state of the evidence" can "on no account be regarded as sufficient to justify a person's initial and continued pre-trial detention"*: see [193].

65. ***Fourthly***, the judicial authorities failed to engage with the evidence of the Applicant's personal circumstances, namely that she was married, had two sons, an infant grandson and an ailing mother in her 90s, all resident in Spain, such that there was no real likelihood of her absconding **[Doc 5**, **p 525]**. Further, she had on 22 March 2017 resigned her position in Parliament and taken up a post in a College in Catalonia. All of these factors pointed to a continued lack of any real risk of her absconding. These submissions were simply not considered in the judgment of 17 May 2018, as they should have been **[Doc 8**, **pp 769, 782]**:see *Becciev v Moldova* (App. No. 9190/03, 4 January 2006), [58] in which the Court held that in assessing the risk of absconding, regard must be had to an individual's "*character, morals, home, occupation, assets, family ties, and all kinds of links with the country*"; see also *Buzadji v Moldova*, [90]; *Merabishvili v Georgia*, [223].

66. In *Boicenco*, the Court, finding a violation of Article 5(3), noted that the judicial authorities had not "*attempted to refute the arguments made by the applicant's defence*" and concluded that the reasons given were not "sufficient" to justify detention: [142]-[145]. Similarly, in *Khudoyorov v Russia* the Court considered it significant that the authorities

"*took no notice of the arguments in favour of the applicant's release pending trial, such as his deteriorating health and family connections in the region*": [185].

67. ***Finally***, the judicial authorities failed to have *"due regard"* to the presumption of innocence. The Court has repeatedly held that this is an important aspect of compliance with Article 5(3): see e.g. *McKay v United Kingdom*, [43]; *Idalov v Russia*, [141]; *Buzadji v Moldova*, [91]; *Bykov v Russia*, [63].

68. In the present case, the Supreme Court found that the risk of absconding was increased because the Applicant maintained her innocence and as such was somehow less likely to continue to "*respect… the decisions of this judge"* **[Doc 4**, **p 441]**.Such reasoning is difficult to comprehend. However, it appears to mean that an individual who believes herself to be innocent is more likely to abscond. If so, such a stance necessarily undermines the presumption of innocence; an admission of guilt being required in order to obtain a chance of bail **[Doc 5**, **pp 523-524]**. The appeal court simply failed to address this point on appeal **[Doc 8, p 779]**.

69. For all these reasons, it cannot on any view be said that the risk of absconding was "duly substantiated".

70. The authorities' reasoning in respect of the risk of reoffending was similarly flawed.

71. ***First***, the reasons given were at an even higher level of abstraction and generality than those relied on in respect of the risk of absconding. For example, in its judgment of 23 March 2018, the Supreme Court acknowledged that the defendants had resigned their positions, but reasoned that this did not "*rule out the possibility of persisting in the determination to secure [their] aims without respecting criminal legislation*" **[Doc 4, pp 441-442].** This conclusion was unsupported by any evidence specific to the Applicant, save for a reference to her former role "*as chairwoman of the pro-sovereignty organisation ANC*" **[Doc 4, p 443].** In fact, the Applicant had resigned this role four years previously and had <u>no</u> subsisting ties with the ANC.

72. The Applicant pointed this out on appeal, also noting that, just days before bail was revoked, the Public Prosecutor had recognised (in the context of a related case) that resignation of public office indicated an "*express desire to cease… political activity*" **[Doc 8, pp 784-787, 794]**.[18] The courts' reasoning on this issue was vague, non-individualised and based on

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[18] This is consistent with the Court's approach in *Aleksanyan v Russia*, where it observed that the authorities had relied on a risk of reoffending – but that, as "the acts imputed to the applicant had allegedly been committed

supposition not evidence. The appeal court simply held that the defendants "*shared independence aspirations that they have attempted to satisfy through instruments of action that violate criminal prohibitive laws*" and a common intent "*to continue the illicit action*" at the first opportunity **[Doc 6, p 561]**. This reasoning plainly violated the principles identified in Section IVA above.

73. ***Secondly***, the Supreme Court's approach impermissibly (contrary to the principles at [44] above) in effect required the Applicant to prove that the defendants had "*abandoned, clearly and definitively, the idea of forcing the collision with the State with the purposes of declaring independence*," since it held that there was 'no evidence' to establish that that was the case **[Doc 6, p 564]**.

C Violation of Articles 10, 11 and Article 3 Protocol No. 1

74. Freedom of speech has repeatedly been recognised by the Court as the cornerstone of a democracy; a prerequisite for its existence and a guarantor of its continued health and vitality: *Animal Defenders International v United Kingdom* [GC] (App. No. 48876/08, 22 April 2013), [100]. In the legislature, (which is not confined to national parliaments but encompasses regional legislatures such as the German and Austrian Länder: *Mathieu-Mohin and Clerfayt v Belgium* (App. No. 9267/81, 2 March 1987) [53]), the elected representatives of the people must be able to express their views freely in order to discharge their function, namely the expression of the free will of the people as guaranteed by Article 3 of Protocol No. 1: *Castells v Spain* (App. No. 11798/85, 23 April 1992) §42; *Jerusalem v Austria* (App. No. 26958/95, 27 May 2001). The Court is therefore assiduous in its protection of the freedom of speech and expression of members of Parliament, especially if they are subject to sanctions such as fines: see *Karacsony v Hungary* (App. Nos. 42461/13 and 44357/13, 17 May 2016), [137]-[144] and [148]-[162]; *Cordova v. Italy* (n° 1) (30 January 2003), [59]. Politicians, whether members of regional or national assemblies, must be guaranteed the highest level of protection, subject only to narrow restrictions and "*very weighty reasons must be advanced to justify with the freedom of expression therein*": *Jerusalem v Austria*, [40]. As such interferences are subject to the "closest scrutiny on the part of the Court: *Otegi Mondragon v Spain* (App. No. 2034/07, 15 March 2011) (conviction of a member of the Basque Parliament for insulting the King).

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by him in his capacity of head of the legal department" at the relevant company, and as he had resigned this position by the time of the decision in question, it was "dubious that the applicant would still have been able to continue his alleged criminal activity": [184].

75. The Applicant has been subjected to pre-trial detention because she exercised her public functions as President of the Parliament and as a member of the Parliamentary Board, in accordance with the rules of Parliament, so as to enable Parliament to carry out its function in expressing the free will of the people by debating and voting on issues freely. As such, it constitutes a most serious and significant interference in her rights under Articles 10, 11 or Article 3 of Protocol No. 1. It is submitted that that interference was not in pursuit of any legitimate aim, nor necessary or proportionate.

76. As regards legitimate aim, the reason for detaining the Applicant was because she did not act contrary to her duties, that is, did not take steps actively to prevent the Catalan Parliament from debating and voting on resolutions (albeit that in reality she had no power to do so). It is impossible to see what legitimate aim that could pursue. Moreover, it raises serious issues regarding the chilling effect on free speech that the risk of such detention gives rise to. Here, indeed, the Applicant actually resigned her elected position as a member of Parliament on 22 March 2018 for fear of being detained following receipt of the summons of 21 March 2018.

77. Further, the pre-trial detention directly interfered with the investiture of the President as explained in paragraph 28 above. The Court held that this was justified to prevent "*the objective order of the national community*" from being jeopardised and also said "*the precautionary measure thus guarantees the correct restoration of self-government*" **[Doc.4, p. 443-444]**. It follows that the pre-trial detention was aimed at preventing free speech/representation and assembly; it was not to pursue any permissible legitimate aim under Articles 10/11 or 3 Protocol No. 1.

78. As regards necessity and proportionality, it is impossible to see on what basis it could be said that the Applicant's pre-trial detention became necessary and proportionate on 23 March 2018 when she had been on bail for four months without any difficulty. There never has been nor ever could be any suggestion that her detention was needed to prevent violence or for safety reasons. Accordingly, her detention amounts to a clear and manifest breach of Articles 10, 11 and 3 of Protocol No.1 of the Convention.

D Conclusion

79. For all the reasons given above, the Respondent has violated the Applicant's rights under Articles 5(1)(c) and/or 5(3), 10, 11 and Article 3 Protocol No. 1 of the Convention.