

THE AIRE CENTRE

Advice on Individual Rights in Europe



**CIVIL
RIGHTS
DEFENDERS**



Independence and Impartiality of the Judiciary

An overview of relevant jurisprudence
of the European Court of Human Rights

September 2021



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European Court of Human Rights

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Preface

Safeguarding the independence and impartiality of the judiciary is an indispensable aspect of upholding the rule of law. The existence of an independent and impartial judicial system is required to hold State authorities to account where their actions jeopardise or run contrary to rule of law principles. In the words of the Grand Chamber of the Strasbourg Court itself, “the notion of the separation of powers between the executive and the judiciary has assumed growing importance in its case-law”. The same applies to the “importance of safeguarding the independence of the judiciary”.^[1]

Understanding and implementing the requirements of the right to a hearing by an “independent and impartial tribunal established by law” under Article 6 ECHR are, therefore, two essential aspects of efforts to strengthen the rule of law across the Western Balkans. The publication explains the key principles developed by the European Court of Human Rights when interpreting and applying the right to a hearing by an independent and impartial tribunal established by law and contains summaries of some of the most pertinent case law on this topic.

Safeguarding the independence and impartiality of the judiciary is essential not only to meet the requirements of Article 6 ECHR, but also to ensure effective protection by the courts of every other Convention right. This publication also, therefore, highlights the interaction between Article 6 and various other Convention rights.

Whilst this topic may be of particular relevance to Western Balkan jurisdictions, the question of where the balance of powers should lie between different branches of government is relevant to countries across Europe. Recent litigation before the ECtHR and the CJEU indicates growing division within States across Europe regarding how exactly power should be allocated between the executive, parliament and the judiciary, as well as how the balance of powers should be regulated.

As this publication makes clear, both the ECtHR and the CJEU continue to develop their approach to such questions. Recent caselaw reveals an important shift in the Strasbourg Court’s approach to cases concerning independence and impartiality. For example, its increasing focus on the need for a tribunal to be “established by law” as a standalone requirement. The structure and analysis of this publication incorporate the very latest developments in the caselaw of both European courts on this subject and reflect this recent evolution in the approach of the ECtHR.

1 *Baka v. Hungary* Grand Chamber judgment of 23 June 2016, no. 20261/12, §88 (included as a summary in this publication)

The Covid-19 crisis has further increased the significance of this topic, as the extensive restrictions imposed on human rights to try to contain the pandemic must ultimately be scrutinised by an independent and impartial judiciary. At the same time, the pandemic has impacted the ability of courts to hold in-person hearings and to function at normal capacity. The need to safeguard the independence and impartiality of the judiciary must be a central consideration in decisions regarding how to deal with the resultant backlog in cases before the courts. Additionally, discussions surrounding how best to safeguard the independence and impartiality of the judiciary must take account of the new reality emerging from the pandemic, whereby hearings are increasingly held remotely.

Each of the above factors render the theme for this year's publication a particularly topical one for all Member States of the ECHR. We therefore hope this guide will provide a useful tool to all those seeking to interpret and apply the case law of the ECHR on independence and impartiality of the judiciary, at a time when this principle appears increasingly under challenge before the national and European Courts.

As highlighted within this publication, responsibility for upholding the independence and impartiality of the judiciary does not rest solely with judges and members of the courts. The right to a hearing by an independent and impartial tribunal established by law engages obligations across various institutions and indeed, across society as a whole. Ministers, politicians and the media, for example, all have a role to play.

The publication forms part of the wider Rule of Law Platform project, a regional online platform designed by the AIRE Centre and Civil Rights Defenders to provide information on rule-of-law developments, in particular the latest jurisprudence from the ECtHR, in English and the Western Balkans' languages.

The publication will also provide the framework for discussion on the topic of independence and impartiality of the judiciary at the Eighth Annual Regional Rule of Law Forum for South East Europe. Since 2014, this Forum has brought together representatives of international, supreme and constitutional courts, presidents of judicial councils, directors of judicial training academies and institutions, government agents before the Strasbourg Court, representatives of NGOs, and prominent legal experts to discuss the most relevant issues under the European Convention on Human Rights for the Strasbourg and national jurisdictions participating in the Forum. The Forum will be live streamed, enabling participants from across Europe to watch and participate online.

We hope this publication will further readers' understanding of what exactly the notion of an 'independent and impartial' tribunal entails. In particular we hope it provides practical guidance on how this vital principle of the independence and impartiality of the judiciary can be safeguarded most effectively.

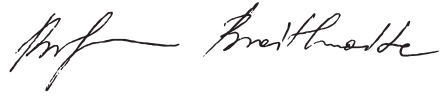
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List of Acronyms

Abbreviation	Definition
CCJE	Consultative Council of European Judges, an advisory body of the CoE on issues relating to the independence, impartiality and competence of judges
CJEU	The Court of Justice of the European Union
CoE	The Council of Europe
CoE Plan of Action	Council of Europe Plan of Action on Strengthening Judicial Independence and Impartiality CM(2016)36
Convention / ECHR	The European Convention on Human Rights
Member State / State	Contracting State(s) of the European Convention on Human Rights
The Court / the ECtHR	The European Court of Human Rights
The European Charter on the Statute for Judges	The European Charter on the Statute for Judges adopted by participants from European countries and two judges' international associations meeting in Strasbourg on 8-10 July 1998, supported by the meeting of the Presidents of the Supreme Courts of Central and Eastern European countries in Kyiv on 12-14 October 1998, and again by judges and representatives from Ministries of Justice from 25 European countries meeting in Lisbon on 8-10 April 1999
The Magna Carta of Judges	Magna Carta of Judges (Fundamental Principles), adopted by the CCJE during its 11th plenary meeting (Strasbourg, 17-19 November 2010), summarising and codifying the main conclusions of the Opinions that it already adopted
The UN Basic Principles	The United Nations Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985
The Venice Commission	The European Commission for Democracy through Law, an advisory body of the CoE, composed of independent experts in the field of constitutional law
The Venice Commission Report on the Independence of the Judicial System Part I	The Venice Commission Report on the Independence of the Judicial System Part I: The Independence Of Judges, Adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010), CDL-AD(2010)004

Table above describes the significance of various abbreviations and acronyms used throughout this Guide.

Notes on Citations, Footnotes and Case Summaries

For European Court of Human Rights cases, references will give the name in italics, the date of the decision or the judgment, and the application number. It will also be noted where cases that are mentioned in the text are summarised in Part 2 of this Guide.

References to Articles and Protocols

All references to Articles and Protocols are to Articles and Protocols of the ECHR, unless otherwise stated.

(1) INTRODUCTION

The right to access a court under Article 6 ECHR is considered by the ECtHR as a fundamental conceptual element of the notion of the rule of law and as a cornerstone of European democratic societies. The focus of this Guide is to analyse the so-called institutional requirements of Article 6 § 1, which concern an “independent and impartial tribunal established by law”.

The procedural requirements of Article 6 § 1 fall outside the scope of the Guide’s main analysis. The Guide does, however, consider other elements of Article 6, including the right to a fair and public hearing within a reasonable time under Article 6 § 1 and the right to the presumption of innocence under Article 6 § 2, in so far as compliance with these elements of Article 6 serves to safeguard and reinforce the independence and impartiality of the judiciary.^[2]

The notion of the separation of powers between the executive and the judiciary, and the importance of safeguarding the independence of the judiciary, has assumed growing importance in the Court’s case law. Maintaining public confidence in the judiciary and safeguarding its independence *vis-à-vis* the other powers of government is an essential aspect of upholding the fundamental principles of the rule of law and separation of powers. Indeed, the current president of the ECtHR has stated that:

“The principle of the rule of law is an empty vessel without independent courts embedded within a democratic structure which protects and preserves fundamental rights. Without independent judges, the Convention system cannot function.”^[3]

Article 6 § 1 ECHR provides that:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

Since its early cases, the Court has considered that the guarantees provided by Article 6 should be interpreted as a whole. In considering whether there has been

2 See the section of this Guide: ‘Safeguarding independence and impartiality’

3 Spano R., ‘The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary’, Eur Law J. 2021;1–17, see in particular page 8: <https://doi.org/10.1111/eulj.12377>.

a violation of the right to fair trial the Court has assessed the various guarantees under Article 6 together, considering the “overall fairness” of proceedings. This was especially true for the institutional requirements which are the focus of this Guide, the right to a hearing by an “independent and impartial tribunal established by law” provided by the first sentence of Article 6 § 1.

In its longstanding case law, the Court developed four key criteria in relation to these institutional requirements, which it used to help determine whether a tribunal could be considered to be “independent”: (i) the manner of appointment of its members; (ii) the duration of their term of office; (iii) the existence of guarantees against outside pressures; and (iv) whether the body presents an appearance of independence.

Traditionally, the Court assessed compliance with these requirements in-the-round, taking into account each of the four criteria. Whether deficiencies in one of the four criteria sufficed to undermine an “independent and impartial tribunal established by law” often depended on the extent to which such deficiencies were countered by the existence of safeguards in relation to the other criteria. For example, the length of the term of judicial office could acceptably be shorter in some cases, if the appointment system was deemed fair.

However, in its recent case law, the Court has dealt with the requirement for a tribunal to be “established by law” as a stand-alone, independent element of the test for compliance with Article 6. It has found that, in certain circumstances, a finding that a tribunal is not established according to law could suffice to constitute a breach of Article 6, without requiring consideration of the other elements of independence and impartiality under Article 6 § 1.^[4]

The structure of this Guide seeks to reflect this important shift in the Court’s approach. The Guide first defines which bodies and institutions the requirements of “established by law”, “independence” and “impartiality” apply to. It then goes on to consider each of these three institutional requirements in turn, in light of the case law of the ECtHR and, where relevant, the case law of the CJEU.

The structure of this Guide also seeks to reflect the fact that “independence” and “impartiality” represent two distinct concepts, which, whilst often considered together by the Court, do pertain to different requirements. The concepts of

4 *Guðmundur Andri Ástráðsson v. Iceland*, Grand Chamber judgment of 1 December 2020, no. 26374/18 (included as a summary in the publication), §§ 231-234 and § 280

independence and impartiality are therefore analysed in two separate chapters of the Guide to afford sufficient consideration to the different concerns which can arise under these two requirements.^[5]

The Guide goes on to analyse the ways in which independence and impartiality should be safeguarded, as well as the institutions and organisations responsible for this. Finally, the Guide examines the ways in which other Convention rights interact with independence and impartiality.

In addition to the relevant case law of the ECtHR and the CJEU, this Guide is informed by the instruments on independence and impartiality of the judiciary developed by the CoE, including through the Venice Commission and the Opinions of the CCJE. The CCJE, which is the advisory body of the CoE on issues relating to the independence, impartiality and competence of judges, is composed exclusively of judges, and in this respect, it is unique in Europe, and indeed in the world.^[6] The Opinions of the CCJE therefore provide a useful framework within which to consider the characteristics of a judicial system, and the safeguards which must be in place, in order to meet the requirements of the ECHR.

The Court in its judgments often refers to the principles established through these instruments. Some notable examples which are referenced within this Guide include:

- » Opinion N° 1 (2001) of the CCJE on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges
- » Opinion N° 3 (2002) of the CCJE on ethics and liability of judges
- » Recommendation CM/Rec (2010)12 of the Committee of Ministers of the CoE on Judges: independence, efficiency and responsibilities
- » The CoE Plan of Action on strengthening judicial independence and impartiality, CM(2016)36
- » The Magna Carta of Judges
- » Venice Commission Report on the Independence of the Judicial System
- » The European Charter on the Statute for Judges

5 For example, in *Demicoli v. Malta*, judgment of 27 August 1991, no. 13057/87, a case concerning breach of privilege proceedings before the Maltese House of Representatives, the Commission found a lack of independence, whereas the Court found a lack of impartiality.

6 See <https://www.coe.int/en/web/ccje> "About Consultative Council of European Judges (CCJE)", Council of Europe

(2) ARTICLE 6 AND OTHER RELEVANT INTERNATIONAL AND EU LAW

a) International law

In addition to the ECHR and the case law of the Court, a number of international instruments may also be relevant to help determine what exactly the right to “an independent and impartial tribunal established by law” demands of States in practice, as well as to determine whether this right has been breached.

The Convention cannot be considered in a vacuum and must be interpreted within the general principles of international law.^[7] This principle of interpretation is an extension of what is set out in Article 53:

“Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.”

For example, the ECtHR has taken account of the following international texts and principles on the independence of the judiciary when considering an alleged breach of Article 6:^[8]

- » The UN Basic Principles
- » The UNHRC General Comment no.32 on Article 14 of the International Covenant on Civil and Political Rights (Right to equality before courts and tribunals and to a fair trial) published on 23 August 2007
- » The Universal Charter of the Judge, approved by the International Association of Judges on 17 November 1999
- » The Bangalore Principles of Judicial Conduct (The Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, revised at the Round Table Meeting of Chief Justices held in The Hague in November 2002)

7 *Hassan v. the United Kingdom*, Grand Chamber judgment of 16 September 2014, no. 29750/09, § 77

8 *Baka v. Hungary*, Grand Chamber judgment of 23 June 2016, no. 20261/12, §§ 57-60 (included as a summary in this publication)

The principles discussed in this Guide are therefore also informed by these international standards.

b) EU Law and the jurisprudence of the CJEU

Whilst the CJEU and ECtHR are independent court systems,^[9] the two courts informally share a broad set of values and principles. In some circumstances the two courts rely on each other's reasoning and interpretations in relation to certain, shared, fundamental rights. For example, the CJEU has formally integrated the jurisprudence of the ECtHR into part of the general principles of EU law.^[10]

Article 47 (Right to an effective remedy and to a fair trial), § 2 of the European Charter on Fundamental Rights provides that:

“Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.”

The CJEU has recently confirmed the strong bond between the notion of the rule of law, as a value of European societies, and the right to have access to an independent and impartial tribunal.^[11] In interpreting the requirements of the second paragraph of Article 47 of the EU Charter, the CJEU seeks to safeguard a level of protection which does not fall below the level of protection established under Article 6 ECHR, as interpreted by the ECtHR.^[12] The interpretation of Article 47 of the Charter is, therefore, grounded in the case law of the ECtHR on Article 6 § 1 of the Convention.^[13]

9 The CJEU derives its authority from the legal system of the European Union and rules on the application and interpretation of EU law while the ECtHR derives its authority from the legal system of the CoE and rules on the application and interpretation of the ECHR.

10 *A.K. v. Krajowa Rada Sądownictwa and CP and DO v. Sąd Najwyższy*, judgment of 19 November 2019, nos. C-585/18, C-624/18 and C-625/18 (included as a summary in this publication)

11 *Commission v. Poland*, Grand Chamber judgment of 24 June 2019, no. C-619/18 (included as a summary in this publication)

12 *Erik Simpson and HG v Council of the European Union and European Commission*, Grand Chamber judgment of 26 March 2020, nos. C-542/18 RX-II and C-543/18 RX-II, § 72

13 *A.K. v. Krajowa Rada Sądownictwa and CP and DO v. Sąd Najwyższy*, judgment of 19 November 2019, nos. C-585/18, C-624/18 and C-625/18 (included as a summary in this publication)

The ECtHR has, in turn, explicitly relied upon the judgments of the CJEU in the development of its case law on Article 6 ECHR,^[14] manifesting what can be termed a *symbiotic relationship* between the two courts in this area of the law.^[15] The introduction of this Guide discusses the Court's recent shift in approach in terms of how it analyses the question of whether a tribunal can be considered to be "independent".^[16] In adopting this new approach, the ECtHR referred extensively to CJEU case law, for example, citing a judgment of the CJEU which acknowledged that the right to a "tribunal established by law" encompasses the process of appointing judges.^[17]

The joint (partly concurring, partly dissenting) opinion in this case argued on the other hand that the CJEU judgments cited by the majority did not necessarily support the logic underpinning the majority's position, namely the existence of a stand-alone right to a "tribunal established by law" detached from a concrete assessment of independence and impartiality, and the automatic consequences which flow from irregularities in a judicial appointment procedure.^[18]

Whilst the exact interpretation of the CJEU case law on this point was not unanimously agreed upon, what is clear from this judgment is that obtaining an understanding of the relevant CJEU case law on the right to a hearing by an "independent and impartial tribunal established by law" is becoming increasingly important when considering the requirements of Article 6 ECHR.

The Court also takes account of the observations and reports of the European Commission (the "Commission") regarding the strength of the independence of the judiciary in Member States, the quality of their national rules to guarantee

14 For example, *Guðmundur Andri Ástráðsson v. Iceland*, Grand Chamber judgment of 1 December 2020, no. 26374/18, § 239 (included as a summary in the publication)

15 Spano R., 'The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary', *Eur Law J.* 2021;1-17, section 4.4: The symbiotic relationship between Strasbourg and Luxembourg on judicial independence

16 See the discussion of *Guðmundur Andri Ástráðsson v. Iceland*, Grand Chamber judgment of 1 December 2020, no. 26374/18 (included as a summary in the publication) in the section of this Guide: 'Introduction'

17 *Guðmundur Andri Ástráðsson v. Iceland*, Grand Chamber judgment of 1 December 2020, no. 26374/18, § 228 (included as a summary in the publication)

18 *Guðmundur Andri Ástráðsson v. Iceland*, Grand Chamber judgment of 1 December 2020, no. 26374/18, §§ 37-40 (included as a summary in the publication)

independence and impartiality, and any problems or concerns relating to independence and impartiality raised by the Commission.^[19]

The contents of this Guide are, therefore, informed by the principles and case law of the CJEU regarding the requirements of independence and impartiality, including the CJEU's interpretation of the relevant ECHR case law. Some of the most pertinent CJEU case law is therefore summarised in the second part of this Guide: '*Case summaries*'.

19 *Guðmundur Andri Ástráðsson v. Iceland*, Grand Chamber judgment of 1 December 2020, no. 26374/18, §130 (included as a summary in the publication); where the Court took account of the European Commission's 2011 Progress Report on Iceland

(3) WHO / WHICH BODIES DOES THE REQUIREMENT OF INDEPENDENCE AND IMPARTIALITY APPLY TO?

a) Tribunals

The right to a fair hearing under Article 6 § 1 requires that a case be heard by an “independent and impartial tribunal established by law”. The requirements of legality, independence and impartiality therefore apply to any body which has the status of a “court” or “tribunal” within the meaning of Article 6 § 1 of the Convention.

The notion of a “court” or a “tribunal” is an autonomous one under the ECHR.^[20] In order to be classed as such under Article 6 § 1, it is not necessary for the institution to be classified as a ‘court’ or a ‘tribunal’ by the legislation of the State concerned, nor is it necessary for the institution to be integrated into the standard judicial machinery of the country concerned. A court or a tribunal might deal with a specific subject matter, or determine a limited number of specific issues, outside of the ordinary court system within a State.^[21]

According to the CJEU (then the European Court of Justice) the relevant factors to determine if an institution should be considered a court are:

“the legal source of the institution, its permanent character, general competence to resolve disputes, respect for the principle of adversarial authority, ... in relation to the relevant disputes and the application of the rules of law.”^[22]

The ECtHR has ruled that the notion of a “court” should be interpreted:

“... in the material sense: its functional ability to resolve matters within its jurisdiction on the basis of the rules of law, following the proceedings followed in a certain way.”^[23]

20 Jean-Paul Costa (former President of the ECHR), ‘Qu’est-ce qu’un tribunal établi par la loi?’, in Fair Trial: Regional and International Perspectives – Liber Amicorum Linos Alexandre Sicilianos, p.102.

21 *Mutu and Pechstein v. Switzerland*, judgment of 2 October 2018, no. 40575/10 and no. 67474/10, § 139

22 *Vaasens Göbbels v. Beamtenfonds voor het Mijbedrijf*, judgment of 30 June 1966, Case 61/65

23 *Sramek v. Austria*, judgment of 22 October 1984, no. 8790/79 (included as a summary in this publication): This

Therefore, a tribunal is characterised by the functions it performs, rather than the label it is given. The key question is whether the relevant person or authority serves a judicial function, i.e., do they determine matters within their competence, which are in dispute, on the basis of rules of law, and are such proceedings conducted in a prescribed manner.

The power to make decisions with binding force, which may not be altered by a non-judicial authority, is also inherent to notion of a “tribunal”.^[24] The power to issue nothing more than an advisory opinion will not suffice to constitute a tribunal.^[25]

Examples of bodies which have been found to have the status of a tribunal within the meaning of Article 6 § 1 include:

- » a regional property transactions authority;^[26]
- » a criminal damage compensation board;^[27]
- » the Court of Arbitration for Sport;^[28] and
- » a football arbitration committee.^[29]

b) Lay Judges, Jurors and Others Performing Judicial Functions

The principles established in the Court’s case law in relation to the independence and impartiality of the judiciary apply equally to jurors, lay judges and other officials exercising judicial functions, such as lay assessors, registrars, legal secretaries and referendaries.^[30] For example, the Court has assessed the following for their compliance with the requirements of independence and impartiality under Article 6 § 1:

conceptual clarification is also found in several other judgments, such as *Cyprus v. Turkey*, Grand Chamber judgment of 12 May 2014, no. 25781/94 and more recently in *Guðmundur Andri Ástráðsson v. Iceland*, Grand Chamber judgment of 1 December 2020, no. 26374/18, § 219 (included as a summary in the publication).

24 *Van de Hurk v. the Netherlands*, judgment of 19 April 1994, no. 16034/90, § 45 (included as a summary in this publication)

25 *Benthem v. the Netherlands*, judgment of 23 October 1985, no. 8848/80, § 40

26 *Sramek v. Austria*, judgment of 22 October 1984, no. 8790/79, § 36 (included as a summary in this publication)

27 *Rolf Gustafson v. Sweden*, judgment of 1 July 1997, no. 23196/94, § 48

28 *Mutu and Pechstein v. Switzerland*, judgment of 2 October 2018, no. 40575/10 and no. 67474/10, § 149

29 *Ali Riza and Others v. Turkey*, judgment of 28 January 2020, no. 30226/10 and 5506/16, §§ 202-204

30 *Bellizzi v. Malta*, judgment of 21 June 2011, no. 46575/09, §51; *Cooper v. the United Kingdom*, Grand Chamber judgment of 16 December 2003, no. 48843/99, § 123 (included as a summary in this publication)

- » lay assessors on a rent review board;^[31]
- » candidates for the office of district court judge known as assessors, who must work for three years as an assessor before becoming a judge;^[32] and
- » members of the jury in a libel case.^[33]

c) The Executive, the Legislature and Other State Authorities

The Court has emphasised that the obligation to ensure a trial by an “independent and impartial tribunal” under Article 6 § 1 is not limited to the judiciary. It also implies obligations on the executive, the legislature and any other State authority (regardless of its level) to respect and abide by the judgments and decisions of the courts, even when they do not agree with them.

It is an indispensable precondition for public confidence in the courts and, more broadly, for the rule of law that other organs and authorities of the State respect the authority of the courts. Simply implementing constitutional safeguards of the independence and impartiality of the judiciary does not suffice; such safeguards must also be effectively incorporated into everyday administrative attitudes and practices.^[34]

This approach is echoed in the relevant instruments of the CoE. The CoE Plan of Action on strengthening judicial independence and impartiality highlights the importance of propagating a culture of respect for judicial independence and impartiality in society generally, and specifically amongst the executive and legislature.^[35] The CoE Plan of Action and its Appendix indicate the following action needs to be taken:

- » Firstly, establish and improve legal guarantees of judicial independence and impartiality.
- » Secondly, put in place or introduce the necessary structures, policies and practices to ensure that these guarantees are respected in practice and contribute to the proper functioning of the judicial branch in a democratic society based on human rights and the rule of law.

31 *Langborger v. Sweden*, judgment of 22 June 1989, no. 11179/84 (included as a summary in this publication)

32 *Henryk Urban and Ryszard Urban v. Poland*, judgment of 30 November 2010, no. 23614/08 (included as a summary in this publication)

33 *Holm v. Sweden*, judgment of 25 November 1993, no. 14191/88, § 30

34 *Agrokompleks v. Ukraine*, judgment of 6 October 2011, no. 23465/03, § 136 (included as a summary in this publication)

35 CoE Plan of Action, p.7

(4) TRIBUNAL ESTABLISHED BY LAW

As discussed in the introduction to this Guide, the Court has recently articulated the right to a “tribunal established by law” as a stand-alone right under Article 6.^[36]

The requirement that a tribunal be “established by law” means that: (i) there must be domestic legislation in place which provides for and regulates the establishment and competence of judicial organs; and (ii) such legislation must be complied with in practice.

The object of the term “established by law” is to ensure that the judicial organisation in a democratic society does not depend on the discretion of the executive, but that it is regulated by law emanating from Parliament.^[37] Whilst a stand-alone right, it does therefore have a “very close interrelationship” to the guarantees of “independence and impartiality”.^[38]

Despite the fact that the Court recalls its “very close interrelationship” with the guarantees of “independence and impartiality” a finding that a tribunal is not “established by law” can itself constitute a reason to find a breach of Article 6, without needing to consider whether the tribunal in question lacked independence or impartiality.^[39] The CJEU has considered it as an argument *d’ordre public*, which should be examined by the interested courts *proprio motu*, i.e. of their own accord.^[40]

36 *Guðmundur Andri Ástráðsson v. Iceland*, Grand Chamber judgment of 1 December 2020, no. 26374/18 (included as a summary in the publication)

37 *Guðmundur Andri Ástráðsson v. Iceland*, Grand Chamber judgment of 1 December 2020, no. 26374/18, §§ 211, 214 (included as a summary in the publication)

38 *Guðmundur Andri Ástráðsson v. Iceland*, Grand Chamber judgment of 1 December 2020, no. 26374/18, § 231 (included as a summary in the publication)

39 *Guðmundur Andri Ástráðsson v. Iceland*, Grand Chamber judgment of 1 December 2020, no. 26374/18, § 295 (included as a summary in the publication): a majority of the Grand Chamber (12 votes to 5) found that it was not necessary to examine separately the applicant’s complaint as regards the lack of independence and impartiality of the Court of Appeal judge in question.

40 *Chronopost and La Poste v Ufex and Others*, Grand Chamber judgment of 1 July 2008, C341/06 P and C342/06 P, §§ 44 to 50 (a); *FV v Council*, judgment of the General Court (Appeal Chamber) of 23 January 2018, T 639/16 P; *Erik Simpson v. Council and HG v. Commission*, Grand Chamber judgment of 26 March 2020, C-542/18, § 45 and C-543/18, § 57. It will be interesting to see whether and how this criterion established by the CJEU will impact the interpretation of the third criteria established by the ECHR in *Guðmundur Andri Ástráðsson v. Iceland*, i.e. the question of effective review by national courts of the relevant breach of domestic law. The question is whether the public policy argument would be such that, even if the breach of the requirement that a tribunal is established by law is not raised by the applicants

This Guide, therefore, analyses the requirement for a tribunal to be “established by law” in this distinct section, ahead of considering the requirements of “independence” and “impartiality” in the separate sections below.

The process of appointing judges is an inherent element of the concept of “establishment” of a court or tribunal by law.^[41] The process of appointing judges must therefore be carried out in accordance with the principle of the rule of law, and in compliance with the applicable rules of national law in force at the material time.^[42]

a) The three-part test to determine whether a tribunal is established by law

The process of appointing judges has fundamental implications for the proper functioning and the legitimacy of the judiciary in a democratic State governed by the rule of law. Findings of irregularity in the establishment of a tribunal or in the judicial appointments process which lead to a finding that a court is not a “tribunal established by law” can have considerable ramifications for the principles of legal certainty and irremovability of judges. The Court has, therefore, established the three-part test described below to determine whether defects in the procedure for the appointment of judges or the establishment of a tribunal are sufficiently grave to breach the requirements of Article 6 ECHR.^[43]

1. Has there been a manifest breach of domestic law?

It is first necessary to establish if the appointers complied with the domestic procedure and obligations in place which regulate how a judge is to be appointed. For example, if there is a specific voting procedure, has this been

at domestic level, the fact that it has not been reviewed proprio motu by the national courts, would not impact the admissibility of the claim for non-exhaustion of domestic remedies and would in fact militate in favour of finding a breach of the third part of the test established in *Guðmundur Andri Ástráðsson*.

41 *Guðmundur Andri Ástráðsson v. Iceland*, Grand Chamber judgment of 1 December 2020, no. 26374/18, § 227 (included as a summary in the publication)

42 *Guðmundur Andri Ástráðsson v. Iceland*, Grand Chamber judgment of 1 December 2020, no. 26374/18, § 98 (included as a summary in the publication)

43 *Guðmundur Andri Ástráðsson v. Iceland*, Grand Chamber judgment of 1 December 2020, no. 26374/18 (included as a summary in the publication): the three-part test was established in the context of the right to a tribunal ‘established by law’ under Article 6, but the Court accepted that the complaints made about independence and impartiality of the judiciary stemmed from the same underlying issue – defects in the procedure for the appointment of judges, so there was no need to consider the issue of independence and impartiality separately from the issue of the right to a tribunal established by law.

complied with? Or, if the appointers are required to provide adequate reasons to substantiate their decisions, have they sufficiently investigated the candidates and substantiated their decisions? A State could also be found to be in breach of domestic law where the procedure carried out to appoint a judge ignores a constitutional court's judgments on how that process should be conducted.^[44]

2. Did the breach of domestic law pertain to any fundamental rule of the judicial appointment procedure?

Secondly, it is necessary to assess whether any breaches in domestic procedure, which were established at stage 1, were of such gravity as to impair the legitimacy of the appointments procedure so as to undermine the very essence of the right to a tribunal established by law. The question is whether the defects in procedure give rise to sufficient uncertainty surrounding the motives for an appointment, to give rise to serious fears of undue interference in the judiciary, and to taint the legitimacy of the whole process?^[45] The Grand Chamber considers that such grave breaches could include, for example, the appointment of persons not fulfilling the legal criteria or other breaches which undermine the purpose and effect of the "established by law" requirement, as interpreted by the Court.^[46] The Court has also held that a persistent failure to comply with relevant judgments of the State's constitutional court on the matter of appointment of judges would constitute a grave breach of domestic law, as this would undermine the rule of law, the principle of legal certainty, the separation of powers and the authority of the judiciary.^[47]

44 *Xero Flor w Polsce sp. z o.o. v. Poland*, judgment of 7 May 2021, no. 4907/18, §272 (included as a summary in this publication). Please note: at the time of writing this judgment has not become final in the circumstances set out in Article 44 § 2 of the ECHR.

45 *Guðmundur Andri Ástráðsson v. Iceland*, Grand Chamber judgment of 1 December 2020, no. 26374/18, § 270 (included as a summary in the publication): the Court found that the decision to put the Minister's proposals for judicial candidates to a single vote in Parliament, instead of a separate vote on each of the candidates, as required by domestic legislation, would not in itself have amounted to a violation of the right to a "tribunal established by law", particularly as the MPs had been offered the opportunity to request a separate vote. However, the voting procedure was found to have compounded the grave breaches of the requisite procedure that the Minister of Justice had already committed, e.g. the Minister's disregard for the fundamental procedural rule that obliged her to base her decision on sufficient investigation and assessment. This procedural rule was deemed to be an important safeguard to prevent the minister from acting out of political or other undue motive that would undermine independence of the judiciary.

46 *Guðmundur Andri Ástráðsson v. Iceland*, Grand Chamber judgment of 1 December 2020, no. 26374/18, § 246 (included as a summary in this publication)

47 *Xero Flor w Polsce sp. z o.o. v. Poland*, judgment of 7 May 2021, no. 4907/18, §281-§282 (included as a summary in this

3. Were the alleged violations effectively reviewed and remedied by the domestic courts?

Finally, any alleged violations must be subject to judicial review. The fact that the violations are subject to review by a higher court will not alone be enough to satisfy the requirements of Article 6. Judicial review must be effective, which means the reviewing court must strike the right balance between preserving the principle of legal certainty and upholding respect for the rule of law.

The three-part test above is used to establish whether defects in the judicial selection process violate domestic law and therefore constitute a breach of Article 6. In addition to this, the relevant international and European instruments contain suggestions on how exactly the selection process should be structured at a national level, and what steps it should contain.^[48] The Magna Carta of Judges, for example, states that decisions on the selection, nomination and career of judges shall be based on objective criteria and taken by a body in charge of guaranteeing independence.^[49]

The CCJE recommends that the authorities responsible in Member States for making and advising on appointments and promotions should introduce, publish and give effect to objective criteria, with the aim of ensuring that the selection and career of judges are “based on merit, having regard to qualifications, integrity, ability and efficiency”. Merit is not defined solely as a matter of legal knowledge, analytical skills or academic excellence. It also should include matters of character, judgment, accessibility, communication skills, efficiency to produce judgments, etc. and it is deemed essential that a judge have a sense of justice and a sense of fairness. In practice it can be difficult to assess such criteria; therefore, the CCJE has stressed that transparent procedures and a coherent practice are implemented when assessing and applying such criteria.

publication). Please note: at the time of writing this judgment has not become final in the circumstances set out in Article 44 § 2 of the ECHR.

48 The UN Basic Principles for example state that Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives.

49 The Magna Carta of Judges, § 5; see also https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805afb78 “Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on judges: independence, efficiency and responsibilities”, CoE Committee of Ministers, 17 November 2010, Chapter VI, § 44: “Decisions concerning the selection and career of judges should be based on objective criteria pre-established by law or by the competent authorities. Such decisions should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity.”

The CoE Plan of Action^[50] also advocates that there should be adequate participation of the judiciary in the selection, appointment and promotion of judges whilst limiting excessive executive or parliamentary interference in this process.^[51]

The principle that all decisions concerning appointment and the professional career of judges should be based on merit, applying objective criteria within the framework of the law is, therefore, now indisputable under the relevant international and European instruments. The existence of objective standards is required not merely to exclude political influence, but also to avoid the risks of favouritism, conservatism and cronyism (or “cloning”), which exist if appointments are made in an unstructured way or on the basis of personal recommendations.^[52]

b) Diversity of the judiciary

With regard to the diversity of members of the judiciary, the process for appointing a new judge must comply with the requirements of the relevant domestic equality law.^[53]

Relevant international instruments also encourage the promotion of greater representation of women and minorities in the judiciary.^[54] The Venice Commission, whilst highlighting that merit should be the primary criterion in selecting members of the judiciary, has stated that diversity within the judiciary will enable the public to trust and accept the judiciary as a whole. Judicial positions should, therefore,

50 CoE Plan of Action, Action 1.2

51 The CCJE does accept that in some countries there is, constitutionally, direct political input into the appointment of judges. Where this is the case, the aim of such a system must be to give the judiciary a certain direct democratic underpinning in the exercise of its functions. It cannot be to submit the appointment of judges to party-political considerations. Where there is any risk that it is being, or would be used, in such a way, the method would pose more of a threat to independence than an advantage.

52 CCJE (2001) Op. N° 1

53 *Guðmundur Andri Ástráðsson v. Iceland*, Grand Chamber judgment of 1 December 2020, no. 26374/18, §§ 260-262 (included as a summary in the publication)

54 The UN Basic Principles provide that in the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory; the Report of the Special Rapporteur on the independence of judges and lawyers: <https://undocs.org/A/HRC/32/34> states that States should also ensure that anyone can enter the legal profession, the prosecution services and the judiciary without discrimination of any sort, in particular on the grounds of gender; States should promote greater representation of women and minorities.

be open and access should be provided to all qualified persons in all sectors of society.^[55] Further, the CoE Plan of Action states that gender balance and, more generally, representation of society as a whole, in the composition of the judiciary should be promoted at each level, including at the most senior levels.^[56] The CCJE considers that it is appropriate to encourage applications for judicial appointment from women and ethnic minorities and has underlined the need to achieve equality between women and men in the judiciary.^[57]

55 See <https://rm.coe.int/1680700a63>: The Venice Commission Report on the Independence of the Judicial System Part I

56 CoE Plan of Action, Action 1.2

57 CCJE (2001) Op. N° 1, § 31

(5) INDEPENDENCE

a) Defining Independence

Independence refers to freedom from external pressures on judicial decision-making and implies the existence of guarantees against undue influence on judges when performing their adjudicatory role. Independence will be undermined when other organs of the state interfere in a case before the court.

The concept of independence includes both external and internal independence. External independence refers to independence from: the other organs of government, i.e. the executive and parliament,^[58] the parties to proceedings before a tribunal^[59] and society as a whole. Internal independence refers to independence from other members of the judiciary.^[60] Presenting an appearance of independence is also important to safeguard public confidence in the judiciary, including the confidence of parties to proceedings before a tribunal.

The notion of independence entails the existence of procedural safeguards to separate the judiciary from other powers of the State and other parties which might influence their decision-making. Dependence or independence of the judiciary will be assessed by reference to these safeguards, looking in particular at the manner of appointment of members of the judiciary, their terms of office, the existence of guarantees against external pressures and whether a body presents an appearance of independence.

Judicial independence should be statutory, functional and financial.^[61] This means it should be guaranteed in respect of judicial activities and in particular in respect of recruitment, nomination until the age of retirement, promotions, irremovability, training, judicial immunity, discipline, remuneration and financing of the judiciary.

All organs of the State, including the executive, parliament and each judge, are responsible for promoting and protecting judicial independence.

58 *Beaumartin v. France*, judgment of 24 November 1994, no. 15287/89, § 38

59 *Sramek v. Austria*, judgment of 22 October 1984, no. 8790/79, § 42 (included as a summary in this publication)

60 *Agrokompleks v. Ukraine*, judgment of 6 October 2011, no. 23465/03, § 137 (included as a summary in this publication)

61 The Magna Carta of Judges

b) Independence from Who?

Independence shall be guaranteed with regard to the other powers of the State, those seeking justice, other judges, and society in general, by means of national rules at the highest level.^[62]

The other powers of the State (the executive and the parliament)

It is crucial in any democracy that judges are independent from other organs of the state, and the notion of separation of powers between the executive and the judiciary has assumed growing importance in the case law of the Court.^[63] However, alongside this emphasis on the importance of separation of powers, the Court has emphasised that neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the interactions of State powers.^[64]

What is essential is that there are sufficient guarantees in place to ensure that judges are free from pressure or influence from other organs of the State when carrying out their duties. In practice, such guarantees might take different forms, and the Court will assess a range of factors in the specific context of a given case to assess whether the system and safeguards in place are compatible with the requirements of Article 6. This will include the processes of judicial appointment, promotion and removal, terms of office and other guarantees against outside pressure, which are discussed in more detail in the sections of this Guide: ‘*Criteria used to determine if a tribunal is independent*’ and ‘*Appointment of judges*’.

The independence of judges will be undermined where members of the executive seek directly to intervene in and affect the outcome of a case pending before the courts,^[65] for example by writing to the courts to exert pressure on them, issuing objections to seek the annulment or revision of a final judgment or directing strongly worded public comments on a case towards members of the judiciary.

62 The Magna Carta of Judges, § 3

63 *Stafford v. the United Kingdom*, Grand Chamber judgment of 28 May 2002, no. 46295/99, § 78 (included as a summary in this publication)

64 *Kleyn and Others v. The Netherlands*, Grand Chamber judgment of 6 May 2003, no. 39343/98 (included as a summary in this publication)

65 *Sovtransavto Holding v. Ukraine*, judgment of 25 July 2002, no. 48553/99, § 80

The fact that a member of the executive or legislature sits as a member of a judicial body can also destroy its independence,^[66] but this will not always be the case.^[67] The mere presence of a member of the legislature or the executive on a tribunal will not, alone, be sufficient to raise doubts as to the independence of the court. The theory of separation of powers cannot be invoked in the abstract, without evidence that the presence of a member of the executive or the legislature on a tribunal poses a threat to its independence in the specific context of a case.^[68]

For example, the fact that a member of the legislature also sat on a court of appeal was not found by the Court to be a problem where that person had not exercised any prior legislative, executive or advisory function in respect of the subject matter or legal issues before the court and their membership of a particular political party had no connection or link with any of the parties in the proceedings or the substance of the case.^[69] However, independence was found to be undermined where a minister of justice sitting on a disciplinary body had initiated the impugned proceedings against the applicant when acting in their capacity as a member of the executive.^[70]

Those seeking justice (the parties to proceedings)

Members of a tribunal must also be independent from the other parties to proceedings. Where a tribunal's members include someone who is in a subordinate position - in terms of his duties and the organisation of his service - to one of the parties, this will cast doubt on the independence of the tribunal, even if there is no indication that they are subject to instructions from the parties.^[71]

Other judges and members of the judiciary (internal independence)

Judicial independence also demands that individual judges be free from undue influence from other members of the judiciary and that sufficient safeguards are in place to secure the independence of judges *vis-à-vis* their judicial superiors.^[72]

66 *Gerovska Popčevska v. the Former Yugoslav Republic of Macedonia*, judgment of 7 January 2016, no. 48783/07, (included as a summary in this publication)

67 *Pabla Ky v. Finland*, judgment of 22 June 2004, no. 47221/99, §§ 31-35

68 *Pabla Ky v. Finland*, judgment of 22 June 2004, no. 47221/99, §34

69 *Pabla Ky v. Finland*, judgment of 22 June 2004, no. 47221/99, §§ 31-35

70 *Gerovska Popčevska v. the Former Yugoslav Republic of Macedonia*, judgment of 7 January 2016, no. 48783/07, §§ 53-55 (included as a summary in this publication)

71 *Sramek v. Austria*, judgment of 22 October 1984, no. 8790/79, § 42 (included as a summary in this publication)

72 *Agrokompleks v. Ukraine*, judgment of 6 October 2011, no. 23465/03, § 137 (included as a summary in this publication)

Society in general

Judicial independence also requires that regard must be had to the special role of the judiciary in society. As the guarantor of justice, a fundamental value in a State governed by the rule of law, the judiciary must enjoy public confidence if it is to be successful in carrying out its duties. It may therefore prove necessary to protect such confidence against gravely damaging attacks against the judiciary, for example in the media, that are essentially unfounded. This is especially so in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying.^[73] Generally, however, given that judges form part of a fundamental institution of the State, they can be expected to be subject to criticism within the permissible limits.^[74]

c) Criteria to Determine if a Tribunal is Independent

After considering whether a tribunal is “established by law”, taking account of the factors discussed in the section of this Guide: ‘*Tribunal established by law*’, the following factors are also relevant to a determination of whether a tribunal can be considered to be independent.

i) Appointment of judges

The process of appointing judges has fundamental implications for the proper functioning and the legitimacy of the judiciary in a democratic State governed by the rule of law. The manner of appointment of judges has therefore been found to be an inherent element of the concept of “establishment” of a court or tribunal by law.^[75] The question of whether the appointment of judges is in accordance with law is discussed above in the section of this Guide: ‘*Tribunal established by law*’. However, the fact that judges have been appointed in accordance with the formal legal requirements might not suffice to conclude that judges so appointed are in fact independent, and further analysis might be needed. The following further factors relating to the appointment of judges, for example who appoints judges, are also relevant to determining whether a tribunal or judge is independent.

73 *Morice v. France*, Grand Chamber judgment of 23 April 2015, no. 29369/10, § 128 (included as a summary in this publication)

74 *July and SARL Libération v. France*, judgment of 14 February 2008, no. 20893/03, § 74

75 *Guðmundur Andri Ástráðsson v. Iceland*, Grand Chamber judgment of 1 December 2020, no. 26374/18, § 227 (included as a summary in this publication)

Who appoints judges?

The fact that judges are nominated by parliament or appointed by government ministers does not, in itself, undermine their independence.^[76] For example, where the President of a State signs the decrees to appoint new judges, and this represents nothing more than the formal completion of a decision-making process carried out by another body, this will not undermine the independence of the persons concerned.^[77]

The Court has accepted that political sympathies may play a part in the process of appointing judges, but that the existence of such sympathies alone should not give rise to doubts as to the independence of judges appointed.^[78] It has also acknowledged that in many systems judges are appointed by ministers of justice.^[79]

What is important, where judges are appointed by members of the legislature or the executive, is to ensure that there are sufficient rules and safeguards in place to secure the independence of judges once they are appointed. It must be clear that, once appointed, judges are not subject to any pressure or influence from those who nominated or appointed them and that they receive no instructions on how to perform their role. Such safeguards could include:

- » Security of judicial tenure for judges.
- » The existence of laws prohibiting judges from being given instructions by the executive whilst exercising their adjudicatory role.

76 *Filippini v. San Marino*, judgment of 26 August 2003, no. 10526/02

77 *Thiam v. France*, judgment of 18 October 2018, no. 80018/12, §§ 80-82 (included as a summary in this publication): there was no violation of Article 6 where the power to appoint judges exercised by the President of the Republic took the form of an instrument issued by the President on the proposal of the Minister of Justice, based on the “binding approval” of the Conseil Supérieur de la Magistrature (National Legal Service Commission) in accordance with Article 65 of the Constitution. In practical terms the executive could not appoint a judge in disregard of the CSM’s decision and the Court inferred from the prerogatives of the CSM, whose role it is, together with the President, to guarantee the independence of the judiciary, that the signing by the President of instruments for the appointment of new judges or for promotion or assignment to a new post was nothing more than the formal culmination of the relevant decision-making process and did not, per se, undermine the independence of the judges concerned. In addition, the exercise of the CSM’s power of “proposal” and “binding approval” constituted an essential safeguard against the risk of pressure on judges by the executive.

78 *Thiam v. France*, judgment of 18 October 2018, no. 80018/12, §§ 80-82 (included as a summary in this publication)

79 *Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, nos. 7819/77 and 7878/77 (included as a summary in this publication)

- » Ensuring that there is no hierarchical or organisational connection between judges and the departments who appoint them, to ensure that, once appointed, they are not in a position of subordination in relation to those who nominated or appoint them.^[80]

The Court has found a violation of Article 6 where the president and vice-president of a maritime disputes division were appointed and removed from office by the Minister of Justice. The absence of the safeguard of irremovability of the judges meant that they remained in a position of hierarchical subordination *vis-à-vis* the Minister once appointed and could not therefore be regarded as independent.^[81]

Independence will also be undermined where a judge is nominated by or retains close links with parties who have an interest in the outcome of proceedings before that judge, to the extent that this connection with the parties would affect the balance of interests and the decision-making of the tribunal when determining the dispute or claim.^[82]

The Venice Commission,^[83] the CCJE^[84] and the Committee of Ministers of the CoE^[85] all recommend the establishment of independent judicial councils or similar bodies, endowed with constitutional guarantees relating to their composition, powers and autonomy, to exercise a decisive influence on decisions regarding the appointment and career of judges. They accept that in some, older democracies the executive may have some influence over judicial appointments. However, this should only be the case where: such powers are restrained by legal culture and traditions which have

80 *Clarke v. United Kingdom*, judgment of 25 August 2005, no. 23695/02: the mere fact that district and circuit judges had been appointed by the Lord Chancellor did not undermine their independence, as there was no hierarchical or organisational connection between the judges and the Lord Chancellor's Department meaning there was no risk of any outside pressure for the judges to decide cases in a particular way.

81 *Brudnicka v. Poland*, judgment of 3 March 2005, no. 54723/00

82 *Langborger v. Sweden*, judgment of 22 June 1989, no. 11179/84 (included as a summary in this publication): violation of Article 6 where the applicant sought the deletion of a negotiation clause from his lease, and members of the tribunal had been nominated by and had close links with two associations who had an interest in the continued existence of this clause; *Thaler v. Austria*, judgment of 3 February 2005, no. 58141/00: violation of Article 6 where the assessors appointed to the Regional Appeals Commission were nominated by and had close links with the two bodies which had drawn up the general agreement at issue.

83 The Venice Commission Report on the Independence of the Judicial System Part I

84 CCJE (2001) Op. N° 1

85 See https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805afb78 "Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on judges: independence, efficiency and responsibilities", CoE Committee of Ministers, 17 November 2010, Chapter IV and Chapter VI §§ 46

evolved over time to protect the independence of the judiciary; guarantees exist to ensure that the procedures to appoint judges are transparent and independent in practice; and decisions to appoint judges are determined by objective criteria.

Even in legal systems where good standards have been observed by force of tradition, under the scrutiny of a free media, there has been increasing recognition in recent years of a need for more objective and formal safeguards of independence in the appointments procedure. For example, the European Charter on the Statute for Judges provides:

“In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.”^[86]

Therefore, whilst the Court accepts that ministers of government and members of parliament can have a role in the nomination and appointment of judges, the establishment of an independent judicial council, largely comprised of judges elected by their peers, with binding influence on decisions on the appointment and career of judges, is an effective way to ensure that the independence of the judiciary is not undermined at the appointment stage.^[87]

In an important CJEU judgment dealing with the judicial reforms in Poland,^[88] and in particular the independence of the Disciplinary Chamber of the Supreme Court in Poland, the CJEU has established three criteria that are relevant for concluding whether a tribunal, albeit established in conformity with the national legal provisions, can be considered independent or not under EU law. The CJEU held, first, that the fact that the judges of the Disciplinary Chamber were appointed by the President of the Republic, did not, *per se*, establish a relationship of dependency, provided that once in office the judges were protected from external pressure and did not receive instructions from the executive. Second, the CJEU noted that the Disciplinary Chamber was established at the same time and had jurisdiction over the law of the Supreme Court of Poland that provided for the early retirement of the

86 The European Charter for the Statute of Judges, § 1.3

87 *Thiam v. France*, judgment of 18 October 2018, no. 80018/12 (included as a summary in this publication)

88 *A.K. v. Krajowa Rada Sądownicta and CP and DO v. Sądnajwyższy*, judgment of 19 November 2019, nos. C-585/18, C-624/18 and C-625/18, §§ 133-134 (included as a summary in this publication)

sitting judges of this Supreme Court^[89]. Third, the CJEU observed that the Disciplinary Chamber, which enjoyed almost complete autonomy from the Supreme Court, was composed of newly appointed judges and not of sitting judges.^[90] The CJEU concluded that these three elements, assessed in combination, might raise doubts as to the independence of the Disciplinary Chamber under Article 47 of the EU Charter on Fundamental Rights^[91].

Qualifications and training

The presence of legally qualified, professional judges and judicial members is a strong indicator of independence and is viewed as a guarantee against outside pressure.^[92] Indeed, the Magna Carta of Judges provides that:

“Initial and in-service training is a right and a duty for judges. It shall be organised under the supervision of the judiciary. Training is an important element to safeguard the independence of judges as well as the quality and efficiency of the judicial system.”^[93]

It is compatible with Article 6 for lay members to sit on a tribunal. The mere fact that a member of a tribunal does not have any legal qualifications or training does not disqualify them from sitting on a tribunal and is not enough to cast doubt on the independence or impartiality of the tribunal. There must, however, be sufficient safeguards of the independence of lay members, given that they are unlikely to be subject to the same safeguards expected of judges.^[94] For example, there could be a

89 *A.K. v. Krajowa Rada Sądownicta and CP and DO v. Sąd Najwyższy*, judgment of 19 November 2019, nos. C-585/18, C-624/18 and C-625/18, §§ 147-149 (included as a summary in this publication). In relation to the compatibility of Law on the Supreme Court with EU law, see *Commission v. Poland*, Grand Chamber judgment of 24 June 2019, no. C-619/18 (included as a summary in this publication)

90 *A.K. v. Krajowa Rada Sądownicta and CP and DO v. Sąd Najwyższy*, judgment of 19 November 2019, nos. C-585/18, C-624/18 and C-625/18, §§ 150-151 (included as a summary in this publication)

91 *A.K. v. Krajowa Rada Sądownicta and CP and DO v. Sąd Najwyższy*, judgment of 19 November 2019, nos. C-585/18, C-624/18 and C-625/18, § 153 (included as a summary in this publication)

92 *Maktouf and Damjanović v. Bosnia and Herzegovina*, Grand Chamber judgment of 18 July 2013, nos. 2312/08 and 34179/08 (included as a summary in this publication): where the fact that the international judges appointed to the State Court were seconded from amongst professional judges in their respective countries was found to represent an additional guarantee against outside pressure.

93 The Magna Carta of Judges, § 8

94 *İbrahim Gürkan v. Turkey*, judgment of 3 July 2012, no. 10987/10: where the lack of legal qualification of the military officer who sat on the bench of the military criminal court was not considered to hinder his independence or

requirement that professional judges sit on the tribunal alongside the lay members, and/or that the professional judges have a deciding vote over any decisions made.^[95] In this regard, the Court has also indicated that “...the higher a tribunal is placed in the judicial hierarchy, the more demanding the applicable selection criteria should be.”^[96]

ii) Term of office

Removability

The Court generally considers the irremovability of judges during their term of office to be a corollary to their independence^[97] and it has found a violation of Article 6 § 1 where members of a tribunal could be removed from office by a government minister.^[98] An issue will arise under Article 6 where the removability of judges is deemed to create a relationship of hierarchical subordination between the judges and the ministers who appointed them, thereby undermining confidence in the independence of the judiciary and diluting the appearance of independence.^[99]

The absence of formal recognition that judges are irremovable will not in itself equate to a lack of independence, provided that the irremovability of judges is recognised in fact and that other necessary guarantees of independence are present.^[100]

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- impartiality, but where the Court found a violation of Article 6 because the military officer remained in the service of the army, was subject to military discipline and was appointed as a judge by his hierarchical superiors, meaning he did not enjoy the same constitutional safeguards provided to the other two military judges on the criminal court.
- 95 *Le Compte, Van Leuven and De Meyere v. Belgium*, judgment of 23 June 1981, nos. 6878/75 and 7238/75: the presence of exactly the same number of members of the judiciary as medical practitioners on the Appeals Council of the Medical Association, in particular with a member of the judiciary always acting as Chairman, with a casting vote on the Appeals Council, supported the Court's conclusion that the Council was independent.
- 96 *Guðmundur Andri Ástráðsson v. Iceland*, Grand Chamber judgment of 1 December 2020, no. 26374/18, § 222 (included as a summary in the publication)
- 97 *Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, nos. 7819/77 and 7878/77 (included as a summary in this publication)
- 98 *Brudnicka v. Poland*, judgment of 3 March 2005, no. 54723/00; where judges were appointed by and could also be removed from office by the Minister of Justice, in agreement with the Minister of Transport and Maritime Affairs.
- 99 *Brudnicka v. Poland*, judgment of 3 March 2005, no. 54723/00, § 41
- 100 *Sacilor-Lormines v. France*, judgment of 9 November 2006, no. 65411/01; *Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, nos. 7819/77 and 7878/77, § 80 (included as a summary in this publication)

In a situation where there are no rules concerning the irremovability of judges, i.e. where there are no provisions enabling a judge to be removed nor to guarantee their irremovability, the Court will assess whether, in reality, there is a realistic possibility that a judge would be removed from office during their term. Where a judge could only be removed in the most exceptional circumstances, this is unlikely to threaten their independence.^[101]

If there is a possibility that judges could be removed from office, sufficient procedural and substantive safeguards must be in place to ensure that this possibility does not impinge on their independence. This is the case even where the power to remove a judge is rarely, or indeed never, used in practice, because the existence of this possibility could still undermine confidence in the judiciary and the appearance of independence.^[102] Examples of safeguards which could help to protect independence where there is a possibility of removal include:^[103]

- » Setting out clearly in law the factual grounds on which a judge could be removed from office.
- » Limiting the grounds on which a judge can be removed, for example only for reasons of incapacity or misconduct, and excluding the possibility that a judge be removed for the content of their judicial decision-making.
- » Ensuring any decision to remove a judge is subject to effective judicial review.^[104]

101 *Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, nos. 7819/77 and 7878/77, § 80 (included as a summary in this publication): where there were no rules governing the removal of members of a Board nor any guarantee for their irremovability. It appeared that the Home Secretary could require the resignation of a member, but that this would be done only in the most exceptional circumstances. The existence of this possibility was not therefore regarded as threatening the independence of the members of a Board.

102 *Henryk Urban and Ryszard Urban v. Poland*, judgment of 30 November 2010, no. 23614/08 (included as a summary in this publication): a legislative provision permitting the Minister of Justice to remove assessors was found to breach Article 6 § 1 despite the fact the Minister had never used this power to remove an assessor, as the existence of the provision was enough to undermine the appearance of independence.

103 *Henryk Urban and Ryszard Urban v. Poland*, judgment of 30 November 2010, no. 23614/08 (included as a summary in this publication): there were found to be insufficient procedural and substantive safeguards because the legislation granting the power to remove assessors did not specify what factual grounds could serve as the basis for removal of an assessor, the removal decision was taken by the Minister, not by a court and there were insufficient guarantees as regards the assessors' term of office because they were not employed for a specified, minimum term. By contrast, in *Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, nos. 7819/77 and 7878/77, (included as a summary in this publication), members of the Board were appointed for fixed-terms of 3 years and in *Clarke v. United Kingdom*, judgment of 25 August 2005, no. 23695/02, decisions to remove circuit and district judges were subject to judicial review, and the grounds on which they could be removed were limited to incapacity and misbehaviour.

104 *Clarke v. United Kingdom*, judgment of 25 August 2005, no. 23695/02

- » Appointing judges for fixed, minimum terms.

Length of term

Fixed terms of office for judges are generally regarded as a guarantee of independence, but only if the term is long enough. The Court has not, however, established a minimum length of term of office which is required to safeguard independence. Consideration of whether the length of the term of office suffices to safeguard independence will depend on the wider context, including what other safeguards in place. For example:

- » A six-year term has been found to constitute a sufficient safeguard.^[105]
- » Three-year terms were considered to be short, but acceptable, where the judicial positions in question were unpaid and where it would have been difficult to recruit volunteers if the terms were any longer.^[106]
- » Four-year terms for military judges have been considered to be too short where other aspects of the judges' status made their independence questionable, for example because the judges were servicemen who remained subject to military discipline and whose terms could be renewed.
- » Four-year terms for military judges have, in other contexts been considered to suffice, for example where the judges were elected from among the ranks of military judges, they could not be removed by a decision of the executive or the military hierarchy during their term of office and they were not subjected to any assessment during their term of office by the executive or the military authorities.

International standards affirm that a necessary condition of an independent judiciary is that judges enjoy security of tenure and are not subject to arbitrary removal from office. For example, the UN Basic principles provide that:

“11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.”^[107]

105 *Le Compte, Van Leuven and De Meyere v. Belgium*, judgment of 23 June 1981, nos. 6878/75 and 7238/75

106 *Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, nos. 7819/77 and 7878/77, (included as a summary in this publication)

107 The UN Basic Principles

iii) Guarantees against outside pressure

In order to protect judicial independence, there must be guarantees in place to ensure that judges are free from undue influence both from within and outside the judiciary. This includes ensuring judges are free from pressure or directives from fellow judges, those who have administrative responsibilities in the court such as the president of the court or the president of a division in the court, in addition to guarantees against external influence, for example from the parties to proceedings, members of government or parliament and any other external bodies.^[108]

Such guarantees could include protections against sanctions and removal from office for improper reasons, ensuring judges are not subject to instructions and that they are not in a position of hierarchical subordination, where such hierarchy could influence the independence of their decision-making.

Protections against sanctions and removal from office

As discussed in paragraph i) above, security of judicial tenure is deemed by the Court to be an important protection against political pressure and influence.^[109]

In relation to the removal and sanctioning of judges, factors relevant to safeguarding their independence include: the reasons for which judges can be removed and/or sanctioned; who or which body carries out disciplinary proceedings against them; and the procedural fairness of disciplinary or removal proceedings, including whether the decision to remove or sanction a judge is subject to judicial review.^[110]

Any decision to sanction or remove a judge must be open to review by a body exercising judicial powers. It will not be a problem if the body reviewing the disciplinary decision is also subject to the same disciplinary body, regulations and sanctions as the party to the proceedings,^[111] so long as there are sufficient measures

108 *Agrokompleks v. Ukraine*, judgment of 6 October 2011, no. 23465/03, § 137 (included as a summary in this publication)

109 *Thiam v. France*, judgment of 18 October 2018, no. 80018/12 (included as a summary in this publication)

110 *Baka v. Hungary*, Grand Chamber judgment of 23 June 2016, no. 20261/12, (included as a summary in this publication): breach of Article 6 where the President of the Supreme Court's mandate was terminated early because of views and positions that he had expressed publicly in his official capacity and where the termination of his mandate was neither reviewed, nor open to review, by any bodies exercising judicial powers.

111 *Ramos Nunes de Carvalho e Sá v. Portugal*, Grand Chamber judgment of 6 November 2018, nos. 55391/13, 57728/13 and 74041/13, §§ 157-165 (included as a summary in this publication), where the Judicial Division of the Supreme Court

in place to safeguard the reviewing body's independence from the disciplinary body.^[112] The Court accepts that all judges are subject to the law in general, and to the rules of professional discipline and ethics, and that, in the performance of their judicial duties they might have to examine a variety of cases in the knowledge that they may themselves, at some point in their careers, be in a similar position to one of the parties, including the defendant. A purely abstract risk of this kind cannot be regarded as apt to cast doubt on the impartiality of a judge in the absence of specific circumstances pertaining to his or her individual situation.

The Court has stressed the growing importance which international and CoE instruments, as well as the case law of international courts and the practice of other international bodies, attach to procedural fairness in cases involving the removal or dismissal of judges, and will scrutinise very carefully any allegations that judicial mandates have been terminated early. The Court has cited international and CoE instruments which propose the following safeguards of independence:^[113]

- » Judges shall be subject to suspension or removal only for reasons of proven incapacity, conviction for a crime or behaviour that renders them unfit to discharge their professional duties.^[114]

reviewed an appeal against a disciplinary decision of the High Council of the Judiciary, but was also subject itself to the disciplinary powers of the High Council. This was not found to be a problem, in particular because the judges of the Supreme Court, were found to be highly qualified and often in the final stages of their careers, meaning they were no longer subject to performance appraisals or in search of promotion, and the CSM's disciplinary authority over them was in reality rather theoretical.

112 *Ramos Nunes de Carvalho e Sá v. Portugal*, Grand Chamber judgment of 6 November 2018, nos. 55391/13, 57728/13 and 74041/13, §§ 157-165; where the Court contrasted their decision with their judgment in *Oleksandr Volkov v. Ukraine*, judgment of 6 February 2018, no. 21722/11 (included as a summary in this publication): in the latter case, the fact that the judges of the Higher Administrative Court (HAC) were under the disciplinary jurisdiction of the Ukrainian High Council of Justice (HCJ) was found to be a problem because the HCJ had extensive powers with respect to the careers of judges in the HAC (appointment, disciplining and dismissal) and there was a significant lack of safeguards for the HCJ's independence and impartiality, including various other structural shortcomings in the procedure before the HCJ and an appearance of bias on other grounds.

113 *Baka v. Hungary*, Grand Chamber judgment of 23 June 2016, no. 20261/12, §§ 72-86 (included as a summary in this publication)

114 The UN Basic Principles, § 18; see also the keynote intervention of the Special Rapporteur at the sixth annual Geneva Forum of Judges and Lawyers, organized by the International Commission of Jurists, which focused on judicial accountability, 14 December 2015; https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805afb78: Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on judges: independence, efficiency and responsibilities", CoE Committee of Ministers, 17 November 2010, §50:

- » Standards should be prepared and published to define not just the conduct which may lead to removal from office, but also all conduct which may lead to any disciplinary steps or change of status, including for example, a move to a different court or area.^[115]
- » Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review^[116] with the possibility of recourse before a court.^[117]

Hierarchical relationships and instructions to judges

Internal Judicial Independence

Judicial independence demands that individual judges be free from undue influence – not only from outside the judiciary, but also from within. The absence of sufficient safeguards securing the independence of judges *vis-à-vis* their judicial superiors may lead the Court to conclude that an applicant’s doubts as to the independence and impartiality of a court can be said to have been objectively justified.^[118]

Subordination of an inferior court to a higher court is likely to cause problems in relation to independence where a higher court issues direct instructions to an inferior court, or where the higher court has effective control of the careers of judges in the inferior court.^[119]

External Independence

Where members of a tribunal are hierarchically dependent on the executive, this will also lead to deficiencies in respect of independence. For example, where

“A permanent appointment should only be terminated in cases of serious breaches of disciplinary or criminal provisions established by law, or where the judge can no longer perform judicial functions. Early retirement should be possible only at the request of the judge concerned or on medical grounds.”

115 CCJE (2001) Op. N° 1, §60

116 The UN Basic Principles, § 20

117 The Magna Carta of Judges, §6; see also CCJE (2001) Op. N° 1, §59: States should consider setting up, by law, a special competent body which has as its task to apply any disciplinary sanctions and measures, where they are not dealt with by a court, and whose decisions shall be controlled by a superior judicial organ, or which is a superior judicial organ itself.

118 *Agrokompleks v. Ukraine*, judgment of 6 October 2011, no. 23465/03, § 137 (included as a summary in this publication)

119 *Findlay v. United Kingdom*, judgment of 25 February 1997, no. 22107/93 (included as a summary in this publication); *İbrahim Gürkan v. Turkey*, judgment of 3 July 2012, no. 10987/10; *Agrokompleks v. Ukraine*, judgment of 6 October 2011, no. 23465/03 (included as a summary in this publication)

members of a tribunal are also employed by government departments and are materially, hierarchically and administratively dependent on the executive for their income and for their position on the tribunal.^[120]

Further, judges must not be subject to instructions from ministers when conducting their adjudicatory role. However, it may be compatible with the requirement of independence for a minister to issue general guidelines as to the performance of their functions.^[121]

iv) Appearance of independence

In order to determine whether a tribunal can be considered to be independent as required by Article 6 § 1, it is also necessary to assess whether the tribunal presents an appearance of independence.^[122] An appearance of independence is important to preserve the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused.^[123]

Where a party has legitimate doubts about the independence of a tribunal this can, therefore, give rise to an issue under Article 6, even where no issue concerning independence has arisen as a matter of fact.^[124]

Whilst the standpoint of the parties is important, it is not decisive. Their concerns must, to some extent, be objectively justified.^[125] A problem will only arise under Article 6 in respect of independence if an “objective observer” would see cause for concern in the circumstances of the case at hand.^[126] For example, in the following

120 *Oleksandr Volkov v. Ukraine*, judgment of 6 February 2018, no. 21722/11 (included as a summary in this publication)

121 *Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, nos. 7819/77 and 7878/77, (included as a summary in this publication)

122 *Sramek v. Austria*, judgment of 22 October 1984, no. 8790/79, § 42 (included as a summary in this publication)

123 *Incal v. Turkey*, Grand Chamber judgment of 9 June 1998, no. 22678/93, § 71

124 *Sramek v. Austria*, judgment of 22 October 1984, no. 8790/79, § 42 (included as a summary in this publication): the Court did not confine itself to looking at the consequences which the subordinate status of the rapporteur (a member of the tribunal) *vis-à-vis* the Transactions Officer (a party to the proceedings) might have had as a matter of fact. Because the tribunal's members included a person who was in a subordinate position, in terms of his duties and the organisation of his service, *vis-à-vis* one of the parties, the litigants' doubts about that person's independence were found to be legitimate. Such a situation was found to seriously affect public confidence in the courts, meaning there was a violation of Article 6.

125 *Sacilor-Lormines v. France*, judgment of 9 November 2006, no. 65411/01, § 63

126 *Clarke v. United Kingdom*, judgment of 25 August 2005, no. 23695/02; *Campbell and Fell v. the United Kingdom*,

situations, the Court did not find that the parties' concerns about independence were objectively justified:

- » Where the Board responsible for adjudicating prisoners' complaints against the prison administration also played a number of administrative roles in the prison and had frequent contact with the prison administration. Whilst the Court accepted that the Board could be perceived as 'closely associated' with the executive and the prison administration, this did not suffice to show a lack of independence, as the Board was in no way dependent on prison management. The impression of the prisoners was deemed to be 'unavoidable' in the custodial setting, but not one which was justifiable to an objective observer.^[127]
- » Where the Lord Chancellor had the power to remove the circuit and district judges which determined the applicants' proceedings against the Lord Chancellor's Department. The Court found that an objective observer would have had no cause for concern about the removability of a judge in the circumstances of the case because: there had been no cases where the power of removal had affected impartiality; there had, in fact, been practically no instances of removal of district or circuit judges by the Lord Chancellor; and the power of removal was subject to judicial review.^[128]

The failure to present an appearance of independence has, however, contributed to a finding of a breach of Article 6 in numerous cases. In some cases it has been decisive, even where other safeguards of independence were in place. For example:

- » Where a member of the police sat in his personal capacity on the Police Board. Although he was not subject to orders, took an oath and could not be dismissed, the Court found a breach of Article 6 because he was a civil servant who returned to other departmental duties, meaning he could be viewed as a member of the police force subordinate to superiors and loyal to colleagues, which could undermine the confidence which courts should inspire.^[129]
- » Where one of the judges of a National Security Court was a military judge, whereas the applicant was a civilian. The Court held there was a violation of Article 6 § 1 because the applicant could legitimately fear that the military

judgment of 28 June 1984, nos. 7819/77 and 7878/77, (included as a summary in this publication)

127 *Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, nos. 7819/77 and 7878/77, § 81 (included as a summary in this publication)

128 *Clarke v. the United Kingdom*, judgment of 25 August 2005, no. 23695/02

129 *Belilos v. Switzerland*, judgment 28 April 1988, no. 10328/83 (included as a summary in this publication)

judge might allow himself to be unduly influenced by considerations which had nothing to do with the nature of the case.^[130]

- » Where a Bailiff present on the Royal Court had had initial personal, direct involvement in a case as he presided over the States of Deliberation when the Development Plan under appeal was adopted. Although there was held to be no question in the case of actual bias on the part of the Bailiff, the Court found a violation of Article 6 because this accumulation of functions gave rise to doubts as to his independence and impartiality.^[131]

The power to make binding decisions free from alteration by non-judicial bodies

Respect from other organs of the state in relation to the authority of the courts is an indispensable precondition for public confidence in the courts and, more broadly, for the rule of law.^[132] To protect judicial independence, executive authorities must not therefore intervene in judicial proceedings, for example they must not try to obtain annulment of decisions or to set aside final judgments.^[133]

The power to make binding decisions which cannot be altered by non-judicial authorities is inherent in the guarantees of Article 6.^[134] The existence of a minister's power to set aside decisions issued by a tribunal can undermine the independence of a tribunal, even where the power is seemingly not exercised in practice.^[135] Further, it is of no relevance whether any interventions made by the executive or legislative branches of government actually affect the course of the proceedings. The existence of such a power or the fact of such an attempt reveals a lack of respect for judicial office which is in itself incompatible with the notion of an "independent and impartial tribunal" within the meaning of Article 6 § 1 of the Convention.^[136]

130 *Incal v. Turkey*, Grand Chamber judgment of 9 June 1998, no. 22678/93

131 *McGonnell v. the United Kingdom*, judgment of 8 February 2000, no. 28488/95 (included as a summary in this publication)

132 *Agrokompleks v. Ukraine*, judgment of 6 October 2011, no. 23465/03, § 137, (included as a summary in this publication)

133 *Sovtransavto Holding v. Ukraine*, judgment of 25 July 2002, no. 48553/99

134 *Van de Hurk v. the Netherlands*, judgment of 19 April 1994, no. 16034/90 (included as a summary in this publication)

135 *Van de Hurk v. the Netherlands*, judgment of 19 April 1994, no. 16034/90 (included as a summary in this publication)

136 *Agrokompleks v. Ukraine*, judgment of 6 October 2011, no. 23465/03, § 134, (included as a summary in this publication)

(6) IMPARTIALITY

a) Defining Impartiality

Impartiality of judges is another institutional criterion which must be complied with to meet the requirements of Article 6 § 1. This criterion is as important as that of independence, and the Court usually analyses independence and impartiality together.

Impartiality denotes the absence of prejudice or bias on the part of a tribunal or an individual judge.^[137]

The existence of impartiality, or lack thereof, can be tested in various ways. For example, the Court takes account of both the objective and the subjective impartiality of a judge or tribunal to determine if they comply with the requirements of Article 6. The Court has also identified different types of situations in which the question of a lack of judicial impartiality can arise, including situations of a functional nature and those relating to the personal character and conduct of a judge. Each of these categories are discussed in more detail below.

It is primarily the responsibility of the individual judge to identify any impediments to his or her participation in proceedings and either to withdraw or, when faced with a situation in which it is arguable that he or she should be disqualified, although not unequivocally excluded by law, to bring the matter to the attention of the parties to allow them to challenge his or her participation.^[138]

b) Objective and Subjective Impartiality

In relation to objective and subjective impartiality, the Court has indicated that there is no watertight division between these two notions.^[139] The same situation, or conduct of a judge, can cause concerns in the eyes of an external observer (the objective test) and also give rise to issues surrounding the judge's personal convictions (the subjective test). Whether a case falls to be dealt with under one test or the other, or both, will depend on the particular facts of the contested conduct.^[140]

137 *Micallef v. Malta*, Grand Chamber judgment of 15 October 2009, no. 17056/06, § 93 (included as a summary in this publication)

138 *Sigríður Elín Sigfúsdóttir v. Iceland*, judgment of 25 February 2020, no. 41382/17, § 35

139 *Kyprianou v. Cyprus*, Grand Chamber judgment of 15 December 2005, no. 73797/01, § 119

140 *Kyprianou v. Cyprus*, Grand Chamber judgment of 15 December 2005, no. 73797/01, § 95

i) Subjective impartiality

The subjective test for impartiality requires an assessment of whether a judge holds any personal prejudice or bias in a given case. The personal convictions, interests and behaviour of a judge in a particular case are all relevant to determining his or her subjective impartiality, for example, where a judge has displayed hostility towards parties to proceedings for personal reasons.^[141]

In applying the subjective test, the Court has consistently held that the personal impartiality of a judge must be presumed until there is proof to the contrary.^[142] It can therefore be difficult (although certainly not impossible) to establish a breach of Article 6 on account of subjective impartiality. Because of this difficulty, the Court often focuses on the objective test for impartiality^[143] and in cases where it is difficult to evidence a lack of subjective impartiality, it may still be possible to evidence a lack of objective impartiality.

Behaviour by judges can, however, be sufficient to conclude a breach of impartiality criterion under the subjective test. For example: acknowledgment of personal feelings following the actions of any of the parties appearing before them; the use of emphatic language during proceedings; and the expression of opinions about an applicant's guilt at early stages of a trial, might lead to the finding of breach of impartiality under the subjective test.^[144]

ii) Objective impartiality

The objective test of impartiality involves a determination of whether, apart from a judge's personal conduct, there are ascertainable facts which give rise to legitimate doubts or fears that a particular judge or tribunal lacks impartiality. For example, because a judge has personal or hierarchical links with other parties to proceedings,^[145] or because a judge plays dual / multiple roles in the same proceedings.^[146]

141 *De Cubber v. Belgium*, judgment of 26 October 1984, no. 9186/80, § 25 (included as a summary in this publication)

142 *Kyprianou v. Cyprus*, Grand Chamber judgment of 15 December 2005, no. 73797/01, § 119; *Hauschildt v. Denmark*, judgment of 24 May 1989, no. 10486.83, § 47

143 *Micallef v. Malta*, Grand Chamber judgment of 15 October 2009, no. 17056/06, § 95 (included as a summary in this publication)

144 *Kyprianou v. Cyprus*, Grand Chamber judgment of 15 December 2005, no. 73797/01, §§ 129-133

145 *Ibid Kyprianou v. Cyprus*, Grand Chamber judgment of 15 December 2005, no. 73797/01, § 97

146 *Mežnarić v. Croatia*, judgment of 15 July 2005, no. 71615/01, § 36; *Wettstein v. Switzerland*, judgment of 21 December 2000, no. 33958/96, § 47 (included as a summary in this publication)

As discussed in the section of this Guide: ‘*Appearance of independence*’, presenting an objective appearance of impartiality is important to inspire and maintain public confidence in the judiciary, given that “justice must not only be done, it must also be seen to be done”.^[147]

The standpoint and the doubts about impartiality of the party concerned are relevant, but not decisive. Their fears must also be objectively justified.^[148] It must therefore be decided in each individual case whether the situation giving rise to doubts about impartiality is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal.^[149]

To satisfy the requirements of objective impartiality, there must be sufficient guarantees and safeguards in place to exclude any legitimate doubts in relation to a judge’s impartiality. For example, the existence of national procedures and regulations to ensure impartiality, such as rules regulating the withdrawal of judges.^[150]

Impartiality of judges, under both the subjective and objective tests, can be tested in two categories of situation that will be analysed below: situations of a functional nature, and of a personal nature.

c) Functional Impartiality

This aspect of impartiality concerns the composition of courts and the functions that a judge performs, for example, whether a judge performs different functions within the judicial process, or the exercise of both judicial and extra-judicial functions relating to the same case.

147 *De Cubber v. Belgium*, judgment of 26 October 1984, no. 9186/80, § 26 (included as a summary in this publication)

148 *Micallef v. Malta*, Grand Chamber judgment of 15 October 2009, no. 17056/06, § 96 (included as a summary in this publication)

149 *Micallef v. Malta*, Grand Chamber judgment of 15 October 2009, no. 17056/06, § 97 (included as a summary in this publication)

150 *Micallef v. Malta*, Grand Chamber judgment of 15 October 2009, no. 17056/06, § 99 (included as a summary in this publication): “Such rules manifest the national legislature’s concern to remove all reasonable doubts as to the impartiality of the judge or court concerned and constitute an attempt to ensure impartiality by eliminating the causes of such concerns. In addition to ensuring the absence of actual bias, they are directed at removing any appearance of partiality and so serve to promote the confidence which the courts in a democratic society must inspire in the public.”

i) The exercise of both judicial and extra-judicial functions

Impartiality can be undermined where an institution or a judge serves dual, overlapping functions. For example, where an institution plays an advisory as well as an adjudicatory role, or where a member of a tribunal also sits in parliament, is a member of the executive, acts as a legal representative as well as a judge, or appears to also play the role of complainant, prosecutor or witness in a case.

The mere fact that a tribunal or judge plays another role or works for another institution will not automatically undermine impartiality. The Court will examine the specific facts of each case to assess the extent to which this dual functionality gives rise to legitimate doubts about impartiality and affects the requisite appearance of impartiality. Factors relevant to this assessment include: the extent of a judge's extra-judicial involvement with matters relevant to the judicial proceedings; the time which has elapsed between the exercise of their extra-judicial function; and the judicial proceedings taking place.^[151]

It is also essential that where a body has the potential for a conflict of roles, it is made known which members of that body sat on a decision, so that there is at least the possibility to challenge the participation of such a member in a decision. This possibility of bringing a challenge is an important safeguard of impartiality.^[152]

Judges who are also members of the legislature and/or the executive

The mere fact that a judge also sits as a member of the legislature or the executive is not enough, alone, to cast doubt on their impartiality. The key question will be the extent to which, in their capacity as a member of the legislature or the executive, they were involved in the passage of the legislation, or the executive rules, which are under scrutiny in judicial proceedings. Any direct, active or formal involvement is likely to cast doubt on the impartiality of a judge subsequently called to determine a dispute over those rules.^[153]

151 *McGonnell v. The United Kingdom*, judgment of 8 February 2000, no. 28488/95, §§ 52-57 (included as a summary in this publication)

152 *Vernes v. France*, judgment of 20 January 2011, no. 30183/06, §§ 42-44

153 *McGonnell v. The United Kingdom*, judgment of 8 February 2000, no. 28488/95, §§ 55-57: where a Bailiff had been actively and formally involved in the preparatory stages of the regulation at issue, this cast doubt on his impartiality when he subsequently determined, as the sole judge, a dispute over whether there were reasons to depart from the regulations (included as a summary in this publication)

However, where a member of the legislature who sits on a court has had no involvement with the development or passage of the legislation which is before the court, and there is no indication that they have had any prior connection or link to the substance of the case, their mere status as a member of parliament is not in itself sufficient to cast doubt on their impartiality. For example, where a member of parliament adjudicates on legislation passed before he or she took office as a member of the legislature and they have no other political connection to proceedings.^[154]

The exercise of both an advisory and an adjudicatory role

The fact that an adjudicatory body also plays an advisory role is not enough, alone, to undermine impartiality. The key question will be whether the advisory work relates to the same case, the same decision or an analogous case, to the one on which the body must adjudicate.^[155] For example, where an adjudicatory body has given advisory opinions on a broad or general subject matter, this will not, generally, prevent it from adjudicating on a specific case which falls within that general subject matter.^[156]

However, this dual functionality would undermine impartiality where it gave rise to objectively justifiable fears that members of a tribunal would feel bound by their previous advisory opinion when adjudicating on a case. Their participation could be seen as undermining the appearance of independence and impartiality.^[157]

Judges who also act as legal representatives

The fact that a judge has played the role of counsel for the opposition and the role of judge in the same set of proceedings will undermine their impartiality. Even where a judge's previous involvement as counsel for the opposition was minor, lasted for no more than two months and took place nine years before the proceedings came

154 *Pabla Ky v. Finland*, judgment of 22 June 2004, no. 47221/99, §§ 33-34; see also *Kleyn and Others v. The Netherlands*, Grand Chamber judgment of 6 May 2003, no. 39343/98 (included as a summary in this publication)

155 *Kleyn and Others v. The Netherlands*, Grand Chamber judgment of 6 May 2003, no. 39343/98 (included as a summary in this publication)

156 *Kleyn and Others v. The Netherlands*, Grand Chamber judgment of 6 May 2003, no. 39343/98 (included as a summary in this publication): The fact that the Council of State had delivered advisory opinions on general transport infrastructure did not undermine its impartiality when adjudicating on subsequent appeals concerning particular routing decisions.

157 *Procola v. Luxembourg*, judgment of 28 September 1995, no. 14570/89; *Martinie v. France*, Grand Chamber judgment of 12 April 2006, no. 58675/00, § 53; *Zahirović v. Croatia*, judgment of 25 April 2013, no. 58590/11, §§ 44-50

before him as a judge, the fact that he had acted as opposition to the applicant in the *same* proceedings was determinative.^[158]

A judge's impartiality can also be undermined where a judge acts as legal representative for an opposing party to the applicant in separate, but parallel proceedings. Where the two sets of proceedings overlap in time, it is legitimate for an applicant to have concerns that the judge would continue to regard them as the opposing party, even if there is no material link between the two proceedings.^[159]

An issue is less likely to arise where a judge plays a dual role in proceedings which do not overlap in time. The Court will also take account of the time that has passed between the two sets of proceedings, and the extent to which they relate to the same subject matter.^[160]

The role of complainant, witness and/or prosecutor

A judge cannot be presumed to be neutral if he or she effectively acts as a complainant, witness and/or prosecutor in the same case in which they act as judge. For example, where judges who were the subject of criticism regarding how they conducted proceedings then took the decision to bring contempt of court proceedings against those who criticised them, tried the issues and sentenced the applicants, this confusion of the roles of complainant, witness, prosecutor and judge was found self-evidently to prompt objectively justified fears as to conformity with the requirement of impartiality.^[161]

Other examples of where impartiality has been undermined because a judge was deemed to have acted, effectively, as both judge and complainant include:

- » Where a Supreme Court judge requested disciplinary proceedings be brought against another judge, and also sat on the court which decided to dismiss this judge for misconduct.^[162]

158 *Mežnarić v. Croatia*, judgment of 15 July 2005, no. 71615/01, § 36

159 *Wettstein v. Switzerland*, judgment of 21 December 2000, no. 33958/96, § 44-47 (included as a summary in this publication)

160 *Puolitaival and Pirttaho v. Finland*, judgment of 23 November 2004, no. 54857/00, §§ 46-54

161 *Kyprianou v. Cyprus*, Grand Chamber judgment of 15 December 2005, no. 73797/01, § 127

162 *Mitrinovski v. the Former Yugoslav Republic of Macedonia*, judgment of 30 April 2015, no. 6899/12, §§ 38-46

- » Where a Supreme Court judge voted on an opinion finding misconduct in the applicant judge and then sat on the panel deciding on that judge's dismissal.^[163]

Where a judge has played an investigatory role prior to a trial, or where there is an overlap between the prosecution and the trial court, an issue with impartiality could arise if a judge has been actively involved in decisions relating to the trial. For example:

- » Where criminal appeal court judges had previously made rulings which contained statements appearing to prejudge the guilt of the accused.^[164]
- » Where two judges in the trial court had previously rejected an appeal against the issuing of the criminal charge on the basis of "sufficient evidence" that an offence had been committed.^[165]
- » Where a judge had previously been the head of the public prosecutor's section which instituted the prosecution in the case before him.^[166]

However, the fact that a judge has prior knowledge of a case file or has previously been involved in decisions taken before a trial, does not necessarily undermine impartiality.^[167] For example, where a judge has previously made an assessment of the existence of a prima facie case or has assessed whether to detain a suspect on remand, taking account of the risks of reoffending, causing harm or obstructing the conduct of proceedings. Similarly, the participation in court deliberations of a *judge rapporteur* does not affect impartiality unless the rapporteur has been involved in the "instruction" or drawing up of the charges.^[168]

Issues can also arise where a judge, or panel of judges, appears to take the role of prosecutor during proceedings. For example, where, in the absence of a public prosecutor, the judge calls and examines a witness^[169] or is forced to undertake the role of presenting and supporting the evidence against the defendant.^[170]

163 *Cerovska Popčevska v. the Former Yugoslav Republic of Macedonia*, judgment of 7 January 2016, no. 48783/07, (included as a summary in this publication)

164 *Chesne v. France*, judgment of 22 April 2010, no. 29808/06, §§ 37-40

165 *Castillo Algar v. Spain*, judgment of 28 October 1998, no. 28194/95

166 *Piersack v. Belgium*, judgment of 26 October 1984, no. 8692/79

167 *Morel v. France*, judgment of 6 June 2000, no. 34130/96

168 *Tedesco v. France*, judgment of 10 May 2007, no. 11950/02

169 *Ozerov v. Russia*, judgment of 18 May 2010, no. 64962/01, §§ 53-55

170 *Karelin v. Russia*, judgment of 20 September 2016, no. 926/08, §§ 72-75

ii) The exercise of different judicial functions within the same or related proceedings

The assessment of whether participation of the same judge in different stages of a case complies with the requirement of impartiality under Article 6 § 1 is made on a case-by-case basis, taking account of the circumstances of the individual case. This case-by-case approach also applies where the same judge participates in factually connected criminal and civil proceedings.^[171] The key question is the extent to which there is a link between the substantive issues determined by the judge at another stage in proceedings, or in related proceedings.^[172]

Separate but related proceedings

It is not a problem, *per se*, under Article 6 if the same judge participates in separate proceedings which relate to the same facts. For example, where a judge plays a role in a criminal case and then sits in an associated claim for civil compensation. To safeguard impartiality in this context it is essential that the two sets of proceedings relate to different issues.

Legitimate doubts about impartiality could arise where the legal issues, as well as the facts in related proceedings, are the same. For example, where the same standard of proof applies in each case, meaning a judge's finding in one case is likely to prejudice their finding in another.^[173]

However, a finding of criminal liability in one set of proceedings does not prejudice a finding of civil liability, or vice versa. For example, because different evidential standards apply.^[174]

A problem with impartiality will not necessarily arise simply because a judge sits in the separate criminal trials of two, co-accused applicants. To safeguard impartiality in this context the judge must not be bound by their decision in relation to the first applicant, when considering the second applicant's case. Instead, the court must give fresh consideration to the entire case of the second applicant, in adversarial

171 *Pasquini v. San Marino*, judgment of 2 May 2015, no. 50956/16, §§ 148-149

172 *Toziczka v. Poland*, judgment of 25 July 2012, no. 29995/08, § 36

173 *Fatullayev v. Azerbaijan*, judgment of 22 April 2010, no. 40984/07, §§ 136-140: legitimate grounds to doubt a judge's impartiality where civil and criminal defamation proceedings based on the same statements were ruled upon consecutively by the same judge, and the key issue was identical in each case.

174 *Lie and Bernsten v. Norway*, judgment of 16 December 1999, no. 25130/94

proceedings, allowing the second applicant to advance new legal arguments and to submit different evidence.^[175]

It will not cast doubt on a judge's independence if they have made passing comments about the second applicant in the first applicant's case, so long as these comments do not demonstrate that they have formed an unfavourable opinion of the applicant. A problem with impartiality would arise, however, if the judge made a finding of fact in the first applicant's case, which could affect the second applicant's case. Or, if the judge made any statements or used any expressions which gave the impression that they had already made a determination about the second applicant's case.^[176]

The fact that a judge has existing detailed knowledge of a case file, or the fact that a judge has undertaken a preliminary analysis of the available information, does not prevent that judge from being regarded as impartial when making a final decision on the merits of the case, so long as the analysis delivered with their final judgment is based on the evidence produced and the arguments heard at the hearing.^[177]

Different judicial roles within the same proceedings

Generally, judges should not be involved in hearing appeals against themselves and they should not be involved in ruling on the same issues in a different forum. However, the impact on their impartiality of their involvement at different stages of proceedings will depend on the particular facts of the case.

The same issues in a different forum or context

Legitimate doubts about impartiality could arise where a judge or court has had prior involvement in matters relevant to a case before them. An issue will arise if, as part of their prior dealings with a matter, the judge or court adopted a definitive position on questions relevant to the case before them. For example, where a Court of Audit had previously contributed to a public report about the mismanagement of public funds and had made specific references to the applicant whose case was before them, it was found that the statements in the report could legitimately be

175 *Khodorkovskiy and Lebedev v. Russia*, judgment of 25 July 2013, nos. 11082/06 and 13772/05, § 544; *OOO 'Vesti' and Ukhov v. Russia*, judgment of 30 May 2013, no. 21724/03

176 *Khodorkovskiy and Lebedev v. Russia*, judgment of 25 July 2013, nos. 11082/06 and 13772/05, § 544; *OOO 'Vesti' and Ukhov v. Russia*, judgment of 30 May 2013, no. 21724/03

177 *Morel v. France*, judgment of 6 June 2000, no. 34130/96, § 45

interpreted as amounting to a prejudgment of the determination of the case about the applicant's mismanagement of public funds.^[178]

It could also be problematic if a judge decided the pre-trial detention of a person because of "particularly confirmed suspicion" and then later decided the same person's guilt.^[179]

It is not an issue, however, if a judge who rules on the merits of an applicant's case has previously rejected their complaint about non-compliance with procedural deadlines, without taking any position on the merits.^[180]

Hearing appeals against their own decisions

Generally, a judge should not hear an appeal against their own decision and should not be asked to determine whether their own interpretation or application of the law in a previous decision was or was not correct.^[181] If a judge has been involved in different stages of the same proceedings, the following factors are relevant to an assessment of how this impacts their impartiality:

- » The extent of their involvement in the different stages of the case, for example, whether they presided over proceedings or had a deciding vote.^[182]
- » The number of judges involved, for example, whether they were part of a large panel of judges, or the sole judge determining a matter.^[183]

178 *Beausoleil v. France*, judgment of 6 October 2016, no. 63979/11

179 *Hauschildt v. Denmark*, judgment of 24 May 1989, no. 10486.83, §§ 51-52

180 *Berhani v. Albania*, judgment of 27 May 2010, no. 847/05

181 *Driza v. Albania*, Judgment of 13 November 2007, no. 33771/02: the Court found that the composition of the Joint Panels of the High Court consisted of six judges who had also participated in the judicial formations of the Panels of the High Court that had previously decided the case of the applicant. The Court therefore found a violation of Article 6 § 1 of the Convention in the light of the objective test of impartiality.

182 *De Haan v. the Netherlands*, judgment of 26 August 1997, no. 22839/93, § 51: breach of Article 6 where the decisive feature of the case was that the judge presided over a tribunal called upon to decide on an objection against a decision for which he himself was responsible. It was also relevant that he was the only person responsible for the original decision; *Fazlı Aslaner v. Turkey*, judgment of 4 March 2014, no. 36073/04: where only three of the thirty-one judges on a panel had taken part in earlier stages of proceedings, but it was relevant that one of those three judges presided over the bench of thirty-one judges and led its deliberations in the case.

183 *De Haan v. the Netherlands*, judgment of 26 August 1997, no. 22839/93; *Fazlı Aslaner v. Turkey*, judgment of 4 March 2014, no. 36073/04, § 37: for examples of where the Court has dismissed complaints on the grounds of the small proportion of judges concerned on benches which take majority decisions see *Ferragut Pallach v. Spain*, judgment

- » Whether there are other professional judges involved at each stage in a case, or whether the judge is on a panel with lay judges.^[184]
- » The extent to which the different stages in proceedings relate to the different questions or issues. A problem will arise where the same facts, evidence and legal arguments come before the same judges to determine if they themselves made errors in their own application of the law.^[185]
- » The extent to which there are sufficient safeguards in place to ensure a judge's dual role does not undermine impartiality.^[186]
- » Whether there is a legitimate reason / justification for why judges are participating at different stages in proceedings.^[187]

of 28 February 2006, no. 1182/03; *Garrido Guerrero v. Spain*, judgment of 2 February 2000, no. 43715/98; *OOO 'Vesti' and Ukhov v. Russia*, judgment of 30 May 2013, no. 21724/03, § 83 and for examples of cases where the Court has found violations of the right to an impartial tribunal, taking into consideration both the large proportion of judges concerned and their duties as president or rapporteur on the bench see *Cardona Serrat v. Spain*, judgment of 26 October 2010, no. 38715/06; and *Olujić v. Croatia*, judgment of 5 February 2009, no. 22330/05, § 67 (included as a summary in this publication).

184 *De Haan v. the Netherlands*, judgment of 26 August 1997, no. 22839/93, § 51: where it was held to be significant that the tribunal was composed of a professional judge assisted by two lay judges.

185 *San Leonard Band Club v. Malta*, judgment of 29 July 2004, no. 77562/01, § 64: breach of Article 6 where the Court of Appeal was essentially called upon to ascertain whether its previous judgment was based on a misinterpretation of the law, meaning the same judges were called upon to decide whether they themselves has committed an error of legal application. The case can be contrasted to *Thomann v. Switzerland*, judgment of 10 June 1998, no. 17602/91 where the same judges sat in retrial proceedings, but were undertaking a fresh consideration of the whole matter, taking into account new and comprehensive information, rather than determining their own alleged mistakes.

186 *Ramos Nunes de Carvalho e Sá v. Portugal*, Grand Chamber judgment of 6 November 2018, nos. 55391/13, 57728/13 and 74041/13, §§ 153-156 (included as a summary in this publication): no breach of Article 6 where the President of the Supreme Court was also the president of the administrative body whose decision was being examined on appeal, it was relevant that the complaint concerned the highest court in Portugal, made up of professional judges, with guaranteed tenure and subject to strict rules apt to guarantee independence and impartiality – for example there was objective criteria for appointment, the judges were not acting on instructions, and the President of the Supreme Court did not actually sit in the judicial division, meaning he was not able to exercise influence over the judges by any means.

187 *Fazlı Aslaner v. Turkey*, judgment of 4 March 2014, no. 36073/04: breach of Article 6 where out of a bench of thirty-one judges, only three had already taken part in the proceedings at an earlier stage. Although the number of judges whose impartiality had been challenged was low in proportion to the total number on the bench, the Court found a violation, in part, because no justification had been given for the need to include the three judges in question on the bench. And secondly, one of those three judges had presided over the bench of thirty-one judges and led its deliberations in the case. The Court therefore found that the applicant's doubts as to the impartiality of the bench were objectively justified (§§ 40-43; compare with the other cases cited in § 38 of the judgment).

In respect of deciding whether a party has permission to appeal, it is not necessarily incompatible with the requirements of impartiality if the same judge is involved in a decision on the merits of a case, and then subsequently involved in proceedings in which the admissibility of an appeal against that decision is examined.^[188]

d) Personal Impartiality

Personal impartiality concerns the personal conduct of a judge, for example the statements they make as part of proceedings, remarks to the media, or any personal links they may have to a case, or the parties to a case. It involves an assessment of whether a judge displays any personal bias towards or against a party.

There is a strong presumption of personal impartiality, until there is proof to the contrary.^[189] For example, it is assumed that professional judges, as a result of their training, would not be influenced by adverse media coverage or hostile coverage against the accused.^[190] Even where a judge takes a strongly negative view of an applicant's case or character, or displays unduly harsh or oppressive behaviour, such behaviour is not necessarily sufficient to show bias or personal prejudice.^[191] The type of proof required to show personal bias includes evidence that a judge has displayed hostility or ill will towards a party, or has arranged to have a case assigned to himself for personal reasons.^[192]

There must, however, be an effective mechanism in place to challenge a judge or court for bias. If a challenge is brought on these grounds, the court must address the challenge and either take action in response to it (for example by expelling the judges if they are found to display bias) or provide sufficient and convincing reasons why no further action is taken, to dissipate any doubts about the judge / court's personal convictions.^[193]

188 *Warsicka v. Poland*, judgment of 16 January 2007, no. 2065/03, §§ 38-47

189 *Le Compte, Van Leuven and De Meyere v. Belgium*, judgment of 23 June 1981, nos. 6878/75 and 7238/75

190 *Craxi v. Italy*, judgment of 5 December 2002, no. 34896/97 (included as a summary in this publication)

191 *Ranson v. the United Kingdom*, judgment of 2 September 2003, no. 14180/03

192 *De Cubber v. Belgium*, judgment of 26 October 1984, no. 9186/80, § 25 (included as a summary in this publication)

193 *Harabin v. Slovakia*, judgment of 20 November 2012, no. 58688/11 (included as a summary in this publication)

i) Conduct in the case including remarks made or language used

The language used, or remarks made by a judge in a case, can provide evidence that they lack the requisite detachment from a case to perform their function.^[194]

However, there is a fairly high threshold to pass before behaviour in a case is found to demonstrate bias or a lack of impartiality. Inappropriate remarks, even those which might indicate unprofessional behaviour, are unlikely to be enough.^[195] The language used by a judge must indicate personal offence or personal involvement with a case, or be so emphatic as to convey hostility, indignation or shock, in contrast to the detached approach expected of judicial pronouncements.^[196]

An issue with impartiality might also arise where a judge intervenes in matters of friendly settlement between the parties, for example by persisting in pressuring a civil litigant to settle a case.^[197]

ii) Public statements about the case

To preserve their appearance of impartiality, judges should refrain from making public comments about the cases in which they are involved, or issues relevant to their cases, even when provoked by the press to comment. In particular, they must avoid making comments which are critical of the parties involved,^[198] or

194 *Vardanyan and Nanushyan v. Armenia*, judgment of 27 October 2016, no. 8001/07, § 82: where the judge's use of language during the hearing was found to be clearly capable of raising a legitimate fear that the applicant's refusal to accept a friendly settlement offer might have an adverse influence on the Chamber's consideration of the merits of his case.

195 *Ilseher v. Germany*, Grand Chamber judgment of 4 December 2018, nos. 10211/12 and 27505/14, § 289: where a judge's inappropriate remark about the dangerousness of an applicant who had already been convicted of murder for sexual gratification was found to be unprofessional, but not enough to show that the judge was personally biased against the applicant.

196 *Kyprianou v. Cyprus*, Grand Chamber judgment of 15 December 2005, no. 73797/01: where the judges, in their sentencing decision, acknowledged that they had been "deeply insulted" "as persons" by the applicant.

197 *Kyprianou v. Cyprus*, Grand Chamber judgment of 15 December 2005, no. 73797/01: where a judge pressure a civil litigant to settle a case by warning that courts always attached importance to which party refused to enter into a settlement agreement, the Court found that this raised an objectively justified fear that he lacked impartiality when the litigant refused to settle.

198 *Lavents v. Latvia*, judgment of 28 November 2002, no. 58442/00, §§ 118-121 (included as a summary in this publication); *Olujic v. Croatia*, judgment of 5 February 2009, no. 22330/05, §§ 61-68 (included as a summary in this publication)

which indicate that they have already formed a view about a case.^[199] The Court considers that, as a matter of principle, a judge should consider disqualifying themselves from sitting if they have made public statements relating to the outcome of the case.^[200]

However, the fact that a judge has known political views opposite to those of an accused, or the fact that a judge has previously expressed criticism of laws which they are subsequently called to adjudicate upon, will not, of itself, disclose a problem with impartiality.^[201]

Where a judge's family member makes public statements related to a case, for example on social media or in the press, the Court will consider:

- (i) Whether the character of those statements was such as to raise objectively justifiable concerns about the impartiality of the proceedings, for example whether the statements could be read as an attempt to exploit a family member's judicial position or to influence a judge; and
- (ii) Whether the statements published can be said to have been associated with the judge themselves, for example, is there any evidence that:
 - » the judge was influenced by the statement of their family member;
 - » the statements arose from discussions between the judge and their family member; or
 - » the judge had agreed to the comments or been aware that they would be posted.^[202]

Use of social media

Judges' use of social media provides a topical example of where a balance needs to be struck between the requirement of personal impartiality and a judge's right to freedom of expression and association (see also the section of this Guide: 'The rights of judges'). In an era where involvement in the communities that judges serve increasingly includes participation in online activities, judges should not be prohibited from participation in social media, so long as such participation is appropriate. This issue of what constitutes an appropriate interaction on social media will be considered by the Court in a communicated case which concerns

199 *Buscemi v. Italy*, judgment of 16 September 1999, no. 29569/95

200 *Rustavi 2 Broadcasting Company Ltd and Others v. Georgia*, judgment of 18 July 2019, no. 16812/17, § 342

201 *Previti v. Italy*, judgment of 8 December 2009, no. 45291/06, §§ 249-269

202 *Rustavi 2 Broadcasting Company Ltd and Others v. Georgia*, judgment of 18 July 2019, no. 16812/17, § 344

whether a judge who is a “friend” on a social network of one of the parties to a case, can be considered impartial or not.^[203]

The United Nations Office on Drugs and Crime recommends the introduction of guidelines and training on the use of social media for judges to ensure their usage is in line with their ethical duties and does not impact their personal impartiality.^[204]

iii) Personal interest in the case / links to the parties / connections / affiliations

Connections between the judges and the parties

Professional, financial or personal links between a judge and a party to a case, or the party’s advocate, may give rise to doubts about impartiality, although this will depend on the circumstances of the case and the nature of the connection in question.

Family connections between a judge and a party to proceedings, or the party’s representative, can give rise to an issue,^[205] but do not automatically mean there has been a violation of the requirement of impartiality.^[206] Systems should exist to ensure that judges do not sit in appeal on cases where members of their family act as prosecutor.^[207] Where a relative of a judge works for the law firm acting for a party, it is relevant to consider:^[208]

203 *Chaves Fernandes Figueiredo v. Switzerland*, communicated on 28 August 2019, no. 55603/18: in this regard, the French Cour de Cassation has maintained the position that: “...the term “friend” used to designate people who agree to enter into contact via social networks does not refer to friendship in the traditional sense of the term...the existence of contacts between these different people via social networks is not sufficient to characterise a particular partiality, the social network being simply a specific means of communication between people who share the same interests and, in this case, the same profession.” (See: arrêt n° 1 du 5 Janvier 2017 (16-12.394), Cour de cassation - Deuxième chambre civile - ECLI:FR:CCASS:2017:C200001)

204 See https://www.unodc.org/res/ji/import/international_standards/social_media_guidelines/social_media_guidelines_final.pdf “Non-Binding Guidelines on the Use of Social Media by Judges”, United Nations Office on Drugs and Crime, 2019

205 *Micallef v. Malta*, Grand Chamber judgment of 15 October 2009, no. 17056/06, § 102 (included as a summary in this publication)

206 *Ramljak v. Croatia*, judgment of 27 June 2017, no. 5856/13, § 29

207 *Dainelienė v. Lithuania*, judgment of 16 October 2018, no. 23532/14, § 45

208 *Nicholas v. Cyprus*, judgment of 9 January 2018, no. 63246/10, § 62; see also *Ramljak v. Croatia*, judgment of 27 June 2017, no. 5856/13, §§ 38-39: doubts as to objective impartiality found where the son of a sitting judge worked as a

- » The relationship between the judge and their relative (for example, the closeness of a father-son relationship is more likely to lead to a finding of a lack of impartiality than a more distant family relationship).
- » The size of the law firm, its internal organisational structure and the financial significance of the case for the firm.
- » Whether the relative has been involved in the case concerned, or worked with others who have been involved, and the position of the relative in the law firm.
- » Any potential financial interest or benefit for the relative (and the size of such a benefit where relevant).

Other examples of cases where a lack of impartiality has been found, outside the context of the judge having a family relationship with the parties involved, include:

- » Where the judge has a past history of negative relations with, or disapproval of an applicant.^[209]
- » Where a judge, acting in another capacity / role, has regular, close and financially lucrative links with a party to proceedings,^[210] or has accepted assets from one of the parties.^[211]
- » Where a judge has recently been involved in a financial agreement between her husband and the bank which was a party in proceedings.^[212]
- » Where a judge has personal relations with a victim in criminal proceedings.^[213]

Connections between judges

Personal links between judges can also cast doubts on their impartiality.^[214] However, the mere fact that judges know each other as colleagues, or share offices,

trainee for the law firm representing a party, given the small size of the firm, the fact that the son worked closely with two lawyers working on the case, and the nature of the father-son link.

209 *Oleksandr Volkov v. Ukraine*, judgment of 6 February 2018, no. 21722/11, § 116 (included as a summary in this publication)

210 *Pescador Valero v. Spain*, judgment of 17 June 2003, no. 62435/00: where the judge's regular, close and financially lucrative links as a professor with the university sued by the applicant justified fears that he might lack impartiality.

211 *Belukha v. Ukraine*, judgment of 9 November 2006, no. 33949/02: where the judge had demanded and accepted assets, e.g. a computer for the court, for free from the other party.

212 *Petur Thor Sigurdsson v. Iceland*, judgment of 10 April 2003, no. 39731/98, § 45

213 *Mitrov v. the Former Yugoslav Republic of Macedonia*, judgment of 2 June 2016, no. 45959/09, §§ 49 and 55

214 *Mitrov v. the Former Yugoslav Republic of Macedonia*, judgment of 2 June 2016, no. 45959/09, §§ 54-56: where the Court found an appearance of impartiality where the applicant was prosecuted in relation to the death in a road traffic accident of the daughter of the presiding judge of the criminal court. The judge presiding over the trial had been the colleague of the presiding judge for a number of years, in a small collegiate group and had also served as his clerk.

is not in itself sufficient to cast doubt on their impartiality. This is particularly so in a very small country, where it might be common for a legal professional to perform multiple functions (for example as a lawyer and a judge) and/or for a large percentage of the legal profession to know each other.^[215]

However, given the importance of the appearance of impartiality, any connections between judges which might give rise to doubts about impartiality must be disclosed at the outset, to enable an open, informed determination of whether any issues might arise, and whether disqualification of a judge is required.^[216]

Where a court president has a connection to a party in a case, but does not actually sit as part of the panel deciding that case, the impact this has on impartiality will depend on the circumstances. Relevant factors include the degree of influence the president can exercise over the case, and the pressure (both direct and indirect) that he or she can exert on the judges who do sit on the panel.^[217]

Specialist tribunals

Where there are professional connections between an applicant and members of a specialist tribunal, this alone will not be enough to cast doubt on their impartiality. It will generally be necessary to show more direct links between the parties and the members of a tribunal and to demonstrate that there is a legitimate reason to fear that the interests of the judge(s) in question are contrary to those of one of the parties to the case.^[218]

Stereotyping

The CoE Plan of Action also emphasises the need to counter the negative influence of stereotyping in judicial decision-making, so as to uphold and improve the appearance of impartiality. Actions 2.4 and 2.5 state that judges should receive detailed, in-depth and diversified training to enable them to perform their duties satisfactorily and to ensure that judicial stereotyping does not compromise the

215 *Bellizzi v. Malta*, judgment of 21 June 2011, no. 46575/09, § 57

216 *Nicholas v. Cyprus*, judgment of 9 January 2018, no. 63246/10, §§ 64-66

217 *Parlov-Tkalcic v. Croatia*, judgment of 22 December 2009, no. 24810/06, §§ 82-97

218 *Langborger v. Sweden*, judgment of 22 June 1989, no. 11179/84 (included as a summary in this publication): where two lay assessors on the Housing and Tenancy Court had close links with the two associations which sought to maintain a clause the applicant was challenging, there being a legitimate fear that their interests were contrary to those of the applicant.

rights of vulnerable groups to access an impartial tribunal. The quality of initial and in-service training for judges should be reinforced by allocating sufficient resources to guarantee that training programmes meet the requirements of competence, openness and impartiality inherent in judicial office.^[219]

Communication with a state body which is party to proceedings

Meetings with any interested party to proceedings, especially where such a party is a state body, on issues which are the subject of pending or foreseeable litigation, should be held in a way which does not undermine the decision-making process and the public confidence that the courts must inspire.^[220] It may be acceptable, in very certain circumstances, for representatives of a judicial body to have contact with a representative of a government department, who later becomes a party to proceeding. For example, where faced with a large influx of similar cases, a court might meet with a government body who later becomes party to proceedings, to discuss and seek methods to deal most effectively with procedural aspects of the dispute and /or to obtain information relevant to adjudication.^[221] In this context, extracting a leading case from among a large number of cases in order to manage the volume of similar pending cases does not undermine an impartial judicial procedure. However, to avoid undermining their impartiality such a meeting should take place outside the framework of proceedings, before proceedings are pending before the court, and should be a public meeting.^[222] It will also be relevant to consider whether the judges are protected from influence by such a meeting, for example if they have security of tenure, and whether there is any evidence that their reasoning has been influenced by the meeting.^[223]

219 CoE Plan of Action, Actions 2.4 and 2.5

220 *Svilengačanin and Others v. Serbia*, judgment of 12 January 2021, nos. 50104/10 and 9 others, §67

221 *Svilengačanin and Others v. Serbia*, judgment of 12 January 2021, nos. 50104/10 and 9 others, §67

222 *Svilengačanin and Others v. Serbia*, judgment of 12 January 2021, nos. 50104/10 and 9 others, §71

223 *Svilengačanin and Others v. Serbia*, judgment of 12 January 2021, nos. 50104/10 and 9 others, §§72- 74

(7) SAFEGUARDING INDEPENDENCE AND IMPARTIALITY

Ensuring judicial proceedings are transparent, and that judges are accountable, are amongst the strongest safeguards of an independent and impartial justice system.^[224]

As discussed above, presenting an appearance of independence and impartiality is a vital part of meeting the requirements of independence and impartiality under Article 6. Public confidence in the courts relies on effective communication with the public. The parties to proceedings and the wider public must be able to access and understand decisions made by the courts. This contributes to the maintenance of independence and impartiality and ensures that where judges do not appear impartial or independent, they can be held accountable.

The obligation to communicate judgments transparently and to ensure accountability of judges should serve to reinforce, rather than undermine, the independence of the judiciary. Whilst judgments should therefore be reasoned and pronounced publicly, judges should not otherwise be obliged to justify the reasons for their judgments outside of judicial proceedings and outside of their judicial role when they, for example, reason their vote in separate opinions attached to the judgment.^[225] Nor should they become involved in publicity about cases to the extent that they no longer remain impersonal, meaning their impartiality is affected.

As discussed below, the responsibility for upholding accountability and transparency of the judiciary, in order to safeguard independence and impartiality, lies first with the courts themselves, and also with other institutions such as the judicial councils and disciplinary bodies of the judiciary, the parliament, the government and the media.

224 See <https://www.gov.uk/government/news/lord-reeds-address-at-the-judicial-forum-in-bosnia-and-herzegovina> "Lord Reed's address at the Judicial Forum in Bosnia and Herzegovina", British Embassy Sarajevo, 28 November 2019

225 See https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805afb78 "Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on judges: independence, efficiency and responsibilities", CoE Committee of Ministers, 17 November 2010, Chapter II, § 15

a) Role of the judiciary

i) Other aspects of the right to a fair trial under Article 6

Presumption of innocence

Article 6 §§ 2 and 3 contain a number of specific guarantees which apply only in the context of criminal proceedings. Article 6 § 2 provides:

“Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”

There is considerable overlap between the presumption of innocence under Article 6 § 2 and the requirement of independence and impartiality under Article 6 § 1. The protection of one of these facets of Article 6 can help to safeguard the other. Similarly, actions which undermine the requirements of independence and impartiality might also breach Article 6 § 2.

For example, where a judge makes statements which are critical of the defence, or which appear to amount to the adoption of a definitive position as to the outcome of a trial, this could cause an applicant legitimately to doubt the impartiality of the judge. It could also suggest that the judge is operating under the impression that the party is guilty and must prove their innocence, contrary to the presumption of innocence under Article 6 § 2.^[226]

The presumption of innocence applies to the operative reasons given in a criminal judgment, as well as to the statements made by a judge prior to their decision.^[227] Judges must, therefore, avoid making statements which imply a premature assessment of a defendant’s guilt, whether they be public statements, statements during proceedings, or statements within the operative parts of their judgments. This requirement also acts as a safeguard of impartiality, as it prevents judges from making comments which might present an appearance of bias against a defendant.^[228]

As discussed in the section of this Guide: ‘*Functional Impartiality*’, a judge’s participation in dual proceedings can undermine the requirement of independence

226 *Lavents v. Latvia*, judgment of 28 November 2002, no. 58442/00, §§ 118-119 (included as a summary in this publication)

227 *Cleve v. Germany*, judgment of 15 January 2015, no. 48144/09, § 41

228 *Gutsanovi v. Bulgaria*, judgment of 15 October 2013, no. 34529/10 (included as a summary in the publication)

and impartiality. Similarly, the presumption of innocence applies to judicial decisions or comments in proceedings which are not directed against an applicant as “accused”, but which are connected to criminal proceedings which are simultaneously pending against the applicant, where a judge implies a premature assessment of the applicant’s guilt as part of these parallel proceedings.^[229]

Hearing within a reasonable time (where challenging a judge makes proceedings lengthy)

Article 6 § 1 provides that:

*“everyone is entitled to a fair and public hearing **within a reasonable time** by an independent and impartial tribunal established by law.”*
(Emphasis added)

The Court has repeatedly stressed the importance of administering justice within a reasonable time, as such delays might jeopardise the effectiveness and credibility of a judicial system.^[230]

There is an obligation on States under Article 6 § 1 to organise their judicial systems in such a way that their courts can meet all of the requirements of Article 6.^[231] The requirement to hold proceedings within a reasonable time acts, therefore, as a safeguard of independence and impartiality because it obliges States to organise their judicial systems in such a way that an applicant would not be deterred from raising doubts about the independence or impartiality of a judge, through fear that that their objections would cause the proceedings to last for an unreasonable length of time.

When considering what constitutes a “reasonable time”, the Court takes account of a range of factors, including the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute. Where an applicant lodges successive motions and appeals, this is deemed to be an objective fact which cannot be attributed to the State, and which will be taken into account when making the reasonableness assessment.^[232]

229 *Böhmer v. Germany*, judgment of 13 October 2002, no. 37568/97, § 67

230 *Scordino v. Italy (No. 1)*, Grand Chamber judgment of 29 March 2006, no. 36813/97, § 224

231 *Dobbertin v. France*, judgment of 25 February 1993, no. 13089/87, § 44

232 *O’Neill and Lauchlan v. the United Kingdom*, judgment of 28 June 2016, no. 41516/10

However, Article 6 § 1 does not require applicants to actively cooperate with the judicial authorities and they cannot be blamed for making full use of the remedies available to them under domestic law, particularly where an applicant's appeals have achieved the purpose of remedying irregularities attributable to judicial authorities.^[233] Member States cannot, therefore, avoid a finding that proceedings were unreasonably long by arguing that an applicant's complaints about independence and impartiality caused delay. States must deal with such complaints without undue delay on their part^[234] and actively manage proceedings to ensure that, even where issues in relation to independence and impartiality arise, proceedings do not last an unreasonably long period of time.

ii) Reasoning of judgments

In order to ensure accountability of the judiciary, both the parties and the wider public must be able to understand the decisions and judgments made by courts. This is a vital safeguard against arbitrariness and a factor which helps foster public confidence in an objective and transparent judicial system.^[235] Understanding a decision is also a prerequisite to bringing a challenge or review of that decision.

Article 6 §1 therefore requires that courts provide reasons for their judgments. This does not mean that courts are obliged to provide a detailed response to every argument advanced by an applicant. However, they should provide specific responses to the arguments which are decisive to proceedings. Such reasons should be sufficient to:

- » Justify and explain why the decision has been made.
- » Demonstrate to the parties that they have been heard.
- » Afford the parties the possibility to appeal against a decision and facilitate effective review of the decision by an appellate body.
- » Facilitate wider public scrutiny of the administration of justice.^[236]

233 *Dobbertin v. France*, judgment of 25 February 1993, no. 13089/87, § 43

234 *O'Neill and Lauchlan v. the United Kingdom*, judgment of 28 June 2016, no. 41516/10, § 92

235 *Suominen v. Finland*, judgment of 1 July 2003, no. 37801/97, § 37

236 *Suominen v. Finland*, judgment of 1 July 2003, no. 37801/97, § 37; *Hirvisaari v. Finland*, judgment of 27 September 2001, no. 49684/99, § 30; see also https://www.echr.coe.int/Documents/Seminar_background_paper_2019_ENG.pdf "Strengthening the confidence in the Judiciary", Background paper for the Judicial Seminar 2019, European Court of Human Rights, p.19.

Whilst judgments should be reasoned and pronounced publicly, judges should not otherwise be obliged to justify the reasons for their judgments.^[237] The obligation to provide reasons under Article 6 § 1 does not concern the adequacy or quality of the reasons given for a decision. Provided that proceedings as a whole are fair, complaints about the adequacy, or the specific content or basis of reasons given, do not engage Article 6 unless the decision reached by a domestic court appears arbitrary or manifestly unreasonable.^[238]

The extent of the obligation to give reasons varies according to the nature of a decision and the circumstances of a case.^[239] For example, an appellate court could comply with their obligation to provide sufficient reasoning, simply by incorporating or endorsing the reasoning of a lower court when dismissing an appeal. However, it must be clear that the lower court or authority provided sufficient reasons to enable the parties to make effective use of their right of appeal and that the appellate court did in fact address the essential issues which were submitted to its jurisdiction, rather than simply endorsing the findings without any further analysis or assessment.^[240]

When assessing whether the reasons provided for a decision comply with Article 6, it is also necessary to take account of the different legal cultures and practices of the Member States. For example, the varying statutory provisions and customary rules which regulate the provision of reasons, as well as the different approaches taken towards the provision of legal opinions and the presentation and drafting of judgments.^[241]

237 See https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805afb78 "Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on judges: independence, efficiency and responsibilities", CoE Committee of Ministers, 17 November 2010, Chapter II, § 15

238 *Khamidov v. Russia*, judgment of 15 November 2007, no. 72118/01, § 170: generally, a domestic judicial decision will only be described as arbitrary to the point of prejudicing proceedings where there are no reasons provided for it at all, or where the reasons provided are based on manifest factual or legal error committed by the domestic court, resulting in a 'denial of justice' (see *Moreira Ferreira v. Portugal (No. 2)*, Grand Chamber judgment of 11 July 2017, no. 19867/12).

239 *Ruiz Torija v. Spain*, judgment of 9 December 1994, no. 18390/91, §§ 29-30; *Van de Hurk v. the Netherlands*, judgment of 19 April 1994, no. 16034/90, § 61 (included as a summary in this publication)

240 *Sale v. France*, judgment of 21 March 2006, no. 39765/04, § 17; *Helle v. Finland*, judgment of 19 December 1997, no. 20772/92

241 *Gorou v. Greece (No. 2)*, Grand Chamber judgment of 20 March 2009, no. 12686/03, § 37; *Ruiz Torija v. Spain*, judgment of 9 December 1994, no. 18390/91, § 29; *Van de Hurk v. the Netherlands*, judgment of 19 April 1994, no. 16034/90, § 61 (included as a summary in this publication)

iii) Publicity of judgments and reasons

Article 6 § 1 guarantees the right to a “*fair and public hearing*” (emphasis added). Ensuring that judicial proceedings are public is another means by which to maintain and encourage public confidence in the judiciary, facilitate scrutiny of the judiciary and protect against arbitrariness.^[242]

Both the judgment and the reasons behind a judgment must be made public, to ensure that the public is able to understand why a claim has been accepted or rejected. For example, the Court has found a violation of Article 6 where a first-instance court read out, in public, the general grounds which gave rise to their decision, but where a full copy of the reasoned judgment was only available to the participants to proceedings.^[243]

Even in cases involving questions of national security or classified information, the interests of national security and/or confidentiality do not outweigh the need for publicity of judgments. In such cases, States must adopt techniques to accommodate legitimate security concerns, without negating the requirement of publicity, for example, by anonymising judgments or classifying only those parts of judicial decisions where disclosure would compromise national security or the safety of others, so that the public still has access to the other parts of the judgment.^[244]

Some practical measures which could be taken by courts to increase the publicity of judgments and reasons, without compromising independence and impartiality, include:^[245]

- » Increasing physical access to courts, so that members of the public and journalists can easily walk in and view the delivery of judgments where appropriate.
- » Enabling the supreme / highest appellate courts in a Member State sometimes to sit in different cities or regions of the State to ensure that members of the public across the State can visit and view proceedings in person.

242 *Fazllyski v. Bulgaria*, judgment of 16 April 2013, no. 40908/05, § 64

243 *Ryakib Biryukov v. Russia*, judgment of 17 January 2008, no. 14810/02

244 *Raza v. Bulgaria*, judgment of 11 February 2010, no. 31465/08, § 53

245 See <https://www.gov.uk/government/news/lord-reeds-address-at-the-judicial-forum-in-bosnia-and-herzegovina> “Lord Reed’s address at the Judicial Forum in Bosnia and Herzegovina”, British Embassy Sarajevo, 28 November 2019

- » Filming or live-streaming hearings and the delivery of judgments:^[246]
 - Live streams could be anonymised and subject to short delays to ensure that nothing confidential is accidentally broadcast.
 - Where a court does not have the technology sufficiently to anonymise a live hearing, the hearing could be recorded, so that an anonymised recording of the hearing / judgment can subsequently be placed on the court's website.
- » Creating short, easily comprehensible video summaries of judgments, which can be released to the media and placed on a court's website.
- » Cooperation with journalists / media representatives so they can help to disperse information and analysis of judgments to the wider public, including by:
 - Informing journalists when judgments will be delivered so that they can attend court.
 - Distributing full copies of judgments of public interest and/or a press release or summary of the judgment to journalists.
- » The publication of guides, factsheets and information notes to assist people to understand a court's case law, procedures and official texts.^[247]

Whilst cooperation with the media helps to ensure judgments are reported widely and accurately, media access to judges themselves should be restricted to ensure that judges remain impersonal and maintain an appearance of impartiality. A media team working with, and whose work is overseen by, judges, should be responsible for liaising with the media.

iv) Judges' training, duties and ethics

To maintain impartiality, judges should reach their decisions solely by application of the rules of law. They must not take account of any considerations which fall outside the application of the rules of law.^[248] Judges must, therefore, know and

246 For example, as part of a wider plan to strengthen the transparency of its operations, in February 2021 the Court of BiH began broadcasting the high-profile criminal trial "*Fadil Novalic et al.*" via YouTube. Access was granted to journalists whose accounts were verified and approved by the Court of BiH as well as to institutions and organisations with which the Court concluded cooperation agreements (including those from trial-monitoring organisations). The Court plans to extend this system to other criminal cases of major public interest.

247 See for example the ECtHR's publication of case law information notes: <https://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis/clin>, case-law guides: <https://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis/guides&c=#>, and factsheets: http://www.echr.coe.int/Pages/home.aspx?p=press/factsheets&c=#n1347890855564_pointer/

248 CCJE (2002) Op. N° 3, § 23

understand the rules of law, to apply them independently and impartially. As stated above, training on the law and new legal developments is an important element to safeguard the independence of judges as well as the quality and efficiency of the judicial system.^[249]

As well as understanding the law, judges must also maintain a high degree of professional competence. The conduct of judges in their professional activities is seen by the public as an essential aspect of the credibility of the courts and is inextricably linked to the appearance of impartiality and public confidence in the courts.^[250]

The ethical aspects of judges' conduct are particularly important to maintaining independence, impartiality and confidence in the judicial system.^[251] The methods used to settle disputes should always inspire confidence. The powers entrusted to judges are strictly linked to the values of justice, truth and freedom. The standards of conduct applying to judges are the corollary of these values and a precondition for confidence in the administration of justice.

Opinion N° 3 (2002) of the CCJE on ethics and liability of judges recommends the introduction of certain ethical principles and rules to govern judges' professional conduct and which should be totally separate from, and pursue different objectives to, judges' disciplinary systems and rules. According to this Opinion, such principles of behaviour should include the following requirements:^[252]

- » Judges should discharge their duties without any favouritism, display of prejudice or bias. They should display due respect for the principle of equal treatment of parties and maintain a balance between the parties to ensure that each receives a fair hearing.
- » Judges should show the consideration due to all persons (parties, witnesses, counsel, for example) with no distinction based on unlawful grounds or incompatible with the appropriate discharge of their functions.
- » Judges should ensure that they maintain a high degree of professional competence through basic and further training, providing them with the appropriate qualifications.
- » Judges should behave with integrity in office and in their private lives.

249 The Magna Carta of Judges, § 8

250 CCJE (2002) Op. N° 3, § 22

251 CCJE (2002) Op. N° 3, § 8

252 CCJE (2002) Op. N° 3, §§23 – 25 and 50

In terms of how such guidelines / principles should be formulated and implemented, the CCJE considers that a ‘statement of standards of professional conduct’ should be prepared in each Member State.^[253] Such statements should be drawn up by judges themselves and should be accompanied by: (i) appropriate basic and further training on professional conduct; and (ii) the creation of high-level groups, consisting of representatives of different interests involved in the administration of justice, to consider ethical issues and disseminate their conclusions.

v) Curing defects on appeal

In some circumstances, defects in relation to the independence and impartiality of a lower court can be cured on review of their decisions by a higher court. For this to be the case, there must be no doubts about the independence and impartiality of the higher, appellate court which is reviewing the decision of the lower court.

The higher court must have full jurisdiction properly to reconsider and rehear the issues which were before the lower court.^[254] Where a defect is found, the higher court should quash the lower court’s judgment in its entirety.^[255]

The extent to which defects can be cured on appeal also depends on the context and nature of a case. For example, a lack of independence may be less likely to be remedied by review in a criminal context.^[256]

b) The role of other institutions

i) Judicial councils, disciplinary bodies and disciplinary proceedings

As discussed in the sections of this Guide: ‘Term of office’ and ‘Guarantees against outside pressure’, the conditions under which judges can be removed, or be subject to disciplinary proceedings, should be limited and should ensure compliance with the requirements of independence or impartiality.

253 CCJE (2002) Op. N° 3, §§4, 46 and 48

254 *Holm v. Sweden*, judgment of 25 November 1993, no. 14191/88: where the fact that both the Court of Appeal and the District Court’s jurisdiction were limited by the terms of the jury’s verdict meant that the defect in proceedings before the latter court could not be cured by an appeal to the former; *Le Compte, Van Leuven and De Meyere v. Belgium*, judgment of 23 June 1981, nos. 6878/75 and 7238/75

255 *Henryk Urban and Ryszard Urban v. Poland*, judgment of 30 November 2010, no. 23614/08 (included as a summary in this publication)

256 *Findlay v. United Kingdom*, judgment of 25 February 1997, no. 22107/93 (included as a summary in this publication)

The body responsible for hearing disciplinary proceedings against a judge must also comply with the requirements of independence and impartiality, and proceedings as a whole must comply with all aspects of the right to a fair hearing under Article 6 § 1.^[257]

Does Article 6 apply to disciplinary proceedings brought against judges?

The observance of the guarantees under Article 6 is particularly important in disciplinary proceedings against a judge given that the confidence of the public in the functioning and the independence of the judiciary is at stake.^[258]

Disciplinary proceedings against judges present a potentially dangerous interface between the judiciary and the executive, with the risk that such proceedings are used by governments to punish judges for the outcomes or content of their decisions, thereby interfering with their independence and impartiality. However, the existence of the possibility of bringing disciplinary proceedings against a judge is also necessary to ensure they comply with their professional obligations. The protections of Article 6 in this context therefore present a key safeguard to prevent the threat of disciplinary proceedings being misused to apply pressure to judges.^[259]

International and CoE instruments, as well as the case law of the Court and of international courts, attach increasing importance to procedural fairness in cases involving the removal or dismissal of judges. In particular, they specify that an

257 See the recent judgment of the CJEU, *Asociația “Forumul Judecătorilor Din România”*, Grand Chamber judgment of 18 May 2021, joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19, C-397/19, §207 (included as a summary in this publication): “Article 2 and the second subparagraph of Article 19(1) TEU and Decision 2006/928 must be interpreted as precluding national legislation adopted by the government of a Member State, which allows that government to make interim appointments to the management positions of the judicial body responsible for conducting disciplinary investigations and bringing disciplinary proceedings against judges and prosecutors, without following the ordinary appointment procedure laid down by national law, where that legislation is such as to give rise to reasonable doubts that the powers and functions of that body may be used as an instrument to exert pressure on, or political control over, the activity of those judges and prosecutors.”

258 *Harabin v. Slovakia*, judgment of 20 November 2012, no. 58688/11, § 133 (included as a summary in this publication); *Ramos Nunes de Carvalho e Sá v. Portugal*, Grand Chamber judgment of 6 November 2018, nos. 55391/13, 57728/13 and 74041/13, § 196 (included as a summary in this publication)

259 See <https://www.coe.int/en/web/ccje/-/-we-need-to-talk-about-disciplinary-proceedings-new-verfassungsblog-podcast-with-the-ccje-s-presidentli> ““We need to talk about disciplinary proceedings” : New Verfassungsblog podcast with the CCJE’s President”, CCJE

authority which is independent of the executive and legislative should be involved in every decision affecting the termination of office of a judge.^[260]

Judicial councils, or professional disciplinary bodies, are often involved with the adjudication of proceedings brought against judges. As discussed in the section of this Guide: ‘Who / Which bodies does the requirement of independence and impartiality apply to?’, the concept of a “tribunal” for the purposes of Article 6 includes any body or authority exercising a judicial function, regardless of how they are labelled / classified at a national level. The requirements of Article 6 § 1 can apply, therefore, to judicial disciplinary bodies, such as High Councils of the judiciary, and the requirements of independence and impartiality which are discussed in detail in the sections of this Guide: ‘Independence’ and ‘Impartiality’ apply when such bodies adjudicate on proceedings against judges.^[261]

If a professional disciplinary body does not comply with the requirements of Article 6, any decisions on disciplinary proceedings must be subject to subsequent control by “a judicial body that has full jurisdiction” and which does provide the guarantees of Article 6 § 1.^[262]

Whilst disciplinary proceedings against judges generally constitute ‘civil’ proceedings, thereby engaging the protections of Article 6 § 1, there are certain situations in which proceedings against a judge might constitute criminal proceedings, therefore engaging the protections of Article 6 §§ 2 and 3. This will depend on the nature of the allegations made against the judge and the severity of

260 See *Baka v. Hungary*, Grand Chamber judgment of 23 June 2016, no. 20261/12, § 64 (included as a summary in this publication) and the citations therein, for example: The UN Basic Principles: “Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings” and the European Charter on the Statute for Judges, § 1.3: “In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.”

261 The Court has examined judges’ independence in relation to a decision by the High Council of the Judiciary (their disciplinary body) in numerous cases, such as *Oleksandr Volkov v. Ukraine*, judgment of 6 February 2018, no. 21722/11 (included as a summary in this publication); *Denisov v. Ukraine*, Grand Chamber judgment of 25 September 2018, no. 76639/11 (included as a summary in this publication); and *Ramos Nunes de Carvalho e Sá v. Portugal*, Grand Chamber judgment of 6 November 2018, nos. 55391/13, 57728/13 and 74041/13, (included as a summary in this publication)

262 *Le Compte, Van Leuven and De Meyere v. Belgium*, judgment of 23 June 1981, nos. 6878/75 and 7238/75, § 29

the sanction which they face. For example, lustration proceedings against a judge could constitute ‘criminal’ proceedings.^[263]

The application of Article 6 in the context of proceedings against judges

In light of the importance of what is at stake when disciplinary proceedings are brought against a judge, the Court has set out certain specific protections, or considerations, which must be taken into account when considering whether proceedings against a judge comply with Article 6.^[264] For example:

- » The criteria for satisfying Article 6 in this context apply both to the disciplinary proceedings at first instance, and to the judicial proceedings on appeal.
- » The proceedings at first instance should entail procedural safeguards and, where an applicant is liable to incur very severe penalties, should also include adequate measures to establish the facts, for example the opportunity to make oral representations.^[265]
- » The requirement to hold a public hearing should only be dispensed of as an exceptional measure which is duly justified in light of the Court’s case law.^[266]
- » The composition of the disciplinary body should mainly be constituted by professional judges, as has been recognised in the European Charter on the Statute for Judges.^[267]
- » The inclusion of the Prosecutor General as a member of a judicial council responsible for discipline and removal of judges is likely to raise concerns, as it may have a deterrent effect on judges (or even be perceived as a potential threat), as the Prosecutor General will participate in many cases which judges have to decide.^[268]

263 *Matyjek v. Poland*, judgment of 24 April 2007, no. 38184/03 (included as a summary in this publication); *Engel and Others v. the Netherlands*, judgment of 8 June 1976, nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, §§ 82-83; *Oleksandr Volkov v. Ukraine*, judgment of 6 February 2018, no. 21722/11, § 93 (included as a summary in this publication)

264 *Ramos Nunes de Carvalho e Sá v. Portugal*, Grand Chamber judgment of 6 November 2018, nos. 55391/13, 57728/13 and 74041/13, § 196 (included as a summary in this publication)

265 *Ramos Nunes de Carvalho e Sá v. Portugal*, Grand Chamber judgment of 6 November 2018, nos. 55391/13, 57728/13 and 74041/13, § 198 (included as a summary in this publication)

266 *Ramos Nunes de Carvalho e Sá v. Portugal*, Grand Chamber judgment of 6 November 2018, nos. 55391/13, 57728/13 and 74041/13, § 210 (included as a summary in this publication)

267 *Oleksandr Volkov v. Ukraine*, judgment of 6 February 2018, no. 21722/11, (included as a summary in this publication): where it was an issue that only 3 out of the 16 panel on the council of judiciary were professional judges

268 *Oleksandr Volkov v. Ukraine*, judgment of 6 February 2018, no. 21722/11, § 114 (included as a summary in this publication)

Can a State exclude proceedings against a judge from the scope of the protections under Article 6?

The Court has established a test known as the “Vilho Eskelinen test” to determine the applicability of Article 6 to disciplinary proceedings against civil servants.^[269] Essentially, the test provides that disputes between a State and its civil servants fall in principle within the scope of Article 6 unless the following two conditions are fulfilled:

1. The State in its national law must have expressly excluded access to a court for the post or category of staff in question; and
2. The exclusion must be justified on objective grounds in the State’s interest.

In respect of the second part of the test, the mere fact that an applicant is in a sector or department which participates in the exercise of power conferred by public law is not in itself decisive. It is also for the State to show that the subject matter of the dispute in issue is related to the exercise of State power or that it has called into question the “special bond of trust and loyalty” between the civil servant and the State, as employer. For example, in the context of a soldier discharged from the army for breaches of discipline.^[270] However, in the context of disputes concerning judges, the notion of a “special bond of trust and loyalty” between judges and the State is difficult to reconcile with the requirements of independence and impartiality of the judiciary. Given the special status of members of the judicial profession and the importance of judicial review of disciplinary proceedings concerning them, it cannot be said that a special bond of trust between the State and a judge justifies excluding the rights guaranteed by Article 6 of the Convention, rendering the Vilho Eskelinen test inapplicable to disciplinary proceedings against judges.^[271]

States cannot argue that the civil limb of Article 6 § 1 is not applicable to a dispute for the sole reason that the dispute falls within the field of public law. A public-law dispute can still bring the civil limb of Article 6 into play if the result of the case is decisive to the protection of a person’s private or pecuniary rights. For example,

269 *Vilho Eskelinen and Others*, Grand Chamber judgment of 19 April 2007, no. 63235/00

270 *Suküt v. Turkey*, decision of 11 September 2007, no. 59773/00, where a soldier was discharged for breaches of discipline, as his conduct and attitude were considered to undermine military discipline and the principle of secularism, and he was unable to challenge his discharge before the courts. The “special bond of trust and loyalty” between the applicant and the State was found to be central to the dispute and the Court found that Article 6 was not applicable.

271 *Eminağaoğlu v. Turkey*, judgment of 9 March 2021, no. 76521/12, §78; *Bilgen v. Turkey*, judgment of 9 March 2021, no. 1571/07, §79

disciplinary proceedings concerning the right to continue practising a profession are always regarded as involving a “dispute as to rights ... of a civil nature” within the meaning of Article 6 § 1 of the Convention.^[272] Article 6 also applies to disputes concerning a measure that has considerable effects on a judge’s professional life and career even without any direct impact in pecuniary terms or on private or family life. For example, a dispute concerning a transfer to a lower court concerns a “right” to be protected against an arbitrary transfer or appointment, and so falls within the scope of Article 6.^[273]

The Court has also examined the specific question of the independence and impartiality of judges sitting on an appeal court, where those judges come under the authority of the judicial council or a disciplinary body whose decision they are reviewing. The following factors will be relevant to determine whether this dual role poses an issue under Article 6:

- » Whether there are any serious structural deficiencies in the judicial system of the State.
- » Whether there is an appearance of bias within the disciplinary body.^[274]
- » The extent of the powers which the disciplinary body can exercise with respect to the careers of the judges sitting in the appellate court.^[275]
- » The extent to which members of the executive or the legislature are involved in the disciplinary proceedings or partake in a review of the disciplinary decision.^[276]

272 *Eminağaoğlu v. Turkey*, judgment of 9 March 2021, no. 76521/12, §66

273 *Bilgen v. Turkey*, judgment of 9 March 2021, no. 1571/07, §§ 65-69

274 *Oleksandr Volkov v. Ukraine*, judgment of 6 February 2018, no. 21722/11, § 130 (included as a summary in this publication); *Denisov v. Ukraine*, Grand Chamber judgment of 25 September 2018, no. 76639/11, § 79 (included as a summary in this publication); *Ramos Nunes de Carvalho e Sá v. Portugal*, Grand Chamber judgment of 6 November 2018, nos. 55391/13, 57728/13 and 74041/13, §§ 157-165 (included as a summary in this publication)

275 The fact that the Council was responsible for the appointment, discipline and dismissal of the judges reviewing their decision in *Oleksandr Volkov v. Ukraine*, judgment of 6 February 2018, no. 21722/11, (included as a summary in this publication) undermined their independence and impartiality, whereas in *Ramos Nunes de Carvalho e Sá v. Portugal*, Grand Chamber judgment of 6 November 2018, nos. 55391/13, 57728/13 and 74041/13 (included as a summary in this publication), the appellate judges were no longer subject to performance appraisals or in search of promotion, and the council’s disciplinary authority over them is in reality rather theoretical.

276 See *Oleksandr Volkov v. Ukraine*, judgment of 6 February 2018, no. 21722/11, (included as a summary in this publication): where the subsequent determination of the applicant’s case by Parliament contributed to the politicisation of the procedure and heightened the need for strict compliance with the requirements of Article 6.

ii) Role of the media

As discussed in the section of this Guide: ‘*Publicity of judgments and reasons*’, the publicity of judicial decisions ensures scrutiny of the judiciary by the public and constitutes a safeguard against arbitrariness, thereby protecting the independence and impartiality of the judiciary. The media, therefore, has an important role to play in safeguarding independence and impartiality of the judiciary, for example by publicising and scrutinising judgments and through accurate and responsible reporting on cases.

Scrutiny of the judiciary

In its role of ‘public watchdog’, the media can help to scrutinise the functioning of the judiciary, highlight any instances where independence and impartiality are under threat and make a constructive contribution to improving the structures and practices of the courts.^[277]

In light of this, the media should not be stopped from criticising the judiciary, including its organisation or functioning.^[278] Even severe, polemic or exaggerated criticism is permitted under the ECHR, where such criticism is founded on research and expert opinion and concerns matters of gravity.^[279]

The impact of media reports on impartiality and the presumption of innocence

In certain situations, a virulent media campaign could affect the fairness of a trial by undermining the impartiality of the courts and/or the presumption of innocence.

Factors relevant to an assessment of the impact of a media campaign on the fairness of a trial include: the time which has elapsed between the press campaign and the commencement of the trial; whether the case is decided by professional judges (professional judges are deemed less likely to be influenced by a press campaign than lay jurors, for example); whether the impugned publications were attributable to, or informed by, the authorities; whether there is any evidence to suggest that the publications influenced the judges and thus prejudiced the outcome

277 *Fazliyski v. Bulgaria*, judgment of 16 April 2013, no. 40908/05, § 69; *De Haes and Gijssels v. Belgium*, judgment of 24 February 1997, no. 19983/92 § 33

278 CCJE (2001) Op. N° 1, § 33

279 *De Haes and Gijssels v. Belgium*, judgment of 24 February 1997, no. 19983/92

of the proceedings; and whether the court has issued well-reasoned judgments in respect of the case.^[280]

The key question is whether, in the particular circumstances of the case, the applicant's fears that a media campaign has influenced the judge can be held to be objectively justified.

Contributing to transparency and publicity

The role of the media is essential in broadcasting information to the public on the role and the activities of the courts.^[281] The media can help to increase public confidence in the judiciary and improve public understanding of their functioning and the impact of their judgments, thereby helping to safeguard the appearance of independence and impartiality.

The CCJE has stressed that the court must take direct initiatives to communicate with the public and collaborate with the media, to ensure that transparency and publicity of judgments is not dependent solely on the actions or the reporting of the media.

The section of this Guide '*Publicity of judgments and reasons*' contains some practical suggestions on how the courts and the media can work together to increase transparency and publicity of judgments. Some of those suggestions are also recommended by the CCJE. Further suggestions by the CCJE on ways to ensure the media contributes to safeguarding, rather than undermining, the independence of the judiciary include:^[282]

- » Judges should only express themselves through judgments and should not explain their judgments in the press.
- » States should create a team to communicate summaries of court decisions to the media, provide factual information about such decisions and liaise with the media about when and where hearings will take place. Judges should have a supervisory role over any court spokesperson or staff responsible for undertaking these roles.
- » States should establish an independent body to deal with problems caused

280 *Paulikas v. Lithuania*, judgment of 24 January 2017, no. 57435/09; *Čivinskaitė v. Lithuania*, judgment of 15 September 2020, no. 21218/12

281 CCJE (2005) Op. N° 7, § 9

282 CCJE (2005) Op. N° 7 (2005)

by media accounts of a court case or difficulties encountered by a journalist obtaining information on a case.

- » Each profession (judges and journalists) should draw up a code of practice on its relations with representatives of the other profession and on the reporting of court cases. The judiciary would define the conditions in which statements may be made to the media concerning court cases, while journalists would produce their own guidelines on reporting of current cases, on the publicising of the names (or pictures) of persons involved in litigation and on the reporting of judgments in cases which attracted major public interest.

Examples of such measures can be found within the ECtHR itself. For example, the Court's Press Unit has press officers who are available to help journalists with specific requests and to answer their questions in a number of different languages. Press releases include summaries of the Court's judgments and decisions as well as information about pending cases and the Court's activities in general. Press releases can be received systematically by following the Court on Twitter, by subscribing to RSS feeds or by subscribing to its mailing list.

iii) Role of the parliament and executive

As discussed in the section of this Guide: '*Who / which bodies does the requirement of independence apply to?*', Article 6 § 1 implies obligations on the executive, the legislature and other State authorities to protect the right to trial by an "independent and impartial tribunal". State authorities must respect the authority of the courts and implement safeguards of the independence and impartiality of the judiciary into their everyday administrative attitudes and practices.^[283] They have a responsibility to enforce judicial decisions effectively and to refrain from intervening in cases to protect the independence and impartiality of the judiciary. In certain circumstances, they must also refrain from commenting publicly on proceedings.

Enforcement of judicial decisions

The power to give a binding decision which may not be altered by a non-judicial authority to the detriment of an individual party is inherent in the very notion of a "tribunal", as is confirmed by the word "determination".^[284]

283 *Agrokompleks v. Ukraine*, judgment of 6 October 2011, no. 23465/03, § 136 (included as a summary in this publication)

284 *Van de Hurk v. the Netherlands*, judgment of 19 April 1994, no. 16034/90, § 45 (included as a summary in this publication)

The Court has stressed that this power is a component of the requirement of “independence” under Article 6 § 1.^[285] The Court has found that the right to an independent and impartial court:

“...would be illusory if a Contracting State’s domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6 para. 1 (art. 6-1) should describe in detail procedural guarantees afforded to litigants - proceedings that are fair, public and expeditious - without protecting the implementation of judicial decisions; to construe Article 6 (art. 6) as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention...Execution of a judgment given by any court must therefore be regarded as an integral part of the “trial” for the purposes of Article 6 (art. 6)...”^[286]

Legal certainty, which is one of the fundamental aspects of the rule of law, requires that where the courts have finally determined an issue, their ruling should not be called into question. A judicial system characterized by the possibility of persistent questioning and repeated annulment of final judicial decisions violates Article 6 § 1 of the Convention.^[287] Deliberate attempts by State agencies to prevent the implementation of a final and enforceable judgment and the tacit approval, or even the toleration, of such attempts by the legislative^[288] or executive^[289] branches of government are all capable of undermining the credibility and authority of the judiciary and of jeopardising its effectiveness.^[290] This includes interferences by

285 *Van de Hurk v. the Netherlands*, judgment of 19 April 1994, no. 16034/90, § 45 (included as a summary in this publication); see as well, *Benthem v. the Netherlands*, judgment of 23 October 1985, no. 8848/80, § 40; *H. v. Belgium*, judgment of 30 November 1987, no. 8950/80 § 50 (included as a summary in this publication); *Belilos v. Switzerland*, judgment 28 April 1988, no. 10328/83, § 64 (included as a summary in this publication)

286 *Hornsby v. Greece*, judgment of 19 March 1997, no. 18357/91, § 40

287 *Sovtransavto Holding v. Ukraine*, judgment of 25 July 2002, no. 48553/99, §§ 74 and 77

288 *Stran Greek Refineries and Stratis Andreadis v. Greece*, judgment of 9 December 1994, no. 13427/87, § 49; *Scordino v. Italy (No. 1)*, Grand Chamber judgment of 29 March 2006, no. 36813/97; *Sharra and Others v. Albania*, judgment of 10 November 2015, nos. 25038/08, 64376/09, 64399/09, 347/10, 1376/10, 4036/10, 12889/10, 20240/10, 29442/10, 29617/10, 33154/11 and 2032/12

289 *Tregoubenko v. Ukraine*, judgment of 2 November 2004, no. 61333/00, § 36; *Sharxhi and others v. Albania*, judgment of 11 January 2018, no. 10613/16 (included as a summary in this publication)

290 *Broniowski v. Poland*, Grand Chamber judgment of 28 September 2005, no. 31443/96, § 176

members of the legislative or executive branches of government during judicial proceedings, such as the modification of the applicable law in a dispute in which the State is one of the parties,^[291] or the non-enforcement of an interim decision, which jeopardise the outcome of the entire proceedings.^[292] Exceptions to this rule are allowed only when this is necessary for compelling reasons and is justified only to correct serious errors of justice.^[293]

The calling into question of judgments by members of the executive is not acceptable and the existence of powers for members of the executive to request or exercise supervisory review of judgments for an indefinite period of time after they have been decided is incompatible with Article 6.^[294] This requirement to uphold and follow judgments is particularly pertinent in the context of upholding judgments which concern the actions of the executive or the legislative, for example the process they undertake for appointing judges. The failure by legislative and executive organs of government to abide by relevant Constitutional Court judgments regarding the process for appointing judges can lead to a breach of Article 6 on the basis that a tribunal is not “established by law” and therefore the judiciary is not protected against unlawful external influence.^[295]

Public comments and interventions in cases to exert pressure

Public statements made by politicians can, depending on the content and manner of such statements, undermine the right to a hearing by an independent and impartial tribunal. When determining whether statements or interventions in proceedings by ministers or politicians violate Article 6, it is relevant to consider:

- » The rank / seniority of the politicians who made the comments, and the number of ministers who made comments.
- » Whether the comments were directed specifically at the judiciary.^[296]

291 *Stran Greek Refineries and Stratis Andreadis v. Greece*, judgment of 9 December 1994, no. 13427/87

292 *Sharxhi and others v. Albania*, judgment of 11 January 2018, no. 10613/16 (included as a summary in this publication)

293 *Ryabykh v. Russia*, judgment of 24 July 2003, no. 52854/99, § 52

294 *Brumărescu v. Romania*, Grand Chamber judgment of 28 October 1999, no. 28342/95

295 *Xero Flor w Polsce sp. z o.o. v. Poland*, judgment of 7 May 2021, no. 4907/18, §287 (included as a summary in this publication); see also the section of this Guide: ‘Tribunal established by law’. Please note: at the time of writing this judgment has not become final in the circumstances set out in Article 44 § 2 of the ECHR.

296 *Kinský v. the Czech Republic*, judgment of 9 February 2012, no. 42856/06, §93; by contrast to *Mosteanu and Others v. Romania*, judgment of 26 November 2002, no. 33176/96, § 42: where the President’s public statement that restitution judgments should not be enforced was considered by the Court to be directed primarily at the administration charged

- » The strength / nature of the comments – for example, strong negative comments, or the expression of unequivocal opinions are more likely to undermine independence and impartiality.^[297]
- » The timing of comments and the number of interventions made.

Article 6 can be violated by comments, threats or pressure exerted by ministers even where there is no proof that they had any influence on the judges. It is the appearance of impartiality which is at stake and Article 6 is engaged where the statements or actions of politicians create an atmosphere or impression that judges' actions and decisions during proceedings are being closely monitored by the government.^[298]

with enforcing the decisions. Similarly, in *Xheraj v. Albania*, judgment of 29 July 2008, no. 37959/02, the President of the Republic requested that the General Prosecutor reopened the criminal proceedings against the applicant following a final acquittal decision. This reopening was considered by the Court as a violation of Article 6 § 1 because it set aside a final judicial decision.

297 *Kinský v. the Czech Republic*, judgment of 9 February 2012, no. 42856/06, § 91

298 *Kinský v. the Czech Republic*, judgment of 9 February 2012, no. 42856/06, § 98

(8) RELATIONSHIP BETWEEN INDEPENDENCE AND IMPARTIALITY AND OTHER ARTICLES OF THE CONVENTION

a) Procedural protections

The obligation on States to guarantee a hearing or investigation by an independent and impartial tribunal can arise under other Articles of the Convention, in addition to Article 6. The Court has held that independence is one of the most important constitutive elements of the notion of a “court”, as referred to in several Articles of the Convention.^[299] This could be in the context the specific procedural, investigative obligations which arise under Articles 2, 3 and 5 of the Convention. Alternatively, compliance with such an obligation might form part of the assessment regarding whether an interference with Articles 8-11 complies with the principle of proportionality and is in accordance with law.

i) Article 2 - Right to life

Article 2 ECHR protects the right to life. Under Article 2, there is a distinct procedural obligation on States to carry out an effective investigation into the death of an individual in circumstances where there is a suspected breach of a State’s substantive duties under Article 2.^[300]

The exact nature and scope of the investigative duty depends on the circumstances of a particular case, but as a minimum an investigation must be effective, which means it must be capable of establishing the facts, identifying those responsible and, if appropriate, imposing an appropriate punishment or form of redress. For this purpose, the Court has held that the procedural obligation under Article 2 of the Convention requires that States have in place an effective independent judicial system.^[301]

This guarantee of an adversarial procedure before an independent and impartial judge must be regarded as furnishing the strongest safeguards of an effective

299 *Šilih v. Slovenia*, Grand Chamber judgment of 9 April 2009, no. 71463/01, § 159

300 *Šilih v. Slovenia*, Grand Chamber judgment of 9 April 2009, no. 71463/01, § 159

301 *Lopes de Sousa Fernandes v. Portugal*, Grand Chamber judgment of 19 December 2017, no. 56080/13, § 214; *Sinim v. Turkey*, judgment of 6 June 2017, no. 9441/10, § 59; *Ciechońska v. Poland*, judgment of 14 June 2011, no. 19776/04, § 66

procedure for the finding of facts and the attribution of responsibility,^[302] be it criminal or otherwise.

To be effective, those responsible for carrying out the investigation must be independent from those implicated in the events. The requirement of independence of those responsible for the investigation should be understood as including not only formal independence but also an independence *de facto* from those presumably implicated in circumstances where life is lost or put in danger.^[303] Whether this independence is present in a specific case will depend on the concrete circumstances of the case.^[304]

There must be no hierarchical subordination, institutional or practical connection between those conducting an investigation and those under investigation.^[305] For example, where an investigation into the police is conducted by officers connected to or subordinate to those subject to investigation, supervision of such an investigation by an independent body does not suffice to meet the requirements of Article 2. Instead, a fully independent investigating agency should be established.^[306]

Under Article 2, an investigation into a potential breach of the right to life must be carried out promptly, with reasonable expedition. Even where there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities is vital in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts, which could undermine the independence of the investigation.^[307] Additionally, the conclusions of the investigation must be based on thorough, objective and impartial analysis of all relevant elements to the case.^[308]

Such obligations relating to the operation of an independent judicial system, for the purposes of the procedural aspect under Article 2, cover not only cases where

302 *McKerr v. the United Kingdom*, judgment of 4 May 2001, no. 28883/95, § 134

303 *Armani Da Silva v. the United Kingdom*, Grand Chamber judgment of 3 March 2016, no. 5878/08, § 232

304 *Mustafa Tunç and Fecire Tunç v. Turkey*, Grand Chamber judgment of 14 April 2015, no. 24014/05, §§ 222-224 (included as a summary in this publication)

305 *Association "21 December 1989" and Others v. Romania*, judgment of 24 May 2011, nos. 33810/07 and 18817/08: breach of Article 2 where the investigation had been entrusted to military prosecutors who, like the majority of the accused, including serving high-ranking army officers, were in a relationship of subordination within the military hierarchy.

306 *McKerr v. the United Kingdom*, judgment of 4 May 2001, no. 28883/95, § 128

307 *Šilih v. Slovenia*, Grand Chamber judgment of 9 April 2009, no. 71463/01, § 195

308 *Armani Da Silva v. the United Kingdom*, Grand Chamber judgment of 3 March 2016, no. 5878/08, § 240

life is put in danger intentionally, but also where life is endangered as a result of negligence.^[309] More specifically, in the context of healthcare, the procedural obligation under Article 2 requires States to set up an effective and independent judicial system to ensure that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable.^[310]

ii) Article 3 - Protection against torture and ill-treatment

Article 3 provides that no one shall be subjected to torture, inhuman or degrading treatment, or punishment. As with Article 2, Article 3 contains a distinct procedural obligation to carry out an effective investigation into alleged breaches of the Article. States are under an obligation to prevent and provide redress for torture and other forms of ill-treatment, and Article 3 requires that there be an effective, official investigation into arguable claims of torture or ill-treatment.

The concept of an ‘effective’ investigation requires that the investigation be carried out by independent investigators without any links to those charged with breaching Article 3,^[311] and that the procedural obligations under Article 3 mirror, to a large degree, the obligations discussed in the section of this Guide: ‘Article 2 - Right to life’.

The Court has found that effective investigations, criminal proceedings, prosecutions, and the imposition of appropriate disciplinary sanctions for a breach of Article 3 are:

“vital in ensuring that the deterrent effect of the judicial system is in place and the significance of the role it is required to play in preventing violations of the prohibition of ill-treatment are not undermined ...”^[312]

This obligation is particularly important given that many cases of ill-treatment take place at the hands of government officials and in detention locations. State authorities are obliged to react effectively and independently not only in cases of

309 *Ciechońska v. Poland*, judgment of 14 June 2011, no. 19776/04, § 66, *Anna Todorova v. Bulgaria*, judgment of 24 May 2011, no. 23302/03, § 72.

310 *Šilih v. Slovenia*, Grand Chamber judgment of 9 April 2009, no. 71463/01; *Lopes de Sousa Fernandes v. Portugal*, Grand Chamber judgment of 19 December 2017, no. 56080/13, § 214

311 *Taraburca v. Moldova*, judgment of 6 December 2011, no. 18919/10, § 54

312 *Gäfgen v. Germany*, Grand Chamber judgment of 1 June 2010, no. 22978/05, § 121

allegations of acts of torture,^[313] but also when they become aware that such acts might have taken place, in the presence of visible injuries for example.^[314]

Access to independent judges must be guaranteed not only when detention regimes are concerned,^[315] but also when other rights and freedoms of detained persons are at stake.^[316]

Another important element of the right to access an independent and impartial judicial mechanism, which is fundamental to protecting individuals from ill-treatment, is the right for an applicant to participate effectively in judicial proceedings to defend their cause.^[317] Only independent and impartial judges can offer such a guarantee of effective participation.^[318]

The issue of independence of the judiciary is also critical in the framework of the European Arrest Warrant within the EU.^[319]

iii) Article 4 – Prohibition of slavery and forced labour

The right not to be a victim of acts qualified as slavery or forced labour, protected by Article 4 ECHR, also entails procedural obligations on Member States which are construed in the same line as those under Articles 2 and 3, mentioned above.^[320]

The same requirements of independence, thoroughness, promptness, public oversight and the victim's involvement are present in cases of alleged slavery, human trafficking and forced labour which fall under this Article.^[321]

313 See *Aksoy v. Turkey*, judgment of 18 December 1996, no. 21987/93, § 59

314 *Taraburca v. Moldova*, judgment of 6 December 2011, no. 18919/10, § 56

315 *Ramirez Sanchez v. France*, Grand Chamber judgment of 4 July 2006, no. 59450/00, §§ 139 and 145-146

316 *Golder v. the United Kingdom*, judgment of 21 February 1975, no. 4451/70

317 *Margaretić v. Croatia*, judgment of 5 June 2014, no. 16115/13, § 128; *Altay v. Turkey (No. 2)*, judgment of 9 April 2019, no. 11236/09, §§ 79-82

318 See <https://www.refworld.org/pdfid/44c489364.pdf> "Response of the Albanian Government to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Albania from 23 May to 3 June 2005", CPT/Inf (2006) 24 § 54

319 *OG and PI v. Public Prosecutor's Office of Lübeck and in Zwickau*, Grand Chamber judgment of 27 May 2019, nos. C-508/18 and C-82/19 PPU

320 *S.M. v. Croatia*, Grand Chamber judgment of 19 July 2018, no. 60561/14, §§ 309-311

321 *Rantsev v. Cyprus and Russia*, judgment of 7 January 2010, no. 25965/04; *Chowdury and Others v. Greece*, judgment of 30 March 2017, no. 21884/15, §§ 123-127; *S.M. v. Croatia*, Grand Chamber judgment of 19 July 2018, no. 60561/14, § 305

iv) Article 5 - Right to liberty and security

Article 5 protects the right to liberty and security of the person. The purpose of Article 5 is to protect an individual from arbitrary detention, including by ensuring that the act of deprivation of liberty is subject to independent judicial scrutiny.^[322]

Article 5 § 1 (a) of the Convention provides:

*“No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a **competent court.**”* (Emphasis added)

The term competent court included in this provision refers to an institution that is established by law,^[323] which must be independent from the executive and the parties in the proceedings, which conducts proceedings of judicial character^[324] and which has judicial powers; meaning the competence to decide the lawfulness of detention and eventually to authorise the release of the detained if the detention is found to be unlawful.^[325]

Article 5 § 3 provides:

“Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

The role of the judge or officer referred to in Article 5 § 3 is to review the circumstances militating for and against detention and to decide, by reference to legal criteria: i) whether there are reasons to justify detention; and ii) to order release if there are no such reasons. As with the competent court under Article 5 § 1 (a) described above, the judge or judicial officer exercising judicial power must actually have the power to release the detained person if the detention measure is found to be illegal or unjustified.^[326]

322 *Aquilina v. Malta*, Grand Chamber judgment of 29 April 199, no. 25642/94, § 49

323 *Yefimenko v. Russia*, judgment of 12 February 2013, no. 152/04, §§ 109-11

324 *De Wilde, Ooms and Versyp v. Belgium*, judgment of 18 June 1971, nos. 2832/66, 2835/66 and 2899/66, § 78

325 *Weeks v. the United Kingdom*, judgment of 2 March 1987, no. 9787/82, § 61

326 *McKay v. the United Kingdom*, Grand Chamber judgment of 3 October 2006, no. 543/03, § 40

The reference to “a judge or other officer authorised by law to exercise judicial power”, has been considered by the Court as a synonym of the term “competent court” described above under Article 5 § 1 (a).^[327] It must therefore respect the same qualities described above, to guarantee that the person detained is not arbitrarily or unjustifiably deprived of their liberty.^[328] These conditions include that the officer must be independent of the executive and of the parties. If the officer may later intervene in subsequent proceedings as a representative of the prosecuting authority, he or she cannot be regarded as independent of the parties at that preliminary stage, as it is possible for them to become one of the parties at a later stage in proceedings.^[329]

Further, the officer’s independence and impartiality could also be undermined if they had a dual role enforcing discipline and order in detention, as well as deciding on questions of release. This would pose a particular problem if one of the reasons allowing an officer to refuse release of an individual related to the interests of discipline.^[330]

Article 5 § 4 provides:

“Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

The form of the judicial review which takes place under Article 5 § 4 might depend on the nature of the deprivation under Article 5 § 1, and the form of review might differ from one domain to another.^[331] However, regardless of the context or the form of review, the court or tribunal to which the person deprived of liberty must have access under Article 5 § 4 must be an independent judicial body.^[332] The general principles concerning the independence and impartiality of a tribunal for the purposes of

327 *Schiesser v. Switzerland*, judgment of 4 December 1979, no. 7710/76, § 29

328 *Hood v. the United Kingdom*, Grand Chamber judgment of 18 February 1999, no. 27267/95; *Nikolova v. Bulgaria*, Grand Chamber judgment of 25 March 1999, no. 31195/96, § 49

329 *Hood v. the United Kingdom*, Grand Chamber judgment of 18 February 1999, no. 27267/95; *Brincat v. Italy*, judgment of 26 November 1992, no. 13967/88, § 20

330 *Hood v. the United Kingdom*, Grand Chamber judgment of 18 February 1999, no. 27267/95, § 58

331 *Khlaifa and Others v. Italy*, Grand Chamber judgment of 15 December 2016, no. 16483/12, § 129

332 *Stephens v. Malta (No. 1)*, judgment of 21 April 2009, no. 11956/07; *Baş v. Turkey*, judgment of 3 March 2020, no. 66448/17, § 266

Article 6 of the Convention^[333] apply equally to Article 5 § 4.^[334] According to the Court, it would be inconceivable that Article 5 § 4 of the Convention, which relates to such sensitive issues as the deprivation of liberty, should not equally envisage, as a fundamental requirement, the impartiality of the court deciding on such issues.^[335]

v) Article 8 - Right to private and family life

Article 8 ECHR protects a person's right to respect for private and family life, home and correspondence. Under Article 8 § 2, an interference with the rights protected under Article 8 § 1 is permitted if the interference pursues a legitimate aim, is in accordance with law and is proportionate to the legitimate aim pursued.

This requirement of proportionality under Article 8 entails procedural, as well as substantive, protections.^[336] In certain situations, the protections under Article 8 can therefore give rise to a right to a hearing before an independent tribunal, even where Article 6 is not engaged.^[337]

Where a State interferes with an individual's Article 8 rights, the decision-making process leading to the measures of interference must be sufficiently fair to afford due respect to the interests safeguarded to an individual by Article 8.

The extent of the procedural protections required to ensure compliance with Article 8 depends on the gravity and nature of the interference. For example, in the context of possession proceedings, given that "*the loss of one's home is a most extreme form of interference with the right to respect for the home*", any person at risk of an interference "*of this magnitude*" must have the opportunity to have the proportionality of the measure determined by an independent tribunal, in light of the relevant principles under Article 8.

Examination of the situation by an independent court, in conformity with the principles established by the Court's case law, is a strong guarantee of legality and proportionality in many specific situations under Article 8 of the Convention, such

333 Elaborated by the Court in *Ramos Nunes de Carvalho e Sá v. Portugal*, Grand Chamber judgment of 6 November 2018, nos. 55391/13, 57728/13 and 74041/13, §§ 144-150 (included as a summary in this publication)

334 *Baş v. Turkey*, judgment of 3 March 2020, no. 66448/17, § 267

335 *Ali Osman Özmen v. Turkey*, judgment of 5 July 2016, no. 42969/04, § 85

336 *McCann and Others v. United Kingdom*, judgment of 13 August 2008, no. 19009/04

337 *McCann and Others v. United Kingdom* judgment of 13 August 2008, no. 19009/04; *Connors v. the United Kingdom*, judgment of 27 May 2004, no. 66746/01

as migration,^[338] expulsions,^[339] secrecy of correspondence,^[340] telephone tapping^[341] or surveillance measures in general^[342] and access to information.^[343]

Even where the procedure leading to an interference can be challenged via judicial review, this will not suffice as a procedural protection if the judicial review proceedings do not provide adequate opportunity to reconsider the relevant factual matters.^[344] There must be an opportunity for an independent tribunal to examine the proportionality of the measures interfering with Article 8, taking into account all relevant factual, as well as legal, issues.

vi) Article 10 – Freedom of Expression

Article 10 ECHR protects a person’s right to freedom of expression. Under Article 10 § 2, an interference with the rights protected under Article 10 § 1 is permitted if the interference is in accordance with law, pursues a legitimate aim and is proportionate to the legitimate aim pursued.

The requirement for an interference to be “in accordance with law” or “prescribed by law” requires both that the measure in question has some basis in domestic law and that the domestic law is of a certain quality. For example, the domestic law should be adequately accessible and foreseeable and it must afford legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention.^[345]

The requirement for an interference with Article 10 to be “in accordance with law” can therefore give rise to an obligation to ensure that an interference with Article

338 *Levakovic v. Denmark*, judgment of 23 October 2018, no. 7841/14, § 42

339 *Ozdil and Others v. the Republic of Moldova*, judgment of 11 June 2019, no. 42305/18, § 68

340 *Ozdil and Others v. the Republic of Moldova*, judgment of 11 June 2019, no. 42305/18, § 68

341 *Petri Sallinen and Others v. Finland*, judgment of 27 September 2005, no. 50882/99, § 92

342 *Roman Zakharov v. Russia*, Grand Chamber judgment of 04 December 2015, no. 47143/06, § 275

343 *M.G. v. the United Kingdom*, judgment of 24 September 2002, no. 39393/98, §§ 31-32

344 *McCann and Others v. United Kingdom*, judgment of 13 August 2008, no. 19009/04, § 53: the “procedural safeguards” required by Article 8 for the assessment of the proportionality of the interference were not met by the possibility for the applicant to apply for judicial review and to obtain scrutiny by the courts of the lawfulness and reasonableness of the local authority’s decisions. The judicial review procedure was found to be ill-adapted for the resolution of sensitive factual questions, which would more effectively be dealt with by the County Court responsible for ordering possession.

345 *Sanoma Uitgevers B.B. v. the Netherlands*, Grand Chamber judgment of 14 September 2010, no. 38224/03, § 81

10 is subject to review by an independent and impartial tribunal, as a procedural guarantee to ensure that the right to freedom of expression is not subject to arbitrary interferences by public authorities.

For example, given the vital importance of press freedom, in cases concerning the protection of journalistic sources, Article 10 requires that any order to disclose a journalistic source is subject to review by a judge or other independent and impartial decision-making body. Under Article 10, a body which is independent from the executive, and from any other interested parties, should be invested with the power to weigh up the various interests involved and determine if the public interest in disclosure outweighs the principle of protection of journalistic sources.^[346]

This independent body must be in a position to weigh up the potential risks and respective interests prior to any disclosure and, with reference to the material in question, to sufficiently protect the right to confidentiality of journalistic sources. An independent review which takes place after disclosure would not suffice to protect this right.^[347]

vii) Article 13 – Right to an effective remedy

Article 13 ECHR provides:

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

The object of Article 13 is to provide a means whereby individuals can obtain relief at a national level for violations of their Convention rights, before having to set in motion the international machinery of a complaint before the Court.^[348]

The “authority” referred to in Article 13 does not need, in all cases, to be a judicial institution in the strict sense or a tribunal within the meaning of Articles 6 § 1 and 5 § 4 of the Convention.^[349] For example, it could be a quasi-judicial body such as

346 *Sanoma Uitgevers B.B. v. the Netherlands*, Grand Chamber judgment of 14 September 2010, no. 38224/03, §§ 90-93

347 *Sanoma Uitgevers B.B. v. the Netherlands*, Grand Chamber judgment of 14 September 2010, no. 38224/03

348 *Kudła v. Poland*, Grand Chamber judgment of 26 October 2000, no. 30210/96, § 152

349 *Golder v. the United Kingdom*, judgment of 21 February 1975, no. 4451/70, § 33; *Klass and Others v. Germany*, judgment of 6 September 1978, no. 5029/71, § 67

an ombudsman, an administrative authority such as a government minister, or a political authority such as a parliamentary commission.^[350] However, the authority's powers and the procedural safeguards that it affords are taken into account in order to determine whether the remedy is effective, including whether any non-judicial "authorities" are independent.^[351]

The reviewing authority cannot, for example, be a political organ which has issued the impugned instructions, otherwise it would be a judge in its own cause.^[352]

In the particular context of asylum claims, although not falling under Article 6 § 1, Article 13 requires: "**independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3.**"^[353] (Emphasis added)

viii) Article 1 of Protocol No. 1

Article 1 of Protocol No. 1 protects the right to peaceful enjoyment of possessions. Although Article 1 of Protocol No. 1 contains no explicit procedural requirements, it has been construed to mean that persons affected by a measure interfering with their "possessions" must be afforded a reasonable opportunity to put their case to the responsible authorities for the purpose of effectively challenging those measures.^[354] In certain circumstances, States must provide an appropriate legal mechanism to allow an aggrieved party to assert their rights effectively.

Rather than focusing on the independence and impartiality of the reviewing body, it is necessary to assess if the procedure provided the applicant a fair possibility of defending his or her interests.^[355] However, where a measure interfering with Article

350 *Leander v. Sweden*, judgment of 26 March 1987, no. 9248/81; *Boyle and Rice v. the United Kingdom*, judgment of 27 April 1988, nos. 9659/82 and 9658/82; *Klass and Others v. Germany*, judgment of 6 September 1978, no. 5029/71

351 *Klass and Others v. Germany*, judgment of 6 September 1978, no. 5029/71, § 67; *Leander v. Sweden*, judgment of 26 March 1987, no. 9248/81, § 77

352 *Silver and Others v. the United Kingdom*, judgment of 25 March 1983, nos. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75, § 116: for example: a competent Minister, if dealing with a complaint as to the validity of an Order or Instruction over which he had control, would not have a sufficiently independent standpoint to satisfy the requirements of Article 13. However, he could be deemed sufficiently independent to determine a complaint alleging that the impugned measure resulted from a misapplication of one of those Orders or directives.

353 *Jabari v. Turkey*, judgment of 11 July 2000, no. 40035/98, § 50

354 *Jokela v. Finland*, judgment of 21 May 2002, no. 28856/95, § 45

355 *Bäck v. Finland*, judgment of 20 July 2004, no. 37598/97, § 63

1 Protocol No. 1 rights has been reviewed at a national level by an independent authority, for example via adversarial court proceedings, this will be a relevant factor in the assessment of whether the measure constitutes a proportionate interference with Article 1 Protocol No. 1 rights.^[356]

As discussed in the section of this Guide: ‘*Safeguarding independence and impartiality*’ (‘*Enforcement of judicial decisions*’), the failure of the executive and legislative branches of governments to implement judgments is capable of undermining the credibility and authority of the judiciary as well as the appearance of independence and impartiality.

Article 1 of Protocol No.1 imposes a positive obligation on States to organise a system for enforcement of judgments that is effective both in law and in practice, and to ensure that the procedures enshrined in the legislation for the enforcement of final judgments are complied with without undue delay.^[357]

When the authorities are obliged to act to enforce a judgment and they fail to do so, their inactivity may, in certain circumstances, engage the State’s responsibility on the grounds of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1.^[358] The extent of the State’s obligations under Article 1 of Protocol No. 1 varies depending on whether the debtor is the State or a private person.^[359] Failure to ensure the enforcement of a final judicial decision against the State in a case concerning pecuniary claims against the State normally amounts to a violation of both Article 6 and Article 1 of Protocol No. 1. When the State is the debtor, it must comply with the court decision fully and on time.^[360]

ix) Article 3 of Protocol No. 1

Article 3 of Protocol No. 1 contains an obligation on States to hold elections which ensure the free expression of the opinion of the people. The provision has been interpreted to comprise of individual rights, including the right to vote and the right to stand for election.^[361]

356 *Jokela v. Finland*, judgment of 21 May 2002, no. 28856/95, §§ 59-60

357 *Valeriy Fuklev v. Ukraine*, judgment of 16 January 2014, no. 6318/03, § 91

358 *Valeriy Fuklev v. Ukraine*, judgment of 16 January 2014, no. 6318/03, § 84

359 *Anokhin v. Russia*, judgment of 31 May 2007, no. 25867/02

360 *Burdov v. Russia*, judgment of 7 May 2002, no. 59492/00, §§ 33-42

361 *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, no. 9267/81, §§ 48-51; *Ždanoka v. Latvia*, Grand Chamber judgment of 16 March 2006, no. 58278/00, § 102

Article 3 of Protocol No. 1 concerns not only the process of the organisation and management of the voting process, but also the manner of review of the outcome of elections and disputes concerning counting of votes and validation of election results.^[362]

Whilst Article 6 is inapplicable to disputes arising over the enforcement of these rights, as they are categorised as ‘political’ rather than ‘civil’ rights,^[363] Article 3 of Protocol No. 1 gives rise to certain positive, procedural obligations.

Under Article 3 of Protocol No. 1, the authorities in charge of electoral administration must function in a transparent manner and maintain impartiality and independence from political manipulation, and their decision must be well-reasoned.^[364]

Further, States must establish a domestic system for the effective examination of individual complaints and appeals in matters concerning electoral rights. Specific instances indicative of failure to ensure democratic elections must be open to challenge by individuals before a competent domestic body capable of effectively dealing with the matter. The appeal body in electoral matters should be either an independent electoral commission or a court.^[365]

b) The rights of judges

Judges, like all citizens in the Member States, enjoy the fundamental rights and freedoms protected by the ECHR. However, in certain contexts, the exercise of their ECHR rights and freedoms could undermine their impartiality and/or their independence. A reasonable balance therefore needs to be struck between judges’ rights, for example their rights to freedom of expression, belief, association and manifestation, and the requirement for them to preserve the independence and impartiality of the judiciary in the discharge of their duties.^[366]

362 *Namat Aliyev v. Azerbaijan*, judgment of 8 April 2010, no. 18705/06, § 81; *Davydov and Others v. Russia*, judgment of 30 May 2017, no. 75947/11

363 *Pierre-Bloch v. France*, judgment of 21 October 1997, no. 24194/94, § 50

364 *Davydov and Others v. Russia*, judgment of 30 May 2017, no. 75947/11

365 *Yumak and Sadak v. Turkey*, judgment of 8 July 2008, no. 10226/03; see also <http://www.eods.eu/library/default%20en.pdf> “European Commission for Democracy Through Law (Venice Commission) Code of Good Practice in Electoral Matters Guidelines and Explanatory Report”, CDL-AD (2002) 23 rev. 23 May 2003, § 3-3(a): “The appeal body in electoral matters should be either an electoral commission or a court. For elections to Parliament, an appeal to Parliament may be provided for in first instance. In any case, final appeal to a court must be possible.”

366 CCJE (2002) Op. N° 3

In striking this balance, it is necessary to remember that the judicial system can only function properly if judges are not isolated from the society in which they live. Their active participation in social life helps them to acquire direct experience of the matters relevant to the decisions they must make. The public benefit of such judicial involvement and participation must, however, be balanced with the need to maintain public confidence in the judiciary, the right to a fair trial and the impartiality, integrity and independence of the judicial system as a whole.

i) Article 5 – Right to liberty and security

Judges, like all citizens of Member States, benefit from the rights protected under Article 5. When considering any measures taken to deprive a judge of their liberty, it is necessary to take particular account of the special role in society played by the judiciary which, as the guarantor of justice, must enjoy public confidence if it is to be successful in carrying out its duties. The deprivation of a judge’s liberty can serve to undermine this confidence. Measures taken to deprive them of their liberty must therefore be subject to heightened procedural safeguards against arbitrariness.^[367]

Article 5 § 1 requires that any deprivation of liberty is: “in accordance with a procedure prescribed by law”. When considering the lawfulness of a deprivation of liberty in the context of the detention of judges, compliance with the rules of ordinary law may not be enough to satisfy the “quality of the law” requirement under Article 5 § 1. Given the necessity of protecting the independence and impartiality of the judiciary, judges may benefit from heightened protection against detention in domestic law. Where domestic law has granted judicial protection to members of the judiciary in order to safeguard the independent exercise of their functions, it is essential that such arrangements should be properly complied with.^[368]

ii) Article 8 - Right to private and family life

There are two key situations in which Article 8 might be engaged in the context of safeguarding independence and impartiality of the judiciary: i) where a judge is dismissed from their role because of activities carried out in their personal life; and ii) where a judge’s dismissal from office constitutes an interference with their right to private life.

367 *Alparslan Altan v. Turkey*, judgment of 16 April 2019, no. 12778/17

368 *Alparslan Altan v. Turkey*, judgment of 16 April 2019, no. 12778/17

Dismissal due to activities in a judge's private life

Protection of the independence and impartiality of the judiciary constitutes a legitimate aim, in pursuit of which a judge's right to private life can permissibly be limited.

The ethical duties and obligations imposed on judges to protect independence and impartiality may, to a certain extent, impinge on their private lives, and it is permissible under Article 8 to oblige judges to exercise restraint in their private life to ensure their behaviour does not tarnish the image, reputation or impartiality of the judiciary.^[369]

However, any interference with a judge's right to private life must comply with the principle of proportionality. A judge can only be removed from office on the basis of actions taken in their private life if the State can evidence that actions taken in their personal life are impacting on their judicial role, for example by influencing their judicial decisions or impacting their appearance of independence and impartiality.^[370]

Further, procedural protections are particularly important when an investigation into a judge's private life is conducted. Any judge who faces removal from office on grounds related to their private or family life must be afforded guarantees against arbitrariness, and in particular a guarantee of adversarial proceedings before an independent and impartial supervisory body.^[371]

The impact of dismissal on a judge's private life

The notion of private life under Article 8 can include activities of a professional or business nature,^[372] and restrictions imposed on access to a profession, or dismissal from office, have been found to affect "private life".^[373] Issues regarding the protection of honour and reputation also fall within the scope of the right to respect for private life.^[374]

369 *Özpinar v. Turkey*, judgment of 19 October 2010, no. 20999/04, §§ 55-56

370 *Özpinar v. Turkey*, judgment of 19 October 2010, no. 20999/04, §77

371 *Özpinar v. Turkey*, judgment of 19 October 2010, no. 20999/04, §88

372 *Niemietz v. Germany*, judgment of 16 December 1992, no. 13710/88, § 29

373 *Sidabras and Džiautas v. Lithuania*, judgment of 27 July 2004, nos. 55480/00 and 59330/00, § 47; *Özpinar v. Turkey*, judgment of 19 October 2010, no. 20999/04, §§ 43-48

374 *See Pfeifer v. Austria*, judgment of 15 November 2007, no. 12556/03, § 35

A judge's dismissal from office can therefore, in certain circumstances, constitute an interference with their right to private life. For Article 8 to be engaged as a result of dismissal from office, dismissal must lead to very serious or significant negative consequences in respect of: (i) the individual's "inner circle", in particular where there are serious material consequences; (ii) the individual's opportunities "to establish and develop relationships with others"; and (iii) the individual's reputation.^[375]

The severity of such consequences is to be assessed by comparing a judge's life before and after dismissal. They must be able to show convincingly that the threshold of severity was attained in his or her case. Relevant factors include:^[376]

- » Whether dismissal had tangible consequences for the material well-being of the judge and their family, for example due to a reduction in salary, or due to public attacks on the judge or their family's reputation.
- » Whether the judge was barred from practicing as a judge entirely, or whether the judge retained employment in some capacity, for example in a different judicial role or a different court, and whether they retained opportunities to establish and maintain relationships of a professional nature as a result.
- » The reasons for dismissal and the focus of the proceedings brought against the judge, and the resultant impact on their professional reputation:
 - Article 8 is more likely to be engaged where proceedings relate to the judge's performance as a judge, concern their judicial competence and professionalism or question their morality or ethics, for example proceedings for breach of a judicial oath or proceedings in relation to judicial corruption.
 - Article 8 is unlikely to be engaged where proceedings relate only to a judge's managerial skills or performance of administrative tasks, as such matters do not relate to the core of the applicant's professional reputation.
- » The severity of a judge's loss of self-esteem and whether this causes serious prejudice in the professional environment.
- » Whether disciplinary proceedings form part of a wider effort to reform a judicial system, where there is a 'pressing social need' to implement such reform, for example due to widespread corruption within the judiciary.

375 *Denisov v. Ukraine*, Grand Chamber judgment of 25 September 2018, no. 76639/11, § 107 (included as a summary in this publication)

376 *Oleksandr Volkov v. Ukraine*, judgment of 6 February 2018, no. 21722/11 (included as a summary in this publication); *Denisov v. Ukraine*, Grand Chamber judgment of 25 September 2018, no. 76639/11 (included as a summary in this publication); *Xhoxhaj v. Albania*, judgment of 9 February 2021, no. 15227/19

Whilst dismissal from judicial office may constitute a legitimate means of protecting independence and impartiality, where Article 8 is engaged as a result of the consequences of dismissing a judge from office, the procedure to dismiss a judge must be in accordance with law and constitute a proportionate measure of achieving that aim.

iii) Article 9 - Freedom of religion

To maintain impartiality, judges must not allow their personal, religious views to interfere with or influence how they carry out their judicial role.

Article 9 § 2 provides:

“Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

Protection of the independence and impartiality of the judiciary constitutes a legitimate aim for which the freedom to manifest one’s religion can be limited.^[377] For example, the dismissal of a judge who expresses religious views during proceedings or allows their religious views to influence the outcome of proceedings, would not violate Article 9, if the dismissal was carried out with the aim of protecting impartiality.

The requirement of impartiality does not mean that judges should be prevented from belonging to religious groups and/or holding religious views in general. Judges do have the freedom to manifest their religious beliefs when acting in a private capacity. Any disciplinary action taken against them on the grounds of religious expression must therefore be based on actions carried out in the performance of their judicial function.^[378] For example, praying publicly during court hearings, promising or affording a favourable outcome to parties if they adopt the judge’s religious views, or criticising the morality of parties to proceedings on the basis of their religious beliefs.

377 *Pitkevich v. Russia*, decision of 8 February 2001, no. 47936/99 (included as a summary in this publication)

378 *Pitkevich v. Russia*, decision of 8 February 2001, no. 47936/99 (included as a summary in this publication)

iv) Article 10 - Freedom of expression

As discussed in the sections of this Guide: ‘*Personal impartiality - public statements about the case*’ and the ‘*Appearance of independence*’, judges might be required to restrict the public expression of their views to safeguard their independence and impartiality. Such restrictions on expression, for example sanctions imposed following the expression of views by a judge, can in certain circumstances engage, and even violate, Article 10 (right to freedom of expression). The section below sets out the test to apply to determine if a judge’s Article 10 rights have been violated.

Public expression of views by a judge

1. Is Article 10 engaged?

The Court has affirmed that Article 10 applies to the workplace and that civil servants, including judges, enjoy the right to freedom of expression.^[379]

To ascertain if Article 10 is engaged in cases concerning disciplinary proceedings against judges, their removal or appointment, it is first necessary to assess whether the restriction, condition or disciplinary measure against a judge actually relates to the exercise of their freedom of expression. Or, whether the disciplinary measure relates instead to the exercise of their judicial function or their professional conduct. For Article 10 to be engaged, there must be a causal link between the exercise of a judge’s freedom of expression and the disciplinary measure taken against them.

The context in which a judge has spoken, expressed an opinion or acted, and the reasoning behind a decision to sanction a judge, are relevant to this assessment. For example, disciplinary measures taken against a judge based on their expression of views in a public forum, such as when that judge delivers a public lecture,^[380] makes statements to the media,^[381] writes letters to politicians or members of public office or delivers a speech or issues a public communiqué, all constitute an interference with Article 10.^[382]

Article 10 is not engaged where a judge is sanctioned predominantly because of their professional ability to exercise judicial functions. Even where disciplinary

379 *Wille v. Liechtenstein*, Grand Chamber judgment of 28 October 1999, no. 28396/95, § 41

380 *Wille v. Liechtenstein*, Grand Chamber judgment of 28 October 1999, no. 28396/95, §§ 48-50

381 *Kudeshkina v. Russia*, judgment of 26 February 2009, no. 29492/05, § 79

382 *Baka v. Hungary*, Grand Chamber judgment of 23 June 2016, no. 20261/12, § 145 (included as a summary in this publication)

proceedings refer in part to views which have been expressed by a judge, Article 10 will not be engaged if the measures against a judge are not “exclusively or preponderantly prompted by those views”, but instead relate mainly to the appraisal of their professional qualifications and personal qualities in the context of a judge’s activities and attitudes relating to the administration of justice.^[383]

2. Does the interference pursue a legitimate aim?

Article 10 § 2 provides:

*“The exercise of these freedoms, since it **carries with it duties and responsibilities**, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society...for the protection of the reputation or **rights of others...or for maintaining the authority and impartiality of the judiciary.**”* (Emphasis added)

The protection of the authority and impartiality of the judiciary is therefore a legitimate aim in pursuit of which the right to freedom of expression can be restricted.

Article 10 § 2 also recognises that the exercise of freedom of expression carries certain “duties and responsibilities”. Such duties and responsibilities are particularly relevant to judges, given the prominent place occupied by the judiciary among State organs in a democratic society. The Court has on many occasions emphasised the special role of the judiciary which, as the guarantor of justice, must enjoy public confidence if it is to be successful in carrying out its duties.^[384] Judicial authorities and public officials serving in the judiciary are therefore expected to show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called into question.^[385] The higher demands of justice and the elevated nature of judicial office mean that greater demands of restraint may justifiably be imposed on judges.

383 *Harabin v. Slovakia*, judgment of 20 November 2012, no. 58688/11, §§ 149-153 (included as a summary in this publication)

384 *Morice v. France*, Grand Chamber judgment of 23 April 2015, no. 29369/10, § 128 (included as a summary in this publication); *Baka v. Hungary*, Grand Chamber judgment of 23 June 2016, no. 20261/12, §§ 163-164 (included as a summary in this publication)

385 *Wille v. Liechtenstein*, Grand Chamber judgment of 28 October 1999, no. 28396/95, § 64; *Kudeshkina v. Russia*, judgment of 26 February 2009, no. 29492/05, § 86; *Baka v. Hungary*, Grand Chamber judgment of 23 June 2016, no. 20261/12, § 164 (included as a summary in this publication)

This duty of restraint relates to public comments made by judges in relation to the cases they are adjudicating upon, as well as to public comments made by judges in relation to their fellow judges or the institution of the judiciary.

The duty of restraint on judges in relation to public comments on their cases

Judicial authorities are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges. Judges must refrain from commenting on their cases in the press, even where provoked or asked for comment.^[386] Public comments by a judge which are critical of a party to proceedings, or public predictions about the outcome of hearings, are incompatible with the requirement of impartiality under Article 6 § 1.^[387] Such speech can legitimately be restricted under Article 10, to preserve the impartiality of the judiciary and protect the right to a fair trial by an independent and impartial tribunal under Article 6.

The duty of restraint on judges in relation to their comments on other people, fellow public officers and other judges

Whilst judges, like other public servants, benefit from the right to freedom of expression in the sphere of the workplace, the Court has acknowledged that employees also owe to their employers a duty of loyalty, reserve and discretion. This is particularly so in the case of judges, given the importance of public confidence in the courts, for the judiciary to be successful in carrying out its duties.^[388]

It may therefore be necessary to restrict the freedom of expression of judges in order to protect public confidence in the judiciary against destructive attacks, particularly those which are unfounded or unsubstantiated, and especially in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying.^[389] For example, it would be legitimate to impose sanctions on a judge who publicly made unsubstantiated allegations of corruption in the judiciary^[390] or who spread serious and unfounded rumours about a fellow

386 *Buscemi v. Italy*, judgment of 16 September 1999, no. 29569/95, § 67

387 *Lavents v. Latvia*, judgment of 28 November 2002, no. 58442/00, §§ 118-119 (included as a summary in this publication)

388 *Simić v. Bosnia and Herzegovina*, judgment of 15 November 2016, no. 75255/10, §32

389 *Kudeshkina v. Russia*, judgment of 26 February 2009, no. 29492/05, § 86; *Simić v. Bosnia-Herzegovina*, no. 75255/10, 15 November 2016

390 *Simić v. Bosnia and Herzegovina*, judgment of 15 November 2016, no. 75255/10

judge,^[391] given the potential for such actions to seriously undermine the appearance of impartiality and public confidence in the judiciary as a whole.

It is important, however, that any restrictions on the expression of judges do, in fact, serve the legitimate aim of protecting the independence and impartiality of the judiciary. Disciplinary measures taken against judges, for example the early termination of their office, also risk undermining the independence and impartiality of the judiciary.^[392] A State cannot invoke the independence of the judiciary as a reason to sanction a judge for the exercise of their freedom of expression, if the measures taken against them would in fact have the opposite effect. For example, the early termination of the mandate of a court judge as a consequence of their exercise of freedom of expression that could undermine impartiality, where their termination was not in accordance with law, did not relate to any grounds of professional incompetence or misconduct and did not relate to speech which was itself harmful to impartiality.^[393]

3. Is the interference necessary in a democratic society?

Any restriction on speech must also be a necessary and proportionate means of pursuing the legitimate aim of protecting the independence, impartiality and authority of the judiciary. To assess the proportionality of a measure, it is necessary to have regard to the circumstances of each case, the nature of the statements made and the context in which they were made,^[394] to determine whether a fair balance has been struck between the fundamental right of the individual to freedom of expression and the legitimate interest of a democratic State in ensuring that its civil service properly furthers the purposes enumerated in Article 10 § 2.

The following factors are relevant to such a proportionality assessment:

- » The special significance^[395] of the “duties and responsibilities” referred to in Article 10 § 2 in the context of expression by judges, given the prominent place among State organs that the judiciary occupies in a democratic society, which

391 *Di Giovanni v. Italy*, judgment of 9 July 2013, no. 51160/06

392 See the sections of this Guide: ‘Term of Office’, ‘Guarantees against outside pressure’ and ‘Safeguarding independence and impartiality’.

393 *Baka v. Hungary*, Grand Chamber judgment of 23 June 2016, no. 20261/12, § 156 (included as a summary in this publication)

394 *Morice v. France*, Grand Chamber judgment of 23 April 2015, no. 29369/10, § 162 (included as a summary in this publication)

justifies leaving to the national authorities a certain margin of appreciation in determining whether the impugned interference is proportionate to the above aim.^[395]

- » The special role in society of the judiciary, which, as the guarantor of justice, a fundamental value in a law-governed State, must enjoy public confidence if it is to be successful in carrying out its duties and in light of this, the duty on judges to show restraint, reserve and discretion.
- » The importance of the separation of powers and the importance of safeguarding the independence of the judiciary, which means that any interference with the expression of a judge must be subject to close scrutiny.
- » The fairness of proceedings and the procedural guarantees in place when assessing the proportionality of an interference with freedom of expression guaranteed by Article 10, as well as the quality of the available judicial review of the necessity of the measure.
- » Whether the expression in question concerns fact or value judgments and, where the expression amounts to a value judgment, whether there exists a sufficient factual basis to support the judgment, or whether the expression concerns unfounded rumours or unsubstantiated criticisms.^[396]
- » Whether the expression concerns matters or questions of public interest in a democratic society which the public has a legitimate interest in being informed about and which fall within the scope of political debate:
 - Expression concerning the separation of powers, constitutional and legislative reforms, the functioning and reform of the judicial system, and the independence and irremovability of judges, fall within the public interest and debate of such matters generally enjoys a high degree of protection under Article 10.^[397]
 - A gratuitous personal attack on a fellow judge is unlikely to be protected.
- » The nature and severity of the sanction imposed. For example, issuing a warning is more likely to be a proportionate than terminating a judge's mandate or preventing them from holding office.^[398]
- » Whether the sanction is likely to have a 'chilling effect' on the speech and participation of judges in public debate on matters of concern to the judiciary.

395 *Vogt v. Germany*, judgment of 2 September 1996, no. 17851/91, § 53

396 *Di Giovanni v. Italy*, judgment of 9 July 2013, no. 51160/06

397 *Kudeshkina v. Russia*, judgment of 26 February 2009, no. 29492/05, § 86; *Morice v. France*, Grand Chamber judgment of 23 April 2015, no. 29369/10, §§ 125-128 (included as a summary in this publication)

398 *Kudeshkina v. Russia*, judgment of 26 February 2009, no. 29492/05

The importance of the participation of judges in public debate on matters concerning the judiciary and the administration of justice

As set out above, expression by judges on matters of public importance benefits from a high level of protection under Article 10. Any restrictions imposed on the freedom of expression of judges must not have a chilling effect on their willingness to participate in public debate on matters concerning the judiciary, for example legislative reforms or issues concerning the independence of the judiciary.^[399]

Judges have an important role to play in the public debate on the effectiveness of and reform to judicial institutions. The Court and the CoE instruments recognise that each judge is responsible for promoting and protecting judicial independence^[400] and that judges and the judiciary should be consulted and involved in the preparation of legislation concerning their statute and, more generally, the functioning of the judicial system.^[401]

It may therefore be the case that it is not only the right, but also the duty of a judge to express their opinion on reforms affecting the judiciary.^[402] They may, in their capacity as legal experts, express their views, including criticism, about legal reforms initiated by the Government. Such a position, expressed in an appropriate manner, does not bring the authority of the judiciary into disrepute or compromise their impartiality in a given case.^[403]

Criticism on judges from those who are not part of the judiciary

As discussed in the sections of this Guide: ‘*Who/which bodies does the requirement of independence and impartiality apply to*’ and ‘*Safeguarding the independence and impartiality of the judiciary*’, the obligations under Article 6 to maintain the independence and impartiality of the judiciary apply to other the organs of the state, and to the media, in addition to the judiciary itself.

The protection of the independence, impartiality and authority of the judiciary may also, therefore, constitute a legitimate aim in pursuit of which it is permissible to limit the speech of those outside the judiciary.

399 *Kudeshkina v. Russia*, judgment of 26 February 2009, no. 29492/05; *Baka v. Hungary*, Grand Chamber judgment of 23 June 2016, no. 20261/12 (included as a summary in this publication)

400 *The Magna Carta of Judges*, § 3

401 CCJE (2002) Op. N° 3, § 34; *The Magna Carta of Judges*, § 9

402 *Baka v. Hungary*, Grand Chamber judgment of 23 June 2016, no. 20261/12 (included as a summary in this publication)

403 *Previti v. Italy*, judgment of 8 December 2009, no. 45291/06, §§ 249-269

When assessing whether a restriction on expression in this context violates Article 10, it is necessary to assess if the restriction is a necessary and proportionate means by which to protect the impartiality of the judiciary. Many of the same factors set out in the section of this Guide: ‘*Public expression of views by judges*’ are relevant to this proportionality assessment.

Generally, comments or reports on the functioning of the judiciary or the handling of a case constitute debate on a matter of public interest, and therefore merit a high level of protection under Article 10, with a narrow margin of appreciation afforded to States. Given that judges form part of a fundamental institution of the State, when acting in their official capacity they can expect to be subject to wider limits of acceptable criticism than ordinary citizens, including personal criticism.

Given the importance of maintaining public confidence in the judiciary, personal insults, which include: calling into question the professional competence of a judge; attributing blameworthy conduct to a judge such as lying, wilfully distorting reality or issuing an untruthful report; or describing a judge specifically in derogatory terms, are unlikely to benefit from the protection of Article 10. However, critical remarks which concern the manner in which a judge conducts proceedings, or which relate to a judge’s performance in a case, are more likely to be protected under Article 10.^[404]

Even where expression includes value judgments which damage the reputation of a judge, restrictions on such speech might still constitute a violation of Article 10, if the penalty imposed is so severe that it risks discouraging open discussion on matters of public concern.^[405]

Criticism from lawyers

The specific status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. They therefore play a key role in ensuring that the courts enjoy public confidence.

404 *Radobuljac v. Croatia*, judgment of 28 June 2016, no. 51000/11

405 *Narodni List D.D. v. Croatia*, judgment of 8 November 2018, no. 2782/12: where a journalist expressed value judgments injurious to the reputation of a judge and the applicant company was ordered to pay EUR 6,870 in non-pecuniary damage, the Court found a violation of Article 10 because the injury to the judge’s reputation was not found to be of a level of seriousness as to have justified an award of that size, and the size of the award could discourage open discussion of matters of public concern.

This role of lawyers as independent professionals means they should be able to draw the public's attention to potential shortcomings in the justice system. They may even have a duty to do so where the judiciary would benefit from constructive criticism.^[406]

Lawyers are therefore entitled to comment in public on the administration of justice, provided that their expression does not overstep certain bounds. For example, they should not make gratuitous and unfounded attacks on the judiciary, driven solely by a wish or strategy to ensure that the judicial debate is pursued in the media or to settle a score with the judges handling a particular case.^[407]

v) Article 11 - freedom of assembly and association

Article 11 § 2 specifies that:

“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.”

In certain situations, States can impose restrictions on a judge's right to freedom of assembly and association, where doing so would protect independence and impartiality. For example, as part of the general duties on judges to exercise restraint in their private lives, restrictions may be placed on their right to become members of certain groups or associations.

Such restrictions must, however, be prescribed by law and sufficiently clear to enable a judge to foresee that their membership of a certain group could lead to disciplinary proceedings against them.^[408]

406 *Morice v. France*, Grand Chamber judgment of 23 April 2015, no. 29369/10 (included as a summary in this publication)

407 *Morice v. France*, Grand Chamber judgment of 23 April 2015, no. 29369/10 (included as a summary in this publication)

408 *Maestri v. Italy*, Grand Chamber judgment of 17 February 2004, no. 39748/98 (included as a summary in this publication)

(9) CONCLUSION

The requirements that a tribunal be independent, impartial and established by law under Article 6 are all integral parts of upholding the fundamental principle of the rule of law and of maintaining public confidence in the courts, both of which are essential features of any democratic society.

This Guide has highlighted the particular importance of these protections under Article 6 in the context of disciplinary proceedings against judges. The existence of the possibility of bringing disciplinary proceedings against a judge is certainly necessary to ensure compliance with their professional obligations, including their obligations to be independent and impartial. There is, however, a risk that such proceedings could be used by governments to punish judges for the outcomes or content of their decisions, thereby interfering with their independence and impartiality. The protections of Article 6 must be implemented stringently to ensure the threat of disciplinary proceedings against judges cannot be misused by States to apply pressure to judges, thereby undermining, rather than advancing their independence and impartiality.

It should also be noted that the right of access to an independent and impartial tribunal established by law serves not only to ensure compliance with the requirements of Article 6, but also helps to secure practical and effective protection of all other Convention rights. Chapter 8 of this Guide analyses some examples of the ways in which the institutional requirements of Article 6 interact with other Convention rights. In reality, the existence of an independent and impartial judiciary established by law is an essential part of upholding every other Convention right, as the operation of an independent and impartial judiciary provides a key mechanism through which individuals can hold States accountable for an interference with their Convention rights.

Finally, what is clear from the content of this Guide is that the task of upholding independence and impartiality of the judiciary requires a multifaceted approach; the obligations imposed under Article 6 are not limited to the judiciary. The legislature, executive, media and judicial councils, for example, must all too play a part in encouraging the transparency of judicial proceedings, the enforcement of judgments and the maintenance of public confidence in the independence and impartiality of the judiciary.

Case Summaries

(1) The Right to a Tribunal Established by Law

The participation of a judge whose appointment was subject to grave breaches of domestic law in the applicant's criminal appeal violated Article 6 § 1 as it failed to strike the appropriate balance between legal certainty and the applicant's right to a tribunal established by law

GRAND CHAMBER JUDGMENT IN THE CASE OF **GUÐMUNDUR ANDRI ÁSTRÁÐSSON v. ICELAND**

(Application no. 26374/18)

1 December 2020

1. Principal facts

The applicant's criminal case

The applicant was born in 1985 and lived in Kópavogur, Iceland. He was convicted in March 2017 of driving without a valid licence under the influence of drugs. His appeal was heard by the newly appointed Court of Appeal which had been set up in January 2018. The applicant unsuccessfully requested Judge A.E.'s withdrawal from his case on the basis of a judgment by the Supreme Court of 19 December 2017 which had found irregularities in her appointment.

The Court of Appeal upheld the applicant's conviction in April 2018. He appealed to the Supreme Court submitting that A.E.'s appointment had not been in accordance with the law and thus he had not enjoyed a fair trial before an independent and impartial tribunal established by law. He also alleged that there had been a political motive behind her appointment. However, the Supreme Court dismissed his appeal on 24 May 2018. Although it accepted that there had been irregularities in the procedure of Judge A.E.'s appointment, it held that her appointment was valid and that there were insufficient reasons to conclude that the applicant had not been given a fair trial within the meaning of Article 6 § 1 of the Convention.

A.E.'s judicial appointment

The independent Icelandic Evaluation Committee (the "Committee") had assessed 33 candidates for 15 judicial posts on the newly established Court of Appeal.

Of those 33 candidates, the Committee then recommended a list of 15 candidates whom it considered to be the most qualified for the role. The Minister of Justice (the “Minister”) was only allowed to depart from this recommendation under the Judiciary Act no. 50/2016 (the “2016 Act”) where: (i) the Committee considered that the proposed candidates fulfilled the minimum requirements of the role under the 2016 Act and; (ii) the proposal was accepted by Parliament.

Ultimately, the Minister chose 11 candidates from the Committee’s recommendation and added four others including A.E.. Parliament accepted the proposal to remove the four candidates from the Committee’s list and add the Minister’s four candidates by a majority single vote in June 2017. The President of Iceland signed the new judges’ appointment letters, including A.E.’s, later that month.

Two of the four candidates who had been removed from the Committee’s list by the Minister’s proposal sued the State on the basis that the resulting judicial appointments had been unlawful. Although the Supreme Court rejected their claims for pecuniary damage, it awarded them 700,000 Icelandic krónur each (ISK) (approximately €5,700) for non-pecuniary damage.

In two judgments of 19 December 2017, the Supreme Court found that the Minister had breached the domestic rules for judicial appointments in her failure to provide Parliament with reasons substantiated by an independent investigation for her departure from the Committee’s list. It also held that the procedure by which Parliament had approved the proposal was flawed in so far as it had conducted a vote *en bloc* for the amended list as opposed to voting on each candidate separately as was required by the Act.

2. Decision of the Court

The applicant complained that one of the judges on the newly constituted Court of Appeal which had upheld his criminal conviction had not been appointed in accordance with the relevant domestic law. He alleged that therefore, the criminal charges against him had not been determined by a “tribunal established by law” within the meaning of Article 6 § 1 of the Convention. In connection with that submission, the applicant further complained that he had been denied the right to an independent and impartial tribunal within the meaning of that same provision.

In its judgment of 12 March 2019, the Chamber held that there had been a violation of the applicant’s right to a tribunal established by law under Article 6 § 1. Accordingly, the Chamber held that there had been no need to examine the

applicant's complaints with respect to his right to an independent and impartial tribunal under that provision. At the Government's request under Article 43, the case was referred to the Grand Chamber.

Article 6 § 1

The present case provided the Court with an opportunity to clarify the concept of a "tribunal established by law" and its relationship to the institutional requirements of "independence and impartiality".

Right to a tribunal established by law

The Court reiterated that if a tribunal is not established in compliance with the intentions of the legislature, it will lack the legitimacy required in a democratic society to resolve legal disputes.

However, the right to a tribunal established by law is not such that any and all irregularities in the appointment procedure would amount to a violation of that right. The right to a fair trial under this provision must be interpreted in light of other principles of the rule of law such as legal certainty and the irremovability of judges. Protecting the right to a tribunal established by law at the expense of these principles may, in some circumstances, cause further harm to the rule of law and public confidence in the judiciary. Therefore, according to the Court's settled case law, departure from the principle of legal certainty is only justified by circumstances of a substantial and compelling character, for example the correction of fundamental defects or a miscarriage of justice. Departure from the principle of the irremovability of judges is only acceptable if it is proportionate to a legitimate objective. It is for the Court to determine whether an appropriate balance has been struck between these fundamental principles of the Convention.

Thus the Court formulated a three-step test to assess whether the irregularities in a given judicial appointment were of such gravity as to entail a violation of the right to a tribunal established by law.

i) The first step

In principle, there must first be a manifest breach of the domestic law. The Court will generally accept the national courts' interpretation as to whether there has been such a breach unless its finding is considered to be arbitrary or manifestly unreasonable.

In the present case, in its judgments of 19 December 2017 and 24 May 2018, the Iceland Supreme Court had concluded that the appointment of the Minister's four Court of Appeal judges breached domestic law in two respects. Firstly, the Minister had not carried out an independent investigation, contrary to section 10 of the Administrative Procedures Act 1993 (the "1993 Act"), as a result of which she had not provided adequate reasons for her departure from the Committee's proposal. Secondly, the Icelandic Parliament had failed to comply with the special voting procedure under the 2016 Act. There were no reasons to depart from the Supreme Court's interpretation of domestic law in the present case and therefore the first condition of the test was satisfied.

However, the Court stressed that the absence of a manifest breach of domestic law is not fatal to the finding of a violation of this right. There may be circumstances in which the appointment seemingly complies with the domestic rules but nevertheless produces results which are incompatible with the object and purpose of the right to a tribunal established by law, in which case the Court would continue its examination under steps 2 and 3 of the test.

ii) The second step

Next, the breach must be assessed in light of its impact on the object and purpose of the right to a tribunal established by law. Namely, its impact on the judiciary's ability to exercise judgment free from undue interference. Therefore, breaches which are of a purely technical nature which have no bearing on the judiciary's ability to protect and preserve the rule of law will fall below the threshold of this test. Accordingly, only breaches which relate to the fundamental procedures of judicial appointments will likely result in a violation of the right in question.

In Iceland, the Committee was empowered to issue binding recommendations for judicial appointments from which the Minister could exceptionally deviate subject to parliamentary control. Given that the aim of this mechanism was to limit the influence of the executive in judicial appointments, thus strengthening the independence of the judiciary in Iceland, respecting the Committee's recommendations was a fundamental rule of the national judicial appointment procedure. The Court went on to examine both the breaches committed by the Minister and the shortcomings of the parliamentary procedure.

The Minister had explained to Parliament that her decision to depart from the Committee's assessment was based on the desire to: (i) accord more weight to judicial experience and; (ii) achieve a gender balance among appointees. However, the Committee's decision to accord the same weight to judicial experience as to

litigation and administrative experience had been in accordance with domestic law. With respect to the gender balance, in its judgment of 19 December 2017 the Supreme Court of Iceland indicated that considerations under the Equality Act were only relevant where two candidates of different genders were considered to be equally qualified, concluding that such consideration could not be had in the present case given the inadequacy of the Minister's investigation.

However, even supposing that the Minister had departed from the Committee's recommendations on legitimate grounds, the Supreme Court's finding of a breach in its judgment of 19 December 2017 was ultimately due to the fact that the Minister had simply failed to explain why she had chosen one candidate over the other as was required under section 10 of the 1993 Act. While all four candidates added to the list by the Minister scored higher in judicial experience than the four she removed from the Committee's list, there had been other candidates on the list who had scored lower in judicial experience than the four who had been removed. Similarly, there were other candidates (including a female candidate) who had scored higher in judicial experience than the four eventually chosen by the Minister. Therefore, this assessment did not provide a satisfactory explanation as to why those eight particular candidates had been added or removed from the list. Although the Government argued that the Minister had also considered the "success" of the candidates' careers, no explanation was provided as to how this was evaluated. As a result, the objectivity of the selection process was in question.

Ultimately, the uncertainty surrounding the Minister's motives raised serious concerns of undue interference by the executive which tainted the legitimacy of the whole procedure. This was especially so given the Minister belonged to one of the political parties composing the majority in the Icelandic coalition government by whose votes alone her proposal was adopted in Parliament. While the Court was not in a position to determine whether the Minister had in fact acted out of political motive, her actions had prompted objectively justified concerns to that effect which were sufficient to detract from the transparency of the judicial selection process. Furthermore, her failure to comply with the domestic rules was all the more serious given that her own legal advisors had reminded her of her legal obligations on a number of occasions. Finally, the Court referred to the Supreme Court's judgments in December 2017 which concluded that she had acted "in complete disregard of the obvious danger" for the reputations of the candidates who had been removed.

Therefore, the Court concluded that the Minister's breaches were not merely technical or procedural irregularities but went to the very essence of the right to a tribunal established by law.

As for the shortcomings with the parliamentary procedure, the Court noted that the Icelandic Parliament had failed to demand from the Minister objective reasons for her proposals. It had also failed to comply with the special voting rules by putting her proposals to a single vote as opposed to conducting a separate vote for each candidate as required by the Act. While the latter failure would not have amounted to a violation of the right to a tribunal established by law on its own, (particularly given that members of parliament had been given the option to conduct a separate vote) the voting procedure exaggerated the breaches committed by the Minister and undermined Parliament's role as a safeguard against undue executive discretion. Accordingly, the applicant's belief that Parliament's decision had been primarily driven by party political considerations was not unreasonable.

Having regard to the above considerations, the Court concluded that there had been a grave breach of a fundamental rule in the Icelandic judicial appointment procedure.

iii) The third step

The third and final step involves an assessment of the national courts' review of the breach. The national courts' finding of a breach of domestic judicial appointment procedure, and its legal consequences, is significant to the question whether such a breach amounted to a violation of the right to a tribunal established by law. Where the domestic review was Convention-compliant, the Court would need strong reasons to substitute its assessment for that of the national courts. Further, although it was not within the Court's competence to set a specific time-limit during which an irregular appointment could be challenged, it considered that the preservation of the principle of legal certainty will carry increasing weight when balancing it against an applicant's right to a tribunal established by law with the passage of time.

In its review of the present case, the Supreme Court had failed to carry out a Convention-compliant assessment. Firstly, despite its power to remedy the effects of the appointment irregularities, the national court had failed to draw the necessary conclusions from its own findings. Although the national court acknowledged that there had been irregularities in A.E.'s appointment it considered that the applicant had nevertheless enjoyed a fair trial. In doing so, it had placed greater emphasis on the fact that the judicial appointments had become official than its own ability to remedy the irregularity. Secondly, the court had focused on whether the irregularities had impacted A.E.'s independence and impartiality rather than addressing the applicant's pertinent arguments with respect to the right to a tribunal established by law. As a result, the judgment did not shed light on why the procedural breaches

had not compromised the lawfulness of A.E.'s appointment and thus of her participation in the applicant's case. Thirdly, the passage of time had not tipped the balance in favour of the principle of legal certainty in the present case given that the relevant judicial appointments had been contested immediately after the appointment procedure had been finalised on the basis of irregularities which had been established before they were officially appointed.

The Supreme Court's restraint in this matter, which resulted in its failure to strike the appropriate balance between the principle of legal certainty and upholding respect for the law, was not specific to the present case but a settled practice. This practice undermined the judiciary's crucial role in maintaining the separation of powers. Further, the effects of these breaches were not limited to the judicial candidates who had been wronged by non-appointment but were of greater rule of law concern to the general public.

In conclusion, having regard to the above three-step test, the Court held that the applicant had been denied his right to a tribunal established by law on account of the participation of a judge whose appointment was subject to grave irregularities which had impaired the right at issue. Therefore, there had been a violation of Article 6 § 1.

Right to an independent and impartial tribunal

The applicant's complaint with respect to independence and impartiality stemmed from the same underlying issue of the above complaint: the procedural defects in A.E.'s judicial appointment to the Court of Appeal. These procedural irregularities were of such gravity that they had undermined the very essence of the right to be tried before a tribunal established by law. Thus, the Court considered that it was not necessary to determine whether these irregularities had also compromised the independence and impartiality of the same court.

Article 46

The Court noted that the applicant's representative had initially indicated that the applicant would not seek to reopen the criminal proceedings against him in the event of a violation of Article 6. It considered that his subsequent request to retract this statement had not provided sufficient justification to explain the change in the applicant's position.

It fell to the State to take any general measures as appropriate to address the conclusions of the present judgment. Accordingly, it stressed that the finding of a violation in this case was not such as to require the State to reopen all similar cases that had since become *res judicata* in accordance with Icelandic law.

Article 41

The Court held that the finding of a violation constituted sufficient just satisfaction in the present case. It awarded the applicant €20,000 for costs and expenses.

The appointment of judges to the Constitutional Court in contravention of domestic law provisions and in persistent breach of the rulings of the Constitutional Court constituted a breach of the right to a tribunal established by law under Article 6 § 1

JUDGMENT IN THE CASE OF
XERO FLOR W POLSCE SP. Z O.O. v. POLAND

(Application no. 4907/18)

7 May 2021

1. Principal facts

The applicant company's civil proceedings

The applicant company, Xero Flor w Polsce sp. z o.o., was one of Poland's leading producers of turf. It suffered damage to the turf caused by deer and wild boar over several years. In 2010 it brought proceedings against the manager of the local game breeding area and agreed a compensation package of PLN 199,920 (equivalent to approximately €50,000).

In September 2012, it sued the State Treasury, objecting to a fixed limit of 25% on compensation for any damage sustained prior to 15 April 2010. In the same proceedings, the applicant company requested the court to refer three questions to the Constitutional Court for a preliminary ruling. These concerned the constitutionality of paragraphs 4 and 5 of the Ordinance of the Minister of the Environment of 8 March 2010 ("the Ordinance") and section 49 of the Hunting Act. It argued that the effect of these provisions was to put persons growing perennial crops in a less favourable position than those growing annual crops and that the provisions were unconstitutional as they were provided by subordinate legislation.

The Regional Court rejected the applicant company's argument that the 25% limit should not apply, finding that turf was not a perennial crop. The decision was upheld by the Court of Appeal in 2014. The Supreme Court refused to hear a cassation appeal in 2015. Finally, the Constitutional Court dismissed the applicant company's constitutional complaint, by a majority of 3 to 2, in 2017.

The judicial appointments to the Constitutional Court

In late 2015, five new judges were due to be appointed by the *Sejm* (the lower house of Poland's bicameral Parliament) to fill five newly vacated seats of the

Constitutional Court. During this period, a dispute arose as to the legitimacy of the elections of judges to the Constitutional Court.

Three of the seats became available on 6 November 2015. On 8 October 2015, the outgoing members of the seventh-term *Sejm* elected three new judges (R.H., A.J., K.Ś.) to fill those seats. A new *Sejm* with a different majority was elected on 25 October 2015 and held its first sitting on 12 November 2015. Under the Constitution, this meant that the term of the previous *Sejm* had finished on 11 November 2015. On 25 November 2015, the new *Sejm* passed resolutions declaring that the judicial elections carried out by the previous *Sejm* had no legal effect. It subsequently elected three new judges, including one judge who formed a part of the panel in the applicant company's case (M.M.), on 2 December 2015, to fill the seats that had been vacated on 6 November 2015.

2. Decision of the Court

The applicant company complained that the domestic courts' refusal to provide satisfactory answers to its submissions regarding the constitutionality of the provisions amounted to a breach of their duty to provide reasoned decisions within the meaning of Article 6 § 1 of the Convention. It further complained that irregularities in the election of one of the judges of the Constitutional Court (M.M.) which heard its constitutional complaint amounted to a violation of its right to a tribunal established by law, also under Article 6 § 1. Finally, the applicant company complained that there had been an interference with its right to peaceful enjoyment of its possessions according to Article 1 of Protocol No. 1 of the Convention.

Article 6 § 1

Right to a reasoned decision

The Court found the complaint admissible as it concerned the scope of the applicant company's right to compensation, which was a civil right within the meaning of Article 6 § 1.

In dealing with the merits of the complaint, the Court stated that the question of whether a national court has failed to give reasons must be answered in light of the case. It also accepted, in part, the Government's argument that there was no automatic right to have a case before a domestic court referred to another court for a preliminary ruling, but stated that failure to do so may infringe the fairness of proceedings in certain cases.

The applicant company had objected to the Ordinance on the basis that it treated those growing perennial crops less favourably than those growing annual ones, with respect to compensation for damage caused by game. In particular, it argued that paragraph 5 of the Ordinance limited an owner's rights in a way that was incompatible with Article 64 § 3 of the Constitution (which provided that any restriction on property rights had to be regulated by a statute enacted by Parliament) because it was secondary legislation.

The Court recognised this as the key issue: all three domestic courts had failed to give reasons for disagreeing with the applicant company's argument, which it had advanced at each stage of the proceedings. Given that the point was "*specific, pertinent and important*", the present case fell within the category in which there was a duty to refer a question of constitutional relevance. As such, the failure of the domestic courts to give reasons for their refusal to refer the question to the Constitutional Court amounted to a violation of the authorities' duty to provide reasoned decisions, per Article 6 § 1.

Right to a tribunal established by law

The Government had objected to the admissibility of the complaint on two grounds: firstly, that the Constitutional Complaint mechanism did not engage Article 6 § 1; secondly, that the matter was not of direct relevance to the applicant company's civil rights. Regarding the first objection, the Court acknowledged that the Polish Constitution drew a deliberate distinction between 'courts' and 'tribunals', but it relied on its own well-established case law to determine that the Constitutional Court was a 'tribunal' within the meaning of Article 6 § 1 of the Convention. Regarding the second objection, the Court acknowledged two key limitations of the Polish Constitutional Complaint mechanism: firstly, that a Constitutional Complaint could only be lodged against a provision and not a decision *per se*; and secondly, that the inability of the Constitutional Court to quash an earlier decision meant that its powers of redress were limited. However, given that a successful applicant could file a request to reopen prior proceedings (under Article 190 § 4 of the Constitution), the outcome was directly decisive to the applicant company's civil rights, meaning this objection on the grounds of admissibility also failed and the complaint was declared admissible.

In analysing whether there had been a breach of the applicant company's right to a tribunal established by law, the Court applied the three-stage test set out in *Guðmundur Andri Ástráðsson v. Iceland*.^[409]

409 *Guðmundur Andri Ástráðsson v. Iceland*, Grand Chamber judgment of 1 December 2020, no. 26374/18 (included as a summary in this publication).

i) *Was there a manifest breach of domestic law?*

The Court found that there had been three distinct breaches of domestic law. Firstly, there had been a breach in respect of the resolutions of 25 November 2015. The Court found that these had no legal effect because the *Sejm* did not have the power to alter an earlier decision on the election of a Constitutional Court judge. Secondly, there had been a breach of Article 194 § 1 of the Constitution, which provided that a judge should be elected by the *Sejm* whose term of office covers the date on which his seat becomes vacant. M.M. had been elected to fill a seat that was vacated on 6 November 2015 by the eighth-term *Sejm*, whose term had commenced with its first sitting on 12 November. Thirdly, there had been a breach of the requirement that the President of the Republic swear in newly elected judges of the Constitutional Court. Although he had heard the oath immediately following the unconstitutionally elected judges on 2 December 2015, the President of the Republic had refused to hear the oath from the three judges who had been properly elected by the seventh-term *Sejm*. The Court drew a sharp distinction between the President of the Republic's responsibility to swear in new judges of the Constitutional Court with the ability to determine its composition, which was a competence held exclusively by the *Sejm*. As such, there had been a manifest breach of the domestic law relating to the election of judges to the Constitutional Court by the eighth-term *Sejm* and the President of the Republic.

ii) *What was the impact of the breach on the object and purpose of the right to a tribunal established by law?*

As per *Guðmundur Andri Ástráðsson*, in determining whether the breach of domestic law amounted to a violation of Article 6, the Court considered both the purpose of the law breached and whether that breach undermined the essence of the right to a tribunal established by law.

The Court found that the above breaches related to the fundamental election rule, derived from Article 194 § 1 of the Constitution, that judges of the Constitutional Court should be elected by the *Sejm* whose term of office covers the date on which that seat became vacant. The essence of this rule had also been breached by the President of the Republic's failure to hear the oath of the three constitutionally elected judges. The Court noted that these breaches were compounded by the fact that the President of the Republic and the eighth-term *Sejm* had persisted in defying the Constitutional Court's finding of 3 December 2015 (K 34/15) that the three judges elected by the previous *Sejm* had been elected legitimately. They were further compounded by the fact that the eighth-term *Sejm* had attempted to force the admission of the

unconstitutionally elected judges to the bench of the Constitutional Court. This persistent refusal to abide by the rulings of the Constitutional Court undermined the authority of the judiciary; the principle of the separation of powers; and the principle of legal certainty, which is a fundamental aspect of the rule of law.

iii) *To what extent had the national courts undertaken an assessment of the breach?*

The Court found that no remedies were provided because there was no procedure under Polish law by which the applicant company could have challenged the alleged defects in the election process for judges of the Constitutional Court. This stage of the test was therefore satisfied.

iv) *iv. Conclusion*

The Court found that the eighth-term *Sejm* and the President of the Republic had breached fundamental rules relating to the election of Constitutional Court judges. In particular, three judges (including M.M.) had been elected to seats that had already been legitimately filled by the previous *Sejm*. Additionally, the President of the Republic had refused to swear in the three properly elected judges. Due to the participation of M.M. in the applicant company's proceedings before the Constitutional Court, the applicant company had been denied its right to a tribunal established by law as guaranteed by Article 6 § 1.

Article 1 of Protocol No. 1

The Court considered that the main legal issues of the applicant company's complaint had already been dealt with by the analysis of Article 6 § 1, and that it was therefore not necessary to consider this complaint separately.

Article 41

The Court dismissed the applicant company's claim for compensation on the basis that it could not discern any causal link between the violations suffered and the alleged pecuniary damage. It awarded the applicant company PLN 15,556 (equivalent to €3,418) in respect of costs and expenses.

(2) Independence – from other Branches of Government (including the Responsibility of the other Branches of Government to uphold Independence and Impartiality)

Political interventions in proceedings concerning restitution of seized property after the Second World War compromised the principle of impartiality

JUDGMENT IN THE CASE OF KINSKÝ v. THE CZECH REPUBLIC

(Application No. 42856/06)
9 February 2012

1. Principal facts

The applicant, Mr František Oldřich Kinský, was an Austrian national who was born in 1936 and died in April 2009. Through more than one hundred civil lawsuits lodged with Czech courts against the State, local municipalities and third persons, he tried to recover his properties, which had been seized by Czechoslovakia after the Second World War, and whose total estimated value was over €2 billion.

In the proceedings at issue, the applicant's action against the State was dismissed by the Děčín District Court in October 2003, which found that the property had been duly confiscated in 1945 pursuant to Presidential Decree No. 12/1945. In November 2005, the Supreme Court dismissed the applicant's appeal on points of law, holding that, while it could not be conclusively established that the property had been duly confiscated, property transferred to the State before 1990 could not be claimed in civil proceedings but only under restitution laws. On 18 April 2006 the Constitutional Court dismissed the applicant's constitutional appeal whereby it was contended that he had not had a fair trial and had been discriminated against. The Constitutional Court relied on its Opinion no. Pl. ÚS-St. 21/05, according to which a civil action for determination of ownership could not be used to circumvent the restitution legislation, and consequently found that the detailed arguments challenging the merits of the decisions were irrelevant.

While the proceedings were pending before the courts, various members of the Government and Parliament expressed publicly their disapproval of property being restituted to people who had "demonstrably" been Nazis, alleging that this applied to the applicant's family. In an interview in July 2003, the Minister of Culture expressed his disagreement with a court's decision upholding one of the applicant's claims in

another case, and stated that judges deciding in a similar way would have to “bear full responsibility” for the State being obliged to surrender property. Furthermore, several politicians, including the President and the Prime Minister, convened a series of meetings on the issue of civil proceedings for the restitution of property acquired before 1948, which resulted in the adoption of recommendations for avoiding court decisions as in the applicant’s case, including the proposal of requesting the Supreme Court to unify the divergent case law on the matter.

In January 2004, the Ministry of Justice requested the regional courts dealing with the applicant’s case to provide it with information on the proceedings on a monthly basis. Only in November 2007 did the Ministry inform the involved courts that it was no longer necessary to submit this information.

In 2004, the police set up a special task force with the aim of investigating the question of returning property in cases such as the applicant’s. In that context, a criminal investigation against the applicant and his counsel was instituted, based on the suspicion that they had tried to commit fraud by intentionally withholding certain facts and information in the civil proceedings in order to support his action. The police examined the counsel’s research activities, in particular in the national archives where he had looked for evidence in support of his client’s civil action. The police also obtained a court order from a district court for the counsel’s telephone calls to be monitored for some time in 2004. Only in June 2006 did the applicant and his counsel find out by chance that they had been under police investigation.

In December 2006 the applicant’s counsel lodged a constitutional appeal with the Czech Constitutional Court against the district court’s surveillance order, invoking the right to confidentiality of communications with his client and challenging the production of the records of his telephone communications under Article 13 of the Czech Charter of Fundamental Rights and Freedoms. In September 2007 the Constitutional Court quashed the order to monitor the telephone communications, ordering the police to destroy all related records, and holding that there had been no reasonable suspicion of a crime.

2. Decision of the Court

Relying on Article 6 (the right to a fair trial) and on Article 1 of Protocol No. 1 (protection of property), the applicant alleged that he had not had a fair trial and that his property rights had thereby been breached. While the applicant died in April 2009, his son, Mr Carlos Kinský, informed the Court that he wished to continue his father’s action. The Court accepted this request as he was the only heir of the applicant and had a legitimate interest in pursuing the original application in his stead.

Article 6 § 1

The Court divided its assessment of the case into two parts. First it considered the effect of the negative statements by politicians towards the applicant and the supervision of his case by the Ministry of Justice. It then considered the effect of the criminal investigation of the applicant.

In relation to the negative statements by politicians towards the applicant and the supervision of his case by the Ministry of Justice, the Court began by examining whether the impartiality of the judges had been compromised as alleged by the applicant. The Court could understand that the media and politicians had been interested in the issue of returning property confiscated before 1990 through general actions for determination of ownership, as success of those could have resulted in the restitution of property worth billions of Euros not only to the applicant, but also to many other people. The Court therefore agreed with the Czech Government that the politicians' interest in the matter and their meetings to find solutions to the situation were legitimate and raised no issue under the Convention.

However, various politicians, including the Minister of Culture, had clearly expressed the opinion that the courts' decisions upholding such claims were wrong and undesirable. It was moreover worrying that another high-ranking politician had linked the applicant to the Nazis and had stated that he would do anything he could to prevent him and others in his position from succeeding in their actions. Both of those statements had been directly aimed at the judges deciding the cases. While the Court saw no reason to speculate about what effect such interventions might have had on the course of the proceedings, the Court agreed with a statement by the Constitutional Court which described the politicians' interventions as "unacceptable in a system based on the rule of law". The Court also observed that the statements had been made before the first-instance decision and that after 2003, none of the applicant's actions had been successful. In those circumstances, his concerns as to the independence and impartiality of the tribunals had not been unreasonable.

The Court noted that the Ministry of Justice was entitled under domestic law to collect information in order to monitor and evaluate the conduct of judicial proceedings in order to ensure that standards of dignity of judicial conduct and ethics were maintained. The Ministry of Justice was also entitled to bring disciplinary proceedings against judges. During the course of the applicant's own case the Ministry of Justice had requested and regularly received information on the development of the proceedings from the regional courts, including the names of the judges involved in the case. While noting the Government's assertion that the

Ministry had only received general administrative information and that there was no indication of misuse or pressure on the judges involved, the Court underlined that the appearance of impartiality was at stake. The activities had undoubtedly alerted the judges that their steps were being closely monitored by politicians who both had power over their careers and had stated that they would do anything they could to achieve a particular outcome in the case. In such circumstances the Court reasoned that any doubts over the impartiality of the judges in the case could therefore not be simply subjective and unjustified.

Turning to the effect of the criminal investigation against the applicant, the Court found that the way the proceedings had been brought and conducted had been manifestly abusive. While under Czech law a claimant in a civil litigation was not obliged to provide the court with all the evidence in their possession, the police had obtained information in that regard and had thus been in a position to accurately anticipate the applicant's course of action, including possible options of legal argumentation and procedural motions, with a degree of accuracy that would have otherwise been unattainable. Any attempt to criminalise the exercise of the rights of a litigant in civil law disputes, especially in proceedings where the State acted as the adverse party, ran counter to the right to a fair trial.

In view of those considerations, the Court concluded that, taken as a whole, the proceedings had not satisfied the requirements of a fair trial, and that there had been a violation of Article 6 of the Convention.

Article 1 of Protocol No. 1

The applicant complained that the domestic law had been applied wrongly and that as a result he had been unable to recover property of which he was the rightful owner. As he failed to raise this complaint before the Constitutional Court, the Court rejected it for non-exhaustion of domestic remedies.

Article 14

As to the applicant's complaint that he had been discriminated against on the basis of his origins because the Constitutional Court had dismissed his appeal by simply referring to its Opinion no. Pl. ÚS-St. 21/05, the Court recognised that there was no appearance of arbitrariness, manifest unreasonableness or different treatment of the applicant. The Constitutional Court had consistently applied the Opinion in all cases raising the same issue as that of the applicant. This part of the application was therefore rejected by the Court.

Article 41

The Court held that the Czech Republic had to pay the applicant €10,000 in respect of non-pecuniary damage, and €3,830 for costs and expenses arising from the case.

Where a judge has presided over the adoption of legislation, the principle of impartiality under Article 6 likely precludes that judge from hearing cases involving disputes whether that legislation should be varied

JUDGMENT IN THE CASE OF **McGONNELL v. THE UNITED KINGDOM**

(Application no. 28488/95)

8 February 2000

1. Principal facts

The applicant, Richard McGonnell, a British national, was born in 1955. In 1982 the applicant bought the Calais Vinery in St Martin, Guernsey. After failing to obtain planning permission to permit residential use of this land, in 1986 or 1987 he moved into a flower-packing shed on the property and began to use it as his dwelling.

In 1988 the applicant made representations to a planning inquiry which, *inter alia*, discussed the zoning of the applicant's land. In 1990 the Deputy Bailiff for Guernsey, Mr Graham Dorey, approved the inquiry's Development Plan, which maintained the applicant's land as reserved for agricultural rather than residential purposes. A further application for planning permission from the applicant to convert the shed he was living in to a dwelling was rejected in 1991.

In 1992 the applicant was convicted of the offence of changing the use of the shed without permission to that of a dwelling and in 1993 the Island Development Committee (IDC) applied to the local Ordinary Court for permission to remedy the applicant's breach of planning law and return the shed to agricultural use. This application was granted, but only after Mr Graham Dorey, as Deputy Bailiff, had stated that he was unwilling to hear the case personally due to his having dealt with the applicant during the finalising of the Development Plan.

The applicant had a further application for change of use in relation to the shed refused and on 6 June 1995 his appeal to the Royal Court was dismissed by reference to the requirements of the Development Plan. The case was presided over by the now Sir Graham Dorey, the then Bailiff. During the hearing before the Royal Court, Sir Graham summed up the case to the Jurats (members of the Guernsey jury) and instructed them that the burden of proof lay with IDC to show that its decision was reasonable. The applicant's appeal was unanimously dismissed although no reasons were given for the Royal Court's decision.

2. Decision of the Court

The applicant complained under Article 6 (the right to a fair trial) that the close connections between the Bailiff's judicial functions and his legislative and executive roles meant that he could not meet the requirements of independence and impartiality required by Article 6 when presiding over court cases.

Article 6

Before addressing the facts of the case, the Court described the position of the Bailiff in the Constitution and law of Guernsey. In modern times, the Guernsey Bailiff acted as the professional judge in the Royal Court and as President of the Guernsey Court of Appeal. The Bailiff also held non-judicial roles, notably as President of the Appointments Board, the Emergency Council, the Legislation Committee and the Rules of Procedure Committee.

The Court noted that there was no suggestion in the applicant's case that the Bailiff had been subjectively prejudiced or biased when he heard the applicant's planning appeal in 1995, nor was it alleged that the Bailiff's participation as Deputy Bailiff in the authorisation of the Development plan had given rise to an actual lack of impartiality. Therefore, the Court restricted its consideration to the question of whether the Bailiff had the required "appearance" of independence or the required "objective" impartiality.

In applying this test to the case, the Court did not accept the premise of the Government's arguments that the Bailiff merely held non-judicial positions rather than exercised non-judicial functions. The Court stated that even a purely ceremonial role must still be classified as a function, and that such functions may not be compatible with the requirements of the principle of independence and impartiality. In the relation to the present dispute, the Bailiff had personal and direct involvement throughout the applicant's case, in that he presided over the adoption of the Development Plan in 1990 and then was subsequently the President of the Royal Court which decided the applicant's planning appeal in June 1995. The Court stated that any direct involvement in the passage of legislation or of executive rules was likely to be sufficient to cast doubt on the judicial impartiality of a person subsequently called on to determine a dispute over whether that legislation or set of rules should be varied. Further, it was clear that as the Bailiff held a casting vote in the non-judicial committees he was president of he clearly held more than ceremonial positions in these committees.

The Court found that the mere fact that the Bailiff had presided over the adoption of the Development Plan was sufficient to cast doubt over his impartiality when determining the applicant's planning appeal in relation to that plan. This therefore amounted to a violation of Article 6 § 1. As a violation had been established, the Court considered it unnecessary to consider any other aspects of the complaint.

Article 41

The Court considered the finding of a violation to be sufficient just satisfaction and awarded the applicant £20,913.90 in respect of costs (approximately €27,550).

The seizure, expropriation and demolition of the applicants' building contrary to an interim order issued by the domestic courts violated the Convention

JUDGMENT IN THE CASE OF **SHARXHI AND OTHERS v. ALBANIA**

(Application no. 10613/16)

11 January 2018

1. Principal facts

The applicants were 19 owners of flats in the Jon Residence (the “residence”) born between 1939 and 1986. The first and second applicants had become flat and shop owners as the original owners of the plot of land while the remaining applicants became owners of flats and shops through purchase agreements.

The residence was constructed pursuant to local authority permission obtained in August 2010. Upon completion of the building’s construction, the majority of the flats and shops were furnished and several of the applicants had moved in.

However, without prior notice, the urban construction inspectorate and the police seized the residence on 3 November 2013 by surrounding it and cordoning it off with yellow tape marked “crime scene – no entry” on account of questions over the legality of the construction permit. Although the applicants were later allowed to return to their flats upon presentation of a certificate of ownership and a valid ID, they were initially prevented from entering their flats or retrieving their belongings.

The applicants lodged a claim with the administrative courts on 7 November 2013 following which an interim order was issued which required the authorities to refrain from any actions that could breach the applicants’ property rights. The authorities demolished the residence between 4 December and 8 December 2013, despite the binding nature of the interim order.

In January 2014, the administrative court issued a decision on the merits of the case which found that the authorities’ seizure of the residence on 3 November 2013 had been unlawful for its failure to respect the interim order.

In the meantime, the Government expropriated the applicants’ properties in the public interest and ordered the payment of compensation to them. However, the applicants challenged the amount of compensation on the basis that the

expropriation procedure had been carried out in flagrant breach of domestic law. Those proceedings were still pending before the Supreme Court at the time of the judgment of the European Court of Human Rights but had on 15 January 2015 stayed the enforcement of the lower court's decision to award the applicants 1,580,712,321 Albanian leks (approximately €1,639,800) in compensation.

2. Decision of the Court

The applicants complained that the seizure, expropriation and demolition of their properties in contravention of the administrative court's interim order violated their rights under Articles 6 § 1, 8, and Article 1 of Protocol No. 1 of the Convention. They further complained that they had had no effective remedy for these violations contrary to Article 13.

The applicants also complained that the seizure of and denial of access to their homes had amounted to a breach of the presumption of innocence under Article 6 § 2 for which they also complained of a violation to their right to reputation under Article 8. Finally, the applicants alleged that they had been discriminated against on the basis that their legally constructed building had been demolished while other illegally constructed buildings on Lungomare promenade had not.

Article 6 § 1 taken alone and in conjunction with Article 13

The Government argued that the applicants could not be considered victims since the domestic courts had issued reasoned decisions in their favour. While the domestic courts had found that the authorities had in fact disregarded the interim order, they did not award the applicants any compensation. In any event, these decisions had remained unexecuted and had failed to prevent the demolition of the building. Accordingly, the national authorities had not afforded redress of the applicants' complaint and they could still claim to be victims of non-enforcement of the interim order. The applicants' complaints were therefore declared admissible.

The Court began by examining whether there had been a violation of Article 6 § 1 in conjunction with Article 13. It considered that a claim for damages under the relevant Acts did not provide the applicants with an effective remedy in the present case given they complained not of a lack of compensation but of a failure to enforce the interim measure, as a result of which they were unable to have the merits of their case properly examined. Accordingly, there had been a violation of Article 13 in conjunction with Article 6 § 1, and the Government's objection as to the non-exhaustion of remedies was dismissed.

The execution of a court judgment, including a judgment resulting from interim proceedings, is an integral part of the “trial” for the purposes of Article 6 in that the right of access to a court would be rendered illusory if an interlocutory order pending a final decision were to be made inoperative to the detriment of one party. This principle is of greater significance in the context of administrative proceedings where the outcome is decisive for the litigant’s civil rights.

According to the reasons provided for by the District Court and a subsequent decision of the Administrative Court of Appeal, the interim order at issue had intended to prevent the demolition of the applicants’ building. Interim orders were directly enforceable and binding on all state institutions under Article 510 of the Code of Civil Procedure. The interim order in the present case was directed to any official body and was to remain in place until the merits of the case had been decided. However, before this could be done, the Council of Ministers expropriated the applicants’ building in the public interest and had it demolished, thereby rendering the main proceedings redundant. The Court noted that the domestic courts at all levels had concluded that the authorities had failed to comply with the interim order.

Therefore, the national authorities had failed to comply with the interim order of 7 November 2013 protecting the applicants’ property rights. Accordingly, there had been a violation of Article 6 § 1.

Article 8 taken alone and in conjunction with Article 13

The requirement for the applicants to present proof of residence upon entry to the building had interfered with their right to respect for their homes, and for which there had been no legal basis. Therefore, there had been a violation of Article 8 and of Article 13 in conjunction with Article 8, for although the domestic courts had found that the applicants’ rights had been violated, they had not been awarded any compensation. It was not necessary to examine this complaint with regards to the expropriation and demolition of the building.

Article 1 of Protocol No. 1 taken alone and in conjunction with Article 13

There had been an interference with the applicants’ rights under Article 1 Protocol No. 1 in so far as they had been refused access to their properties for a one-month period from 3 November to 4 December 2013, for which no legal justification had been provided. This interference was unlawful under domestic law in any event because the authorities had disregarded the interim order issued by the domestic courts. Accordingly, there had been a violation of Article 1 of Protocol No. 1 and of

Article 13 in conjunction with Article 1 of Protocol No. 1 given the applicants had not been awarded any compensation.

Moving on to the expropriation and demolition of the building, the Court considered that the applicants maintained a victim status given that they had not received adequate compensation for the expropriation as was required by domestic law. Moreover, dismissing the Government's argument as to non-exhaustion of remedies in this respect, the Court considered that the applicants could not have been expected to bring a challenge against the demolition order given that they had already exhausted a remedy that was effective and sufficient, namely the interim order. Accordingly, there had been a violation of Article 13 in conjunction with Article 1 of Protocol No. 1 in that the applicants had not had an opportunity to challenge the demolition or apply for a new interim order.

In considering whether the expropriation and demolition had breached the applicants' rights under Article 1 of Protocol No. 1, the Court found that even though the applicants had been granted an interim order, they could not enjoy their properties. Further, the demolition of the residence had deprived them of any future possibility of enjoyment of their properties and had thus deprived them of their right to enjoyment of their properties within the meaning of this provision.

As for whether this interference was justified, the domestic courts had found that the demolition was unlawful due to the authorities' failure to comply with the interim order and the Court considered that the expropriation and demolition of the residence had entailed sufficiently serious consequences for the applicants. In view of all the circumstances, the interference was incompatible with the applicants' right to peaceful enjoyment of their possessions. Accordingly, there had been a violation of Article 1 of Protocol No. 1 on account of the expropriation and demolition of the applicants' properties.

Other violations

The Court considered that the applicants' complaints with regards to the presumption of innocence under Article 6 § 2 and the right to reputation under Article 8 were manifestly ill-founded and that their complaint under Article 14 in conjunction with Articles 6 § 1 and 8 was not raised at domestic level and were thus all declared inadmissible.

Article 41

The Court awarded the applicants €13,098,600 jointly in respect of pecuniary damage, the first and second applicants €7,800 each, and the remaining 17 applicants €13,000 each in respect of non-pecuniary damage. It awarded the applicants €112,100 in total for costs and expenses.

The State's annulment, by legislative measure, of an arbitration award owed by it to the applicants while the arbitration proceedings were still pending violated the Convention

JUDGMENT IN THE CASE OF **STRAN GREEK REFINERIES AND STRATIS ANDREADIS v. GREECE**

(Application no. 13427/87)
9 December 1994

1. Principal facts

The applicants were a private limited company, Stran Greek Refineries, which was registered in Athens and its sole shareholder, Mr Stratis Andreadis. The second applicant, the company's sole shareholder, died in 1989, after he had lodged his application. His son and heir, Mr Pedro Andreadis, pursued the application.

The applicant company had concluded a contract with the Greek State in July 1972, at a time when the State was under military regime. The applicant company had undertaken to construct a crude oil refinery in the Megara region upon the State's purchase of a plot of land suitable for the project. The military regime ultimately decided not to follow through with the project in November 1973. When democracy was restored in 1974, the Government decided to terminate the contract on the grounds that it was a preferential contract and prejudicial to the national economy. The contract was terminated in October 1977 and the applicants did not challenge this decision.

However, the applicant company lodged a claim for compensation against the State with the Athens Court of First Instance for the expenses it had incurred in connection with the contract. The State challenged the court's jurisdiction on the grounds that the dispute should have been dealt with in arbitration and filed an arbitration petition in June 1980. On 27 February 1984, the arbitration proceedings resulted in an arbitration award in favour of the applicant company of 116,273,442 drachmas, 16,054,165 US dollars and 614,627 French francs. The State unsuccessfully appealed the arbitration award in the Court of First Instance and the Court of Appeal.

The State appealed to the Court of Cassation in December 1986. However, the hearing was postponed at the State's request on 4 May 1987 on the ground that there was a draft law which was relevant to the case before Parliament. The Court of Cassation's *judge-rapporteur* had sent his opinion to the parties, recommending the court dismiss the State's appeal, prior to this request.

Parliament enacted Law no. 1701/1987 (the “Law”) on 22 May 1987 which came in to force on 25 May of the same year. Article 12 of the Law removed the domestic court’s jurisdiction to review the terms, conditions and clauses (including arbitration clauses) of State terminated contracts entered into during the State’s military regime. The Court of Cassation refused to apply the Law on the grounds of unconstitutionality and, in accordance with domestic law, remitted the case to the First Division which, in April 1990, declared the arbitration award void.

2. Decision of the Court

The applicants complained that the adoption of Article 12 of the Law and its application in their case by the Court of Cassation had deprived them of their right to a fair trial under Article 6 § 1 of the Convention. They also complained that the length of the validity proceedings for the arbitration award of 27 February 1984 had exceeded a “reasonable time” within the meaning of that same provision.

The applicants further complained that the adoption of the Law had the effect of depriving them of their rights with respect to the debt owed to them, recognised by the Athens Court of First Instance and the arbitration award, under Article 1 Protocol No. 1.

Article 6 § 1

The applicants’ right to recover the arbitration award as a result of the arbitration proceedings was a “civil” right within the meaning of Article 6 regardless of the parties’ contractual relationship under Greek law.

The Court first considered the applicants’ claim that they had been deprived of a fair trial and of their right of access to a court as a result of the State’s removal of the courts’ jurisdiction by enacting Article 12 of the Law. It noted that the enactment of this provision indisputably represented a turning-point in the proceedings before the ordinary and arbitration courts, which had, up until that point, been in favour of the applicants.

The Government contended that it was necessary to enact Article 12 in order to provide an authoritative interpretation of the Law after years of growing academic, judicial and public debate on the validity of the arbitration clause. While the Court acknowledged the Government’s intention to eradicate residual measures of the military regime by way of a democratic legislation, it reiterated the significance of the guarantee of the right to a fair trial including equality of arms; which Greece had

committed to providing upon re-joining the CoE on 28 November 1974. Therefore, the timing and manner of the adoption of Article 12 of the Law had to be closely examined.

Significantly, the State had sought adjournment of the case on the basis of the draft Law after the parties had received the *judge-rapporteur's* opinion recommending that the Court of Cassation dismiss the State's appeal. Although Article 12 of the Law did not mention the applicant company by name, it was in reality aimed at the applicant company. It was thus an inescapable fact that the legislature's intervention in the present case took place while judicial proceedings, in which the State was a party, were pending.

There was no doubt that the appearances of justice had been preserved in the instant case; the applicants could have requested an adjournment to prepare their case and paragraph 1 of Article 12 allowed for judicial examination of the nullity of the arbitration award. However, both the principle of the rule of law and the notion of a fair trial preclude any interference by the legislature designed to influence the judicial determination of a dispute. The wording of paragraphs 1 and 2 of Article 12 taken together effectively excluded any meaningful examination of the case by the Court of Cassation, as a result of which the First Division's subsequent decision became inevitable. Therefore, the State had intervened in a manner which was decisive as to a favourable outcome for it. Accordingly, there had been a violation of Article 6 § 1.

However, the Court considered that there had been no violation of Article 6 § 1 with respect to the applicants' complaint that their case had not been dealt with within a "reasonable time". The only proceedings which were open to criticism were those before the Court of Cassation which had lasted more than three years. However, this period was justified on account of the Law's passage through Parliament and the Court of Cassation's duty to refer a case to the plenary court where it refuses to apply a law on the ground that it is unconstitutional. Therefore, there had been no violation of Article 6 § 1 in this regard.

Article 1 of Protocol No. 1

The arbitration award constituted a possession within the meaning of this provision given it was final, binding, and enforceable under Greek law. Further, the applicants' inability to enforce this arbitration award amounted to an interference with their property right. In considering whether this interference was justified, the Court acknowledged the necessity for the democratic State of Greece to terminate

contracts, like the one concluded with the applicants, which were prejudicial to its economic interests; namely preferential contracts concluded with the military regime. However, in doing so it was required by international law to pay compensation. Given unilateral termination of a contract did not take effect to essential clauses of the contract (such as arbitration clauses) allowing an authoritative amendment to be made to such a clause, as was done in the present case, made it possible for the State to evade jurisdiction in the dispute.

Therefore, by intervening at that stage of proceedings before the Court of Cassation, the State had upset, to the detriment of the applicants, the balance required between the protection of the applicants' property rights and the public interest. Accordingly, there had been a violation of Article 1 of Protocol No. 1.

Article 50 (now Article 41)

The Court awarded the applicants 116,273,442 Greek drachmas (approximately €341,228.50), \$16,054,165 US (approximately €13,193,200), and 614,627 French francs (approximately €93,700) in respect of pecuniary damage and £125,000 (approximately €138,222.5) for costs and expenses.

The power of a Minister to overturn a Tribunal's judgment and deprive it of its effect was a violation of Article 6 § 1 as the applicant's civil rights and obligations were not determined by a tribunal

JUDGMENT IN THE CASE OF **VAN DE HURK v. THE NETHERLANDS**

(Application no. 16034/90)

19 April 1994

1. Principal facts

The applicant who was born in 1945 was a dairy farmer in the province of Noord-Brabant, the Netherlands. On 29 June 1984 he filed a claim for a larger levy-free quantity of milk with the Head of the District Office of the Board for the Implementation of Agricultural Measures of the province of Noord-Brabant. His claim stated that he had entered into obligations to invest in increasing the number of cow stands for dairy cows and cows in calf as early as January 1984.

His claim was forwarded to the Director of Agriculture where it was rejected. The applicant then unsuccessfully filed an objection with the Minister of Agriculture and Fisheries.

The applicant appealed to the Industrial Appeals Tribunal. He argued for an interim measure to the effect that, pending the Tribunal's judgment, he should not be required to pay the additional levy for 1984-85. The President of the Tribunal asked the Minister to indicate whether he was prepared to reconsider his decision. The Minister maintained his previous position that the increase in cow stands fell well short of the minimum required by the 1984 Ordinance and he further submitted that the applicant's investments referable to that increase fell short of the required minimum of Netherlands guilders 100,000. The applicant argued that the Minister was estopped from using this argument, which had never been invoked as a reason for rejecting the applicant's original claim and that in the alternative, the Minister's calculations were wrong.

On 7 July 1987 the President of the Tribunal gave a decision refusing the interim measure requested. The President accepted the Minister's alternative argument concerning the applicant's investment and rejected the applicant's submission that the Minister was estopped from relying on that ground, holding that section 51 of the 1954 Industrial Appeals Act (the "1954 Act") entitled him to supplement his arguments while the applicant had not only had sufficient possibility of replying to the Minister's alternative submission but had in fact done so.

The applicant continued the proceedings and a public hearing was held on 19 April 1989, during which the applicant again contested the Minister's method of calculation. The Tribunal refused to consider the price put forward by the applicant at the hearing and it accepted the Minister's method of calculation. Accordingly, concluding that the applicant's investments fell short of the minimum required, the Tribunal rejected the applicant's appeal.

2. Decision of the Court

Relying on Article 6 § 1 of the Convention the applicant argued that his case had not been determined by an "independent tribunal", since section 74 of the 1954 Act allowed the Crown (a decree signed by the Monarch and the Minister) to decide that judgments of the Tribunal should not be implemented. The applicant further argued that the proceedings were unfair as he was required to produce all his arguments and evidence at the outset, and that certain evidence submitted by him was not accepted by the Tribunal.

Article 6 § 1

The Court stated that the power to give a binding decision which may not be altered by a non-judicial authority to the detriment of an individual party is inherent in the very notion of a "tribunal", as is confirmed by the word "determination". In relation to the applicant's argument that the power of the Crown under section 74 of the 1954 Act to decide that judgments of the Tribunal should not be implemented impaired that tribunal's independence, the Court found that there was nothing to indicate that the mere existence of the Crown's powers under section 74 of the 1954 Act had any influence on the way the Tribunal handled and decided the cases which came before it. In particular, no significance could be attributed to the low success rate of appeals against decisions taken by the Tribunal. Whether or not the requirements of Article 6 had been met could not be assessed with reference to the applicant's chances of success alone, since this provision did not guarantee any particular outcome.

However, the Court, while accepting the argument that section 74 of the 1954 Act did not confer upon the Crown the power to overturn the Tribunal's judgments as regards their reasoning, pointed out that for an individual litigant it is the consequences of litigation which are of importance. The Court could not disregard the fact that there was nothing to prevent the Crown from availing itself of the powers thereby conferred upon it had it considered such a course of action necessary or desirable in view of what was perceived as the general interest. It followed that at the material time section 74 of the 1954 Act, which remained in force until 1

January 1994, allowed the Minister partially or completely to deprive a judgment of the Tribunal of its effect to the detriment of an individual party. One of the basic attributes of a “tribunal” was therefore missing.

The Court stated that a defect of this nature may, however, be remedied by the availability of a form of subsequent review by a judicial body that affords all the guarantees required by Article 6. However, in relation to a retrial, the Court noted that section 75 of the 1954 Act did not allow the Tribunal to depart from the Crown’s decision under section 74. In relation to bringing a case to the civil courts on the ground that the Tribunal could not be considered an independent tribunal, the civil courts held that the Tribunal satisfied sufficient guarantees of judicial review. There was accordingly a violation of Article 6 § 1 in that the applicant’s civil rights and obligations were not “determined” by a “tribunal”.

In relation to the fairness of proceedings, the Court stated that this complaint overlooked the fact that section 51 of the 1954 Act meet the requirement of “equality of arms” in that it allowed both parties to the proceedings before the Tribunal to “alter their claim or their defence and the grounds advanced in support”. Although in the proceedings before the Tribunal the Minister based his case on new arguments which differed from those on which he had founded his original refusal of the applicant’s request, the applicant was allowed to submit a report by his accountant as well as counter-arguments. Therefore, not only did the applicant have a genuine opportunity to respond but he actually did so. No breach of the principle of “equality of arms” was therefore established and thus no violation of Article 6 occurred.

The applicant further argued that his case had not been dealt with fairly as the Tribunal had refused to consider his calculations. The Court stated that the effect of Article 6 was to place the “tribunal” under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they were relevant to its decision. The Tribunal had applied a method of calculation different from that advocated by the applicant and thereby arrived at a result which was not favourable to him. It was not for the Court to criticise this choice; as a general rule, the assessment of the facts is within the province of the national courts and thus the refusal of the Tribunal to consider the applicant’s new figure did not constitute a violation of Article 6.

Article 50 (now Article 41)

The Court rejected the applicant’s claim for pecuniary damage as it was not clear that the outcome of the case would have been different in the absence of

the violation found in respect of Article 6 § 1. The applicant was awarded the sum of 35,000 Netherlands guilders plus VAT, plus 6,336 French francs (approximately €26,871) in respect of costs and expenses.

The State's legislative intervention in pending court proceedings, to which it was a party, violated the applicants' right to a fair trial under Article 6 § 1

GRAND CHAMBER JUDGMENT IN THE CASE OF
ZIELINSKI AND PRADAL AND GONZALEZ AND OTHERS v. FRANCE

(Application nos. 24846/94, 34165/96 to 34173/96)

28 October 1999

1. Principal facts

The applicants were eleven residents of France who worked for social-security bodies in Alsace-Moselle. The first applicant was Mr Zielinski born in 1954. The second applicant was Mr Patrick Pradal born in 1955. The third applicant was Jeanine Gonzalez born in 1956.

On 28 March 1953, the representatives of the social-security offices of the Strasbourg region signed a collective agreement with the representatives of the trade unions which set out a "special difficulties allowance" (*indemnité de difficultés particulières* – "IDP"). However, the implementation of the agreement gave rise to difficulties and a number of staff at the local social-security offices brought legal proceedings. The applicants applied to industrial tribunals.

The Colmar industrial tribunal allowed the third applicant and others' applications in July 1991. The Colmar Health Insurance Office and the Director of Health and Social Affairs appealed. Meanwhile, the Metz industrial tribunal allowed the applications of the first and second applicants which was upheld by the Metz Court of Appeal. The State prefect and the Director of Health and Social Affairs appealed to the Court of Cassation.

Concurrently, the Court of Cassation issued a judgment on proceedings brought by other staff members covered by the same 1953 agreement which quashed the judgments of the lower courts. The Besançon Court of Appeal, responsible for rehearing the cases in light of the framework laid down by the Court of Cassation, decided on a method of payment which was favourable to the applicants. However, Parliament passed an amendment (section 85) to Law no. 94-43 of 18 January 1994 (the "1994 Act") which endorsed, with retrospective effect, the amount of IDP put forward by the State prefect in the court proceedings.

On 13 January 1994, the Constitutional Council held that section 85 of the 1994 Act was constitutional. Accordingly, the Court of Cassation quashed the Metz Court of

Appeal judgment which had been in favour of the applicants. Also relying on section 85 of the 1994 Act, the Colmar Court of Appeal upheld the State prefect's appeal.

2. Decision of the Court

The applicants complained that the State's intervention in the case by the adoption of section 85 of the 1994 Act had violated their right to a fair trial under Article 6 § 1 of the Convention. They further alleged that the proceedings before the Colmar Court of Appeal had not taken place within a reasonable time in breach of that provision.

Article 6 §1

In assessing the impact of adopting section 85 of the 1994 Act on the fairness of the applicants' proceedings, the Court could not overlook the section's content taken together with the method and timing of its adoption. Although section 85 did not apply to court decisions that had become final on the merits, it had retrospectively settled once and for all disputes that were before the ordinary courts at the time. Further, it was only after the Besançon Court of Appeal had issued its judgment that the section 85 amendment to alter the *IDP* was tabled.

It also noted that section 85 had simply endorsed the State's position in the pending proceedings and that the majority of the earlier tribunal decisions had been in favour of the applicants. While the Metz Court of Appeal decision conflicted with that of the Colmar Court of Appeal, the Besançon Court of Appeal had a special role in the present case as the court tasked with deciding the issues of fact within the legal framework provided for by the Court of Cassation's judgments of 22 April 1992. In doing so, the Besançon Court of Appeal had rejected the State's calculation method and set a new reference index of how the allowance should be calculated. The practical effect of this decision was favourable to the applicants as it doubled the allowance paid by the social-security offices and conferred a right to back payment of the difference over several years.

The conflicting decisions of the Metz and Colmar Court of Appeals had not required legislative intervention while proceedings were pending before the higher courts. Conflicting court decisions were an inherent consequence of any judicial system with a network of trial and appeal courts. It was precisely the Court of Cassation's role to resolve the conflicting decisions of the lower courts. Further, it was impossible to conjecture what its decision would have been but for the State's intervention.

The circumstances of the case were not such that the legislature's intervention was foreseeable, nor did they support the argument that its original intention had been frustrated given the dispute arose from an agreement that was adopted under a prescribed procedure by the relevant employers and trade unions. Moreover, the alleged financial risk to the Government did not justify the legislature substituting itself for both the parties to the collective agreement and the courts to settle the dispute.

The adoption of section 85 had in reality determined the substance of the dispute rendering it pointless to continue the proceedings. In light of this view, the Court considered that no final decision had been obtained on the merits and thus no valid distinction could be made between the applicants in the present case.

As for the Government's contention that the dispute had not been between the applicants and the State, the legislature had intervened at a time when legal proceedings to which the State was a party were pending. Having regard to the above considerations, there had been a violation of Article 6 § 1 in respect of the applicants' right to a fair trial.

The Court then went on to examine whether the proceedings before the Colmar Court of Appeal had been conducted within a reasonable time. There was nothing to suggest that the applicants had been responsible for prolonging the proceedings which had lasted three years, eight months and eight days. Although the applicants had lodged their appeal on 10 September 1991, the hearing was not set until 12 July 1994; a delay for which no persuasive explanation had been provided. It noted that the Colmar Court of Appeal had already ruled on the *IDP* issue in its judgment of 23 September 1993. Further, the Court of Appeal's judgment in the present case was not delivered until 19 May 1995, almost a year after the passing of the Act.

In light of these considerations, the proceedings had not been conducted within a reasonable time. Accordingly, there had been a violation of Article 6 § 1 in that regard.

Article 13

Having regard to the finding of a violation under Article 6 § 1, the Court considered that it was not necessary to examine this complaint.

Article 41

The Court awarded FRF 47,000 (approximately €6,702.85) each to the first and second applicants and FRF 80,000 (approximately €11,409) to each of the other nine applicants in respect of all heads of damage taken together. It awarded FRF 30,000 (approximately €4,278.41) each to the first and second applicants for costs and expenses and FRF 4,000 (approximately €570.46) each to the other nine applicants.

(3) Independence – From the Parties to Proceedings and from other Judges or Members of the Judiciary

Insolvency proceedings against Ukraine's biggest oil refinery brought by private company involved numerous breaches of Article 6 § 1 as regards their length and the lack of independence, impartiality and legal certainty

JUDGMENT IN THE CASE OF **AGROKOMPLEKS v. UKRAINE**

(Application No. 23465/03)

6 October 2011

1. Principal facts

The applicant, Agrokompleks, was a private Ukraine based company which dealt, at the time of the events, with Russian companies involved in barter trade operations, including exchanging Ukrainian raw foodstuffs for Russian crude oil and further sale of finished oil products.

In the early 1990s, the applicant company supplied 375,000 tons of crude oil to the majority State-owned and then biggest oil refinery in Ukraine—later renamed LyNOS—for refining. In 1993, the refinery delivered only a small part of the agreed oil products to the applicant company. In March 1993 and November 1994, the Higher Arbitration Court (“HAC”), following claims brought by the applicant company, confirmed the refinery’s contractual obligations and ordered it to deliver the agreed oil products. In 1995, the State Department for the Oil, Gas and Oil Refining Industries found the applicant company’s claims to be well-founded and noted that the main reason for the refinery’s failure to comply with its obligations was the unpaid diversion of oil products by the regional authorities to local industries in 1993. In July 1996, the HAC awarded the applicant company compensation for the lengthy non-enforcement of the judgments in its favour.

Also in July, the applicant company brought insolvency proceedings against LyNOS, referring to the non-enforcement of the judgments in its favour. In a final ruling of 2 July 1998, the HAC established LyNOS’s debt to the applicant company at 216,150,544 Ukrainian hryvnias (UAH) (equivalent to approximately €19.5 million).

However, later in July 1998, the Government created a taskforce of representatives from high-level State authorities to establish the reasons for LyNOS’s debts and

study the consequences thereof. In its August 1998 report, the taskforce advised the need to verify the amount of arrears and an audit was subsequently ordered by the First Deputy Prime Minister. In its April 2000 report, the Lugansk Regional Audit Department concluded that the HAC's findings of 2 July 1998 were in contradiction to the applicable legislation and LyNOS's debt was in fact UAH 36,401,894.

LyNOS relied on that conclusion and applied to the HAC for review of the ruling of 2 July 1998. Whereas in September 2000 the HAC found that the Audit Department report did not contain any new information and upheld the decision establishing the final amount of the debt, the court's president subsequently instructed his deputies to review that finding. In June 2001, the HAC reduced the debt to UAH 97,406,920 and, on appeal by the applicant company, the Donetsk Commercial Court of Appeal further reduced it to UAH 90,983,077 in October 2001.

Appeals by the applicant company against that decision and against a subsequent friendly settlement between LyNOS and its creditors, according to which the creditors' claims were to be settled by exchanging them for the debtor's assets, were unsuccessful. In November 2004, the Supreme Court rejected the applicant's request for leave to appeal in cassation.

On a number of occasions, LyNOS complained to several State authorities about the courts' decisions and various State actors intervened in the proceedings on its behalf. In particular, in September 1998, the First Deputy Prime Minister asked the HAC's president to consider the findings of the taskforce concerning the need to reassess the debt, "having regard to [LyNOS's] importance to the economy and security of the State". In December 2000, the President of Ukraine forwarded a letter from LyNOS to the HAC's president in which LyNOS deplored the applicant company's "exaggerated claims" in the insolvency proceedings. The HAC's president responded with status reports on the proceedings and explanations of the measures taken.

2. Decision of the Court

The applicant company complained under Article 6 § 1 about the excessive length and unfairness of the insolvency proceedings, alleging that the courts were not independent or impartial given the intense political pressure stemming from the strong interest of the State authorities in the outcome. It further complained that the courts breached the legal certainty principle by quashing the final decision of July 1998. Relying on Article 1 of Protocol No. 1, it complained that it was unable to recover in full the 375,000 tons of oil it had supplied to the refinery.

Article 6 § 1

The Court observed that various Ukrainian authorities had intervened in the judicial proceedings on several occasions. Those interventions took place in an open and persistent manner, often expressly solicited by the applicant company's adversary LyNOS. In its case-law, the Court had already condemned strongly attempts by non-judicial authorities to intervene in court proceedings, considering them incompatible with the notion of an "independent and impartial tribunal" in Article 6 § 1. It emphasised that the scope of the State's obligation to ensure a trial by an independent and impartial tribunal was not limited to the judiciary, but also implied obligations on any other State authority to respect and abide by the judgments and decisions of the courts.

Judicial independence further demanded that individual judges be free from undue influence, including from within the judiciary. The fact that the HAC's president had given direct instructions to his deputies to reconsider the court's September 2000 ruling was contrary to the principle of internal judicial independence.

There had accordingly been a violation of Article 6 § 1 as regards the lack of independence and impartiality of the courts.

The Court further reiterated that legal certainty, a fundamental aspect of the rule of law, required that where courts had finally determined an issue, their ruling should not be called into question. In the present case, the July 1998 ruling was a final judicial determination of the amount of outstanding arrears owed by LyNOS. However, the non-judicial State authorities had called into question that decision, revised it as they saw fit and criticised its findings as unlawful. Moreover, the non-judicial revision of the debt was the basis on which the courts reconsidered, to the applicant company's disadvantage, the amount thereof.

The reopening of the finally settled legal issue of the amount of arrears was based merely on the State authorities' disagreement therewith, which amounted to a flagrant breach of the principle of legal certainty in contravention of Article 6 § 1.

Regarding the length of the proceedings, the Court observed that the period to be taken into consideration, from the date the European Convention on Human Rights entered into force in Ukraine until the final decision of the Supreme Court, lasted over seven years. While the case had been factually and legally complex, the major delay could be explained by the authorities' efforts to have the amount of debt revised, despite the final judicial decision in that regard. No delays in the proceedings

were attributable to the applicant company. Hence there had also been a violation of Article 6 § 1 concerning the length of proceedings.

Article 1 of Protocol No. 1

As LYDOS's debt to the applicant company was confirmed by a final judicial decision, it constituted part of the applicant company's "possessions" within the meaning of Article 1 of Protocol No. 1. Its subsequent reduction, due to the reopening of the case, amounted to an interference with the applicant company's right to peaceful enjoyment of those possessions. The quashing of the HAC's July 1998 ruling frustrated the applicant company's reliance on a binding judicial decision and deprived it of an opportunity to obtain money it legitimately expected to receive. The revision of the amount of debt therefore placed an excessive burden on the applicant company and was incompatible with Article 1 of Protocol No. 1.

Given the Court's findings that the domestic courts in this case lacked the requisite independence and impartiality, it considered that no "fair balance" was struck between the demands of the public interest and the need to protect the company's right to the peaceful enjoyment of its possessions. There had accordingly been a violation of Article 1 of Protocol No. 1.

Article 41

The Court initially reserved the issue of just satisfaction and invited the parties to submit, within three months from the date on which the judgment became final, their observations on the matter and notify the Court of any agreement reached. Subsequently, on 9 December 2013, the Court ordered the State to pay the applicant €27,000,000 in respect of pecuniary and non-pecuniary damage and €30,000 in respect of costs and expenses.

A Judicial Code which precluded the applicant from replying to the submissions of the avocat général and allowing the latter to participate in the court's deliberations violated the rights of defence and equality of arms under Article 6 § 1

JUDGMENT IN THE CASE OF **BORGERS v. BELGIUM**

(Application no. 12005/86)
30 October 1991

1. Principal facts

The applicant was a lawyer who practised at the Hasselt Bar. He had been elected provincial counsellor in November 1981 upon which he tendered his resignation from the post of substitute district judge. Under the Judicial Code, the post of substitute district judge was incompatible with his new elected office.

In May 1982, the Antwerp Court of Appeal convicted the applicant of forgery and using forged documents and issued a suspended sentence of six months' imprisonment with a fine of 40,000 Belgian francs (approximately €991.58). However, the Court of Cassation allowed the applicant's appeal and quashed the decision on the grounds that the Court of Appeal had not provided an adequate statement of reasons. The Court of Cassation had heard the submissions of the *avocat général* (a member of the *procureur général*'s office), who also attended deliberations in accordance with Article 1109 of the Judicial Code.

The case was remitted to the Ghent Court of Appeal which convicted the applicant in November 1984 and imposed identical judicial sanctions to the earlier decision. This time, the applicant's appeal was dismissed by the Court of Cassation in a judgment of 18 June 1985. The Court of Cassation had heard the submissions of the *avocat général* and allowed him to participate in the deliberations.

2. Decision of the Court

The applicant complained that the fact that he had been unable to reply to the submissions of the *avocat général* and that the latter had participated in judicial deliberations had violated his right to a fair hearing by an impartial tribunal under Article 6 § 1 of the Convention.

Article 6 § 1

The Court began by stating that the findings in the case of *Delcourt v. Belgium*^[410] on the question of independence and impartiality of the Court of Cassation and its *procureur général's* department remained entirely valid. Accordingly, there had been no perceived breach of the Convention in the present case with regards to the issue of independence and impartiality. While the Judicial Code had entered into force in Belgium since then, many of its provisions confirmed existing rules in the field which had been examined in its hearing of 29 September 1969.

The Court hence went on to examine whether the rights of the defence and the principle of equality of arms had been respected as wider concepts of a fair trial. These latter concepts had undergone considerable evolution in the Court's case-law, in particular in respect of the importance attached to appearances and the increased sensitivity of the public to the fair administration of justice.

The objectivity with which the *procureur général's* department discharged its function at the Court of Cassation was not put into question. It had been approved by Parliament on a number of occasions and there had existed a consensus in Belgium as to its inception. Nevertheless, the *avocat général's* opinion could not be regarded as neutral from the point of view of the parties to the proceedings at the Court of Cassation since the *avocat général's* official recommendation to either allow or dismiss the accused's appeal would make him, objectively speaking, the accused's ally or opponent.

In the present case, the applicant had not been aware of, nor had he been allowed to reply, to the *avocat général's* submissions at the hearing of 18 June 1985. Following the *avocat général's* intervention, the applicant was thereafter prevented from lodging even a written reply by Article 1107 of the Judicial Code. There was no justification for such restrictions on the rights of the defence as the applicant had an interest in being able to submit his observations before argument was closed. The fact that the Court of Cassation's jurisdiction was confined to questions of law did not impact this finding.

Further and above all, this inequality was increased by the *avocat général's* participation in the court's deliberations. Although the *avocat général's* advisory assistance may have been of some use for drafting judgments, provided it was with total objectivity, this task fell in the first place to the Court of Cassation itself. However,

410 *Delcourt v. Belgium*, judgment of 17 January 1970, no. 2689/65

it was difficult to see how such assistance could be limited to stylistic considerations given these were often indissociable from substantive matters. This is even more so if the assistance was intended, as the Government affirmed, to maintain the consistency of the court's case law. Even if the assistance provided in the present case had been limited to stylistic considerations, it could reasonably be concluded that the deliberations had afforded the *avocat général* with an additional opportunity to promote, without fear of contradiction by the applicant, his submissions that the appeal should be dismissed.

Having regard to appearances with respect to the requirements of the rights of defence and equality of arms principle, there had been a violation of Article 6 § 1.

Article 50 (now Article 41)

The Court held that the finding of a violation constituted sufficient just satisfaction in respect of non-pecuniary damage and awarded the applicant 113,250 Belgian francs (approximately €2807.39) for costs and expenses.

Disciplinary proceedings conducted by a Board of Visitors of a prison did not violate the requirement for an independent and impartial tribunal under Article 6

JUDGMENT IN THE CASE OF **CAMPBELL AND FELL v. THE UNITED KINGDOM**

(Application no. 7819/77; 7878/77)

28 June 1984

1. Principal facts

The first applicant, Mr John Joseph Campbell, was a United Kingdom citizen, born in Northern Ireland in 1944. In November 1973, he was convicted of various offences, including conspiracy to rob and possession of a firearm with intent to commit robbery, and sentenced to ten years' imprisonment. The second applicant, Father Patrick Fell, was a United Kingdom citizen, born in England in 1940. He was a Roman Catholic priest. In November 1973, after being convicted of conspiracy to commit arson, conspiracy to commit malicious damage, and taking part in the control and management of an organisation using violent means to obtain a political end, he was sentenced to twelve years' imprisonment. Both applicants were detained in Albany Prison, Isle of Wight. At all relevant times, both applicants were classified as "category A" prisoners and were believed by the authorities to have been connected with Irish Republican Army.

On 16 September 1976, an incident occurred in Albany Prison. The applicants engaged in a protest at the treatment of another prisoner, by sitting down in a corridor of the prison and refusing to move. They were removed by prison officers after a struggle and in the process, injuries were sustained by certain members of staff and by both applicants. The first applicant was transferred to Parkhurst Prison hospital for treatment and returned to Albany Prison on 30 September 1976. The prisoners were charged with disciplinary offences by the Prison Board of Visitors. The Board heard the case of the second applicant on 24 September 1976 and that of the first applicant on 1 October 1976.

The first applicant had received before the hearing a report setting out the charges against him and a copy of a form outlining its procedure. He did not attend the hearing and declared prior to it that he would be prepared to attend only if he were legally represented. His request for legal representation before the Board was refused. On 6 October 1976, he was found guilty of both charges and was awarded, for the mutiny and the violence offences respectively, 450 days' and 120 days' loss of

remission. He decided not to appeal by way of certiorari proceedings as his lawyers considered that proceedings would be destined to fail on the ground that he had refused to participate in the adjudication.

The second applicant was charged with and found guilty by the Prison Board of Visitors of disciplinary offences against the Prison Rules 1964. He did at first not appeal but at a later stage sought to quash the boards verdict on the ground of “substantial unfairness”, however his application failed, both at first instance and on appeal.

The applicants both petitioned the Home Secretary asking to consult with their lawyer. On 9 February 1977 the Home Secretary granted the second applicant the opportunity to seek legal advice. The Home Secretary refused the first applicant’s petition, on the ground that he had not supplied sufficient details for a proper internal inquiry to commence. Both applicants subsequently obtained legal advice and on 13 September 1979 instituted proceedings alleging assault against individual prison officers, the Deputy Governor and the Home Office.

2. Decision of the Court

The applicants alleged that they had been convicted by the Board of Visitors of disciplinary charges amounting in substance to “criminal” charges, without having been afforded a hearing compliant with the requirements of Article 6 of the Convention. The applicants further submitted that the delay in granting them permission to seek legal advice in connection with a civil action claiming compensation for the injuries sustained during the incident constituted denial of access to the courts, in violation of Article 6. In addition, the second applicant complained that the restriction on his personal correspondence was a violation of Article 8.

Article 6

In relation to the question of admissibility, the Court stated that the existence of a remedy must be sufficiently certain before there can be an obligation to exhaust it. At the time of the first applicant’s application to the Strasbourg organs in March 1977, there was nothing to indicate that certiorari proceedings were possible in respect of a Board of Visitors’ adjudication. In this situation he was justified in not applying to the domestic courts for judicial review, and his complaint was admissible. However, in relation to the second applicant’s complaint challenging the Board’s verdict on the ground of “substantial unfairness” the correct remedies had not been exhausted and his complaint under Article 6 was declared inadmissible.

In considering the existence of a “criminal” charge the Court stated that the guarantee of a fair hearing is one of the fundamental principles of any democratic society, within the meaning of the Convention. Justice cannot stop at the prison gate and there is, in appropriate cases, no warrant for depriving inmates of the safeguards of Article 6. Taking into account, therefore, both the “especially grave” character of the offences with which the first applicant was charged and the nature and severity of the penalty that he risked incurring and did in fact incur, the Court found that Article 6 was applicable to the Board of Visitors’ adjudication in his case.

The Court stated it was not disputed in the present case that the Board of Visitors, when carrying out its adjudicatory tasks, was a “tribunal established by law”. In determining whether a body can be considered to be “independent” - notably of the executive and of the parties to the case - the Court has had regard to: the manner of appointment of its members and the duration of their term of office; the existence of guarantees against outside pressures; and the question of whether the body presents an appearance of independence.

In this regard the Court noted that members of the Board held office for a term of three years or such less period as the Home Secretary appointed. The Court noted that the reason for this lay in the fact that members were unpaid and that it would have been difficult to find individuals willing and suitable to undertake the onerous and important tasks involved if the period was longer. The Court found that the Rules contained neither any regulation governing the removal of members of a Board nor any guarantee of their irremovability. Although it appeared that the Home Secretary could require the resignation of a member, this would be done only in the most exceptional circumstances and the existence of this possibility was not regarded as threatening in any respect to the independence of the members of a Board in the performance of their judicial function. The Court also noted the Board’s independence was not threatened having regard to the fact that it had both adjudicatory and supervisory roles. The existence of sentiments on the part of inmates that Boards were closely associated with the executive and the prison administration was not sufficient to establish a lack of independence. The Court held that the mere fact that contacts existed between a Board and the authorities did not create an impression that the former was dependent on the latter. Thus, the Court saw no reason to conclude that the Board in question was not “independent” within the meaning of Article 6.

With regards to impartiality, the Court stated that under the subjective test the impartiality of members of a body covered by Article 6 is to be presumed until there is proof to the contrary. In the present case, the applicant adduced no evidence to

give the Court any cause for doubt on this score. In relation to the objective test, appearances may be of a certain importance and account must be taken of questions of internal organisation. However, prior to 6 October 1976, the Albany Prison Board of Visitors played no role whatsoever in the disciplinary proceedings against Mr Campbell; when it sat on that date, it came fresh to his case. The Court, therefore, perceived nothing in the actual organisation of the adjudication that would reflect adversely on the Board's objective impartiality.

In relation to the applicant's complaint that the adjudication by the Board of Visitors in his case had not been conducted in public, the Court stated that, in light of the factors cited by the Government around the security problems of disciplinary proceedings conducted in public, a requirement for such disciplinary proceedings concerning convicted prisoners to be held in public imposed a disproportionate burden on the authorities. However, in relation to the applicant's complaint that the Board of Visitors had not pronounced publicly its decision in his case, the Court found a violation of Article 6 § 1.

Article 6 § 2

The Court rejected the complaint that the Board's adjudication violated the right under Article 6 § 2 that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. When the first applicant failed to attend the hearing, pleas of "not guilty" to both charges were entered on his behalf and he adduced no evidence to establish that the Board proceeded otherwise than on the basis of those pleas.

Article 6 § 3

In relation to the first applicant's complaint that he had not been adequately informed of the nature of the accusation against him, the Court found no violation of Article 6 § 3. The Court noted that, prior to the hearing, he had received a report setting out the charges against him. In relation to the complaint that in view of the nature of the charges against him he should have been able to obtain legal advice, the Court considered that in all the circumstances the applicant was left with adequate time to prepare his defence. The first applicant was informed of the charges against him five days before the Board sat and also received reports with further details. Furthermore, seen in the light of the fact that the first applicant declined to attend the adjudication, the Court rejected the complaint concerning examination of witnesses.

Article 6 and Article 8

The applicants submitted that the delay in granting them permission to seek legal advice in connection with a civil action claiming compensation for the injuries sustained during the incident constituted a denial of access to the courts, in violation of Article 6. While it was true that the applicants were eventually granted the permission which they sought, speedy access to legal advice was important in personal injury cases. Thus, the Court found a violation of Article 6, and a further violation of Article 8 in light of the applicants' inability to correspond with their solicitors.

As regards the Restrictions on Father Fell's personal correspondence, the Court concluded that the refusal to allow the second applicant to correspond with two nuns constituted a violation of Article 8.

In relation to the conditions for visits to Father Fell by his solicitors, the Court held that there had been a violation of Article 6 § 1. Although security considerations could justify some restriction on the conditions for visits by a lawyer to a prisoner the Government had not argued before the Court that such considerations obtained in the case.

Article 13

The Court found that the restrictions on the second applicant's access to legal advice and on his personal correspondence were the result of the application of norms that were incompatible with the Convention. In such circumstances, there could have been no "effective remedy" as required by Article 13.

Article 50 (now Article 41)

The Court found that finding of violations constituted sufficient just satisfaction. The Court awarded the applicants the sum of £13,000 (approximately €50,216.29) in respect of costs and expenses.

The guarantee of an independent and impartial tribunal in court martial proceedings

GRAND CHAMBER JUDGMENTS IN THE CASES OF
**COOPER v. THE UNITED KINGDOM AND
GRIEVES v. THE UNITED KINGDOM**

(Applications nos. 48843/99 and 57067/00)
16 December 2003

1. Principal facts

In *Cooper v. the United Kingdom*, the applicant Graham Cooper was born in 1968 and lived in Birmingham, United Kingdom. At the relevant time, he was a serving member of the Royal Air Force (“RAF”).

On 18 February 1998 the applicant was convicted of theft under the 1968 Theft Act by an RAF District Court Martial (“DCM”). He was sentenced to 56 days’ imprisonment, to be demoted to the ranks and dismissed from the service. The DCM comprised a permanent president, two other officers lower in rank and a judge advocate. The permanent president sitting on the applicant’s court martial was on his last posting prior to retirement and had ceased to be the subject of appraisal reports from August 1997. The two ordinary members of the court martial had attended a course in 1993 which included training in disciplinary procedures.

On 3 April 1998 the Reviewing Authority, having received advice from the Judge Advocate General, upheld the DCM’s finding and sentence. The applicant appealed unsuccessfully to the Courts Martial Appeal Court (“CMAC”).

In *Grievés v. the United Kingdom*, the applicant Mark Anthony Grievés was born in 1968 and lived in Devon, United Kingdom. At the relevant time, he was a serving member of the Royal Navy (“RN”).

On 18 June 1998 the applicant was convicted by a RN Court Martial of unlawfully and maliciously wounding with intent to do grievous bodily harm, contrary to the Offences Against the Person Act 1861. He was sentenced to three years’ imprisonment, demoted in rank, dismissed from the service and ordered to pay £700 in compensation. The court martial comprised a president (a Royal Navy captain), four naval officers and a judge advocate, who was a serving naval officer and barrister working as the naval legal adviser to FLEET (the military command responsible for the organisation and deployment of all ships at sea).

On 29 September 1998 the Admiralty Board, having received advice from the Judge Advocate of the Fleet (“JAF”), upheld the court martial’s finding and sentence. The applicant appealed unsuccessfully to the CMAC.

2. Decision of the Court

Both applicants complained under Article 6 § 1 (the right to a fair trial) that the courts martial which tried them, structured as they were under the 1996 Act, lacked independence and impartiality and that they were therefore denied a fair and public hearing by an independent and impartial tribunal established by law.

Article 6 § 1

The Court considered that, given the nature of the charges against the applicants, together with the nature and severity of the penalty imposed (56 days’ and three years’ imprisonment, respectively), the court martial proceedings constituted the determination of a criminal charge. Finding that the applicants’ complaints raised questions of law which were sufficiently serious that their determination should depend on an examination of the merits, the Court declared the complaints admissible.

In *Cooper*, the Court rejected the applicant’s general submission that Service tribunals could not, by definition, try criminal charges against Service personnel consistently with the independence and impartiality requirements of Article 6 § 1. There was nothing in the Court’s prior established case law and nothing in the provisions of Article 6 that would in principle exclude the determination by service tribunals of criminal charges against service personnel. Questions of independence and impartiality had to be considered in respect of each individual case in which they were raised.

The Court also rejected his complaint regarding the independence and impartiality of the bodies involved in the proceedings prior to the court martial hearing itself. His submissions did not cast any doubt on the genuineness of the separation of the prosecuting, convening and adjudicating roles in the court martial process or the independence of the decision-making bodies from the chain of command, rank or other Service influence.

Turning to the independence and impartiality of the court martial itself, the Court stated that there were no grounds upon which to question the independence of the RAF judge advocate since he was a civilian appointed by the Lord Chancellor

(a civilian) and he was appointed to specific courts martial by the Judge Advocate General (also a civilian). In the course of a court martial, the judge advocate played a central role in proceedings, equivalent to that of a trial judge. The judge advocate was responsible for the fair and lawful conduct of the court martial and his rulings on the course of the evidence and on all questions of law were binding and had to be given in open court. While the judge advocate did not provide a vote on the court martial's verdict, they did sum up evidence and refuse to accept a verdict if they considered it to be 'contrary to law'. It was found that the presence of a civilian with such qualifications and such a central role in court martial proceedings constituted a significant guarantee of the independence of those proceedings. Furthermore the Permanent President of Courts Martial ("PPCM") appointed to the court martial in the case was independent, due to his seniority, his widely understood lack of prospects of promotion (which gave him independence from his superiors as he was answerable to no-one and had no effective fear of removal), and his subjection to supervision of the judge advocate. In fact, the Court concluded the permanent president made an important contribution to the independence of an otherwise *ad hoc* tribunal.

Turning then to the ordinary members of the court martial, the Court found that their *ad hoc* appointment to the court martial and relatively junior rank did not in themselves undermine their independence, as there were safeguards against outside pressure being brought to bear on them. The accused had the right to object to any ordinary member chosen to sit on their court martial, the most junior officer of the ordinary members always gave their verdict first to avoid knowingly conflicting with a senior officer and ordinary members were subject to the possibility of prosecution for perverting the course of justice if they did not perform their role to the required standard. The fact that the ordinary members of the court martial lacked legal qualifications did not undermine their independence and impartiality due to their direction in their work by the legally qualified and experienced judge advocate. Independence and impartiality were further guaranteed by the presence of the PPCM and the judge advocate, the prohibition of reporting on members' judicial decision-making and the briefing notes distributed to the members which provided a step by step guide to the procedures of a court martial and a manual to the nature and limits of their role and the functions of the judge advocate and PPCM. It was especially relevant that these briefing notes gave full instructions of the need to function independently and impartially and the importance of this being seen to be done. It also provided practical and precise indications of how independence and impartiality could be achieved or undermined in a particular situation.

The Court noted that the Reviewing Authority, who would automatically review the court martial verdict and sentence and formed part of the process by which

any verdict or sentence became final, was an anomalous feature of the present court martial system and expressed its concern about a criminal procedure which empowered a non-judicial authority to interfere with judicial findings. However, the Court found that the role of the Reviewing Authority did not undermine the independence of the court martial, because the final decision in the proceedings would always lie with a judicial body, the CMAC.

Accordingly, in *Cooper*, the Court concluded that the court martial proceedings could not be said to have been unfair and that there had not, therefore, been a violation of Article 6 § 1.

In *Grieves*, the Court contrasted the RN court martial system with the RAF court martial system it had considered in *Cooper*. The Court found it significant that the post of PPCM did not exist in the naval system; the president of a RN court martial being appointed for each court martial as it was convened. The Court considered that the absence of a full-time PPCM, with no hope of promotion and no effective fear of removal and who was not subject to report on his judicial decision-making, deprived RN courts martial of an important contribution to the independence of an otherwise *ad hoc* tribunal.

Most importantly, however, the Court noted that, although RN judge advocates fulfilled the same pivotal role in courts martial as their RAF equivalents, these judge advocates were serving naval officers, who, when not sitting in a court martial, carried out regular naval duties. The RAF judge advocate was a civilian working full-time for the Judge Advocate General, himself a civilian. In addition, RN judge advocates were appointed by a naval officer, the Chief Naval Judge Advocate.

The Court was concerned by certain reporting practices regarding RN judge advocates which applied at the relevant time. For example, the JAF's report on a judge advocate's judicial performance could be forwarded to the judge advocate's senior service reporting officer. The Court considered that, even if the judge advocate appointed to the applicant's court martial could be seen as independent despite these reporting practices, the position of naval judge advocates could not be considered a strong guarantee of the independence of a RN court martial. Accordingly, the lack of a civilian in the pivotal role of judge advocate deprived a RN court martial of one of the most significant guarantees of independence enjoyed by other Services' courts martial.

The Court further considered the briefing notes sent to members of RN courts martial to be substantially less detailed and significantly less clear than the

RAF briefing notes. They were consequently less effective in safeguarding the independence of the ordinary members of courts martial from inappropriate outside influence.

The Court accordingly found that the distinctions between the RAF court martial system assessed in the case of *Cooper* and the RN court martial system at issue in *Grievés*, were such that the misgivings of the applicant in the latter case about the independence and impartiality of his court martial, convened under the 1996 Act, could be considered to be objectively justified. His court martial proceedings were consequently unfair and there had, therefore, been a violation of Article 6 § 1.

Article 41

The Court awarded the applicant *Grievés* €8,000 for costs and expenses, less the amount received in legal aid.

The central role played by the convening officer in the organisation of a court martial was a breach of the requirement of an independent and impartial tribunal under Article 6

JUDGMENT IN THE CASE OF
FINDLAY v. THE UNITED KINGDOM

(Application no. 22107/93)
25 February 1997

1. Principal facts

The applicant was born in 1961 and lived in Windsor, England. In 1980 he joined the British army and in 1982 he took part in the Falklands campaign. During the battle he witnessed the death and mutilation of several of his friends and was himself injured in the wrist by a mortar-shell blast and as a result of these experiences of battle he suffered from post-traumatic stress disorder (“PTSD”). In 1987 he sustained an injury during training for service in Northern Ireland, severely damaging his back. In 1990, after a heavy drinking session, he held members of his own unit at gun point and threatened to kill himself and some of his colleagues. He fired two shots, which were not aimed at anyone and hit a television set. He was then arrested.

A psychiatrist examined the applicant and found that he was responsible for his actions at the time of the incident. However, a combination of stresses together with his heavy drinking on the day, had led to an almost inevitable incident and it was recommended that he was awarded with the minimum appropriate punishment. A medical report confirmed was fit to plead and knew what he was doing at the time of the incident. However, his chronic back problem together with his previous combat stresses and a very high level of alcohol combined to produce this dangerous behaviour. The applicant was later diagnosed as suffering from PTSD.

The convening officer for the applicant’s court martial remanded the applicant for trial on eight charges arising out of the incident and decided that he should be tried by general court martial. The convening officer convened the general court martial and appointed the military personnel who were to act as prosecuting officer, assistant prosecuting officer and assistant defending officer and the members of the court martial.

The applicant was sentenced to two years’ imprisonment. Under the Army Act 1955, the decision of the court martial had no effect until it was confirmed by the

confirming officer. In the applicant's case, as was usual practice, the confirming officer was the same person as the convening officer. The applicant petitioned him for a reduction in sentence. Having received advice from the Judge Advocate General's Office, the confirming officer informed the applicant that the sentence had been upheld. The applicant appealed two other times and at each of the three stages the advice given by the Judge Advocate General's Office was not disclosed to the applicant, nor was he given reasons for the decisions confirming his sentence and rejecting his petitions.

The applicant applied to the Divisional Court for leave to challenge by judicial review the validity of the findings of the court martial. He claimed that the sentence imposed was excessive, the proceedings were contrary to the rules of natural justice and that the judge advocate had been hostile to him on two occasions during the court martial hearing. The Divisional Court refused leave on the basis that the court martial had been conducted fully in accordance with the Army Act 1955 and that there was no evidence of improper conduct or hostility on the part of the judge advocate.

The applicant commenced a civil claim in negligence against the military authorities, claiming damages in respect of his back injury and PTSD. The civil action was settled by the Secretary of State for Defence, who paid the applicant £100,000 and legal costs, without any admission of liability.

2. Decision of the Court

Relying on Article 6 § 1 the applicant complained that the court martial was not an independent and impartial tribunal because all the officers appointed to it were directly subordinate to the convening officer who also performed the role of prosecuting authority. Furthermore, he argued that the lack of legal qualification among the officers making the decisions made it impossible for them to act in an independent or impartial manner. In addition, he complained that: he was not afforded a public hearing; no reasons were given for the decisions made; the process of confirming and reviewing the verdict and sentence were carried out in private; and the court martial was not a tribunal established by law.

Article 6

The Court recalled that in order to establish whether a tribunal can be considered as independent, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of guarantees against

outside pressures and the question whether the body presents an appearance of independence. As to the question of impartiality, there are two aspects to this requirement. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect.

The Court discussed firstly whether the convening officer was central to the applicant's prosecution and closely linked to the prosecuting authorities. The Court noted that the convening officer played a significant role before hearing the case. He decided which charges should be brought and which type of court martial was most appropriate. He convened the court martial and appointed its members and the prosecuting and defending officers. The Court observed that he had the task of sending an abstract of the evidence to the prosecuting officer and the judge advocate and could indicate passages which might be inadmissible. He procured the attendance at trial of the witnesses for the prosecution and those "reasonably requested" by the defence. His agreement was necessary before the prosecuting officer could accept a plea to a lesser charge from an accused and was usually sought before charges were withdrawn. For these reasons the Court considered that the convening officer was central to the applicant's prosecution and closely linked to the prosecuting authorities. Therefore, in light of this, the Court examined whether members of the court martial were sufficiently independent of the convening officer and whether the organisation of the trial before the court martial offered adequate guarantees of impartiality.

The Court noted that all the members of the court martial were not only appointed by the convening officer but were also subordinate in rank to him and under his command. Furthermore, the convening officer had the power to dissolve the court martial either before or during the trial. Therefore, since all the members of the court martial which decided the applicant's case were subordinate in rank to the convening officer and fell within his chain of command, the applicant's doubts about the tribunal's independence and impartiality could be objectively justified. In addition, the Court found it significant that the convening officer also acted as "confirming officer", whereby the decision of the court martial was not effective until ratified by the convening officer. This was contrary to the principle that the power to give a binding decision which may not be altered by a non-judicial authority is inherent in the very notion of a tribunal and can also be seen as a component of the independence required by Article 6.

The Court stated that the fundamental flaws in the court martial system were not remedied by the presence of safeguards, such as the involvement of the judge

advocate, who was not himself a member of the tribunal and whose advice to it was not made public. Nor could the defects referred to above be corrected by any subsequent review proceedings. Since the applicant's hearing was concerned with serious criminal charges, he was entitled to a first-instance tribunal which fully met the requirements of Article 6 § 1.

For all these reasons, and in particular the central role played by the convening officer in the organisation of the court martial, the Court considered that the applicant's misgivings about the independence and impartiality of the tribunal which dealt with his case were objectively justified, and there had hence been a breach of Article 6 § 1 of the Convention. In view of the above, the Court held that it was not necessary for it to consider the applicant's other complaint under Article 6 § 1 that he was not afforded a public hearing by a tribunal established by law.

Article 50 (now Article 41)

The Court did not award the applicant compensation for pecuniary damage as no causal link had been established between the breach and the alleged pecuniary damage. In relation to non-pecuniary damage the Court found that a finding of violation in itself afforded the applicant sufficient reparation. The Court awarded the applicant the sum of £23,956.25 (approximately €27,657.50) in respect of costs and expenses.

Numerous failings, including the presence of a military judge in the proceedings compromised the principle of independence and impartiality in the high profile case of former PKK leader led to violations of the Convention

GRAND CHAMBER JUDGMENT IN THE CASE OF
ÖCALAN v. TURKEY

(Application no. 46221/99)

12 May 2005

1. Principal facts

The applicant, Abdullah Öcalan, was born in 1949. At the time of this judgment he was incarcerated in İmralı Prison in Turkey.

At the time of the events in question, the Turkish courts had issued seven warrants for the applicant's arrest and a wanted notice (red notice) had been circulated by Interpol. The applicant had been accused by the Turkish state of founding an armed gang in order to destroy the integrity of the Turkish State and of instigating terrorist acts resulting in loss of life.

On 9 October 1998 the applicant was expelled from Syria, where he had been living for many years. From there he went to Greece, Russia, Italy and then again Russia and Greece before going to Kenya, where, on the evening of 15 February 1999, in disputed circumstances, he was taken on board an aircraft at Nairobi airport and arrested by Turkish officials. He was then flown to Turkey.

On arrival in Turkey, the applicant was taken to İmralı Prison, where he was held in police custody from 16 to 23 February 1999 and questioned by the security forces. He received no legal assistance during that period. His lawyer in Turkey was prevented from travelling to visit him by members of the security forces. 16 other lawyers were also refused permission to visit on 23 February 1999.

On 23 February 1999 the applicant appeared before an Ankara State Security Court judge, who ordered him to be placed in pre-trial detention. The applicant was allowed only restricted access to his lawyers, who were in turn not authorised by the prison authorities to provide him with a copy of the documents in the case file, other than the indictment. It was not until the hearing on 4 June 1999 that the State Security Court gave the applicant permission to consult the case file under the supervision of two registrars and authorised his lawyers to provide him with a copy of certain documents.

On 29 June 1999 Ankara State Security Court found the applicant guilty of carrying out actions calculated to bring about the separation of a part of Turkish territory and of forming and leading an armed gang to achieve that end. It sentenced him to death, under Article 125 of the Criminal Code. That decision was upheld by the Court of Cassation.

Under Law no. 4771, published on 9 August 2002, the Turkish Assembly resolved to abolish the death penalty in peacetime. On 3 October 2002 Ankara State Security Court commuted the applicant's death sentence to life imprisonment.

2. Decision of the Court

The applicant complained under Articles 2 (right to life), 3 (prohibition of torture and inhuman and degrading treatment) and 14 (prohibition of discrimination) that the imposition and/or execution of the death penalty to which he had been sentenced would violate the Convention. The applicant further complained under Article 3 that the conditions in which he was transferred from Kenya to Turkey and detained on the island of İmralı amounted to inhuman treatment. Under Article 5 (right to liberty and security) the applicant complained that he was deprived of his liberty unlawfully and that he was not brought promptly before a judge. He also complained under Article 6 § 1 (right to a fair trial) that he had not had a fair trial because he was not tried by an independent and impartial tribunal, that the judges were influenced by hostile media reports and that his lawyers were not given sufficient access to the court file to enable them to prepare his defence properly. Finally, he complained under Article 34 (the right to individual application) that his legal representatives in Amsterdam were prevented from contacting him after his arrest and that the Turkish Government failed to reply to the request of the Court for them to supply information.

In its Chamber judgment of 12 March 2003, the Court held, among other things, that there had been a violation of Article 5 §§ 3 and 4, Article 6 §§ 1 and 3 (b) and (c), and also of Article 3 on account of the fact that the death penalty had been imposed after an unfair trial. The case was referred to the Grand Chamber at the request of the applicant and the Government.

Article 5

In relation to Article 5 § 1 (Deprivation of Liberty), the Grand Chamber considered that the applicant's arrest on 15 February 1999 and his detention had been in accordance with "a procedure prescribed by law" and that there had, therefore, been no violation of Article 5 § 1.

Regarding Article 5 § 3 (Right to be brought promptly before a judge), it was noted that the total period spent by the applicant in police custody came to a minimum of seven days. The Grand Chamber could not accept that it was necessary for the applicant to be detained for such a period without being brought before a judge. There had accordingly been a violation of Article 5 § 3.

Article 6 § 1

Here, the applicant complained that he had not been tried by an independent and impartial tribunal since a military judge had sat on the bench during part of the proceedings of the National Security Court.

The Court agreed that the presence of a military officer acting as a judge on a national security court trying a case involving allegations of serious offences relating to national security raised questions about the national security court's independence from the executive. The Court stated that the applicant therefore had a legitimate fear that the National Security Court might have allowed itself to be unduly influenced by considerations unrelated to his case.

That the military judge on the National Security Court had been replaced with a civilian judge before the applicant's conviction did not necessarily remedy the issue explained above. The effect of a court's composition on its independence did not solely depend on its composition when it delivered its verdict. The protections of Article 6 required the relevant court to be seen as independent of the executive and the legislature at each of the three stages of Turkish criminal proceedings: the investigation, the trial and the verdict. In this case the military judge was present at two preliminary hearings, six hearings on the merits, and when interlocutory decisions were taken. The Court also emphasised that the military judge had participated in one or more interlocutory decisions that had remained in effect throughout the entire proceedings, even after he had been replaced. Further, the Court reiterated its general rule that where a military judge has participated in interlocutory decisions forming an integral part of proceedings against a civilian, the whole proceedings have consequently been deprived of their appearance of having been conducted by an independent and impartial tribunal. Further, none of the military judge's decisions were reviewed after he had been replaced.

The Court also referred to its established case law by noting that any situation in which a civilian has to appear before a court composed, even in part, by members of the armed forces would seriously affect the confidence courts were required to inspire in a democratic society. In such circumstances the Court was clear that the applicant

was reasonable in holding concerns over the independence and impartiality of his trial and therefore there had been a violation of Article 6 § 1.

Article 6 § 3

The Grand Chamber considered that the applicant's trial was unfair because: he had no assistance from his lawyers during questioning in police custody; he was unable to communicate with his lawyers out of the hearing of third parties; he was unable to gain direct access to the case file until a very late stage in the proceedings; restrictions were imposed on the number and length of his lawyers' visits; and his lawyers were not given proper access to the case file until late in the day. The Grand Chamber found that the overall effect of those difficulties taken as a whole had so restricted the rights of the defence that the principle of a fair trial, as set out in Article 6 § 3, had been violated.

The Death Penalty (Articles 2, 3 and 14)

The death penalty had been abolished in Turkey and the applicant's sentence had been commuted to one of life imprisonment. Accordingly, there had been no violation of Articles 2, 3 or 14 on account of the implementation of the death penalty.

In considering the imposition of the death penalty under Article 3, regard had to be had to Article 2, which precluded the implementation of the death penalty concerning a person who had not had a fair trial.

In the Grand Chamber's view, to impose a death sentence on a person after an unfair trial was to subject that person wrongfully to the fear that he would be executed. The fear and uncertainty as to the future generated by a sentence of death, in circumstances where there existed a real possibility that the sentence would be enforced, inevitably gave rise to a significant degree of human anguish. Such anguish could not be dissociated from the unfairness of the proceedings underlying the sentence which, given that human life was at stake, became unlawful under the Convention.

The Grand Chamber noted that there had been a moratorium on the implementation of the death penalty in Turkey since 1984 and that, in the applicant's case, the Turkish Government had complied with the Court's interim measure under Rule 39 of the Rules of Court to stay the execution.

However, the applicant's background as the leader and founder of the PKK, an organisation which had been engaged in a sustained campaign of violence causing

many thousands of casualties, had made him Turkey's most wanted person. The risk that the sentence would be executed remained for more than three years of the applicant's detention in İmralı.

Consequently, the Grand Chamber concluded that the imposition of the death sentence on the applicant following an unfair trial by a court whose independence and impartiality were open to doubt amounted to inhuman treatment in violation of Article 3.

Article 3

In relation to the Conditions of the applicant's transfer, it had not been established 'beyond all reasonable doubt' that the applicant's arrest and the conditions in which he was transferred from Kenya to Turkey exceeded the usual degree of humiliation that was inherent in every arrest and detention or attained the minimum level of severity required for Article 3 to apply. Consequently, there had been no violation of Article 3 on that account.

The general conditions in which the applicant was being detained at İmralı Prison had not reached the minimum level of severity required to constitute inhuman or degrading treatment within the meaning of Article 3. Therefore there had been no violation of Article 3 on that account.

Article 34

The Grand Chamber noted that there was nothing to indicate that the applicant had been hindered in the exercise of his right of individual petition to any significant degree. There had accordingly been no violation of Article 34.

Article 46

The Grand Chamber considered that, where an individual, as in the applicant's case, had been convicted by a court which did not meet the Convention requirements of independence and impartiality, a retrial or a reopening of the case, if requested, represented in principle an appropriate way of redressing such a violation.

However, the specific remedial measures, if any, required of a respondent State in order to discharge its obligations under Article 46 had to depend on the particular circumstances of the individual case and be determined in the light of the terms of the Court's judgment in that case, and with due regard to the case law of the Court.

Article 41

The Court held that its findings of violations of Articles 3, 5 and 6 constituted in themselves sufficient just satisfaction for any damage sustained by the applicant and awarded the applicant's lawyers €120,000 for costs and expenses.

The presence of a tribunal member who was subordinate to the Government's representative in proceedings before the tribunal, violated the principle of independence under Article 6 § 1

JUDGMENT IN THE CASE OF **SRAMEK v. AUSTRIA**

(Application no. 8790/79)
22 October 1984

1. Principal facts

The applicant was a citizen of the United States who lived in Munich, Germany. In the hopes of building a holiday residence in Hopfgarten, following negotiations, the applicant apparently purchased a plot of land in an initial contract in 1973. The definitive contract was drawn up on 13 January 1977.

However, the contract could not take effect unless it was approved by the local Real Property Transactions Authority (the "local authority") as required by section 3 of the Tyrolean Real Property Transactions Act which was amended by an Act of 1973 and had come into force on 1 January 1974 (the "1970/1973 Act").

The Hopfgarten local authority approved the contract in March 1977. However, the Real Property Transactions Officer (the "Transactions Officer"), acting on behalf of the Government, appealed the decision to the Regional Real Property Transactions Authority (the "Regional Authority") on the grounds that it contravened section 4(2) of the 1970/1973 Act. He submitted that there were already 110 foreign landowners in Hopfgarten and hence a risk of foreign domination. An approval of the contract would therefore be contrary to the social and economic interests of the municipality under that provision.

The Tyrol government office was comprised of groups with subdivisions of which the Transactions Officer was the director of group III and his secretariat was provided for by division III b. 2. The secretariat and rapporteur of the Regional Authority was provided for by division III b. 3. The Regional Authority upheld the Government's appeal in June 1977 and refused to approve the transfer of title to the applicant. The applicant unsuccessfully appealed to the Constitutional Court on various grounds including that the Regional Authority was not an independent tribunal within the meaning of Article 6 of the Convention. The court reasoned that the tribunal was independent as it was not bound by executive instructions as to the exercise of their

functions. Further, the tribunal members could not be removed during their three-year term except in limited circumstances.

Even before the Constitutional Court had come to its decision, the plot in question was sold to an Austrian who apparently returned it to grazing-land.

2. Decision of the Court

The applicant alleged that the Regional Authority was not an independent and impartial tribunal within the meaning of Article 6 § 1 of the Convention and that in any event it had not provided her with a fair and public hearing contrary to that same provision.

Article 6 § 1

Article 6 § 1 was applicable to the present case given an unfavourable decision as to the validity of her purchase agreement was “decisive for private rights and obligations.” This had been accepted by the Government.

The Regional Authority was a tribunal established under Austrian law by the 1970/1973 Act. It similarly amounted to a tribunal for the purposes of Article 6 given its function to determine matters on the basis of rules of law within its competence by conducting proceedings in a prescribed manner.

The 1970/1973 Act, as modified following a judgment of the Constitutional Court, satisfied the requirements of Article 6 with regards to the length of the term of office of the tribunal members with only a limited possibility of removal. Although the power of appointing non-judge members fell to the Land Government, this was not sufficient in itself to doubt the independence and impartiality of the members since they did not possess any power in an individual capacity. Further, the law prohibited the executive from providing the members with instructions.

The tribunal in the present case was comprised of a Tyrol mayor and farmer; an Innsbruck Court of Appeal judge; an agricultural expert and farmer; a lawyer; and three civil servants from the Land Government. The independence and impartiality of the judge and the agricultural expert were not in question. Similarly, the Court rejected the applicant’s submission that the lawyer might have received instructions from the Land Government if he had been engaged to represent them in legal proceedings since: (a) this had not occurred in the present case; and (b) this did not suffice in itself to call his impartiality into question. Likewise, the independence of the mayor could not be called into question merely on the basis that the office was exercised under

the supervision of the Land or the Federation since he was still capable of acting independently in matters such as his role as Chairman of the Regional Authority which fell outside the ambit of his mayoral powers.

The Court then considered the independence and impartiality of the civil servants who were required to be amongst the Regional Authority's members under the 1970/1973 Act. In the present case, the Government had acquired the status of a party when it appealed the local authority's decision which had been in the applicant's favour. Further, the Government had been represented by the Transactions Officer before the Regional Authority, who was in fact the hierarchical supervisor of one of the three civil servants in question. Moreover, that particular civil servant had occupied a key position within the Regional Authority as the rapporteur responsible for commenting on the results of the investigation and presenting a conclusion.

Although the Transactions Officer was prohibited from exerting his superior position to instruct the rapporteur (there also being no evidence that he had or had attempted to do so in the present case) the Court noted that appearances may also be of importance to the question of independence under Article 6. Where a tribunal's members include a person who is in a subordinate position to one of the parties, in terms of his duties and the organisation of his service, litigants may entertain a legitimate doubt as to that member's independence which may, in turn, seriously affect the public's confidence in the courts of a democratic society. Accordingly, there had been a violation of Article 6 § 1.

Having regard to its above finding, the Court considered that it was not necessary to examine the applicant's complaints with regards to the provision of a fair and public hearing.

Article 50 (now Article 41)

The applicant's claims for pecuniary damage proceeded on the assumption that if the Regional Authority had in fact constituted an independent and impartial tribunal, it would have approved her contract of sale. However, the evidence in her file did not warrant this conclusion and therefore her claim for pecuniary damage was rejected. The Court did however award the applicant 100,000 shillings (approximately €7,267.28) for legal costs.

The detention of a man on the orders of a government minister, rather than a court, violated Article 5 the Convention as the existence of such executive powers did not accord with the notion of separation of powers or the principles of the rule of law and protection from arbitrariness

JUDGMENT IN THE CASE OF **STAFFORD v. THE UNITED KINGDOM**

(Application no. 46295/99)

28 May 2002

1. Principal Facts

The applicant, Mr. Dennis Stafford, was convicted of murder in 1967. In 1979 he was released on licence, a condition of which was that he was required to remain in the United Kingdom unless authorised to leave. The applicant subsequently travelled abroad without authorisation and in 1980 had his licence revoked, meaning that he was out of detention unlawfully. In 1989 he re-entered the United Kingdom on a false passport and was arrested. After paying a fine for his possession of the false document, the applicant remained in custody due to the revocation of his licence. In 1991, after a review, he was once again released on licence. However, in 1993 he was again arrested and convicted on fraud charges and sentenced to six years' imprisonment. His licence relating to his life sentence was again revoked.

In 1996 his case was reviewed and the Parole Board recommended that he be released. This recommendation was rejected by the Secretary of State. The applicant judicially reviewed this rejection and the Secretary of State's decision was quashed on the basis that the Secretary of State had no authority to detain a life prisoner after he had served his term of imprisonment and where there was no recognised risk of his violent reoffending. However, the Secretary of State's decision was confirmed by the Court of Appeal with the House of Lord's denying a further appeal. In 1998 the applicant was finally released on licence, over a year after he would have been released for his sentence for fraud had the Secretary of State not refused his release.

2. Decision of the Court

Relying on Articles 5 § 1 (right to liberty and security of person) and 5 § 4 (right to speedy determination by a court of the legality of one's detention) of the Convention the applicant complained to the Court that his detention as determined by the Secretary of State was arbitrary and that he should have had the possibility of

applying to a body that could have reviewed and decided on his continued detention, rather than a body that could only issue non-binding recommendations.

Article 5 § 1

The Court began by establishing that while it had already considered whether the United Kingdom's life sentencing regime complied with the Convention in earlier cases, in the interests of the Convention remaining dynamic and evolutive, and the rights it contains being practical and effective, it was necessary to reassess the sentencing regime around life sentences in the light of 'present-day conditions' with the United Kingdom. Specifically, the Court was of the view that, unlike in prior cases, it had since been established in domestic law that the life sentence that the applicant received was not an indeterminate or whole life punishment but a determinate sentence, the continuation of which after the stated period of imprisonment had been fulfilled was based on the an assessment of the characteristics of the imprisoned person.

In the present case, the applicant had ended his period of imprisonment in relation to his life sentence in 1979 when he was first released on licence. Therefore, the Court reasoned that once his period of imprisonment for his fraud conviction ended on 1 July 1997, his continued detention under the terms of his mandatory life sentence could not be regarded as justified as punishment for his original crime. Nor did the Secretary of State justify the applicant's continued detention on the grounds of his danger to the public. The Court went on to explain that under Article 5 § 1 (a), an individual could be deprived of his right to liberty and security of person in cases where the deprivation was carried out via a procedure prescribed by law and where it amounted to the lawful detention of a person after conviction by a competent court. For this to have occurred 'after conviction' there had to be a causal connection between the conviction and the detention. In this case, the Court found no such causal connection between the applicant's detention after 1 July 1997 and his original conviction for murder.

The Court noted that there was no power under domestic law that authorised the imposition of indefinite detention on a person in order to prevent their committing future non-violent offences. The Court further concluded that the detention of the applicant by the Secretary of State on the basis of a general fear that he might commit future non-violent offences did not comply with the Convention's emphasis on the rule of law and protection from arbitrariness. Therefore, the Court found that the applicant's detention after the end of his period of imprisonment for fraud did not meet the requirements for justification under Article 5 § 1 (a) and that therefore had been a violation of Article 5 § 1.

Article 5 § 4

The Court began by reiterating that as the applicant's imprisonment comprised the punishment element of his mandatory life sentence, the Secretary of State's decision to extend his imprisonment was a sentencing exercise and therefore within the scope of Article 5 § 4. The Court reasoned that it was not sufficient for the requirements of Article 5 § 4 to have been met only during the original trial and appeal procedures, they had also to be met in subsequent determinations of detention. The Court was clear that as the applicant's detention after the end of his period of imprisonment for fraud had been ordered by the Secretary of State, the lawfulness of the applicant's detention during that time had not been determined by a "court". The Court was clear that the process by which the Secretary of State ordered the applicant's detention had not contained the safeguards required of a court, including, for example, the possibility of an oral hearing. Therefore, there had been a violation of Article 5 § 4.

Article 41

The Court held that the applicant should be awarded €16,500 in respect of pecuniary and non-pecuniary damages together, and £17,865.10 (approximately €28,727) in respect of costs and expenses.

(4) Independence – The Appointment of Judges

The involvement of two lay assessors, appointed by the Landlord's and Tenant's Association respectively, violated Article 6 as both bodies had interests in the outcome of the applicant's case

JUDGMENT IN THE CASE OF LANGBORGER v. SWEDEN

(Application no. 11179/84)

22 June 1989

1. Principal Facts

The applicant was a Swedish national born in 1922. He was a consultant engineer, and on 1 October 1982 he rented an apartment just outside Stockholm. The lease contained a "negotiation clause". Section 2 of the 1978 Rent Negotiation Act defined a negotiation clause as a provision in a lease whereby the tenant agrees to be bound by the terms of the lease, in particular regarding the rent, as accepted by the association conducting the negotiations. In relation to the applicant's lease, Section 1 of the 1978 Rent Negotiation Act required that the parties undertook to accept, without prior termination of the lease, the rent and other conditions agreed upon between, on the one hand, a landlords' union affiliated to the Swedish Federation of Property Owners and a landlord, who with his property was affiliated to such a union; and, on the other hand, a tenants' union affiliated to the National Tenants' Union. For conducting the negotiations, the tenants' union in question received a commission of 0.3% of the rent.

The applicant was dissatisfied with the rent and with the fact that he was represented by the Tenants' Union of the Greater Stockholm Area. He therefore gave notice of his intention to terminate the lease in accordance with Chapter 12, section 54 of the Land Act, with a view to having its terms altered.

The applicant proposed to the landlord the conclusion of a new agreement with a fixed rent and no negotiation clause. Following the rejection of his offer, he brought the dispute before the Rent Review Board for Stockholm County on 23 June 1983. Under section 5 of the 1973 Lease Review Boards and Rent Review Boards Act, each rent review board was composed of a chairman (a Rent Judge) and two lay assessors, one of whom had to be familiar with the problems of the administration of property and the other with those of tenants. The two assessors were nominated respectively

by the Swedish Federation of Property Owners and the National Tenants' Union. On 17 November 1983 the Rent Review Board held a hearing at which the applicant and his representative and the landlord's representative were present.

The applicant challenged the two lay assessors because they had been nominated by a landlords' association and a tenants' organisation. The applicant submitted that they could not decide his case objectively and impartially because the National Tenants' Union depended for its existence on the sums paid to it for conducting the rent negotiations and the Swedish Federation of Property Owners also derived a major part of its *raison d'être* from its participation in these negotiations. Separately, he sought the deletion of the negotiation clause from the lease and contested the amount of the rent. The chairman dismissed the applicant's challenge because the rules governing the appointment of the lay assessors did not in themselves provide a ground for such a challenge. In relation to the deletion of the negotiation clause, the Review Board dismissed the applicant's claims. Its decision referred to the declarations of the competent minister during the examination of the Rent Negotiation Bill regarding the discretion conferred on rent review boards in deciding whether negotiation clauses should be retained.

The applicant appealed this decision to the Housing and Tenancy Court and also challenged the lay assessors of this Court.

The Housing and Tenancy Court which examined the applicant's appeal was composed of four members, two housing judges and two lay assessors. The two lay assessors had (like the assessors sitting on the Rent Review Board) been nominated by, respectively, the Swedish Federation of Property Owners and the National Tenants' Union. On 23 February 1984 the Court rejected the application challenging the two lay assessors stating that the rules governing their appointment could not in themselves constitute valid grounds for their disqualification. On 2 April 1984 the Housing and Tenancy Court dismissed the remainder of the applicant's appeal and upheld the Rent Review Board's decision. It gave its ruling in private, in the absence of the parties and without having held a hearing. Its decision was final.

2. Decision of the Court

The applicant argued that his claim for a fixed rent and no negotiation clause was not examined by an independent and impartial tribunal and violated Article 6. The applicant further argued breaches of Articles 8, 11 and 13 and Article 1 of Protocol No.1

Article 6

The Court limited its examination to the Housing and Tenancy Court as this body was the last national organ to determine both the questions of fact and the legal issues in dispute. It noted that although the independence and impartiality of the professional judges were not at issue the position of the two lay assessors remained to be considered. The Court began by stating that in order to establish whether a body can be considered “independent”, regard must be had, *inter alia*, to: the manner of appointment of its members and their terms of office; the existence of guarantees against outside pressures; and the question whether the body presents an appearance of independence. As regards impartiality, a distinction must be drawn between a subjective test, where the purpose is to establish the personal conviction of a given judge in a given case, and an objective test, aimed at ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect.

Although the lay assessors appeared in principle to be extremely well qualified to participate in the adjudication of disputes between landlords and tenants and the specific questions which may arise in such disputes, this did not exclude the possibility that their independence and impartiality could be open to doubt in a particular case. However, in the present case the Court stated that there was no reason to doubt the personal impartiality of the lay assessors in the absence of any proof.

As regards their objective impartiality and the question whether they presented an appearance of independence, however, the Court noted that they had been nominated by, and had close links with, two associations which both had an interest in the continued existence of the negotiation clause. The Court found that as the applicant sought the deletion from the lease of this clause, he could legitimately fear that the lay assessors had a common interest contrary to his own and therefore that the balance of interests, inherent in the Housing and Tenancy Court’s composition in other cases, was liable to be upset when the court came to decide his own claim. The fact that the Housing and Tenancy Court also included two professional judges, whose independence and impartiality were not in question, made no difference in this respect. Accordingly, the Court held that there had been a violation of Article 6.

Articles 8, 11 and 13 and Article 1 of Protocol No.1

The applicant argued that the power conferred on the National Tenants’ Union to negotiate on his behalf the amount of the rent for the flat in which he lived was

a breach of the right to respect for his “home” within the meaning of Article 8. The applicant also complained of a violation of his freedom of association guaranteed under Article 11, on the ground that he had to accept, against his will, the services of the National Tenants’ Union in the negotiations, for which services he also had to pay.

The Court held that the questions raised under those heads did not come within the scope of the Articles relied upon. The applicant’s argument that the legal obligation to make financial contributions to the National Tenants’ Union entailed a deprivation of possessions contrary to Article 1 of Protocol No. 1 was also dismissed. Finally, with regard to the alleged violations of Article 6, the Court did not find it necessary to examine the applicants argument under Article 13 that he did not have any effective remedy against the various breaches of the Convention of which he complained.

Article 50 (now Article 41)

The Court awarded the applicant the total sum of 63,475 SEK (approximately €6,290) in respect of costs and expenses.

The French President's participation in the applicant's criminal trial as a civil party did not violate the principles of equality of arms or independence and impartiality under Article 6 § 1

JUDGMENT IN THE CASE OF **THIAM v. FRANCE**

(Application no. 80018/12)

18 October 2018

1. Principal facts

The applicant was born in 1978 and lived in Limay.

The Société Générale bank lodged a criminal complaint against persons unknown in September 2008 for forgery, uttering forged documents, and fraud pursuant to complaints made by Mr Sarkozy, the then President of the Republic (the “President”), about a fraudulent payment for mobile telephones from his account. The public prosecutor launched a judicial investigation for fraud in October 2008 in respect of a particular organised gang during which the President applied to join the proceedings as a civil party.

The applicant and six other persons were accused of having obtained telephone accounts, mobile telephones and payment of subscriptions using a third party's banking information and were accordingly committed to trial in June 2009. Before the trial began, the applicant unsuccessfully complained of the President's application to join the proceedings as a civil party. The applicant was convicted and sentenced to a year's imprisonment, but the court deferred its decision on the President's claim for damages. In January 2010 the Versailles Court of Appeal varied the sentence to an eight months' imprisonment and ordered the applicant to pay the President compensation of €1 and court costs.

The applicant appealed and asked the Court of Cassation to refer a preliminary ruling on constitutionality (*question prioritaire de constitutionnalité* – QPC) to the Constitutional Council on the separation of powers, the rights of defence and the right to a fair trial. The Court of Cassation refused to refer the QPC and found that the President had been entitled to join the proceedings as a civil party during his term but remitted the case in part for failure to consider a suspended sentence. The Versailles Court of Appeal changed the applicant's sentence to a suspended ten months' imprisonment.

2. Decision of the Court

The applicant complained that joining the President as a civil party to the criminal proceedings breached the principle of equality of arms and infringed his right to an independent and impartial court within the meaning of Article 6 §§ 1 and 3 (d) of the Convention.

Article 6 §§ 1 and 3 (d)

The Court stressed that the choice of the French legislature to allow the President to act in judicial proceedings as a civil party during his term of office could not constitute a subject of dispute before the Court. While the concept of separation of powers between the executive and the judiciary is of increasing importance in its jurisprudence, neither Article 6 nor any other provision of the Convention requires States to adopt a specific constitutional model of interaction between the powers.

With regards to the equality of arms principle, the applicant complained of the President's involvement in his case for the imbalance created by Article 67 of the Constitution which provided the President with protection from actions against improper use of his civil-party intervention. However, the Court of Cassation considered that the applicant would have been unable to bring such an action in any event given he had not been granted any discontinuance or acquittal and the President had not initiated the prosecution himself. In view of this finding, the Court considered that the President's intervention in the applicant's proceedings had not deprived him of equal treatment.

Under the Constitution the President could not be compelled to appear as a witness. The applicant alleged that in order for his trial to be fair, there ought to have been an opportunity for direct confrontation with the President during the oral proceedings. However, the President's absence from the trial did not amount to a breach of Article 6 since it was based on a serious legal ground for the protection of the office of Head of State provided for by the Constitution. Moreover, the domestic courts' judgments had not referred to any decisive incriminating evidence given by the President which would have required him to be examined in a hearing for credibility and reliability. Accordingly, the nature of the evidence in the case had not required a testimony from the President.

Finally, there was no indication from the case file that the President had encouraged the public prosecutor's office to act in a way which would have unduly influenced the criminal court. There was similarly no evidence that the applicant had been denied the full benefit of adversarial proceedings.

Having regard to the above considerations, the Court concluded that the President's intervention in the proceedings as a civil party had not had the concrete effect of creating an imbalance in the rights of the parties. Accordingly, there had been no violation of Article 6 § 1 with respect to the equality of arms principle.

As for the applicant's allegation with regards to the lack of impartiality of the court, it was important to note that the applicant's guilt had been established by evidence which was separate from the President's civil action. Significantly, the applicant had not alleged that the Court of Cassation had acted on the President's instruction or demonstrated any form of bias. Therefore, there was nothing to suggest that the applicant's trial had not been impartial.

Moving on to the applicant's right to an independent tribunal, the Court reiterated that the appearance of independence is an important element of this right. Consequently, an applicant's right to an independent tribunal will be undermined where their fears in that regard are objectively justified. However, it considered that the terms of office of the judges and the existence of protection against external pressure in the present case guaranteed the national courts' functional independence from the executive. As noted by the Court of Cassation, judges were not subordinate to the Ministry of Justice and were therefore not subject to pressure in the exercise of their duties. Further, in France, security of judicial tenure was guaranteed by the Constitution and accompanied by rules of advancement and discipline.

The Court emphasised that the mere appointment of judges by the President did not entail a relationship of subordination provided that once they were appointed, the executive could not influence or pressure the judiciary in the exercise of its role. In France, judicial appointments were subject to the approval of the National Legal Service Commission (*conseil supérieur de la magistrature* – CSM) under Article 65 of the Constitution. Following their appointment, judicial transfers, promotion, and other career changes were subject to the CSM's intervention after adversarial proceedings. The CSM was also directly responsible for disciplinary matters and its decisions in this area were of a judicial character. Therefore, the signing by the President of judicial appointment instruments was merely a formality and did not undermine the independence of the judges concerned.

The applicant had not provided concrete evidence to show that he had an objectively justified fear that the domestic court judges were under the President's undue influence. The Court also noted that the present case had not borne any relation to the President's political duties. In addition, the Court of Cassation's

judgment was delivered at a date when the President no longer chaired the CSM; the role having been transferred to the President of the Court of Cassation.

While the Court considered it necessary to reiterate that the participation of a high-ranking figure, with an institutional role in judges' career development, as a claimant in proceedings may cast legitimate doubt as to the independence and impartiality of a tribunal, having regard to the above considerations and the subject matter of the dispute, there was no reason to suggest that the court was not independent in the present case. Accordingly, there had been no violation of Article 6 § 1 with regards to the applicant's right to an independent and impartial tribunal.

(5) Independence – Guarantees Against Outside Pressure

Despite the high level of media interest in the applicant's case there was nothing to suggest this had influenced the judges in their decision – no violation of Article 6 on this basis

JUDGMENT IN THE CASE OF CRAXI v. ITALY

(Application no. 34896/97)
5 December 2002

1. Principal facts

The applicant, Benedetto Craxi, was an Italian national born in 1934. Better known by the name of Bettino Craxi, before his death in January 2000 he had served as Secretary of the Italian Socialist Party and Prime Minister of Italy. His widow and two children indicated that as his heirs they wished to pursue the proceedings in the applicant's stead.

Criminal proceedings were instituted against the applicant after serious irregularities were discovered in the negotiations relating to an agreement between the Eni and Montedison groups to form the Enimont company. In 1992 the applicant and numerous others were charged with false accounting, illegal funding of political parties, corruption, extortion and handling offences, all of which had been committed in particular at the time of the sale of Montedison's shareholding to Enimont. In all, 26 notices of intention to commence criminal proceedings were issued against him. The criminal proceedings against the applicant and other political, economic and establishment figures were reported in the press.

The applicant was committed for trial in the Milan District Court in six sets of proceedings. He was convicted in all but one case and given prison sentences of up to eight and a half years.

In one of the six cases, the Eni-Sai case, the applicant was prosecuted for corruption. He was accused of having influenced and facilitated a planned joint venture between three companies belonging to the insurance sector. It was alleged that he and some of his co-defendants had illegally paid high amounts to public officials and the directors of the above-mentioned companies.

According to his lawyers, the applicant did not attend the first hearing in this case on grounds of ill-health and danger to his personal safety. He did not attend

any of the other 55 hearings because he moved to Tunisia in May 1994. During the trial a number of his co-defendants stated that they wished to remain silent, so their statements were appended to the case file. Other defendants in connected proceedings were questioned at the trial and a transcript of the questioning was also appended to the case file.

In a judgment of 6 December 1994 the applicant was sentenced *in absentia* to five and a half years' imprisonment. He appealed unsuccessfully against that judgment, challenging in particular the use of transcripts of statements by witnesses whom he had been unable to cross-examine. The Court of Cassation also dismissed an appeal by the applicant in a judgment of 12 November 1996, holding that his conviction had not been based exclusively on those statements since they had been corroborated by witness evidence.

2. Decision of the Court

Relying on Article 6, the applicant complained of the unfairness of the criminal proceedings against him. He submitted under Article 6 §§ 1 and 3 (b) that he had not had adequate time and facilities for the preparation of his defence and, under Article 6 §§ 1 and 3 (d) that he had been unable to cross-examine the prosecution witnesses or have them cross-examined. He further alleged under Article 6 § 1 that the press campaign conducted against him had influenced the judges determining the charges against him.

Article 6 §§ 1 and 3 (b)

The present application had been declared admissible solely as regards the alleged unfairness of the proceedings in the Eni-Sai case, so the Court limited its consideration to these.

From 18 October 1994 until the adoption of a judgment on the merits on 6 December 1994, hearings had been scheduled according to a timetable that had been agreed to by the applicant's lawyers. The applicant could therefore not complain about proceedings that had been arranged with the consent of his counsel. As regards the period before 18 October 1994, the Court noted that thirty-eight hearings had been held in the Eni-Sai case, at the same or almost the same time as numerous hearings in other cases in which the applicant had been prosecuted.

The applicant, who had not attended the first hearing, had of his own accord left Italy and moved to Tunisia, and had freely chosen not to appear in court. The

applicant's defence had consequently been conducted by lawyers, who had had to take part in a large number of hearings within a short space of time. However, it did not appear from the evidence before the Court that their presentation of his case had been deficient or ineffective. Furthermore, the applicant's lawyers had not provided the Court with any relevant explanation as to why they had not, until 9 November 1994, drawn the national authorities' attention to the problems they were encountering in preparing his defence. The Court accordingly held that there had been no violation of Article 6 under that head.

Article 6 §§ 1 and 3 (d)

The Code of Criminal Procedure provided for the possibility, in determining the merits of a charge, of using statements made before the trial by co-defendants who had subsequently exercised their right to remain silent, or by persons who had died before having the opportunity to give evidence in court. However, that fact did not deprive an accused of the right to have any material evidence against him examined in adversarial proceedings. In the present case, it appeared from the Court of Cassation's judgment of 12 November 1996 that the applicant had been convicted solely on the basis of statements made before the trial by other defendants who had chosen not to give evidence in court and by a person who had subsequently died. The applicant and his lawyers had not had the opportunity to cross-examine those witnesses and had consequently not been able to challenge the statements which had formed the legal basis for the applicant's conviction.

In that connection, the Court noted that the applicant's lawyers had not raised any objections in the Milan District Court contesting the lawfulness or advisability of appending the statements in issue to the case file. However, as the statements had been appended to the file in accordance with the relevant domestic legislation in force at the material time, the Court considered that any objection would have had little prospect of success and that the failure to raise such an objection could not be construed as a tacit waiver of the right to have prosecution witnesses cross-examined, especially as the applicant had subsequently raised the matter in the Court of Appeal and the Court of Cassation. The Court accordingly held that there had been a violation of Article 6 §§ 1 and 3 (d) under that head.

Article 6 § 1

The Court then turned to the applicant's allegations that press coverage of his case had influenced the judges presiding over his hearing. It was confirmed that according to the Court's case law a press campaign could in some cases undermine

the fairness of a trial by influencing public opinion and therefore the opinion of the jurors called upon to rule on the guilt of the accused. However, it was also reiterated that courts could never be asked to operate in a vacuum and that the public also had a right to receive information and ideas communicated by the media, especially in cases involving well known figures and politicians. Despite the importance of this right, the Court also made it clear that the right to a fair trial was so essential to democratic society that under the provisions of Article 6 States could not allow media commentary to, intentionally or unintentionally, reduce a person's chances of a fair trial or undermine public confidence in the courts as authoritative bodies in the administration of criminal justice.

In this case, the Court observed that the high levels of interest present in the media and the public stemmed from the eminent political position occupied by the applicant, the political context in which the alleged offences had taken place, and the nature and gravity of those offenses. In the Court's view, it was inevitable in a democratic society that the press should sometimes make harsh comments on a sensitive case such as the present one, which called into question the morality of high-ranking public officials and the relations between the political and business worlds.

The Court further noted that the courts that had dealt with the applicant's case had been composed exclusively of professional judges, rather than jurors who were members of the public. These judges had sufficient experience and training to avoid being influenced by the press campaign regarding the applicant. The Court also observed that the applicant had been convicted following adversarial proceedings, in which the applicant had every chance to present to the domestic court any arguments which he thought may have helped his case.

Admittedly, the Court had found a breach of the requirements of a fair hearing in this case, but that had resulted from the judges' application of legislative provisions that were general in scope and were applicable to everyone. Therefore, there was nothing in the present case to suggest that the judges had been influenced by the statements made in the press. The Court accordingly held that there had been no violation of Article 6 under that head.

Article 41

The Court ruled that the finding of a violation constituted in itself sufficient just satisfaction in this case and that as the applicant had not submitted any evidence as to his costs no payment under that heading would be awarded.

The applicant's dismissal from the post of president of a court of appeal breached Article 6 § 1 as the court had failed to ensure an independent and impartial examination of his case

GRAND CHAMBER JUDGMENT IN THE CASE OF
DENISOV v. UKRAINE

(Application no. 76639/11)
25 September 2018

1. Principal Facts

The applicant, Mr Denisov, started his judicial career in 1976, when he was first elected to the post of judge of a district court. During his judicial career the applicant held the position of president in several courts. In December 2005 the applicant was elected to the post of judge of the Kyiv Administrative Court of Appeal (the “ACA”), and in February 2009 he was appointed as the president of that court by the Council of Judges of Ukraine (a body of judicial self-governance). He was appointed for a five-year term on the understanding that he would reach the retirement age in July 2013, before the end of that term.

On 24 May 2011 the Council of Administrative Court Judges (another body of judicial self-governance), chaired by Judge K., made a submission to the High Council of Justice (“HCJ”) proposing the applicant’s dismissal from the position of president of the ACA for failure to perform his administrative duties properly. On 14 June 2011 the HCJ examined the case in the applicant’s absence and decided to dismiss him from the post of president of the court. The HCJ noted that “significant shortcomings, omissions and errors, and grave violations of the foundations of the organisation and administration of justice set forth by law [had] been found in the organisation of the work of the Kyiv Administrative Court of Appeal”. It stated that the improper organisation of the court’s work had been caused by the applicant.

The decision was voted on by the HCJ, whose members present on that occasion included Judge K., the Prosecutor General and other judicial and non-judicial members. Of the eighteen members present, eight were judges. Fourteen votes were cast in favour of the applicant’s dismissal. According to the applicant, the composition of the HCJ in his case included two members who on earlier occasions had initiated proceedings for his dismissal from the post of judge for an alleged breach of oath. The applicant also alleged that the President of the HCJ and another member of the HCJ had previously attempted – albeit without success – to influence him in the course of his professional activities.

On 23 June 2011 the applicant was dismissed from his administrative position, though he remained in office as a judge.

The applicant challenged the decision of the HCJ before the Higher Administrative Court (“HAC”). He submitted that the HCJ had failed to comply with the requirements of an independent and impartial tribunal. The applicant further argued that his right to participate in the hearings had not been secured, and that the decision of the HCJ was worded in general terms and did not refer to any specific facts. The applicant also claimed compensation for the pecuniary damage caused by the ensuing reduction in his remuneration.

On 25 August 2011 the HAC held a hearing in the presence of the applicant and decided to dismiss his claim in respect of pecuniary damage without considering it. On 11 October 2011 the HAC rejected the applicant’s claim concerning his dismissal from the administrative position as unsubstantiated. The HAC stated that the applicant had not contested the facts forming the grounds for his dismissal and therefore those facts had been taken as established. The HAC concluded that the HCJ’s decision had been lawful and that the applicant’s right to participate in the proceedings in person had not been violated because the HCJ had taken all the necessary measures to inform him about the hearings and the applicant had not had any valid reason for being absent from the hearings.

Following his dismissal from the position of president of the ACA, the applicant continued to work as a regular judge in the same court until 20 June 2013, when Parliament dismissed him from the post of judge after he had tendered a statement of resignation.

2. Decision of the Court

Relying on Articles 6 § 1 and 8, the applicant complained that his dismissal from the position of president had not been carried out in conformity with the requirements of independence and impartiality and constituted an unlawful and disproportionate interference with his private life.

Article 6 § 1

The applicant complained under Article 6 § 1 that the proceedings before the HCJ and the HAC concerning his removal from the position of president of the ACA had not been compatible with the requirements of independence and impartiality. He complained, in addition, that the HAC had not provided a sufficient review of his case, thereby impairing his right of access to a court.

The Court first considered the admissibility of the claim. The Government had submitted that the civil limb of Article 6 was not applicable since there was no “civil” right at issue. It was argued that the dispute had been entirely within the sphere of public law and the claim submitted by the applicant in respect of pecuniary damage concerned a small amount, which had not constituted a significant disadvantage for him.

The Court noted that scope of the “civil” concept in Article 6 was not limited by the immediate subject matter of the dispute. Instead it covered cases which might not initially appear to concern a civil right but have direct and significant repercussions on a private pecuniary or non-pecuniary right belonging to an individual. The Court recalled the presumption that Article 6 applies to “ordinary labour disputes” between a civil servant and the State and that it would be for the respondent Government to show that a civil servant did not have a right of access to a court under national law and that this exclusion of the rights under Article 6 was justified.

The Court reiterated that a public law dispute might bring the civil limb into play if the private law aspects predominate over the public law ones in view of the direct consequences for a civil pecuniary or non-pecuniary right. Furthermore, the Court applied a general presumption that such direct consequences for civil rights exists in “ordinary labour disputes” involving members of the public service, including judges. It concluded that this case concerned an “ordinary labour dispute” given that it essentially affected: (i) the scope of the work which the applicant was required to perform as an employee; and (ii) his remuneration as part of his employment. There was no reason to conclude that there was no “civil” element in the applicant’s dispute or that such an element was insufficiently significant to bring the “civil” limb of Article 6 into play. The Government’s objection as to the applicability of the Article 6 § 1 was dismissed accordingly.

Moving on to consider the merits of the complaint, the Court recalled that in its judgment in *Oleksandr Volkov v. Ukraine*^[411], it had looked at the same bodies and constitutional arrangements as in the present case, and it had found a violation of Article 6 § 1 of the Convention in relation to Mr Volkov who had been similarly dismissed as a judge. It was noted that the present applicant’s case was heard and determined by 18 members of the HCJ, of whom only eight were judges. The non-judicial members therefore constituted a majority capable of determining the outcome of the proceedings. Furthermore, Judge K., who was a member of the HCJ, had initially in his capacity as chairman of the Council of Administrative Court

411 *Oleksandr Volkov v. Ukraine*, judgment of 9 January 2013, no. 21722/11, (included as a summary in this publication).

Judges, played a role in the preliminary inquiry of the applicant's case and in making the proposal to the HCJ for his dismissal, which casted objective doubt on Judge K.'s impartiality. Therefore, the Court concluded that the proceedings before the HCJ had lacked the guarantees of independence and impartiality in view of the structural deficiencies and the appearance of personal bias.

The Court also looked at whether the HAC had provided a sufficient review of the applicant's appeal. In its decision the HAC considered that the applicant had not contested the facts forming the grounds for his dismissal and therefore those facts were taken as established. The Court considered that this conclusion was inconsistent with the grounds of the applicant's claim before the HAC, in which he clearly contested those facts. Secondly, the HAC made no genuine attempt to examine another important argument by the applicant alleging a lack of independence and impartiality in the proceedings before the HCJ. The HAC reached a general conclusion that the HCJ had not violated the Constitution or the laws of Ukraine but provided no reasons in that regard. Therefore, the review of the applicant's case by the HAC was not sufficient. Accordingly, the Court concluded that the HCJ had failed to ensure an independent and impartial examination of the applicant's case, and the subsequent review of his case by the HAC had not put those defects right. Therefore, there had been a violation of Article 6 § 1.

Article 8

The applicant complained that his right to respect for his private life had been violated by his dismissal from the position of president of the ACA.

The Court observed that the explicit reasons for the applicant's dismissal from the position of president of the ACA were strictly limited to his performance in the public arena, namely his alleged managerial failings, which were said to undermine the proper functioning of the court. It was noted that those reasons related only to the applicant's administrative tasks in the workplace and had no connection to his private life.

The Court then considered whether the dismissal had negative consequences for the aspects constituting his "private life". It was noted that the dismissal did not result in his removal from his profession. Furthermore, the applicant did not provide any evidence to suggest that the ensuing reduction in his monthly remuneration seriously affected the "inner circle" of his private life. Furthermore, his professional reputation had not been affected as his work as a judge had never been brought to question.

Therefore, the Court concluded that the dismissal had limited negative effects on the applicant's private life and did not cross the threshold of seriousness for an issue to be raised under Article 8. The complaint was hence declared inadmissible.

Article 1 of Protocol No 1

The applicant complained of a violation of his pecuniary rights under Article 1 of Protocol No. 1 because he had been precluded from receiving a higher salary and higher retirement benefits at a later stage. The Court stated that this Article applies only to a person's existing possessions and does not create a right to acquire property. Therefore, future income cannot be considered to constitute "possessions" unless it has already been earned or is definitely payable. The complaint was therefore declared inadmissible.

Article 41

The Court held that Ukraine was to pay the applicant €3,000 in respect of non-pecuniary damage and €3,000 in respect of costs and expenses.

The lack of independence of a trial court constituted by an assessor violated Article 6 § 1 of the Convention

JUDGMENT IN THE CASE OF
HENRYK URBAN AND RYSZARD URBAN v. POLAND

(Application no. 23614/08)
30 November 2010

1. Principal facts

The applicants were born in 1962 and 1960 respectively and lived in Uherce Mineralne, Poland. On 2 October 2007 they were convicted by the Lesko District Court for failing to disclose their identity to the police. The applicants appealed, objecting to the fact their case had been decided by an ‘assessor’ and not by a judge.

The Law of 27 July 2001 on the Organisation of Courts (the “2001 Act”) laid out the requirements that needed to be fulfilled to assume the office of a district court judge. Assessors were candidates for the office of district court judge who, under the 2001 Act, had to work for a minimum of three years as an assessor in a district court on completion of their training and examinations.

In their objection, the applicants relied heavily on a judgment by the Constitutional Court of 24 October 2007 which had found that the vesting of judicial powers in assessors by the Minister of Justice was unconstitutional since the assessors did not enjoy the necessary guarantees of independence which were required of judges. Nevertheless, on 10 December 2007 the Krosno Regional Court upheld the District Court’s judgment. The office of assessor was later abolished altogether and, in January 2009, the Polish Parliament enacted a new law for the establishment of a comprehensive and centralised institution for training judges and prosecutors.

2. Decision of the Court

Relying on Article 6 § 1 of the Convention, the applicants argued that they had been deprived of a fair trial on account of the lack of independence of the trial court.

Article 6 § 1

The applicants argued that the legislation on the status of assessors had not met the standard of an “independent tribunal” required under Article 6. The Court began

by noting that in its analysis of the question of the independence of assessors the Constitutional Court observed that Article 45 of the Polish Constitution was modelled on Article 6 § 1. The important consideration for the Court was that the Constitutional Court found that the manner in which Poland had legislated for the status of assessors was deficient since it lacked the guarantees of independence required under Article 45 § 1 of the Constitution, guarantees which were substantively identical to those under Article 6 § 1. Hence, having regard to the similarity between the constitutional and the Convention requirements in so far as judicial independence was concerned, the Court held that the Constitutional Court's findings applied to the present case.

The Court underlined that the Constitutional Court had set aside the regulatory framework governing the institution of assessors as laid down in the 2001 Act. It stressed however that the Constitutional Court did not exclude the possibility that assessors or similar officers could exercise judicial powers provided they had the requisite guarantees of independence. What the Court was concerned with in this case was not to rule *in abstracto* on the compatibility with the Convention of the institution of assessors, but to examine the manner in which Poland regulated the status of assessors. In this regard, the Court re-emphasised that in determining whether a body can be considered as "independent" regard must be had, *inter alia*, to the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.

The principal reason for the Constitutional Court's finding was related to the Minister's power to remove an assessor who exercised judicial powers, and the lack of adequate substantive and procedural safeguards against the discretionary exercise of that power. Like the Constitutional Court, the Court considered that the assessor in the applicants' case had lacked independence, as she could have been removed by the Minister of Justice at any time during her term of office and that there had been no adequate guarantees protecting her against the arbitrary exercise of that power by the Minister.

The Court found that these failings had not been rectified on appeal by the Regional Court. In the applicant's case, the Regional Court did not have the power to quash the judgment on the ground that the District Court had been composed of the assessor since the assessors vested with judicial powers were authorised to hear cases in first-instance courts. Thus, the Regional Court dismissed as unfounded the issue of the lack of independence of the assessor. The Court therefore held that the Lesko District Court had not been independent, in violation of Article 6 § 1.

Article 41

The Court held that in the particular circumstances of the case the finding of a violation constituted in itself sufficient just satisfaction for any non-pecuniary damage which might have been sustained by the applicants.

Having regard to the principle of legal certainty, the Court held that there were no grounds which would require it to direct the reopening of final rulings given by assessors in the period when the manner of conferring judicial powers on them had not been constitutionally questioned. Although the constitutional deficiency identified in its judgment required the intervention of the legislator to bring the status of assessors into line with the Constitution, there was no automatic correlation between that deficiency and the validity of each and every ruling given previously by assessors in individual cases. Furthermore, the Court noted that domestic authorities had implemented the Constitutional Court ruling that the unconstitutional provision be repealed eighteen months after the promulgation of its judgment. As such, the Court held that the constitutional and Convention deficiency regarding the status of assessors was remedied by the domestic authorities within the time frame stated. Finally, as the applicants has not submitted any evidence in relation to their claim for costs, no such award was made.

No reason to question the independence of the international members of Court of Bosnia and Herzegovina, making complaints in relation to Article 6 inadmissible, however the retrospective application of the 2003 Criminal Code to two war criminals breached Article 7

GRAND CHAMBER JUDGMENT OF
MAKTOUF AND DAMJANOVIC v. BOSNIA AND HERZEGOVINA

(Application nos. 2312/08 and 34179/08)

18 July 2013

1. Principal Facts

The first applicant, Abduladhim Maktouf, was an Iraqi national born in 1959 and the second applicant, Goran Damjanović, was a national of Bosnia and Herzegovina born in 1966. Both applicants were convicted by the Court of Bosnia and Herzegovina (“the State Court”) of war crimes committed against civilians during the 1992-1995 war.

The first applicant helped to abduct two civilians in 1993 in Travnik in order to exchange them for members of the ARBH forces (mostly made up of Bosniacs) who had been captured by the HVO forces (mostly made up of Croats). On 1 July 2005, a trial chamber of the State Court convicted the first applicant of aiding and abetting the taking of hostages (a war crime) and sentenced him to five years’ imprisonment under the 2003 Criminal Code of Bosnia and Herzegovina (“the 2003 Criminal Code”). On 4 April 2006, an appeals chamber of the State Court confirmed the conviction and the sentence after a fresh hearing with the participation of two international judges.

The second applicant took a prominent role in the beating of captured Bosniacs in Sarajevo in 1992, to punish them for resisting a Serb attack. On 18 June 2007, a trial chamber of the State Court convicted him of torture (a war crime) and sentenced him to 11 years’ imprisonment under the 2003 Criminal Code. On 18 November 2007, an appeals chamber of the State Court upheld that judgment.

The applicants’ constitutional complaints were ultimately rejected. The first applicant’s case resulted in a decision on 23 June 2007 by the Constitutional Court, which found that none of his rights under the Convention had been breached. The second applicant’s complaint was dismissed as out of time on 15 April 2009.

2. Decision of the Court

Relying on Article 6 § 1 (right to a fair trial), the first applicant alleged that the proceedings against him had been unfair, notably because the international judges who decided on his case on appeal had not been independent. Relying on Article 7 (no punishment without law), both applicants complained that the State Court had retroactively applied to them a more stringent criminal law, the 2003 Criminal Code, than that which had been applicable at the time of their commission of the criminal offences, namely the 1976 Criminal Code of the Socialist Federal Republic of Yugoslavia (“the 1976 Criminal Code”). Further, relying on Article 14 (prohibition of discrimination) and Article 1 of Protocol No. 12 (general prohibition of discrimination), they also complained that they had been treated differently from those who were tried before the Entity courts, which normally applied the 1976 Criminal Code in war crime cases and imposed on average lighter sentences than the State Court.

The case was relinquished to the Grand Chamber under Article 30.

Article 6 § 1

The first applicant challenged the independence of the two international members of the adjudicating tribunal as the Office of the High Representative had appointed them for a renewable period of two years.

The Court began by reiterating the factors used to determine whether a body could be described as independent, such as: the manner of appointment of its members; the duration of their term of office; the existence of guarantees against outside pressures; and the question whether the body presents an appearance of independence. It was noted that appointment of judges by the executive or the legislature is permissible, provided that appointees are free from influence or pressure when carrying out their adjudicatory role.

On the facts, the Court found no reason to question the independence of the international members of the State Court from the High Representative. Their appointments were made on the basis of a recommendation from the highest judicial figures in Bosnia and Herzegovina and they were under identical duties and requirements as the national members whose independence was undisputed. Furthermore, the fact that the international judges had been seconded from amongst professional judges in their respective countries was an additional guarantee against outside pressure. Though their term of office was relatively short, this was

understandable in the context of their secondment and given the provisional nature of the international presence at the State Court.

Hence, there was no reason to call into question the finding of the Constitutional Court of Bosnia and Herzegovina that the State Court was independent within the meaning of Article 6 § 1. Accordingly, the complaint was found to be manifestly ill-founded and declared inadmissible.

Article 7

Both applicants complained that the criminal law applied to them, the 2003 Criminal Code, was more stringent than the applicable law at the time of their commission of the criminal offences, the 1976 Criminal Code.

The Court considered the different sentencing frameworks regarding war crimes provided by the two Criminal Codes. The State Court had sentenced the first applicant to five years' imprisonment, the lowest possible sentence under the 2003 Code. In contrast, under the 1976 Code, he could have been sentenced to a year's imprisonment. The second applicant had been sentenced to 11 years' imprisonment, slightly above the minimum of ten years. Under the 1976 Code, it would have been possible to impose a sentence of only five years. It was of particular relevance that the 1976 Code was more lenient in respect of the minimum sentence, as the first applicant had received the lowest sentence provided for and the second applicant had received a sentence which was only slightly above the lowest sentence provided for. The Court granted that the applicants' sentences were within the latitude of both the 1976 Criminal Code and the 2003 Criminal Code. While it could not be said with any certainty, the applicants could have received lower sentences had the 1976 Code been applied. Accordingly, since there was a real possibility that the retroactive application of the 2003 Code operated to the applicants' disadvantage, the Court found that it could not be said that they had been afforded effective safeguards against the imposition of a heavier penalty, in breach of Article 7 § 2.

Furthermore, the Court rejected the Government's argument that if an act was criminal under "the general principles of law recognised by civilised nations" within the meaning of Article 7 § 2 at the time when it was committed, then the rule of non-retroactivity of crimes and punishments did not apply. This argument was inconsistent with the intention of the drafters of the Convention, as Article 7 § 2 had been included so as to ensure that there was no doubt about the validity of prosecutions after the Second World War in respect of the crimes committed during

that war. It was clear in the Court's opinion that the drafters of the Convention had not intended to allow for any general exception to the rule of non-retroactivity.

Accordingly, there had been a violation of Article 7 in both applicants' cases. However, the Court emphasized that this did not indicate that lower sentences ought to have been imposed, but simply that the sentencing provisions of the 1976 Code should have been applied.

Article 14 together with Article 1 of Protocol No. 12

The Court declared inadmissible the applicants' complaints under Article 14 and/or Article 1 of Protocol No. 12. The Court was aware that the Entity courts imposed in general lighter sentences than the State Court at the time. However, that treatment was not to be explained in terms of personal characteristics (such as nationality, religion or ethnic origin) and therefore it did not amount to discriminatory treatment.

Article 41

The finding of a violation was held to constitute sufficient just satisfaction for any non-pecuniary damage suffered. However, the Court ordered Bosnia and Herzegovina pay each applicant €10,000 in respect of costs and expenses.

Secretive lustration proceedings against the applicant were found to constitute criminal proceedings and the withholding of relevant documents from the applicant throughout proceedings on the grounds of confidentiality was held to be unfair under Article 6 § 1 taken together with Article 6 § 3

JUDGMENT IN THE CASE OF
MATYJEK v. POLAND

(Application no. 38184/03)

24 April 2007

1. Principal facts

The applicant, Tadeusz Matyjek, a Polish national, was born in 1935 and lived in Warsaw.

The case concerns so-called “lustration proceedings” in Poland. The 1997 Lustration Act in Poland obliged persons exercising public functions to disclose whether they had worked for or collaborated with the State’s security services (the “secret services”) between 1944 and 1990. The applicant, who had been a Member of the Parliament in Poland, declared that he had not collaborated with the secret services during this period. Subsequently, proceedings were brought against the applicant by the Commissioner of Public Interest. Hearings were held *in camera* in September and October 1999.

On 17 December 1999 the Warsaw Court of Appeal, relying on an expert opinion prepared by the State Security Bureau’s Department of Criminology and Chemistry, found that the applicant had been a deliberate and secret collaborator with the secret services and that he had therefore lied in his lustration declaration. The operative part of the judgment was served on him, but the reasoning was considered “secret”. The reasoning could only be consulted in the court’s “secret registry”.

The applicant appealed, maintaining that his contacts with the Civil Militia and a secret service agent had been purely private and had never taken the form of conscious collaboration. He also requested the examination of more witnesses and called for an independent opinion to be commissioned from an expert who did not belong to an agency of the State Security Bureau. On 17 February 2000 the applicant’s appeal was dismissed. As before, the written reasoning for the dismissal was not served on the applicant. The Supreme Court subsequently quashed that judgment and found a serious procedural shortcoming in so far as the applicant’s request to call two additional witnesses had been disregarded.

In December 2000 the Head of the State Security Bureau lifted the confidentiality restrictions from the applicant's case-file. In the course of further proceedings, the Court of Appeal examined witnesses named by the applicant, received further documents concerning the applicant from the State Security Bureau, held a public hearing and ordered an expert opinion from the Warsaw University Institute of Criminology. However, following another hearing held *in camera*, the Warsaw Court of Appeal found that the applicant had lied in his lustration declaration. In May 2003 the Supreme Court finally dismissed the applicant's cassation appeal.

According to the domestic law in force at the relevant time, the Court of Appeal's judgment of 17 February 2000 was considered final. Therefore, with effect from that date the applicant was deprived of his mandate as a Member of Parliament and was banned from being a candidate in elections or from holding any other public office for the next ten years.

2. Decision of the Court

Relying on Article 6 of the Convention, the applicant complained about the unfairness of the lustration proceedings against him. He particularly referred to the unequal and secret nature of the proceedings, the confidentiality of relevant documents and the unfair procedures governing access to the case file.

In its admissibility decision of 30 May 2006, the Court decided that Article 6 under its criminal head applied to the lustration proceedings.

Article 6 § 1 in conjunction with Article 6 § 3

The Court accepted that, in certain situations, there could be a compelling reason for maintaining secrecy of documents, even those produced under the former regime. Nevertheless, such a situation could only arise exceptionally and it was for the Government to prove the existence of such an interest.

It was noted that at least part of the documents relating to the applicant's lustration had been classified as "top secret". The security services had had the power to lift that confidentiality rating, which it had done in December 2000 in respect of certain material in the case file. However, although the applicant had been allowed access to his file from that date onwards, restrictions still applied to any documents subsequently added to the file.

It was observed that at the pre-trial stage, the Commissioner of Public Interest had had right of access to all material on the applicant collated by the former security services. When the trial began, the applicant had been given access to his file but any confidential documents could only be consulted in the “secret registry” of the court. No copies could be made of material in the file. Any notes taken when consulting the file or during hearings, which were mostly held *in camera*, had to be made in special notebooks which were then sealed and left at the “secret registry”. Identical restrictions were imposed on his lawyer. It was noted that the applicant had had to rely solely on memory and this had prevented him from using the notes effectively or showing them to an expert for opinion. Even more importantly, he claimed that he had not been allowed to use those notes to defend himself during his trial, an allegation which had not been contested by the Government.

Given what had been at stake in the lustration proceedings – namely the applicant’s good name, loss of his seat in Parliament and a ban from holding public office for ten years – the Court considered it had been important for him to have unrestricted access to his file and to any notes he had made, including, if necessary, the possibility of obtaining copies of relevant documents.

The Court concluded that the lustration proceedings against the applicant, taken as a whole, were unfair under Article 6 § 1 taken together with Article 6 § 3 and there had, accordingly, been a violation of those provisions.

Article 41

The Court held that the finding of a violation constituted sufficient just satisfaction for non-pecuniary damage and awarded the applicant €1,220 for costs and expenses.

Proceedings that led to the dismissal of a judge of the Supreme Court lacked independence and impartiality and were in breach of Articles 6 and 8 of the Convention

JUDGMENT IN THE CASE OF **OLEKSANDR VOLKOV v. UKRAINE**

(Application No. 21722/11)

9 January 2013

1. Principal facts

The applicant, Mr Oleksandr Fedorovych Volkov, was elected to the post of judge of the Ukrainian Supreme Court on 5 June 2003. On 2 December 2005 he became Deputy President of the Council of Judges of Ukraine, and on 30 March 2007 he was elected President of the Military Chamber of the Supreme Court.

On 7 December 2007, the applicant was elected to the High Council of Justice (“HCJ”), but did not assume his position as he was prevented from taking the oath due to preliminary inquiries taking place into possible professional misconduct.

In December 2008 and March 2009 respectively, two members of the HCJ, R.K. and V.K. (who was elected president of the HCJ in March 2010) lodged separate requests with the HCJ asking it to determine whether the applicant could be dismissed from the post of judge for “breach of oath”, claiming that on several occasions the applicant had reviewed decisions delivered by Judge B., his wife’s brother, and that he had committed a number of gross procedural violations when dealing with cases concerning corporate disputes involving a limited liability company.

On 26 May 2010 the HCJ considered the requests lodged by R.K. and V.K. and adopted two decisions that led to the HCJ making submissions to Parliament to have the applicant dismissed from his post as a judge. On 17 June 2010, Parliament, having considered the HCJ’s submissions, as well as the recommendation of the Parliamentary Committee on the Judiciary (“Parliamentary Committee”), voted for the applicant’s dismissal.

The applicant challenged this dismissal before the Higher Administrative Court (“HAC”), which however found that the HCJ’s application to dismiss him following V.K.’s inquiry had been lawful and substantiated. However, the HAC also found that the application for the applicant’s dismissal following R.K.’s inquiry had been unlawful because the applicant and his wife’s brother were not considered relatives

under the legislation in force at the time. However, the HAC refused to quash the HCJ's actions, noting that under the applicable provisions it was not empowered to do so. The HAC further noted that there had been no procedural violations before the Parliamentary Committee or Parliament.

2. Decision of the Court

Relying in particular on Article 6 § 1 (the right to a fair trial) and Article 8 (right to respect for private and family life) of the Convention, the applicant complained about the unfairness of the proceedings against him, and about the fact that his dismissal for a breach of the fundamental standards of the judicial profession had amounted to an interference with his private and professional life. He further complained that he had no effective remedies in respect of his unlawful dismissal in contravention of Article 13.

Article 6 § 1

The applicant made seven different complaints under Article 6 § 1 of the Convention. He complained that: (i) his case had not been considered by an “independent and impartial tribunal”; (ii) the proceedings before the HCJ had been unfair, in that they had not been carried out pursuant to the procedure envisaged by Chapter 4 of the HCJ Act 1998, which offered a set of important procedural guarantees, including limitation periods for disciplinary penalties; (iii) Parliament had adopted its decision on his dismissal at a plenary meeting via an abuse of its electronic voting system; (iv) his case had not been heard by a “tribunal established by law”; (v) the decisions in his case had been taken without a proper assessment of the evidence and important arguments raised by the defence had not been properly addressed; (vi) the absence of sufficient competence on the part of the HAC to review the acts adopted by the HCJ had run counter to his right to a court; and (vii) the principle of equality of arms had not been respected.

The Court began by considering whether the protections of Article 6 applied to the applicant's case as in prior cases it had ruled that employment disputes between authorities and public servants were excluded from the scope of Article 6 as they were not considered civil disputes. The Court therefore applied the test first set out in *Vilho Eskelinen v. Finland*^[412]: had the State expressly excluded access to a court for employment disputes related to the post or category of staff in question and was this exclusion justified on objective grounds in the State's interest. As the applicant's case had been considered by two judicial bodies, the HJC and the HAC, it was clear

412 *Vilho Eskelinen v. Finland*, Grand Chamber judgment of 19 April 2007, no. 63235/00.

that national law did not expressly exclude the applicant from having access to a court with regard to his claim. Therefore, Article 6 applied under its civil head.

Turning to questions of independence and impartiality, the Court found that the facts of the case pointed to the presence of structural deficiencies in the proceedings before the HCJ as well as to personal bias in some of its members. Under the law in force at the time, non-judicial staff, appointed directly by the Government and the Parliament, had comprised the vast majority of the HCJ's members. Of the sixteen members who had determined the case, only three were judges. Furthermore, the fact that the Minister of Justice and the Prosecutor General were *ex officio* members of the HCJ – a body concerned with the appointment, disciplining and removal of judges – had created the risk that judges, by perceiving their presence as a potential threat to their employment, would not act impartially and therefore undermine the necessity of ensuring judicial independence. The Court also observed that the members of the HCJ who had requested the applicant's dismissal had subsequently taken part in the decisions to remove him from his office.

The applicant's accusations of personal bias also had to be taken into consideration regarding Mr S.K., the chairman of the Parliamentary Committee on the judiciary, who also acted as a member of the HCJ. Mr S.K. had both played a role in refusing to let the applicant take the oath of office as a member of the HCJ and had published an opinion in which he stated he strongly disagreed with the applicant's action in a case where he had been a claimant.

The structural deficiencies of the proceedings had been reinforced at the parliamentary stage of the proceedings as two of the HCJ's members had also been members of the Parliamentary Committee. This served to contribute to the politicisation of the procedure and to undermine the principle of the separation of powers. Therefore, the deficiencies in impartiality relating to the HJC's chairman were also relevant to the parliamentary proceedings. In the plenary meeting of Parliament, the case had been presented by the chairman of the Parliamentary Committee and by the president of the HCJ, and the procedure had merely entailed an exchange of general opinions.

The Court was further not persuaded that the procedure before the HAC had offered sufficient review in the present case. It noted that the HAC was unable to formally quash a decision of the HCJ or Parliament, even when these decisions had been declared unlawful. Further, the Court noted that there was a lack of rules governing the progress of disciplinary proceedings. The Government further confirmed that an HAC declaration could not automatically lead to the reinstatement of a judge. Furthermore, important arguments advanced by the applicant, in particular his allegations regarding

impartiality, had not been properly addressed by the HAC. Moreover, the judges of the HAC who performed the judicial review were also under the disciplinary jurisdiction of the HCJ and could themselves have been subjected to its disciplinary oversight. As the independence and impartiality of the proceedings were therefore put into question, the Court concluded that there had been a violation of Article 6.

The Court further held that there had been additional violations of Article 6 in relation to the principle of legal certainty and finality as Ukrainian law in force at the time had not provided for any time limit on proceedings for dismissal of a judge for “breach of oath”. Article 6 had also been violated as the applicant’s dismissal during a plenary meeting of Parliament had been adopted in violation of parliamentary procedure and therefore of national law and the principle of the rule of law.

Regarding the complaint that the HAC had not been a “tribunal established by law”, the Court noted that the chamber’s composition had been defined by a judge who, despite his five-year term of office as HAC president having already expired, continued to act in this role. This failure to appoint a new president had been due to the fact that the national law under which presidents of the courts were appointed had been declared unconstitutional and new provisions had not yet been introduced. As a consequence, such appointments had become a matter of serious controversy among the Ukrainian authorities. Under these circumstances, the Court could not find that the chamber deciding the case had been composed in a manner satisfying the requirements of a “tribunal established by law” and therefore there had been in violation of Article 6.

Turning to the remaining three complaints the Court found that they raised no separate issues and that there was no need to examine them under this heading.

Article 8

The parties agreed that there had been an interference with the applicant’s right to respect for his private life, and the Court found no reason to hold otherwise as private life encompasses the right for an individual to form and develop relationships with other human beings, including relationships of a professional or business nature. The Court’s finding under Article 6 that the parliamentary vote on the decision to remove the applicant from his office had not been lawful under national law was sufficient to establish that there had been a violation of Article 8.

Although this conclusion in itself would have been sufficient, the Court examined the applicant’s complaint further and noted that at the time his case was decided,

there were no guidelines or practice establishing a consistent interpretation of the notion of “breach of oath”, and no adequate procedural safeguards had been put into place to prevent an arbitrary application of the relevant provisions. In particular, national law had not set out any time-limits for proceedings against a judge in case of “breach of oath”, which had made the disciplinary authorities’ discretion open-ended and had undermined the principle of legal certainty. Moreover, national law had not set out an appropriate scale of sanctions for disciplinary offences and had not developed rules ensuring their application in accordance with the principle of proportionality. Finally, as the Court found under Article 6, there had been no appropriate framework for an independent and impartial review in case of dismissal for “breach of oath”. As a consequence, the Court held that there had been a violation of Article 8.

Article 13

Given its findings under Article 6, the Court held that it was not necessary to examine the complaint under Article 13.

Article 46

The Court held that this case disclosed serious fundamental systemic problems in the Ukrainian legal system arising from the State’s failure to respect the principle of the separation of powers, and the failure to provide appropriate guarantees against abuse and misuse of disciplinary measures to the detriment of judicial independence. Consequently, the Court recommended that Ukraine should urgently restructure the institutional basis of its legal system in order to reform the organisation of its judicial discipline by taking a number of general measures, including legislative reforms.

In answering the question as to what individual measures would be the most appropriate to put an end to the violations in the present case, the Court did not consider the reopening of the domestic proceedings as an appropriate form of redress for the violations of the applicant’s rights, as there were no grounds to assume that his case would be retried in accordance with Article 6 in the near future. Given the very exceptional circumstances of the case, the Court held that Ukraine should secure the applicant’s reinstatement to the post of judge of the Supreme Court at the earliest possible date.

Article 41

The Court awarded the applicant €6,000 for non-pecuniary damage, and €12,000 in respect of costs and expenses arising from the case.

Proceedings before the Supreme Court in relation to disciplinary proceedings against a judge did not violate the requirement of independence and impartiality, however shortcomings in the conduct of the proceedings constituted a breach of Article 6

JUDGMENT IN THE CASE OF **RAMOS NUNES DE CARVALHO E SÁ v. PORTUGAL**

(Applications nos. 55391/13, 57728/13 and 74041/13)

6 November 2018

1. Principal Facts

The applicant, Paula Cristina Ramos Nunes de Carvalho e Sá, was a judge born in 1972. In 2010 and 2011 three sets of disciplinary proceedings were brought against the applicant, who was a judge at the Vila Nova de Famalicão Court of First Instance: firstly, for calling the judicial inspector responsible for her performance appraisal a “liar” during a telephone conversation and accusing him of “inertia and lack of diligence”; secondly, for the use of false testimony in the earlier proceedings; and thirdly, for asking the judicial investigator, in the course of a private conversation, not to take disciplinary action against the witness on her behalf who had been called during the first set of proceedings.

Between 2011 and 2012 the High Council of the Judiciary (*Conselho Superior da Magistratura* - CSM) ruling in the three sets of proceedings, respectively ordered the applicant to pay 20 day-fines (20 days without pay) for acting in breach of her duty of propriety; suspended her from duty for 100 days for acting in breach of her duty of honesty; and suspended her for 180 days for acting in breach of her duties of loyalty and propriety. In 2013 the Judicial Division of the Supreme Court unanimously dismissed the three appeals lodged by the applicant against the CSM’s decisions, without holding a hearing. The Supreme Court found, among other things, that its task was not to review the facts but only to examine whether the establishment of the facts had been reasonable and coherent. In 2014 the plenary CSM grouped together the penalties imposed in the three sets of disciplinary proceedings and imposed a single penalty of 240 days’ suspension on the applicant.

2. Decision of the Court

Relying on Article 6, the applicant alleged a violation of her right to an independent and impartial tribunal, her right to a review of the facts as established by the CSM and her right to a public hearing. She further complained that, in view

of the reclassification of the facts by the CSM, she had not been informed in detail of the nature of the accusations against her and accordingly had not had adequate time and facilities for the preparation of her defence. In a judgment of 21 June 2016, a Chamber of the Court held that there had been a violation of Article 6 of the Convention. At the Government's request under Article 43, the case was referred to the Grand Chamber.

Article 6

In relation to the CSM's alleged lack of independence and impartiality the Court noted that the applicant had not made this complaint in her initial application. Consequently, the Court concluded that it was made out of time since the domestic proceedings had ended more than six months before the complaint was submitted, and declared this part of the application inadmissible.

In relation to the applicant's complaint that she was not informed in detail of the accusation against her, and that she did not have adequate time and facilities for the preparation of her defence, the Court noted that the case concerned disciplinary proceedings applicable to judges. As neither the prosecuting authorities nor the criminal courts had been involved in determining the cases, the Court found the disciplinary proceedings against the applicant did not concern the determination of a criminal charge within the meaning of Article 6. Although the amount of the fine had been substantial and the sanction was therefore punitive in nature, its severity did not bring the offence into the criminal sphere. Consequently, the Court rejected as inadmissible this part of the applicant's complaint.

The Court then moved on to examine the impartiality and independence of the Judicial Division of the Supreme Court, and noted that there were two aspects to the applicant's complaint. The first concerned the fact that the President of the Supreme Court was also the President of the CSM, while the second related to the fact that the Supreme Court judges came under the authority of the CSM with regard to their careers and disciplinary proceedings against them.

In relation to the first aspect, the Court noted that the applicant's complaint concerned the highest court in Portugal, which was made up solely of professional judges who were independent and were subject to rules on incompatibility apt to guarantee their independence and impartiality. The composition of the Judicial Division of the Supreme Court was determined by the Status of Judges Act on the basis of objective criteria such as judges' seniority and their membership of a particular division, and the President of the Supreme Court did not sit in that ad hoc division.

In practice, the members of the division were formally appointed by the most senior Vice-President of the Supreme Court. Furthermore, the applicant did not allege that the judges of the Judicial Division had been acting on the instructions of the President of the Supreme Court or had been influenced by the latter, or that they had otherwise demonstrated bias. In particular, it was not established that those judges had been specially appointed with a view to adjudicating her case. The dual role of the President of the Supreme Court was therefore not such as to cast doubt on the independence and objective impartiality of that court.

In relation to the second aspect, the CSM's role regarding the careers of Supreme Court judges and disciplinary proceedings against them, the Court referred to its judgment in the case of *Oleksandr Volkov v Ukraine*^[413] concerning a similar issue. Unlike in the case of *Oleksandr Volkov*, no serious issues had been identified in terms of structural deficiencies or an appearance of bias within the Portuguese CSM. The Court emphasised that the independence of the judiciary in Portugal was protected both by the Constitution and by other provisions of domestic law, and the system whereby jurisdiction over appeals against decisions of the CSM was assigned to the Judicial Division of the Supreme Court had been endorsed on several occasions by the Constitutional Court.

It further noted that the judges of the Supreme Court, who were often in the final stages of their careers, were no longer subject to performance appraisals or in search of promotion, and that the CSM's disciplinary authority over them was, in reality, rather theoretical. The Court also observed the absence of any specific evidence of a lack of impartiality, such as the existence of pending disciplinary proceedings against one of the members of the benches that had examined the applicant's appeals. Nor was there any specific evidence of a lack of impartiality. Therefore, the fact that judges hearing cases were themselves still subject to the law in general, and to the rules of professional discipline and ethics in particular and might at some point be in a similar position to one of the parties was not in itself a sufficient basis for finding a breach of the requirements of impartiality. A purely abstract risk of this kind could not be regarded as apt to cast doubt on the impartiality of a judge in the absence of specific circumstances pertaining to his or her individual situation. As such, the Court found no evidence of a lack of independence and impartiality on the part of the Judicial Division of the Supreme Court, and held that there had been no violation of the requirement of independence and impartiality under Article 6 § 1.

The final point for the Court to examine was the applicant's complaint regarding the alleged insufficiency of the review conducted by the Judicial Division of the

413 *Oleksandr Volkov v. Ukraine*, judgment of 9 January 2013, no. 21722/11, (included as a summary in this publication).

Supreme Court and her complaint concerning the lack of a hearing – these were considered together since they were closely linked.

The Court considered, firstly, that the review of a decision imposing a disciplinary penalty for an alleged breach of professional obligations differed from that of an administrative decision that did not entail such a punitive element. Secondly, it noted that the disciplinary proceedings in the present case had concerned a judge. Even if they did not come within the scope of Article 6 under its criminal head, disciplinary penalties could nevertheless entail serious consequences for the lives and careers of judges. The judicial review carried out had to be appropriate to the subject matter of the dispute, that is, to the disciplinary nature of the administrative decisions in question. This consideration applied with even greater force to disciplinary proceedings against judges, who had to enjoy the respect necessary for the performance of their duties and where public confidence in the functioning and independence of the judiciary was at stake.

The proceedings before the CSM had afforded the applicant the opportunity to mount a defence. However, the proceedings had been in writing, despite the fact that the applicant had been liable to incur very serious penalties. She had been unable to attend the sittings in any of the three sets of proceedings concerning her, as the CSM was not authorised by law to hold public hearings, and had not had an opportunity to make oral representations, either on the factual issues and the penalties or on the various legal issues. Furthermore, the CSM had not heard any evidence from witnesses, although not only the applicant's credibility, but also that of crucial witnesses, had been at stake. Accordingly, the CSM had not exercised its discretionary powers on an adequate factual basis.

In the proceedings before the Judicial Division of the Supreme Court the applicant had denied calling the judicial inspector a "liar" and requesting that no proceedings be instituted against the witness whom she had wished to call. These facts were "decisive" and the applicant had faced the possibility of very serious penalties which carried a significant degree of stigma which could have had irreversible repercussions on her life and career. As to the extent of the review carried out by the Judicial Division of the Supreme Court regarding the establishment of the facts, that division had stated expressly that it did not have full jurisdiction in disciplinary matters but was called upon solely to review the lawfulness of the decisions under challenge. In particular, it had stressed that it did not have jurisdiction when it came to "gathering the evidence or establishing the key facts". It appeared therefore that, the Judicial Division of the Supreme Court had not been empowered to examine the decisive points in the proceedings, namely the content of the applicant's conversations with the judicial inspector and the judicial investigator.

The Court observed that the assessment of the facts entailed examining issues going to the credibility of the applicant and the witnesses. Having found that it did not have jurisdiction to re-examine the facts and the evidence, even on the basis of the material in the file sent to it, the Judicial Division of the Supreme Court had accordingly refused the applicant's request for a public hearing. In the Court's view, the dispute as to the facts and the repercussions of the disciplinary penalties on the applicant's reputation had made it necessary for the Judicial Division of the Supreme Court to perform a review that was sufficiently thorough to enable it firstly to determine, for instance, whether the applicant had made certain remarks during her telephone conversation with the judicial inspector or her private meeting with the judicial investigator and, secondly, to form its own impression of the applicant by affording her an opportunity to explain her version of the situation orally. The Court reiterated in that regard that no hearing had been held before the CSM and that the Judicial Division of the Supreme Court had been the first and only judicial body to examine the applicant's appeals against the CSM's decisions. In the present case the applicant had requested a public hearing. She should therefore have had the possibility of obtaining a hearing; this would have allowed for an oral confrontation between the parties and a more thorough review of the facts, which were disputed.

The Court concluded that taking into consideration: the specific context of disciplinary proceedings conducted against a judge; the seriousness of the penalties; the fact that the procedural guarantees before the CSM had been limited; and the need to assess factual evidence going to the applicant's credibility and that of the witnesses and constituting a decisive aspect of the case – the combined effect of two factors, namely the insufficiency of the judicial review performed by the Judicial Division of the Supreme Court and the lack of a hearing either at the stage of the disciplinary proceedings or at the judicial review stage, meant that the applicant's case had not been heard in accordance with the requirements of Article 6 § 1 of the Convention.

Article 41

The Court saw no causal link between the violations and the pecuniary damage alleged, and dismissed the applicant's claim for just satisfaction. In relation to costs and expenses, the applicant had provided documents only before the Grand Chamber without offering an explanation, and hence this claim was dismissed too.

As the national court ruling in the applicant's case met subjective and objective standards of independence and impartiality, the judicial review of an appointment to the judiciary did not constitute a violation of Article 6

JUDGMENT IN THE CASE OF **TSANOVA-GECHEVA v. BULGARIA**

(Application No. 43800/12)

15 September 2015

1. Principal Facts

The applicant, Ms Velichka Asenova Tsanova-Gecheva, was a judge. On 14 July 2009 she was appointed Vice-President of the Sofia City Court. When the post of President became vacant, the applicant was appointed to fill this position on an interim basis with effect from 22 November 2010.

After one month, the Supreme Judicial Council published a competition notice with a view to filling the vacant post. The applicant applied and following the assessment of all the applications, among all the candidates, she obtained the highest ranking along with Ms V.Y. Two secret ballots took place and on both times Ms V.Y. obtained the majority of the votes and therefore was nominated President of the Sofia City Court in May 2011.

Due to her alleged close friendship with the Bulgarian Minister of the Interior, Ms V.Y.'s candidature and appointment received widespread media coverage and were vehemently criticised by numerous journalists and public figures. Two judges of the Supreme Judicial Council resigned and publicly criticised the appointment procedure, stating that it had been non-democratic, and that the outcome had been fixed in advance.

The applicant appealed to the Supreme Administrative Court against the Supreme Judicial Council's decision via a judicial review, arguing that it was adopted in breach of the law and the applicable procedural rules. On 3 November 2011, the Supreme Administrative Court, ruling as a bench of three judges, set aside the appealed decision, however it did so solely on the grounds that the secret ballot was contrary to the statutory provisions which prescribed the vote should be conducted by means of a show of hands.

Ms V.Y. and the Supreme Judicial Council appealed on points of law against the Supreme Administrative Court's decision. In her observations, the applicant

contested the judgment of 3 November 2011, which, in her opinion, had not been accompanied by sufficient reasons. She maintained that, by rejecting her arguments concerning the lack of reasons for the Supreme Judicial Council's decision, the Supreme Administrative Court had not conducted a sufficiently wide-ranging review and had not examined all the legal and factual issues that were decisive for the outcome of the case.

On 12 January 2012, the Supreme Administrative Court, ruling as a bench of five judges, held that the vote by secret ballot conducted by the Supreme Judicial Council had been lawful. As a consequence, the latter's decision had been valid and the judgment of 3 November 2011 setting it aside had erred in its application of the law. Further, it held that it was unnecessary to rule on the arguments raised by the applicant, since the judgment complained of had been in her favour.

2. Decision of the Court

The applicant alleged that the scope of the judicial review of her appeal lodged against the Supreme Judicial Council's decision on the appointment of the new President of the Sofia City Court was insufficient and inadequate, and violated her right to a fair hearing in breach of Article 6 § 1 of the Convention. The applicant also submitted that the Supreme Administrative Court had failed to meet the standards of independence and impartiality required by Article 6.

Article 6 § 1

The Court began by stating that the Convention did not guarantee a right to be promoted or to hold a public office. However it also confirmed that if certain employment rights were recognised, at least on arguable grounds, under domestic law – in so far as the domestic courts had acknowledged their existence and had examined the grounds raised by the persons concerned in that regard – then Article 6 rights would apply in relation to the domestic application of that domestic law. Furthermore, as the applicant had access to a court under domestic law with regard to her complaint, the Court's restriction of the scope of Article 6 in relation to employment disputes between the State and its administrative officers did not apply in this case. Therefore, Article 6 applied under its civil limb.

In examining the applicant's complaint, the Court proceeded to examine whether the applicant had access to a court that satisfied the requirements of Article 6 and, more specifically, whether the scope of the judicial review conducted by the Supreme Administrative Court was sufficient.

In the Court's view, the Supreme Administrative Court had been entitled to set aside the nomination of Ms V.Y. as President of the Sofia City Court on several grounds of unlawfulness linked to the procedural and substantive requirements laid down by law, and to refer the case back to the Supreme Judicial Council for a new decision in conformity with possible directions issued by the Supreme Administrative Court itself regarding any irregularities found. However, it had not been empowered to review all aspects of the Supreme Judicial Council's decision. In particular, it could not, except in the case of an abuse of powers, have called into question the choice made by the Supreme Judicial Council as to who had been the best candidate for the post, and could not have substituted its own assessment for that of the Supreme Judicial Council.

Nevertheless, the Court explained that in situations of judicial review, Article 6 did not guarantee individuals the right to have the possibility of a domestic court substituting the relevant opinion of the administrative authorities with its own. In this regard, particular emphasis had to be placed on the respect to be accorded to administrative authorities' decisions taken on grounds of expediency, and those which often involve specialised areas of law. In the present case, although the domestic case law conferred a considerably broad discretion on the Supreme Judicial Council when it came to assessing candidates' qualities and choosing the person best qualified for the post, the Supreme Administrative Court had limited the scope of its review to whether the decision of the Supreme Judicial Council had involved an abuse of powers, that is, whether it had been made in breach of the purpose of the law. In addition, it had also reviewed whether the Supreme Judicial Council had complied with the relevant conditions expressly laid down in national law.

With regard to the nature of the decision in question, it had concerned the appointment of the president of a court. That issue entailed the exercise of the Supreme Judicial Council's wide powers of discretion, it being the authority specifically mandated to ensure the autonomous operation of the judiciary, particularly with regard to appointments and the disciplinary rules governing members of the judiciary, with the aim of ensuring judicial independence. Furthermore, the Supreme Judicial Council's decision had been taken following a rigorous and detailed selection procedure laid down by law and containing a number of procedural safeguards, with the aim of guaranteeing a transparent and fair selection process. The Supreme Administrative Court had simply reviewed compliance with these rules, of its own motion and in response to the parties' submissions. More generally, it had responded to the main arguments raised by the applicant, who, moreover, had not made any submissions concerning the alleged links between Ms V.Y. and the then Minister of the Interior. The Supreme Administrative Court had also confirmed that the reasons given by the Supreme Judicial Council in that regard had been sufficient.

The Court recognised that the allegations regarding the lack of transparency and interference by the political authorities in the appointment procedure in question, and the criticisms made in that regard by the competent international bodies, were a cause for concern. However, while it was aware of the importance of the procedures for appointing and promoting judges and their impact on the independence and proper functioning of the judicial system, it recognised that it was not its task to express a view on the appropriateness of the Supreme Judicial Council's choices, or on the criteria that should be taken into account. The Court therefore concluded that the scope of the Supreme Administrative Court's review had been sufficient for the purposes of Article 6.

The Court also specifically considered whether the Supreme Administrative Court had failed to meet the requirements of independence and impartiality required by Article 6. Prior to this judgment questions had already been raised over the procedure for the appointment of judges and the independence of the Supreme Judicial Council by the European Union's European Commission and the Advisory Council of European Judges in publications unrelated to this case. In order to establish if a tribunal is independent, regard must be had to the manner of appointment of its members and their term of office, the existence of safeguards against external pressure and the question whether the body presents an appearance of independence. As far as impartiality is concerned, it denotes the absence of prejudice or bias. According to the Court's settled case law, the existence of impartiality must be determined according to a subjective test, where regard must be had to the personal conviction and behaviour of a judge; and an objective test, consisting in ascertaining if the tribunal offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality. In the present case, the Court did not find any violation of the applicant's right to an independent and impartial tribunal as no external pressures were made on the judges of the Supreme Administrative Court, they were appointed following the procedure established, and a valid decision was adopted according to the domestic law.

In view of these considerations, the Court held that there had been no violation of Article 6 of the Convention.

(6) Appearance of Independence

The composition of a municipal police board gave rise to legitimate doubts as to its independence and impartiality, amounting to a breach of Article 6 § 1

JUDGMENT IN THE CASE OF **BELILOS v. SWITZERLAND**

(Application no. 10328/83)
29 April 1988

1. Principal facts

The applicant, Mrs. Belios, was a Swiss citizen and student who lived in Lausanne, Switzerland. The applicant received a fine of 200 Swiss francs for allegedly taking part in an illegal protest on 4 April 1981. The fine was imposed by the municipal Police Board (the “Board”) at a meeting on 29 May 1981 which was not attended by the applicant. The applicant subsequently lodged an application for appeal to the Board under the Vaud Municipal Decisions Act on the grounds that she had been tried without being summoned.

The evidence adduced by the applicant included witness evidence by her former husband that, at the time of the demonstrations, he was in fact with her at a café. However, the Board relied on a contradictory account of a police officer and concluded that it had “satisfied itself in the course of its enquiries that the defendant [had] indeed participated in the demonstration”. The Board upheld the conviction and ordered that the applicant pay costs, though it reduced the fine to 120 Swiss francs on the basis that the applicant did not play an active role.

The applicant subsequently appealed to the Criminal Cassation Division of the Vaud Cantonal Court (the “Cantonal Court”). The applicant argued that the Board was not an impartial and independent tribunal, and that the Cantonal Court should consider the evidence of the applicant’s former husband. The Cantonal Court held that by virtue of the reservations made to Article 6 of the ECHR by the Swiss Government in its interpretative declaration, the obligation to provide a public hearing and pronounce judgment publicly did not extend to proceedings relating to the determination of a criminal charge before an administrative authority. The fact that the appeal proceedings were in written form without any oral argument or taking of evidence was held not to be contrary to Article 6 § 1. The appeal was accordingly dismissed.

The applicant subsequently appealed to the Federal Court, arguing that Switzerland's interpretative declaration did not mean that an administrative authority such as the Board had the authority to determine criminal charges in the context where their decisions were not amenable to any form of judicial review. However, the Federal Court rejected this argument on the basis that the interpretive declaration limited Switzerland's obligations under Article 6 § 1 to a mere review of the lawfulness of the decision of the first instance court.

2. Decision of the Court

The applicant complained under Article 6 § 1 that she had not been tried by an independent and impartial tribunal with complete jurisdiction to consider and determine questions of fact and law.

Article 64

The Court first considered whether the interpretative declaration made by Switzerland when the instrument of ratification was deposited precluded Switzerland from complying with certain of its obligations under Article 6 § 1. It was concluded that the general nature of the interpretative declaration and the fact it did not contain a brief statement of the law concerned rendered it invalid as a reservation. As such, Switzerland remained bound by Article 6 § 1.

Article 6 § 1

The applicant submitted that the Board, composed as it was of a single official, meant that it was certain to adhere to the will of the police authorities. Moreover, she alleged that neither the Cantonal Court nor the Federal Court provided sufficiently extensive "ultimate control of the judiciary" as they were unable to reconsider findings made by the Board, a purely administrative body.

With regards to impartiality, the Court recalled that a "tribunal" is defined by its substantive judicial function: determining matters within its competence on the basis of the rule of law and conducting proceedings in a prescribed manner. The Court considered in the present case that whilst the single member of the Board was appointed by the municipality, this was not in of itself sufficient to cast doubt on the impartiality of the person concerned. It was further noted that the municipal civil servant sat in a personal capacity and in principle could not be dismissed from his term of office. Moreover, the personal impartiality of the official had not been called into question.

Nonetheless, the Court observed that justice must not only be done, but must also seem to be done. As the Board constituted a senior civil servant who was liable to return to other departmental duties, ordinary citizens of Lausanne such as the applicant would likely view him as a member of the police force subordinate to his superiors and loyal to his colleagues. Accordingly, the applicant's doubts as to the independence and organisational impartiality of the Board were legitimate.

The Court recalled that it must be satisfied that the forms of appeal available to the applicant must have made it possible to remedy the deficiencies noted in the first instance proceedings. The Court referred to the judgment of the Cantonal Court which noted that proceedings before it only amounted to a review of its lawfulness and did not include oral argument or the taking of evidence. Reference was also made to the judgment of the Federal Court that the Cantonal Court "did not have full competence to re-examine the facts". The Court additionally agreed with the applicant that the inability of the Federal Court to re-examine questions of fact or law (it being only concerned with preventing arbitrariness) rendered it incapable of remedying prior deficiencies. It was concluded that the forms of review provided at the level of the Cantonal Court and Federal Court were inadequate.

In conclusion, the Court found a violation of Article 6 § 1 as regards the principle of impartiality and independence of the tribunal and the adequacy of avenues for appeal.

Articles 50 (now Article 41)

The Court noted that it was not empowered under Article 50 to quash the conviction and sentence, nor alter domestic legislation, and rejected the applicant's request to seek cancellation and refund of the fine, and the amendment of the Vaud Municipal Decisions Act. However, it ordered the Government to pay the applicant in respect of costs and expenses, the sum of 11,750 Swiss francs (approximately €15,000), minus the sum paid to the applicant by the CoE in respect of legal aid.

(7) Impartiality- Objective and Subjective Impartiality

The failure to investigate and properly address allegations that a number of judges presiding over disciplinary proceedings against the President of the Slovakian Supreme Court were not impartial was held to violate Article 6

JUDGMENT IN THE CASE OF HARABIN v. SLOVAKIA

(Application no. 58688/11)
20 November 2012

1. Principal facts

The applicant, Mr Stefan Harabin, was a Supreme Court judge. At the time of this judgment he had been the President of the Supreme Court since June 2009 (after having previously held this office between 1998 and 2003). He had been the Minister of Justice of the Slovak Republic between July 2006 and June 2009.

In July and August 2010, the applicant, in his capacity as its President, prevented a group of auditors instructed by the Minister of Finance from carrying out an audit at the Supreme Court, the aim of which was to examine the use of public funds, the efficiency of financial management and the elimination of shortcomings identified in a previous audit. The applicant then informed the Minister of Finance that the Ministry lacked the legal basis and power to carry out the audit and that it was the Supreme Audit Office which had the authority to do so in respect of the principle of independence of the judiciary.

In November 2010, upon the submission by the Minister of Finance, the Minister of Justice initiated disciplinary proceedings before the Constitutional Court against the applicant for having prevented the audit. During the proceedings, the Minister of Justice challenged three constitutional judges for bias, on the ground that they had had a personal relationship with the applicant for several years and that they had been nominated to posts by the same political party. Also, the applicant challenged four different constitutional judges for bias. He argued that two of them had made negative statements about him in the media on two different occasions, that a third judge was a member of the same chamber as those two judges, and that a fourth had been convicted of a tax offence and had been criticised for ignoring an invitation by the Constitutional Court to reconsider his position as a judge. In reply to these objections, neither of the judges considered themselves biased and, in May

2011, the Constitutional Court decided not to exclude any of the seven judges from dealing with the case. The Constitutional Court noted that the determination of the disciplinary offence allegedly committed by the applicant fell within the exclusive jurisdiction of its plenary session, and considered that excessive formalism posed the risk of rendering the proceedings ineffective.

On 29 June 2011, the applicant was found guilty and sentenced to a disciplinary sanction which consisted of a 70% reduction of his salary for one year.

2. Decision of the Court

Relying on Article 6 (right to a fair trial), the applicant complained that the proceedings before the Constitutional Court had been unfair, alleging that a number of the judges who decided on the case had been biased. He also made a number of other complaints including: that the Constitutional Court had erroneously interpreted the relevant provisions as to what the elements of a serious disciplinary offence were; that he had been sanctioned for his legal opinions; that his right to peaceful enjoyment of his possessions had been impaired; that he had been discriminated against in the enjoyment of his rights set out above; and that he had had no effective remedies at his disposal to challenge the Constitutional Court's decision, in breach of Articles 10 (freedom of expression), 1 of Protocol No. 1 (protection of property), 13 (right to an effective remedy) and 14 (prohibition of discrimination) of the Convention.

Article 6

After having underlined that its task in the present case was exclusively to determine whether the applicant's rights under the Convention had been complied with in the proceedings before the Constitutional Court in which he was sanctioned for a disciplinary offence, the Court proceeded to address the complaint about the alleged lack of impartiality of the constitutional judges.

The Court stressed that it was particularly relevant that the guarantees of the right to a fair trial under Article 6 were complied with in proceedings initiated by a Government against a judge in his capacity as President of the Supreme Court, given that the confidence of the public in the functioning of the judiciary at the highest national level was at stake. Under Slovak law, disciplinary proceedings against the President of the Supreme Court could only be decided by a majority of the Constitutional Court's plenary. The Constitutional Court, faced with a situation where seven of its thirteen judges were challenged by the parties for bias, had had

to balance the need to respond to the requests for exclusion of those judges against the need to maintain its capacity to determine the case. The Court considered that, in doing so, the Constitutional Court had failed to take an appropriate stand from the point of view of the guarantees of Article 6.

Firstly, two of the judges challenged by the applicant and two of the judges challenged by the Minister had been excluded in an earlier set of proceedings before the Constitutional Court involving the applicant. Given that doubts were therefore likely to arise as to their impartiality; the Constitutional Court should have clearly adduced convincing arguments as to why the challenges could not be accepted in the disciplinary proceedings. Secondly, the Constitutional Court had not taken a stand as to whether any of the other reasons raised by the parties would have justified the exclusion of any of the relevant judges.

Only after answering the parties' arguments and establishing whether or not the challenges to the judges were justified, the question as to whether there was any proclaimed need or justification for not excluding any of the judges could have arisen. The reasons invoked by the Constitutional Court, namely the need to maintain its capacity to determine the case, could therefore not justify the participation of the judges in respect of whose alleged lack of impartiality the Constitutional Court had failed to convincingly dissipate doubts. The applicant's right to a hearing by an impartial tribunal had therefore been infringed.

Having regard to that conclusion, and considering that it had only limited powers to deal with errors of fact or law allegedly committed by national courts, the Court did not find it necessary to examine separately the applicant's other complaints relating to the alleged unfairness of the disciplinary proceedings against him.

Article 10

The applicant was sanctioned at the behest of the Minister of Justice and after the Constitutional Court had concluded that he had failed to comply with his obligations relating to court administration as laid down in the relevant domestic legislation. It was the applicant's professional behaviour in the context of administration of justice and in respect of a different State authority which represented the essential aspect of the case and which determined the application of the disputed sanction. It therefore did not amount to an interference with the exercise of the applicant's right to freedom of expression as guaranteed by Article 10.

Article 1 of Protocol No. 1

According to the applicant, the sanction imposed on him consisting in a 70% reduction of his annual salary was disproportionate and contrary to his right to peaceful enjoyment of his possessions. The Court found that the interference was provided for by law and pursued a legitimate aim in the public interest (i.e. to ensure monitoring of appropriate use of public funds and compliance by the applicant with his statutory obligations as President of the Supreme Court). The Court therefore rejected this part of the application as manifestly ill-founded.

Article 14

The applicant had not been treated differently in relation to other individuals in the same situation, and this part of the application was rejected by the Court.

Article 13

The Court reiterated that where the applicant alleged a violation of a right conferred by the Convention by the final judicial authority of the domestic legal system, the application of Article 13 is implicitly restricted. Therefore, the Court rejected this aspect of the applicant's complaint.

Article 41

The Court held that Slovakia had to pay the applicant €3,000 in respect of non-pecuniary damage, and €500 for costs and expenses arising from the case.

Article 6 applies to interim proceedings which are “civil” and where the interim measure determines the “civil” right at stake, as independence and impartiality must be guaranteed even in interim proceedings; close family ties between a judge and a party’s lawyer held to breach Article 6 § 1

JUDGMENT IN THE CASE OF **MICALLEF v. MALTA**

(Application no. 17056/06)
15 October 2010

1. Principal facts

The applicant, Joseph Micallef was a Maltese national who was born in 1929 and lived in Malta. In 1985 his sister, Mrs M., who since died, was sued in the civil courts by her neighbour in connection with a dispute between them. The presiding judge of the court hearing the case granted the neighbour an injunction in the absence of Mrs M., who had not been informed of the date of the hearing. In 1992 the court found against Mrs M. on the merits.

In the meantime, Mrs M. had brought proceedings in the Civil Court, sitting in its ordinary jurisdiction, alleging that the injunction had been granted in her absence and without giving her the opportunity to testify. In October 1990 the Civil Court found that the injunction had been issued in violation of the adversarial principle and declared it null and void.

In February 1993 the Court of Appeal upheld an appeal lodged by the neighbour and set aside the judgment of the Civil Court in favour of Mrs M. The Court of Appeal was presided over by the Chief Justice, sitting with two other judges. Mrs M. then lodged a constitutional appeal with the Civil Court, in its constitutional jurisdiction, alleging that the Chief Justice had not been impartial given his family ties with the lawyers representing the other party. She pointed out that he was the brother and uncle, respectively, of the lawyers who had represented her neighbour. The constitutional appeal, which was taken over by the applicant after his sister’s death, was dismissed in January 2004. In October 2005 a further appeal lodged with the Constitutional Court was also dismissed.

2. Decision of the Court

Relying on Article 6 § 1 of the Convention, the applicant complained of the Court of Appeal’s lack of impartiality on account of the family ties between the presiding

judge and the lawyer for the other party. He added that this had given rise to an infringement of the principle of equality of arms.

In a judgment of 15 January 2008, a Chamber of the Court held that there had been a violation of Article 6 § 1 of the Convention on account of the lack of objective impartiality of the Court of Appeal. The case was referred to the Grand Chamber under Article 43 at the Government's request.

Article 6

The Court first examined the admissibility of the complaint, and held that contrary to the Government's argument, the applicant did have victim status, firstly because he had been made to bear the costs of the case instituted by his sister and could thus be considered to have a patrimonial interest in the case and, secondly, because the case raised issues concerning the fair administration of justice and thus an important question relating to the general interest. The Court also found that the applicant had exhausted domestic remedies.

The main issue in relation to admissibility concerned the Government's argument that the guarantees provided by Article 6 § 1 did not apply to proceedings such as these, which concerned interim or provisional measures. Here the Court reiterated that preliminary proceedings, like those concerned with the grant of an interim measure such as an injunction, did not normally fall within the protection of Article 6. The Court observed that there was now a widespread consensus amongst CoE member States regarding the applicability of Article 6 to interim measures, including injunction proceedings. This was also the position adopted in the case law of the CJEU. The Court observed that a judge's decision on an injunction would often be tantamount to a decision on the merits of the claim for a substantial period of time, or even permanently in exceptional cases. It followed that, frequently, interim and main proceedings decided the same "civil rights or obligations", within the meaning of Article 6, and produced the same effects. In the circumstances the Court no longer found it justified to automatically characterise injunction proceedings as not determinative of civil rights or obligations. Nor was it convinced that a defect in such proceedings would necessarily be remedied in proceedings on the merits since any prejudice suffered in the meantime might by then have become irreversible.

The Court therefore considered that a change in the case law was necessary. Article 6 would be applicable if the right at stake in both the main and the injunction proceedings was "civil" within the meaning of Article 6 and the interim measure determined the "civil" right at stake. However, the Court accepted that in exceptional

cases it might not be possible to comply with all of the requirements of Article 6, though the independence and impartiality of the tribunal or the judge remained an inalienable safeguard.

In the present case the substance of the right at stake in the main proceedings concerned the use by neighbours of property rights in accordance with Maltese law, and therefore a right of a “civil” character according to both domestic law and the Court’s case law. The purpose of the injunction was to determine the same right as the one being contested in the main proceedings and was immediately enforceable. Article 6 was therefore applicable.

Moving on to consider the merits of the case, the Court reiterated that it assessed the impartiality of a court or judge according to a subjective test, which took account of a judge’s conduct, and an objective test which, quite apart from the judge’s conduct, sought to determine whether there were ascertainable facts, such as hierarchical or other links between the judge and other actors in the proceedings which might raise doubts as to his impartiality. The Court pointed out that even appearances might be of a certain importance in that regard.

The Court observed that under Maltese law, as it stood at the relevant time, there was no automatic obligation on a judge to withdraw in cases where impartiality could be an issue. Nor could a party to a trial challenge a judge on grounds of a sibling relationship – let alone an uncle-nephew relationship – between the judge and the lawyer representing the other party. Since then Maltese law had been amended and now included sibling relationships as a ground for withdrawal of a judge. In the dispute at issue here the Court took the view that the close family ties between the opposing party’s lawyer and the Chief Justice sufficed to objectively justify fears that the panel of judges lacked impartiality. Accordingly, it concluded that there had been a violation of Article 6 § 1.

Article 41

The Court considered that the finding of a violation constituted sufficient just satisfaction, but awarded the applicant €2,000 euros in respect of costs and expenses.

(8) Impartiality- Personal Impartiality

Appointment of the trial judge in Poland's high profile misappropriation scandal trial amounted to a violation of Article 6 on the basis that the tribunal had not been established by law, however no other violations of Article 6 were found

JUDGMENT IN THE CASE OF CHIM AND PRZYWIECZERSKI v. POLAND

(Application no. 36661/07 and 38433/07)
12 April 2018

1. Principal facts

The first applicant was Janina Irena Chim, who was born in 1950 and lived in Poland. The second applicant was Dariusz Przywieczerski, who was born in 1946 and lived in the United States. Ms Chim was deputy director general of the state-run Fund for the Service of Foreign Debt (the "FOZZ"). Mr Przywieczerski was the managing director and chairman of the board of a company which regularly transacted with the FOZZ. The purpose of the FOZZ was to collect and manage the funds earmarked for servicing Poland's foreign debt.

In May 1991 an investigation was opened following a complaint by an individual at the Polish consulate in Cologne, Germany. The pair were indicted in January 1998 and in March 2005 were both convicted of misappropriation of FOZZ funds and other offences. The first and second applicant were given prison sentences of six years and two and a half years respectively, in addition to fines.

The applicants appealed their convictions to the Warsaw Court of Appeal. They alleged that the appointment of the trial Judge A.K. to their cases by way of an order of the President of the 8th Division breached the Polish Code of Criminal Procedure (the "CCP") and was unlawful. They further alleged that he lacked impartiality. The second applicant highlighted statements made by Judge A.K. at the beginning of the trial and passages in the reasoning of the judgment which indicated a negative attitude towards the second applicant. Attention was also drawn to an interview given by Judge A.K. in which, according to the applicants, he assumed the defendant's guilt and voiced his opinion that the so-called "white collars" should have been severely punished. The applicants further noted Judge A.K.'s alleged links to the Law and Justice party and his involvement with the drafting of legislation amending the limitation periods for offences covered by the second applicant's indictment (the "2005 Amendment").

The appeal was partly successful. In January 2006, the Court of Appeal in Warsaw quashed some of the convictions and lowered the fines imposed on the applicants. The Court of Appeal acknowledged flaws in the assignment of Judge A.K. to the case and established that he had actively sought to influence the 2005 Amendment to the detriment of the applicants. However, the Court of Appeal upheld the applicants' convictions for misappropriation of the FOZZ's property of a considerable value, on the basis that the admitted shortcomings did not influence the content of Judge A.K.'s judgment, and dismissed the remainder of the appeals.

The Prosecutor General appealed the case to the Supreme Court. In February 2007, the Supreme Court quashed part of the Court of Appeal's judgment allowing the discontinuation of proceedings against the second applicant, holding that the Court of Appeal exceeded its powers by refusing to apply legislation it saw as unconstitutional. Pursuant to the Supreme Court's directions, the Court of Appeal asked the Constitutional Court to consider the constitutionality of the 2005 Amendment. In February 2009, the Constitutional Court referred to its earlier 2008 decision that the 2005 Amendment was constitutional and had not influenced the judicial determination of the FOZZ case.

2. Decision of the Court

The applicants complained under Article 6 § 1 (right to a fair trial) that Judge A.K. had been assigned in violation of domestic law, that he had not been impartial and that there had been legislative interference in the criminal proceedings because of the 2005 Amendment.

Article 6 § 1

The applicants had argued that the trial court had not been a "tribunal established by law" as the bench was not composed in accordance with the CCP and was therefore unlawful. In contrast, the Government had submitted that the assignment of Judge A.K. was not arbitrary but made pursuant to a decision of the Board of the Warsaw Regional Court. The Government had also cited practical considerations: the size and complexity of the case meant that the case had to be allocated to a judge who could examine the case rapidly. The Court noted that the Supreme Court had examined this issue in detail and agreed with the Supreme Court's earlier finding that Judge A.K.'s assignment breached the CCP. It was concluded that the trial court could not be regarded as a "tribunal established by law" and accordingly, there had been a violation of Article 6 § 1.

The Court then moved on to consider the applicants' allegations of bias on the part of Judge A.K. The Court recalled that the test for impartiality involves both a subjective test, which examines the judge's personal conviction and behaviour to determine whether it held any personal prejudice or bias in a given case, and an objective test, which assesses if there are ascertainable facts which may cast doubt on the judge's impartiality.

With respect to the subjective test, the Court agreed with the earlier findings of the Court of the Appeal that the passages of the reasoning could not be considered indicative of personal prejudice or bias. The Court of Appeal found that the second applicant was not able to substantiate how the cited passages of the judge's reasoning amounted to evidence of negative attitude. With regards to the statements in the media, while it was noted that it would have been preferable for Judge A.K. to have refrained from expressing his views in the media entirely, nonetheless he did not imply that he had formed an unfavourable view of the applicants or make any pronouncement on their guilt. Furthermore, it did not necessarily follow from comments in favour of a harsh criminal policy that Judge A.K. considered the applicants guilty. As such, it was held that the applicants had not established personal bias on the part of Judge A.K.

With regard to the objective test, the applicants alleged impartiality on the basis of: i) the assignment of Judge A.K. to hear the applicants' case in violation of the CCP; and ii) his alleged involvement in the passage of the 2005 Amendment, despite his involvement in the applicants' cases.

In relation to the former, it was noted that the applicants had failed to demonstrate to the Supreme Court that the assignment resulted in any shortcoming in their case. This, in conjunction with the absence of any suggestion that Judge A.K. arranged to have the case assigned to him for personal reasons led to the conclusion that the applicants' allegations regarding impartiality were not objectively justified. In relation to the latter, the Court noted that the Supreme Court i) overruled the finding of the Court of Appeal that Judge A.K. had actively sought to influence the amending legislation; and ii) excluded the possibility that the parliamentary debate had overlapped with the trial hearing. The Court further analysed the minutes of the Parliament committee which oversaw the 2005 Amendment and observed that Judge A.K. had been mostly absent from the discussions; on the one occasion he had been there he was prevented from commenting. It was also noted that the applicants failed to provide any evidence to support allegations that Judge A.K. had advised his opposition deputies on the 2005 Amendment or indeed that he had any political links with the Law and Justice

party. The Court therefore concluded that there was no violation of Articles 6 on account of the alleged impartiality of Judge A.K.

Finally, the Court examined the applicants' allegations of legislative interference. The Court noted that the first applicant's complaint was not admissible on the basis that the 2005 Amendment extending limitation periods did not impact the limitation periods for the offences for which she was convicted and was accordingly rejected. The Court concluded that the second applicant's complaints were admissible. However, reference was made to the reasoning of the Constitutional Court that the law had not substantively affected the judicial determination of the second applicant's case but had simply extended the time-limit for criminal liability. The Court also reflected on existing case law providing that limitation periods were procedural laws which did not lay down penalties or define offences. In the absence of arbitrariness in the case of the second applicant, the Court concluded that there had been no violation of Article 6 § 1 on account of legislative interference.

In conclusion, the Court found a violation of Article 6 § 1 as regards the principle of a "tribunal established by law", but no violations in relation to the applicants' other complaints.

Article 41

The Court rejected the first applicant's claim for award of pecuniary and non-pecuniary damages and the second applicant's claim in relation to pecuniary damage, while concluding that his claim in relation to non-pecuniary damage was satisfied by way of finding of a violation alone. It was ordered that the Government pay €5,000 to the second applicant for costs and expenses, plus interest.

Investigation and trial of a senior figure of a collapsed bank involved numerous violations of the applicant's rights under Article 6 to be tried by an independent and impartial tribunal established by law and to a hearing within a reasonable time, in addition to breaches of Articles 5 and 8

JUDGMENT IN THE CASE OF **LAVENTS v. LATVIA**

(Application no. 58442/00)
28 November 2002

1. Principal facts

The applicant, Aleksandrs Lavents, was born in 1959 and lived in Riga, Latvia. He was chairman of the supervisory board of Latvia's largest bank. The bank went into liquidation, causing severe damage to the national economy and the financial ruin of hundreds of thousands of people. The prosecutor dealing with the applicant's case suspected him of the offence of sabotage for having authorised the transfer of approximately €139 million to a Russian bank based in Moscow in exchange for an undertaking to make a payment in the form of Russian government bonds. The applicant was also accused of carrying out fraudulent actions in order to create a prosperous and stable image of the bank.

On 1 June 1995 the applicant was formally declared a suspect on a charge of sabotage and was questioned, and on 28 June 1995 he was placed under investigation. After an order had been made for his detention pending trial, he was imprisoned on 14 July 1995. During the investigation, the applicant's pre-trial detention was prolonged several times, despite a number of appeals. In addition, during that period he was twice admitted to hospital under supervision due to heart problems.

On 12 June 1997 the case was set down for trial in Riga Regional Court. The court dismissed an application by the applicant for his release, on the ground that he was charged with serious offences and that his state of health did not warrant amending the preventive measure imposed on him. After suffering a heart attack during a hearing on 14 October 1997, the applicant was placed under house arrest; he was kept under supervision and was prohibited from leaving his flat. The day after that decision, Latvia's main daily newspaper at the time, published a statement by the Prime Minister and the Minister of Justice in which they expressed their disagreement with the amendment of the preventive measures imposed on the applicant. The following day, the judges dealing with the case withdrew because of pressure "from

the Government and the public”, and the case was assigned to a different bench of the same court.

Also in October 1997, the applicant’s correspondence - including that with his lawyers - was seized and examined on an order by a judge. At the time of the ECtHR’s judgment, that measure was still in place. On 14 September 1998 the applicant was imprisoned. He made a total of nine applications for release, all of which were refused on the grounds that his character and the serious nature of the charge made it necessary to keep him in custody. Given his state of health, he was again admitted to hospital, both in prison – where he was denied family visits – and in outside medical establishments.

On a number of occasions during the trial, the applicant challenged the presiding judge of the Regional Court, Mrs. Šteinerte, and the other two judges dealing with the case, accusing them of bias and of concealing a significant piece of exonerating evidence. An order by the other two judges for Mrs. Šteinerte to withdraw was revoked on 14 December 1999 by the Senate of the Supreme Court, at the prosecution’s request. The challenge was referred to the Riga Regional Court, which, with exactly the same members sitting and Mrs. Šteinerte presiding, dismissed it. Furthermore, in November and December 1999 Mrs. Šteinerte made a number of statements to the press in two newspapers in which she criticised the conduct of the defence and alluded to the outcome of the trial. She also expressed her surprise that the applicant was persisting in denying the charges and called on him to prove his innocence.

In a judgment of 28 December 2001, the applicant was convicted and sentenced to nine years’ imprisonment. At the time of the Court’s judgment, appeal proceedings were still pending.

2. Decision of the Court

The applicant complained under Article 5 of the length of his detention pending trial and of the lack of effective judicial review of the detention. Under Article 6, he submitted that he had not had a hearing within a reasonable time or by an independent and impartial tribunal established by law and that the statements made to the press by the judge dealing with his case had indicated that she was persuaded of his guilt. He further submitted that the seizure and examination of his correspondence and the ban on family visits during part of his time in detention, had infringed Article 8.

Article 5 § 3

The Court noted that for 11 months the applicant had been permanently confined to his flat under supervision, being strictly forbidden to leave. It held that the degree of constraint entailed by such a measure was sufficient for it to be regarded as a deprivation of liberty within the meaning of Article 5. The same applied to the periods spent in hospital.

The Court was only able to consider the period after 27 June 1997, the date on which the Convention had come into force in respect of Latvia. However, it had to take into account the period already spent in custody by that date in order to assess whether the length of the detention was reasonable. It accordingly noted that six years, five months and 14 days had elapsed between the date on which the applicant had been arrested and the date on which a court had determined the merits of the charge against him, including a period of four years and six months after the Convention had entered into force in respect of Latvia.

The Court noted that after the Convention had come into force, the Regional Court had on nine occasions refused applications for the applicant's release without providing sufficiently detailed reasons. In the Court's view, such grounds could not justify the applicant's prolonged detention and did not stand the test of time, and accordingly there had been a violation of Article 5 § 3.

Article 5 § 4

The Court had jurisdiction to examine this complaint only as regards the period after 27 June 1997, and that meant that its examination of the effectiveness of judicial review concerned only the judicial stage of the proceedings.

The Riga Regional Court had been called upon to consider the merits and had also had the task of examining the applicant's applications for release. In that connection, the Court referred to its conclusions (below) under Article 6 § 1 to the effect that the applicant had not been tried by an impartial tribunal and that the bench dealing with his case had not been "established by law" as regards the period after 14 December 1999. The Court accordingly held that there had been a violation of Article 5 § 4.

Article 6 § 1

The Court determined that the proceedings in the applicant's case had begun when he had first been questioned as a suspect on 1 June 1995, and had ended with

the delivery of the judgment at first instance on 28 December 2001. The proceedings, which were still pending on appeal, had therefore lasted almost six years and seven months. Although the Court was able to consider this complaint only from the date on which the Convention had come into force in respect of Latvia, it pointed out that it was required to take into account the stage reached in the proceedings by that date. By that date, the investigation of the case had taken two years and 27 days.

The case was an extremely complex one and substantial delays had been caused by the applicant's state of health, although the applicant could not be held responsible for such delays as they had been the result of force majeure. As regards the conduct of the national authorities, almost 11 months had elapsed between the date on which the judges had withdrawn from considering the case, citing Government pressure, and the date on which the case had been referred to a different bench, without any reason having been given for such inaction. It was concluded that the judicial authorities had not shown the diligence required for the proper conduct of proceedings, and held that there had been a violation of Article 6 § 1.

The Court noted that the order for Mrs. Šteinerte to withdraw had been revoked by the Senate of the Supreme Court, at the prosecution's request. Contrary to the instruction given by the Senate in its order, the case was referred to the same bench of the Riga Regional Court that had already withdrawn. The Court further noted that after the decision by the two non-presiding judges had been revoked, those judges had been disqualified by law from sitting in the case. The bench of the Regional Court had accordingly not been constituted in accordance with the law, and there had therefore been a violation of Article 6 § 1 on that account.

The Court noted that in the press, Mrs. Šteinerte had criticised the attitude of the defence, made predictions about the outcome of the trial and expressed surprise that the applicant was persisting in pleading not guilty, calling on him to prove his innocence. In the Court's opinion, those statements amounted to the adoption of a definite position as to the outcome of the trial, with a distinct preference for a guilty verdict against the applicant. The statements caused the applicant to fear that the judge in question lacked impartiality. The Court accordingly held that there had been a violation of Article 6 § 1 on account of the court's lack of impartiality and held that that finding made it unnecessary to examine separately the question whether the court had been "independent".

Article 6 § 2

The Court noted that it appeared from Mrs. Šteinerte's statements to the press that she was persuaded of the applicant's guilt. She had even suggested that he

prove that he was not guilty, an attitude which was at variance with the very principle of the presumption of innocence. The Court accordingly held that there had been a violation of Article 6 § 2.

Article 8

The Court determined that there had been an interference with the applicant's right to respect for his correspondence. It noted that the measure in issue had been ordered by a judge on the basis of the Code of Criminal Procedure, which authorised such a measure in the case of persons accused of particularly serious offences. In the Court's view, that provision left the courts too much latitude by merely indicating the types of offences concerned and not specifying the period of validity of the measure or the reasons that might warrant it. The law that had been applied did not sufficiently prescribe the scope and manner of exercise of the discretion conferred on the authorities. The Court held that the interference had not been prescribed by law and that there had been a violation of Article 8.

The Court also noted that there had been an interference with the applicant's right to respect for his family life. The applicant's wife and daughter had not been allowed to visit him during three periods, the longest of which lasted almost a year and seven months. Moreover, the ban had been absolute. In addition, the Court observed that the applicant did not engage in any form of collusion or of hindering the investigation of his case during his period of house arrest, despite having unlimited contact with his family. The Court was therefore not satisfied that the application of such a stringent measure had been proportionate. It held that there had been a violation of Article 8 on that account.

Article 41

The Court awarded the applicant €15,000 for costs and expenses.

The applicant's fears about the impartiality of the trial court, where the presiding judge had worked with and for another judge who was a protagonist to the case, were objectively justified in violation of Article 6

JUDGMENT IN THE CASE OF **MITROV v. THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA**

(Application no. 45959/09)

2 June 2016

1. Principal facts

The applicant, Slobodan Mitrov, was born in 1974 and lived in Strumica. In November 2006 the applicant was involved, as the driver of a car, in a traffic accident in which the eighteen-year-old daughter of the president of the criminal section of the Strumica Court of First Instance, Judge M.A., was killed. At the time when the criminal proceedings were initiated, there were four judges working in the criminal section of the court (Judges M.A., C.K., T.D. and G.M). Judge C.K., before being appointed as a judge in 2005, had been working first as a clerk and then alongside Judge M.A. and two other judges. In addition, Judge B.B. was an investigating judge in the trial court, Judge V.D. worked on cases concerning minor offences, and Judge S.D. was on sick leave.

In April 2007, following an investigation carried out by Judge B.B., which included, *inter alia*, the submission of a commissioned expert report (“the first expert report”), the public prosecutor charged the applicant with “severe crimes against the safety of people and property in traffic.” In May 2007 a three-judge panel of the trial court, presided over by Judge T.D., dismissed an objection by the applicant to the indictment. In June 2007 an alternative expert report was drawn up, at the applicant’s request, by a private expert agency (“the second expert report”).

In July 2007 the applicant asked the president of the trial court to exclude the trial court judges who acted in the criminal proceedings, as well as Judges G.M., S.D. and T.D. He further complained that the investigation had been unfair, and alleged that Judge B.B. had been partial. The president of the trial court dismissed the application for exclusion in respect of Judges C.K. and T.D. and rejected as inadmissible the application concerning Judges G.M. and S.D., who had not been acting in the particular case. The trial continued, and on the same day the applicant lodged a fresh application for exclusion of Judge T.D., which was later upheld by the president of the trial court.

In March 2008 the trial court convicted the applicant and sentenced him to four years and six months' imprisonment. It also upheld the compensation claim lodged by Judge M.A., her husband and her other daughter against the applicant's insurance company, which had acknowledged the claim.

In April 2008 the applicant appealed against the judgment, arguing, *inter alia*, that the case should have been assigned to another court. He also complained that the trial court had not admitted evidence proposed by him. The applicant further requested that the case be remitted and heard either before a different panel of the trial court or before a different court. In September 2008 the appellate court dismissed the applicant's appeal, upheld the prosecutor's appeal, and increased the sentence to six years' imprisonment.

In November 2008 the applicant lodged a request for extraordinary review of a final judgment but this was later dismissed by the Supreme Court, which endorsed the lower courts' findings and reasoning, without providing further reasoning in respect of the applicant's complaint concerning the judges' alleged bias. In September 2010 and March 2011 the Supreme Court dismissed two requests by the applicant for extraordinary mitigation of his sentence.

2. Decision of the Court

The applicant complained under Article 6 § 1 of the Convention that his case had not been heard by an impartial tribunal, since the trial court judges lacked the necessary impartiality. He further complained about a violation of the principle of equality of arms on the grounds that the courts had refused to admit evidence proposed by him.

Article 6 § 1

The Court reiterated that, according to its settled case law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test, which entailed an assessment of the personal conviction and behaviour of a particular judge in a given case, and also according to an objective test, which enabled the Court to ascertain whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality. In the present case, the Court found that no evidence had been produced as to any personal bias on the part of the trial court judges who adjudicated the applicant's case. It then moved on to examine whether the applicant's doubts as to the impartiality of his trial, stemming from the specific circumstances, could be regarded as objectively justified in the circumstances of the case.

The Court began by explaining that in its settled case law, the objective test mostly concerned hierarchical links between a presiding judge and other protagonists to the proceedings. However, in this case the Court instead focused on whether personal links existed between the presiding judge and other protagonists to the proceedings. Here, the Court found that it could not be excluded that personal links had come to exist between the other judges in the criminal section of the trial court and Judge M.A., given the limited number of the judges appointed in the criminal section of the trial court at the relevant time as well as the fact that they all worked full-time and had similar functions.

Given that such links existed, the Court deemed the nature of these links to be key to determining whether the applicant's fears over the impartiality of his trial were objectively justified. In that respect, the Court evaluated the relationship between Judge M.A. and Judge C.K., who had presided over the applicant's trial. Here, Judge M.A. and her family were given victim status in the proceedings against the applicant and thus were recognised as protagonists to the proceedings. In this context, Judge C.K. was Judge M.A.'s colleague as a judge on the criminal court and had worked directly under her as her clerk prior to being appointed a judge. Given this personal link, the Court considered the fact that Judge C.K. presided over the applicant's trial relating to the killing of Judge M.A.'s daughter gave rise to objectively justified doubts as to Judge C.K.'s objectivity and impartiality. The Court also noted that similar personal links existed between all the judges in the trial court and Judge M.A.

Further, the fact that domestic law provided for the possibility of transferring a case to another competent court if such a step was required, and that this practice had been shown to have been applied in another case involving similar circumstances but not the applicant's own case, further added weight to the applicant's doubts over the impartiality of his trial.

The above considerations were sufficient for the Court to conclude that in the present case the applicant's fears as to the impartiality of the trial court could be considered objectively justified, and thus there had been a violation of Article 6 § 1.

Finally, the Court found that there was no need to give a separate ruling on the applicant's further complaint under Article 6 about a violation of the principle of equality of arms.

Article 41

The Court awarded the applicant €3,600 in respect of non-pecuniary damage, and €660 for costs and expenses.

Disciplinary proceedings against the former President of the Supreme Court of Croatia were in violation of Article 6 as there were objectively justified fears about the lack of impartiality of the judges

JUDGMENT IN THE CASE OF **OLUJIĆ v. CROATIA**

(Application No. 22330/05)
5 February 2009

1. Principal facts

The applicant, Krunoslav Olujić, was a Croatian national born in 1952. He was a judge and the President of the Supreme Court, as well as a member of the National Judicial Council (“NJC”), before being dismissed in October 1998.

In 1996 disciplinary proceedings were brought against the applicant: he was accused of having sexual relationships with minors and of using his position to protect the financial activities of two individuals known for their criminal activities. The NJC found it established that the applicant had indeed used his position in an improper way; that decision was upheld by the Parliament’s Chamber of Counties. However, both those decisions were quashed in April 1998 by the Constitutional Court and the case was sent back to the NJC for fresh examination.

In the resumed proceedings before the NJC, the allegations against the applicant were reduced: he was accused of fraternising in public with two individuals who had a criminal background. In October 1998 the applicant was found guilty and was dismissed from office. In November, the Parliament’s Chamber of the counties upheld the NCJ’s decision.

In December of the same year, the applicant lodged a complaint before the Constitutional Court alleging, amongst other things, that the disciplinary proceedings had not been held in public; that three members of the NJC, namely A.P., V.M. and M.H., had made statements against him in the media and could therefore not be considered impartial; and, that witnesses in his favour had not been heard. In December 2004 that complaint was dismissed as ill-founded.

2. Decision of the Court

Relying in particular on Article 6 §1, the applicant complained about the unfairness and excessive length of the disciplinary proceedings against him.

Article 6 § 1

The Court began by considering the applicant's allegations regarding the impartiality of the three relevant members of the NJC. It emphasised the importance of impartiality for democratic society, stating that it was fundamental for courts to inspire confidence in the public and especially in those subject to their decisions. For the Court, impartiality denoted an absence of prejudice or bias. Impartiality could be identified using a subjective approach or test which considered the personal conviction or interest of a given judge in a particular case, and an objective approach or test which considered whether sufficient guarantees existed to exclude any legitimate doubts over impartiality. In relation to these two approaches the Court noted that in applying the subjective test of a court's impartiality, the personal impartiality of a judge had to be presumed until there was proof to the contrary. While this was clearly a considerable hurdle for any applicant, the Court considered that the requirements of the objective test remained an important guarantee of impartiality. For the objective approach, the Court stated that matters that would fall under the objective test of a court's impartiality might also raise issues if considered in the course of a subjective approach. Therefore, whether a case should be solely or mainly dealt with under one test or the other, or whether it should be dealt with under both tests, would depend on the facts of the case.

The three members of the NJC about whom questions of impartiality had been raised were A.P., V.M. and M.H. The Court noted that an interview with V.M. had been published in the national daily newspaper "Večernji list" in February 1997, when the case was pending before the Chamber of Counties. In that interview V.M. had revealed that he had supported the applicant when he had requested V.M.'s withdrawal from the case, had publicly voted against the applicant's appointment as President of the Supreme Court and had himself been a potential candidate for the same post. At various other times V.M. had also commented on the results of the applicant's proceedings and negatively commented on the applicant's defence. This therefore had created a situation which could raise legitimate doubts as to V.M.'s impartiality when presiding over the applicant's case.

Concerning A.P., who at the time was President of the NJC, the Court noted that an interview with him had been published in the same newspaper, "Večernji list", in March 1997, when the applicant's case was pending before the Constitutional Court and therefore had not yet been decided. In the interview A.P. stated that the applicant had committed indecent activities, specifically that he had used his personal influence and contacts in order to protect the interests of two people with a criminal background, and added that the defence's allegations that the case was politically

motivated had been untrue. Those statements implied that A.P. had already formed an unfavourable view of the applicant's case and were clearly incompatible with his participation in the proceedings as they fostered objectively justified fears as to his lack of impartiality.

The Court further noted that an interview with M.H. had been published in another national daily newspaper, "Slobodna Dalmacija", in September 1997, when the case was also pending before the Constitutional Court. In the interview M.H. described the applicant as lacking experience and knowledge, and as a *corpus alienum* (a foreign body) in the Croatian judiciary. The Court considered that those expressions had clearly shown M.H.'s bias against the applicant and that his participation in the proceedings after the publication of the interview had been incompatible with the requirement of impartiality.

Accordingly, the Court held that the requirement of impartiality had not been met by these three members of the NJC and there had been a violation of Article 6 § 1.

The Court then went on to consider the applicant's complaint regarding his right to a public hearing. Here the Court observed that the NJC had excluded the public from the hearing in the case on the ground that it was necessary to protect the dignity of both the applicant and the judiciary. However, the applicant himself had asked that the proceedings be public and had therefore shown that he had not considered that his dignity required protection. Moreover, given that the proceedings had concerned such a prominent public figure and that public allegations had already been made suggesting that the case against him had been politically motivated, it was evident that it was in the interest of the applicant as well as that of the general public that the proceedings before the NJC be open to public scrutiny. Nor had that lack of public access been rectified in the proceedings before the Parliament's Chamber of Counties or before the Constitutional Court. Therefore, as the applicant's right to a public hearing had not been respected, there had been a violation of Article 6 § 1.

The Court then considered the applicant's complaint regarding the principle of equality of arms. The Court stated that the reasons relied on by the NJC for refusing to accept any of the witnesses called on behalf of the applicant for the purpose of substantiating his line of defence had not been sufficient. Indeed, the NJC had admitted all the proposals to hear evidence from the witnesses nominated by the counsel for the Government and none of the proposals submitted by the applicant. The Court therefore found that the Croatian authorities' refusal to examine any of the defence witnesses had led to the applicant's ability to present his case having been limited, in breach of Article 6 § 1.

Finally, the Court held that the length of the resumed proceedings – over six years – had been excessive, in particular in view of what had been at stake for the applicant, namely his dismissal. This length of proceedings had therefore amounted to a violation of Article 6 § 1.

Article 41

The Court awarded Mr Olujić €5,000 for non-pecuniary damage but awarded no costs and expenses due to the applicant's lack of a claim in that respect.

(9) Impartiality- Functional Impartiality

The exercise of the functions of investigating judge and trial judge by the same person in the same case violated the requirement for an independent and impartial tribunal under Article 6

JUDGMENT IN THE CASE OF **DE CUBBER v. BELGIUM**

(Application no. 9186/80)
26 October 1984

1. Principal Facts

The applicant was born in 1926 and lived in Brussels. On 4 April 1977, he was arrested by the police at his home and taken to Oudenaarde police station where he was questioned in connection with a car theft. Warrants of arrest for forgery and uttering forged documents were issued by the investigating judge Mr. Pilate against the applicant on the following day, on 6 May and on 23 September 1977. After preliminary investigations lasting more than two years, a chamber of the court sent the applicant forward for trial.

For the purpose of the trial the Oudenaarde criminal court sat as a chamber composed of a president and two judges, including Mr. Pilate. The applicant stated that he protested orally against the latter's presence given that he had served as the investigating judge and was now a trial judge in the same case. After a hearing the criminal court gave judgment on 29 June 1979 and the applicant was acquitted on two counts and convicted on the remainder. He was accordingly sentenced, in respect of one matter, to five years' imprisonment and a fine of 60,000 BF (approximately €1,487) and, in respect of another, to one year's imprisonment and a fine of 8,000 BF (approximately €198).

Both the applicant and the public prosecutor's department appealed. On 4 February 1980, the Ghent Court of Appeal reduced the first sentence to three years' imprisonment and lowered the fine. The applicant appealed to the Court of Cassation, raising some ten different points of law. One of his grounds, based on Article 292 of the Judicial Code and Article 6 § 1 of the ECHR was that Mr. Pilate had been both judge and party in the case since after conducting the preliminary investigation he had acted as one of the trial judges. The Court of Cassation held that this combination of functions violated neither Article 292 of the Judicial Code nor Article 6 § 1 of the Convention.

2. Decision of the Court

Relying on Article 6 the applicant argued that he did not receive a hearing by an “impartial tribunal” as one of the three judges of the Oudenaarde criminal court had previously acted as the investigating judge in the case.

Article 6

Considering first the subjective test in relation to the requirement of impartiality, the Court noted that the applicant alleged that Mr. Pilate had for years shown himself somewhat relentless in regard to the applicant’s affairs. However, the Court stated that personal impartiality of a judge is to be presumed until there is proof to the contrary, and in the present case no such proof was put forward in evidence before the Court. In particular, there was nothing to indicate that in previous cases Mr. Pilate had displayed any hostility or ill-will towards the applicant or that he had arranged to have assigned to himself the preliminary investigation opened in respect of the applicant in 1977. Moving on to the objective test, the Court stated that account must also be taken of considerations relating to the functions exercised and to internal organisation. In this regard, even appearances may be important - what is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused.

The Court noted in this case it was dealing with the exercise of the functions of investigating judge and trial judge by the same person in the same case. One could understand that an accused might feel some unease should he see on the bench of the court called upon to determine the charge against him the judge who had ordered him to be placed in detention on remand and who had interrogated him on numerous occasions during the investigation, albeit with questions dictated by a concern to ascertain the truth. Furthermore, the judge in question, unlike his colleagues, would already have acquired well before the hearing a particularly detailed knowledge of the case. Consequently, it was quite conceivable that he might have appeared firstly in a position enabling him to play a crucial role in the trial court and, secondly, even to have a pre-formed opinion which was liable to weigh heavily in the balance at the moment of the judgment. In conclusion, the impartiality of the Oudenaarde criminal court was capable of appearing to the applicant to be open to objective doubt and a violation of Article 6 had occurred.

Furthermore, the Court rejected the Government’s argument that as Article 6 § 1 concerns primarily courts of first instance the proceedings before the Oudenaarde criminal court fell outside the ambit of Article 6. The fundamental guarantees,

including impartiality, must also be provided by any courts a Contracting State may have chosen to set up. It also rejected the argument that the subsequent intervention of the Ghent Court of Appeal made good the wrong of the first-instance proceedings as the Court noted that the particular defect in question did not bear solely upon the conduct of the first-instance proceedings. Finally, the Court rejected the argument that a finding by the Court of a violation of Article 6 § 1 would entail serious consequences for Belgian courts with limited staff. The Contracting States were under an obligation to organise their legal systems so as to ensure compliance with the requirements of Article 6 § 1, and the Court's task was to determine whether the Contracting States had achieved the result, not to indicate the particular means to be utilised.

Article 50 (now Article 41)

The Court held that the question of just satisfaction was not ready for decision and reserved it. On 1987 the Court subsequently orders that the applicant be paid 100,000 BF (approximately €2,479) in respect of pecuniary and non-pecuniary damage and 178,221 BF (approximately €4,418) in respect of costs and expenses.

Manner of dismissal of five judges by the state judicial council held to violate principles of independence and impartiality under Article 6

JUDGMENT IN THE CASES OF
**GEROVSKA POPČEVSKA, JAKŠOVSKI AND
TRIFUNOVSKI, and POPOSKI AND DUMA v. THE
FORMER YUGOSLAV REPUBLIC OF MACEDONIA**

(Application Nos. 48783/07, 56381/09 and 58738/09, and 69916/10 and 36531/11)
7 January 2016

1. Principal facts

The cases concerned complaints in three different applications by five judges, all Macedonian nationals, who had been dismissed from office for professional misconduct.

In March 2007, the applicant in the first case, Ms Gerovska Popčevska (the “first applicant”) was dismissed by the State Judicial Council (“SJC”) (a body vested with jurisdiction to decide misconduct proceedings) for professional misconduct, following its review of a civil case concerning compensation proceedings against the State which she had adjudicated at first instance. The SJC found that the first applicant had wrongly applied procedural and material law in that case, which she had decided out of the established order in which cases should have been dealt with. In this case, a member of the SJC, Judge D.I., who had instituted the proceedings, sat in the plenary session which decided the dismissal of the applicant.

The applicants in the second case, Mr Jakšovski (the “second applicant”) and Mr Trifunovski (the “third applicant”), were dismissed from the office of judge for professional misconduct by the SJC in December 2008 and February 2009 respectively. It was found that the second applicant had not been diligent in conducting proceedings in a civil case, while the third applicant was found to have lacked diligence in investigating an incident that had occurred in a detention centre.

In the third case, the applicants, Mr Poposki (the “fourth applicant”) and Ms Duma (the “fifth applicant”), were dismissed for professional misconduct by the SJC in December 2009 and June 2010, respectively. The fourth applicant was dismissed for violating the rules on legal representation of the parties in a civil case he had adjudicated. The fifth applicant was dismissed from the office of judge on two different grounds: she had failed to establish the identity of a convicted person in a

criminal case which she had adjudicated and she had not withdrawn from another criminal case in which there was a possible conflict of interest.

All five applicants challenged their dismissals at second instance, namely before an appeal panel formed within the Supreme Court, and set up on an *ad hoc* basis in each separate case. The Appeal Panel dismissed all the appeals, and upheld the SJC's decisions. The third applicant also challenged his dismissal before the Administrative Court by means of an administrative-dispute action, but his action was rejected as inadmissible. The first applicant and fifth applicant also lodged constitutional appeals, which were rejected on the ground that the Constitutional Court had no jurisdiction to review the lawfulness of the SJC's decisions. In particular, as to whether the first applicant and fifth applicant's dismissals affected their freedom of expression, the court held that a distinction had to be made between exercising the office of judge and that particular freedom, ruling that the office of judge entailed a right and duty to adjudicate in accordance with the law, and that that right and duty did not form part of the rights and freedoms on which it had competence to decide under the Constitution.

2. Decision of the Court

Relying on Article 6 § 1 of the Convention, all five applicants essentially alleged that the bodies which had considered their cases – namely the SJC and/or the Appeal Panel set up within the Supreme Court – had been neither independent or impartial.

Article 6 § 1

The Court noted that all applicants' cases were considered by the SJC, whose plenary meetings adopted decisions on their dismissal, which were later reviewed by the Appeal Panel – a body composed of judges performing a judicial function. In such circumstances, the Court found Article 6 applicable to the impugned proceedings under its civil head.

The Court reiterated that, as a rule, impartiality denotes the absence of prejudice or bias. According to its case law, the existence of impartiality for the purposes of Article 6 § 1 must be determined following both a subjective test, with regard to the personal conviction or behaviour of a particular judge in a given case; and an objective test, by ascertaining whether the tribunal itself and its composition offers sufficient guarantees to exclude any legitimate doubt in respect of its impartiality. However, the division between the two tests is not irrefutable, and even appearances may be of certain importance. The courts in a democratic society must inspire the confidence in the public: "justice must not only be done, it must also be seen to be

done”. Finally, the Court observed that the concepts of independence and impartiality are closely linked, and in the present case found it appropriate to examine those issues together.

The first applicant – The Court noted that in the decision dismissing the applicant the SJC relied on the opinions of both the Civil Division, and the plenary of the Supreme Court. The applicant was dismissed by a unanimous vote of the plenary of the SJC, which included Judge D.I. as an *ex officio* member, who, as President of the Supreme Court, had participated in the Civil Division judicial opinion and expressed an unfavourable view of the applicant. Thus, the Court found that his further participation in the impugned professional misconduct proceedings before the SJC was incompatible with the requirement of impartiality under Article 6 § 1. Similar considerations applied to the participation of the then Minister of Justice in the decision of the SJC to dismiss the applicant although he had requested, as the then President of the State Anti-Corruption Commission, that the SJC reviewed the civil case adjudicated by her. The Court considered that the presence in that body of the Minister of Justice, as a member of the executive, impaired its independence in this particular case. It was concluded that the first applicant’s case was not decided by “an independent and impartial” tribunal as required by Article 6 § 1.

The second and third applicant – According to the relevant domestic law, the Court noted that any SJC member could ask the SJC to establish whether there had been professional misconduct on the part of a judge. In the instant case, V.V. requested such proceedings in respect of the second applicant, and R.P. requested them in respect of the third applicant. The Court found that the system in which the complainants, both members of the SJC who had carried out the preliminary inquiries and sought the impugned proceedings, subsequently took part in the decisions to remove the applicants from office, casted objective doubt on the impartiality of those members when deciding on the merits of the applicants’ cases. The Court therefore concluded that the confusion of roles of the complainants – V.V. in the first applicant’s case and R.P. in the second applicant’s – in the impugned proceedings resulting in the dismissal of the applicants prompted objectively justified doubts as to the impartiality of the SJC. Accordingly, there had been a violation of Article 6 § 1 on this account. The second and the third applicant further complained that the Appeal Panel set up within the Supreme Court had been composed of judges whose career had been completely dependent on the SJC. In view of the above considerations and the conclusion that there was a violation of the applicants’ right to a hearing by an independent and impartial tribunal under Article 6 § 1, the Court considered that it was not necessary to examine them separately.

The fourth applicant and the fifth applicant – Under the applicable legislation, any SJC member could ask the SJC to determine whether there had been professional misconduct on the part of a judge. Indeed, such proceedings were requested by N.H.A., a member of the SJC, in respect of the fourth applicant, and by the Minister of Justice in respect of the fifth applicant. The Court considered that both complainants had rights as parties to the impugned proceedings. As in the previous case, the Court considered that a system in which members of the SJC who had carried out the preliminary inquiries and sought the impugned proceedings consequently took part in the decisions to dismiss the applicants from the office of judge, casted objective doubt on the impartiality of those members when deciding on the merits of the applicants' cases. The Court ruled that the confusion of the complainants' roles in the impugned proceedings resulting in the applicants' dismissal prompted objectively justified doubts as to the impartiality of the SJC, and therefore there had been a violation of Article 6 § 1.

Article 41

In all three cases the Court awarded €4,000 to each of the five applicants for non-pecuniary damage. Furthermore, it awarded €900 to the first applicant, €300 to the third applicant, and €150 to the fifth applicant in respect of costs and expenses.

No objective reason to doubt the independence and impartiality of a judicial body responsible for hearing transport planning appeals which also had advisory powers – no breach of Article 6 § 1

GRAND CHAMBER JUDGMENT IN THE CASE OF **KLEYN AND OTHERS v. THE NETHERLANDS**

(application nos. 39343/98, 39651/98, 43147/98 and 46664/99)

6 May 2003

1. Principal facts

The case concerned four joined applications brought by 23 Netherlands nationals and 12 Dutch companies, whose homes or business premises were located on or near the track of a new railway, the *Betuweroute* railway, which was being constructed at the time of the judgment and which ran across the Netherlands from the Rotterdam harbour to the German border.

All applicants took part in proceedings objecting to the decision on the determination of the exact routing of the *Betuweroute* railway, the so-called Routing Decision. This Routing Decision was taken under the procedure provided for in the Transport Infrastructure Planning Act, as in force since 1 January 1994. In its decision of 28 May 1998, the Administrative Jurisdiction Division of the Council of State rejected most of the applicants' complaints. In so far as the complaints were considered well-founded, new partial routing decisions were taken in 1998. Appeals against these new partial decisions were dismissed by the Administrative Jurisdiction Division in separate decisions taken between 16 April 1999 and 25 July 2000.

2. Decision of the Court

The applicants complained, under Article 6 § 1 of the Convention, that the Administrative Jurisdiction Division of the Council of State could not be regarded as an independent and impartial tribunal in that the Council of State exercised both advisory functions, by giving advisory opinions on draft legislation, and judicial functions, by determining appeals under administrative law. Relying on the Court's findings in *Procola v. Luxembourg*^[414] case, where it was held that the Supreme Administrative Court's successive performance of advisory and judicial functions in respect of the same decisions was capable of casting doubt on that institution's

414 *Procola v. Luxembourg*, judgment of 28 September 1995, no. 14570/89.

structural impartiality, the applicants complained that the Council of State had advised the Government on the Bill for the Transport Infrastructure Planning Act and that the Routing Decision they had subsequently challenged before the Administrative Jurisdiction Division of the Council of State had been taken on the basis of that Act.

Jurisdiction was relinquished in favour of the Grand Chamber under Article 30.

Admissibility

The Government contended that only two of the applicants had exhausted domestic remedies, the rest had neither challenged the Administrative Jurisdiction Division nor appealed to the civil courts on the ground that the administrative proceedings at issue did not offer sufficient guarantees of fairness. Since the challenge by the two applicants, which was based on the Court's finding in the *Procola v. Luxembourg* case, had been dismissed, the Court failed to see how a further challenge by the other applicants, based on the same arguments could have resulted in a different decision. The applicants had further established that the civil remedy referred to by the Government offered no reasonable prospect of success. Accordingly, the applications could not be dismissed for failure to exhaust domestic remedies. The Court considered that the complaint under Article 6 § 1 raised questions of law which were sufficiently serious to warrant an examination of the merits.

Article 6 § 1

The sole question before the Court was whether, in the circumstances of this case, the Administrative Jurisdiction Division had had the requisite appearance of independence or the requisite objective impartiality.

The Court found nothing in the manner and conditions of appointment of the Netherlands Council of State's members or their terms of office to substantiate the applicants' concerns regarding the independence of the Council of State. Nor was there any indication of any personal bias on the part of any member of the bench that had heard the applicants' appeals against the Routing Decision.

The Court was not as confident as the Government that the internal measures taken by the Council of State with a view to giving effect to the *Procola* judgment in the Netherlands were such as to ensure that in all appeals the Administrative Jurisdiction Division constituted an impartial tribunal under Article 6 § 1. However, it was not the Court's task to rule in the abstract on the compatibility of the Netherlands

system in this respect with the Convention. The issue before the Court was whether, in respect of the applicants' appeals, it was compatible with the requirement of objective impartiality that the Council of State's institutional structure had allowed certain of its councillors to exercise both advisory and judicial functions.

The Council of State had advised on the Transport Infrastructure Planning Bill, whereas the applicants' appeals had been directed against the Routing Decision. The Court found that the advisory opinions given on the draft legislation and the subsequent proceedings on the appeals against the Routing Decision could not be regarded as involving the "same case" or the "same decision". Although the planning of the *Betuweroote* railway had been referred to in the advice given to the Government, that could not reasonably be regarded as a preliminary determination of any issues subsequently decided by the ministers responsible for the Routing Decision. The Court could not agree with the applicants that, by suggesting name of places where the *Betuweroote* was to start and end, the Council of State had in any way prejudged the exact routing of that railway.

The applicants' fears regarding the Administrative Jurisdiction Division's lack of independence and impartiality could not be regarded as objectively justified. There had accordingly been no violation of Article 6 § 1.

The significant involvement of a senior judge in proceedings concerning the dismissal of another judge breached the requirement of impartiality under Article 6 § 1

JUDGMENT IN THE CASE OF
MITRINOVSKI v. THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA

(Application no. 6899/12)

30 April 2015

1. Principal facts

The applicant, Jordan Mitrovski, was born in 1950 and lived in Skopje. He was previously a judge at the Skopje Court of Appeal.

On 6 December 2010, the applicant (as a member of a three-judge panel at the Skopje Court of Appeal), voted in favour of replacing an order for detention of an accused on remand, with an order for house arrest. This ruling was challenged by the State Public Prosecutor, and the Supreme Court subsequently found that the Court of Appeal did not have the jurisdiction to examine the case.

On the same day, the criminal division of the Supreme Court, which included that court's president ("J.V."), found that two of the judges of the Skopje Court of Appeal who had participated in the decision, including the applicant, had committed professional misconduct. J.V., who was a member of the State Judicial Council ("SJC") by virtue of his office, then requested the SJC to establish that the applicant and another judge had committed professional misconduct. On 23 December 2010 the plenary of the SJC, which included J.V., discussed this request and subsequently set up a Commission for determination of professional misconduct by the applicant. The Commission, which was made up of five members, included the President of the SJC but did not include J.V..

In May 2011, the plenary of the SJC, dismissed the applicant from the office of judge for professional misconduct. Particular reference was made to the decision of 6 December 2010 in relation to which the applicant's conduct was said to have been unprofessional.

The applicant appealed against the decision before an Appeal Panel set up with the Supreme Court. This appeal was dismissed by the Appeal Panel in September 2011, which confirmed the SJC's decision dismissing the applicant from the office of judge.

2. Decision of the Court

Relying on Article 6 of the Convention, the applicant complained that the SJC was not an “independent and impartial tribunal” since: i) the President of the SJC, who had been a member of the Commission in his case; and ii) the President of the Supreme Court (J.V.), whose request had set in motion the impugned proceedings, had subsequently taken part in the SJC’s decision dismissing him.

Article 6 § 1

The Court highlighted that according to its settled case law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to both a subjective and objective test. However, there is no absolute distinction between these tests, and even appearances are important, since “justice must not only be done, it must also be seen to be done”. In the absence of judicial impartiality, public confidence in the courts may be affected.

The Court noted that the SJC was composed of fifteen members, which included J.V. by virtue of his position as President of the Supreme Court. According to the relevant domestic legislation, a finding by the SJC of professional misconduct by a judge could only lead to that judge being dismissed from his office. Any member of the SJC could ask the SJC to establish that professional misconduct had been committed by a judge. In the applicant’s case, J.V.’s request to the SJC was submitted after the criminal division of the Supreme Court had unanimously established that there was professional misconduct by two judges in the 6 December 2010 hearing. Though the applicant had not been mentioned by name, it was obvious that the Supreme Court was of the opinion that the applicant had committed professional misconduct. J.V. had participated in this finding and voted in favour of it.

In such circumstances, the Court considered that the applicant had legitimate grounds for fearing that J.V. was already personally convinced that he should be dismissed for professional misconduct before the issue was considered by the SJC, thus revealing an issue of subjective impartiality. The request of J.V. had set in motion the proceedings before the SJC, to which he submitted evidence and arguments in support of the allegations of professional misconduct. As such, he had acted as a form of prosecutor. Subsequently he had played a part in coming to the decision as a member of the SJC.

The Court considered that the system in which J.V. took part in the decision to remove the applicant from his office casted objective doubt on his impartiality when

deciding on the merits of the applicant's case. Therefore, the Court found that J.V.'s role in the proceedings failed both the subjective and objective impartiality test.

Accordingly, there had been a violation of Article 6 § 1 on account of the lack of requisite impartiality of the SJC that examined the applicant's case.

Article 41

The Court held that the Government was to pay the applicant €4,000 in respect of non-pecuniary damage and €1,230 in respect of costs and expenses.

An Appeal Court was not an “independent and impartial tribunal” because it was presided over by the same judge in the second proceedings as in the first set of proceedings

JUDGMENT IN THE CASE OF
OBERSCHLICK v. AUSTRIA

(Application no. 11662/85)

23 May 1991

1. Principal Facts

The applicant was an Austrian journalist residing in Vienna, and at the relevant time he was the editor of the review Forum. On 29 March 1983 during an election campaign, Mr Walter Grabher-Meyer, a politician, had made certain public statements concerning foreigners’ family allowance and proposed that such persons should receive less favourable treatment than Austrians. On 20 April 1983 the applicant and several other persons submitted a criminal complaint against Mr Grabher-Meyer. However, the Vienna public prosecutor’s office decided on 1 June 1983 not to prosecute him. On the day it was submitted, the full text of the criminal complaint was published by the applicant in Forum.

On 22 April 1983 Mr Grabher-Meyer brought a private prosecution for defamation against the applicant and the other signatories of the criminal information. The Vienna Regional Court found that the publication did not constitute a criminal offence, since the case did not concern the wrongful attribution of a certain dishonest behaviour but only value-judgments on behaviour which, as such, had been correctly described. The Vienna Court of Appeal, composed of Mr Cortella, as President, and Mr Schmidt and Mr Hagen, quashed the above decision on 31 May 1983. It held that for the average reader the publication must have created the impression that a contemptible attitude was ascribed to Mr Grabher-Meyer.

The case was referred back to the Regional Court for a second set of proceedings and the Court held a hearing on 11 May 1984 and gave judgment on the same day. The applicant was convicted of defamation and sentenced to a fine of 4,000 Austrian schillings (approximately €290) or, in default, to 25 days’ imprisonment. In its judgment, the Regional Court held that it was bound by the opinion expressed by the Court of Appeal in its decision of 31 May 1983.

The Regional Court stated whilst everyone was free to report to the police facts

which he considered constituted a criminal offence, it went far beyond the mere reporting of a criminal suspicion to publish information thus to make it accessible to the general public. On 6 September 1984 the applicant unsuccessfully applied to the Regional Court for a rectification of the trial record which, according to him, failed to mention certain statements by Mr Grabher-Meyer which were of importance for assessing the evidence concerning the truth of the applicant's allegations.

On 17 December 1984 the Vienna Court of Appeal, composed of the same judges as under the first proceedings on 31 May 1983 and again presided over by Mr Cortella, dismissed the applicant's appeal of his conviction. The Court of Appeal held that the publication in the form of criminal information was intended to ensure that the accusation as to his character made therein would have a particularly telling effect on the average reader.

2. Decision of the Court

The applicant alleged that he had not received a "fair hearing" by an "impartial tribunal established by law", within the meaning of Article 6 § 1 of the Convention. He further argued that his conviction for defamation and the other related court decisions had breached his right to freedom of expression as guaranteed under Article 10.

Article 6

In relation to the applicant's complaint regarding rectification of the trial record and the unfairness of proceedings before the Regional Court, no violation of Article 6 § 1 was found.

The applicant then argued that the Vienna Court of Appeal, when hearing his case in the second set of proceedings, was not an "independent and impartial tribunal" and was not "established by law" because, contrary to Article 489 para. 3 of the Code of Criminal Procedure, it was presided over by the same judge as in the first set of proceedings. Before the Court the applicant supplemented this complaint by submitting that in the meantime, he had been led to believe that not only the presiding judge but also the other two appeal judges had participated on both occasions.

The Court noted that the Code of Criminal Procedure stated that the Court of Appeal should not comprise, in a case like this, any judge who had previously dealt with it in the first set of proceedings, and manifested the national legislature's

concern to remove all reasonable doubts as to the impartiality of that court. Accordingly, the failure to abide by this rule meant that the applicant's appeal was heard by a tribunal whose impartiality was recognised by national law to be open to doubt.

In relation to the Government's argument that in failing to challenge or raise any objection to the participation of the presiding judge the applicant had waived his right to have him replaced, the Court stated that waiver of a right guaranteed by the Convention must be established in an unequivocal manner. Here, not only the President but also the other two members of the Court of Appeal should have withdrawn in accordance with the Code of Criminal Procedure. Whatever the position might have been with respect to the presiding judge, neither the applicant nor his counsel was aware until well after the hearing of 17 December 1984 that the other two judges had also participated in the decision of 31 May 1983. It was thus not established that the applicant had waived his right to have his case determined by an "impartial" tribunal. There had accordingly been a violation of Article 6 § 1 in this respect.

Article 10

It was not disputed that the applicant's conviction by the Vienna Regional Court on 11 May 1984 as upheld by the Vienna Court of Appeal on 17 December 1984, constituted an "interference" with his right to freedom of expression. The argument before the Court concentrated on the question whether the interference was "necessary in a democratic society" to achieve that aim. In this regard the Court recalled that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment.

The Court noted that freedom of political debate is at the very core of the concept of a democratic society and what was at stake in this case were the limits of acceptable criticism in the context of public debate on a political question of general interest. The Court noted that the applicant was convicted for having reproduced in publication the text of a criminal information which he and other persons had laid against Mr Grabher-Meyer. The information published by the applicant began by reciting the facts reported in Mr Grabher-Meyer's statements. What followed was an analysis of these statements, on the basis of which the authors of the information concluded that this politician had knowingly expressed ideas that corresponded to those professed by the Nazis. The Court stated that applicant had published a true statement of facts followed by a value-judgment as to those facts.

The Court further stated that the requirement by the Austrian courts that the applicant had to prove the truth of his allegations was itself an infringement of freedom of expression. As to the form of the publication, the Court accepted the assessment made by the Austrian courts. It noted that they did not establish that “the presentation of the article in the form of a criminal information” was misleading in the sense that a significant number of the readers were led to believe that a public prosecution had been instituted against Mr Grabher-Meyer or even that he had already been convicted. It followed that a violation of Article 10 had occurred as the interference with the applicant’s exercise of his freedom of expression was not “necessary in a democratic society”.

Article 50 (now Article 41)

The Court awarded the applicants the sum of 18,123.84 schillings (approximately €1,317) in respect of damages and 85,285 schillings (approximately €6,197) in respect of costs and expenses.

In the context of a juror's admission of racism, failure to check whether the court met the requirements of an impartial tribunal amounted to a breach of Article 6 § 1 of the Convention

JUDGMENT IN THE CASE OF **REMLI v. FRANCE**

(Application no. 16839/90)

23 April 1996

1. Principal facts

The applicant, Said André Remli, a French national of Algerian origin, was in prison in Marseilles, France. The applicant and a fellow prisoner (Mr. Boumédiène Merdji, of Algerian nationality) killed a warden while trying to escape from prison and were charged with intentional homicide for the purpose of facilitating, preparing or executing the offences of escape and attempted escape.

The applicant and Mr. Merdji were tried by the Rhone Assize Court on 12, 13 and 14 April 1989. On 12 April, prior to the commencement of the hearing, a third party (Mrs. M), overheard one of the jurors on the trial remark “what’s more, I’m a racist”. Mrs. M made the applicant’s counsel aware of the comment and identified the juror in question. On 13 April applicant’s counsel submitted a request that the Assize Court make a formal note of the incident, which was refused on the grounds that the statement had been made before the beginning of the first hearing and not in the presence of the judges.

On 14 April, the Assize Court sentenced the applicant to life imprisonment and Mr. Merdji to a twenty-year term. The applicant appealed to the Court of Cassation on points of law, arguing that the Assize Court had disregarded Article 6 of the European Convention on Human Rights in holding that it was not able to take formal note of events alleged to have occurred out of its presence when it had power to do so. The Court of Cassation dismissed the appeal, holding instead that the Assize Court “rightly refused to take formal note of events which, assuming they were established, had taken place outside the hearing, such that it could not have been in a position to note them.”

2. Decision of the Court

The applicant alleged violations of Article 6 (right to a fair trial) in conjunction with Article 14 (prohibition of discrimination) on the basis that he was not tried by

an impartial tribunal and that he had suffered discrimination on the grounds of race. In addition, he alleged a violation of Article 13 (right to an effective remedy).

Admissibility

Regarding the complaint based on Article 14 taken together with Article 6, the Court found that the applicant's failure to complain of discrimination in the national courts meant that he had not exhausted domestic remedies, and this complaint was declared inadmissible. The complaint under Article 6 in relation to the impartiality of the Assize Court was declared admissible.

Article 6 § 1

The applicant submitted that if a court trying people of foreign nationality or origin included a juror who, before the hearing, had publicly expressed racist sentiments, it lacked impartiality. The juror in question, the applicant argued, should not have sat in a case they were unable to assess with complete objectivity. The Assize Court's failure to make formal note of the comment therefore denied the applicant the opportunity to be tried by an impartial tribunal, as required by Article 6 § 1. The Government conceded that any court containing a juror who actively declared himself to be a racist could not be regarded to be impartial. However, it had to be established with certainty that the racist opinions were really held and that they could have influenced the conviction. The sentence "what's more, I'm a racist" could have been uttered as a joke or in connection with another case. Furthermore, a court could not be expected to verify all the remarks that a juror might make before being drawn by lot.

The Court recalled that when deciding whether there is a legitimate reason to fear that a particular judge lacks impartiality, the decisive factor is not the standpoint of the accused, but whether the fear of the accused can be objectively justified. In the instant case, the Court noted the significance of the statement in the context of a trial of two men of north African origin. The Court observed that the Assize Court dismissed the application for formal note to be taken on the grounds that it was "not able to take formal note of events alleged to have occurred out of its presence", nor did it order that evidence be taken to verify the report.

As such, the applicant was unable to i) have the juror in question replaced; ii) rely on the comments in support of his appeal on points of law; or iii) challenge the juror, as the jury had been finally empanelled. Furthermore, the applicant was unable to appeal the Assize Court's judgment other than on points of law. The Court considered

that Article 6 § 1 imposed an obligation on every national court to check whether it met the requirements of “an impartial tribunal”. On the facts, the Assize Court’s failure to make such a case deprived the applicant of the possibility of remedying a situation contrary to the Convention. This, considered in light of the need for the courts inspire confidence in those subject to their jurisdiction, amounted to a breach of Article 6 § 1.

Article 50 (now Article 41)

The finding of the breach of Article 6 § 1 was held to be sufficient just satisfaction for the applicant. However, the Court ordered the Government to pay the applicant in respect of costs and expenses, the sum of 60,000 French francs (approximately €9,150).

The involvement of two judges who in separate proceedings had acted as lawyers against the applicant was a breach of the requirement of an impartial tribunal under Article 6 § 1

JUDGMENT IN THE CASE OF **WETTSTEIN v. SWITZERLAND**

(Application no. 33958/96)
21 December 2000

1. Principal Facts

The applicant was born in 1930 and was a businessman living in Pfäffikon, Switzerland. He was the owner of two properties, and was involved in building proceedings in the Kloten municipality in which the opposing party, a cantonal insurance pension office, was represented by a lawyer, Mr W. The applicant was also involved in separate building proceedings against the Küsnacht municipality in which that municipality was represented by a lawyer, Mrs R. These proceedings were conducted before the Administrative Court of the Canton of Zürich and in last resort before the Federal Court. Mrs R. and Mr W. were practising lawyers who at that time shared office premises in Zürich together with Mr L. The lawyers, Mrs R. and Mr L., also acted as part-time administrative court judges at the Administrative Court of the Canton of Zürich.

In the proceedings concerning the applicant's properties in Kloten the applicant filed on 15 February 1995 an action with the Administrative Court of the Canton of Zürich. The bench of the Administrative Court was composed of five judges and among the administrative court judges were R. and L., sitting as part-time judges. On 15 December 1995 the court rejected the applicant's action.

The applicant filed a public-law appeal with the Federal Court in which he complained that judge R. had shortly before acted in separate appeal proceedings, instituted by the applicant, as the legal representative of the opposing party, namely the Küsnacht municipality. Moreover, judge R. shared office premises with judge L., and also with W. who, in separate proceedings instituted by the applicant, had represented the opposing party. The public-law appeal was dismissed by the Federal Court on 29 April 1996.

2. Decision of the Court

The applicant argued that the involvement of the two judges in the building proceedings who in separate proceedings had acted as lawyers against him constituted a lack of impartiality under Article 6 § 1 of the Convention.

Article 6

The Court stated at the outset that there was no reason to doubt that legislation and practice on part-time judiciary in general could be framed so as to be compatible with Article 6. What was at stake was solely the manner in which the proceedings were conducted in the applicant's case. According to the Court, when the impartiality of a tribunal for the purposes of Article 6 § 1 is being determined, regard must be had to the personal conviction and behaviour of a particular judge in a given case – the subjective approach – as well as to whether it afforded sufficient guarantees to exclude any legitimate doubt in this respect – the objective approach. As regards the subjective aspect of impartiality, the Court found that there was nothing to indicate in the present case any prejudice or bias on the part of judges R. and L..

As regards the objective approach it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which raises doubts as to his impartiality. What is at stake is the confidence which the courts in a democratic society must inspire in the public and in this respect even appearances may be of a certain importance. When deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the person concerned is important but not decisive – what is decisive is whether this fear can be held to be objectively justified.

In this regard the Court noted that judge R. acted against the applicant in separate building proceedings as the legal representative of the Küssnacht municipality. Judges R. and L. both shared office premises with lawyer W. who had previously acted as legal representative in other building proceedings in the Kloten municipality. While there was no material link between the applicant's case before the Administrative Court and the separate proceedings in which R. and W. acted as legal representatives, the Court noted that, when the applicant instituted the present proceedings before the Administrative Court with R. as a judge on the bench, the parallel proceedings in which R. acted as legal representative for the Küssnacht municipality against the applicant were pending before the Federal Court.

Less than two months after these Federal Court proceedings against the Küssnacht municipality had been terminated, the Administrative Court gave its judgment. There was, therefore, an overlapping in time of the two proceedings with R. in the two functions of judge, on the one hand, and of legal representative of the opposing party, on the other. As a result, the Court stated that in the proceedings before the Administrative Court, the applicant had reason for concern that judge R. continued to see in him the opposing party.

The Court found that this situation could have raised legitimate fears in the applicant that judge R. was not approaching his case with the requisite impartiality. The fact that W., an office colleague of judges R. and L., had represented the party opposing the applicant in other proceedings, could have further confirmed the applicant's fear that judge R. was opposed to his case. These circumstances served objectively to justify the applicant's apprehension that judge R. of the Administrative Court lacked the necessary impartiality. As such the Court ruled that there had been a violation of Article 6 § 1 of the Convention with regard to the requirement of an impartial tribunal.

Article 41

The Court awarded the applicant the total sum of CHF 9,000 (approximately €8328.19) in respect of costs and expenses.

(10) The Relationship between Independence and Impartiality, and other aspects of Article 6 and further rights in the Convention

Premature termination, with no review, of the President of the Hungarian Supreme Court's mandate as a result of his expression of his professional views on legislative reform violated Articles 6 and 10

GRAND CHAMBER JUDGMENT IN THE CASE OF BAKA v. HUNGARY

(Application No. 20261/12)

23 June 2016

1. Principal Facts

The applicant, Mr András Baka, was a Hungarian national born in 1952. From 1991 to 2008, the applicant served as a judge on the European Court of Human Rights. He then spent more than a year as a member of the Budapest Court of Appeal.

On 22 June 2009, the Hungarian Parliament elected the applicant as president of the Supreme Court for a six-year term. This role involved managerial tasks and presiding over deliberations resulting in uniformity resolutions. The applicant was also head of the National Council of Justice, which imposed a statutory obligation on him to express his opinion on parliamentary bills that affected the judiciary, after gathering and summarising the opinions of different courts.

In April 2010, the Hungarian Parliament began a program of comprehensive constitutional and legislative reforms. Throughout this reform period, the applicant publicly expressed his professional opinions on bills affecting the judiciary. On 24 March 2011, before Parliament, the applicant expressed his opinions on the new name of the Supreme Court (Kúria), the new powers attributed to it in ensuring consistency in the case law, the management of the judiciary, and the functioning of the National Council of Justice, as well as the introduction of a constitutional appeal against judicial decisions. In April 2011, the applicant, along with other court presidents, issued an open letter criticising the proposal to reduce the mandatory retirement age of judges from 70 years to 62. In June 2011, the applicant challenged a judicial reform act before the Constitutional Court. Further, in a speech, delivered in November 2011, the applicant expressed to Parliament his disapproval of the Organisation and Administration of the Courts Bill and the Legal Status and Remuneration of Judges Bill. The applicant said the draft legislation did not address

the structural problems of the judiciary, but left them to “the discretion of the executive of an external administration (the President of the proposed National Judicial Office, which would replace the National Council of Justice in managing the courts), who [would be] assigned excessive and, in Europe, unprecedented powers, with no adequate accountability.”

The Hungarian Parliament passed the Fundamental Law, which established that the Supreme Court would be renamed the Kúria, on 25 April 2011. Following this, multiple politicians stated that the legislation would not result in a new president of the Supreme Court. However, on 9 November 2011 the Organisation and Administration of the Courts Bill was amended, requiring the new president of the Kúria to have served at least five years as a judge in Hungary. Serving on an international court did not count toward this requirement. In the period between 19 and 23 November 2011, Hungarian MPs submitted several amendments proposing that the applicant’s mandate as President of the Supreme Court be terminated, as he did not have the newly requisite experience. In December 2011 Parliament elected two candidates, namely Péter Darák and Tünde Handó, as President of the new Kúria and President of the National Judicial Office respectively. The applicant remained in office as president of the civil-law bench of the Kúria.

2. Decision of the Court

The applicant alleged that he was denied access to a tribunal to defend his rights in relation to his premature dismissal, in violation of Article 6 (right to a fair trial), and that his mandate was terminated as a result of expressing his professional opinions on legislative reform in breach of Article 10 (freedom of expression). He further complained that he had no effective remedy under Article 13 (right to an effective remedy), and that he had been discriminated against in violation of Article 14 (prohibition of discrimination).

On 27 May 2014 a Chamber of the Court held that there had been violations of Articles 6 and 10 of the Convention in relation to the applicant’s case. On 15 December 2014 a panel of the Grand Chamber accepted the Government’s request for referral of the case under Article 43.

Article 6

The Court began by determining whether the protections of Article 6 applied to the applicant’s case. According to its case law, for Article 6 § 1 to apply there had to be a genuine and serious dispute over a right that was recognised in domestic law. The

Court found that under domestic law the applicant had been appointed to his position for a fixed period of six years (2009-2015) and that the only permissible grounds for early termination of this position by dismissal contained a right for the subject of the dismissal to judicially review that decision. Further, the 1949 Constitution affirmed that judges could only be removed on specific grounds in accordance with procedures specified by law and that judges were independent and protected by the principle of irremovability. The new legislation could not remove, retrospectively, the applicant's right to fulfil his term under the applicable rules in force at the time of his election. Therefore, given these protections, the Court held there was a genuine and serious dispute over a right between the applicant and the Hungarian Government on which the applicant could claim on arguable ground under domestic law.

However, the Court had previously stated that employment disputes between authorities and public servants were excluded from the scope of Article 6 § 1 as they did not amount to civil disputes. The Court applied the test from *Vilho Eskelinen v. Finland*^[415] to see if the applicant would fall into this category. For the applicant to be excluded, first, the State, in its national law, must have expressly excluded access to a court for employment disputes related to the post or category of staff in question. Secondly, the exclusion had to be justified on objective grounds in the State's interest.

In analysing the first *Vilho Eskelinen* criterion, the Court found the applicant should have been able to contest his removal before the Service Tribunal. The protection of the applicant from dismissal was specifically provided for in domestic law, in line with international and European standards on the independence of the judiciary and procedural safeguards applicable in cases of removal of judges. But in this particular case, despite the legal protections described above, the applicant's access to a court had been impeded by the fact that the premature termination of his mandate as President of the Supreme Court had been included in the transitional provisions of the new Organisation and Administration of the Courts Act. This act precluded the applicant from contesting his termination before the Service Tribunal, something he would have been able to do in the event of a dismissal on the basis of the pre-existing legal framework.

However, the Court reasoned that the applicant could not be legitimately excluded from accessing a court by the very measure that was alleged to constitute an interference with the applicant's Article 6 rights. Otherwise, States could simply deny public servants access to courts and the protections of Article 6 by including such a provision in any statutory instrument they introduce. The Court

415 *Vilho Eskelinen v. Finland*, Grand Chamber judgment of 19 April 2007, no. 63235/00.

also emphasised that for national legislation to exclude access to a court under the requirements of Article 6 § 1 it had to be compatible with the rule of law, meaning that any interference with the Convention had to be based on an instrument of general application. Further, the Venice Commission had stated that laws directed against specific people were contrary to the rule of law. Therefore, as the applicant's exclusion from access to a court was not in keeping with the rule of law, it could not be held to expressly exclude the applicant from the protections of Article 6. Accordingly, the applicant was not excluded from Article 6 protection.

The applicant's premature removal from office was not reviewed nor open to review. This lack of opportunity for a judicial review was also the result of legislation, the compatibility of which with the requirements of the rule of law was considered doubtful by the Court. The Court also noted the growing importance of procedural fairness in international and CoE instruments, as well as in the case law of international courts and other international bodies, in cases involving the removal or dismissal of judges. As a result, the Court held that a violation of the applicant's right of access to a court under Article 6 had occurred.

Article 10

In order to determine whether the applicant's right to freedom of expression had been violated, the Court first had to determine whether the measure complained of amounted to an interference with the applicant's freedom of expression in the form of a "formality, condition, restriction or penalty" or whether it had merely affected the exercise of his right to hold a public post in the administration of justice, which was not a recognised right. In this case, the Court noted that the Government's proposals to terminate the applicant's mandate, as well its proposal for a new eligibility criterion for the post of President of the Kúria, had all been submitted to Parliament within a strikingly short time, between 9 and 23 November 2011, and shortly after the applicant had publicly expressed his critical views on several legislative reforms affecting the judiciary, most notably on 3 November. Further, interviews given by two members of the parliamentary majority and government assurances to the Venice Commission that the applicant would not be removed from his post all pre-dated his speech in Parliament on 3 November 2011, after which the proposals to terminate his mandate and to abolish his post-term allowances were all submitted.

In the Court's view, having regard to the sequence of events in their entirety, there was *prima facie* evidence of a causal link between the applicant's exercise of his freedom of expression and the termination of his mandate. The Court held that once there was *prima facie* evidence in favour of the applicant's version of the events

and the existence of a causal link, the burden of proof shifted to the Government to deny such a link. In this case, the Government failed to show convincingly that the applicant's removal from office was prompted by the elimination of the applicant's post and functions. Therefore, the Court agreed with the applicant that the termination of his mandate had been prompted by the views and criticisms that he had publicly expressed in his professional capacity, leading to an interference with his right to freedom of expression.

The Court then went on to examine whether this interference had been justified, i.e. it was prescribed by law, pursued a legitimate aim and was necessary in a democratic society. As stated above in relation to the applicant's complaint under Article 6, the Court had significant doubts as to whether the legislation underpinning the termination of the applicant's mandate complied with the rule of law. However, for the purposes of this case the Court proceeded on the assumption that the interference with Article 10 was indeed prescribed by law.

The Government claimed the new legislation and the applicant's removal were efforts to maintain the authority and impartiality of the judiciary. However, the Court held that a State could not legitimately invoke the independence of the judiciary in order to justify the premature termination of the mandate of a court president for reasons that had not been established by law and did not relate to any grounds of professional incompetence or misconduct. Further, the measures had been introduced as a result of the exercise of the applicant's right to freedom of expression, in a situation where the applicant was the highest office holder in the judiciary and was prevented from serving his full term of office. The Government's actions were therefore not compatible with their stated aim; the removal of the applicant was deemed by the Court to appear to be incompatible with the aim of maintaining the independence of the judiciary.

While a violation of Article 10 was therefore found at this point, given the interference was not justified, the Court considered it important to consider whether the interference could have been considered necessary in a democratic society. While considering the principles of freedom of expression that applied to judges, the Court stressed that given the importance of the separation of powers and of safeguarding the independence of the judiciary, any interference with the freedom of expression of a judge required close scrutiny. Furthermore, questions concerning the functioning of the justice system and the separation of powers fell within the public interest, the debate and discussion of which enjoyed a high degree of protection under Article 10.

The Government's actions were deemed to be not necessary in a democratic society because they compromised the principle of the irremovability of judges, a key element for the maintenance of judicial independence, and had inspired a fear of being removed from their posts in other judges, what the Court called a "chilling effect". This chilling effect ensured that other judges were reluctant to participate in public debates on issues related to the administration of justice and the judiciary. The Court emphasised that it was not only the applicant's right but also his duty as President of the National Council of Justice to express his views on legislative reforms that affected the judiciary and in particular the independence of the judiciary, especially given the fact that every judge was responsible for promoting and protecting judicial independence. The applicant merely spoke out within the professional responsibility of his post and profession and his statements never went beyond mere criticism from a strictly professional perspective on a matter of great public interest. The Court considered that the Government's measures targeting the applicant defeated, rather than served, the purpose of maintaining the independence of the judiciary.

The Court therefore concluded that the interference with the applicant's exercise of his right to freedom of expression had not been "necessary in a democratic society" and had amounted to a violation of Article 10.

Article 13

The Court found that there was no need to examine the application separately under Article 13 of the Convention in conjunction with Article 10.

Article 14

The Court found that there was no need to examine the application separately under Article 14 of the Convention in conjunction with Articles 6 and 10.

Article 41

The Court held that Hungary should pay the applicant €70,000 in respect of pecuniary and non-pecuniary damage and €30,000 in respect of costs and expenses.

Comments on charges brought against the applicant, a well-known politician, by a judge and a minister were held to violate his right to presumption of innocence

JUDGMENT IN THE CASE OF **GUTSANOVI v. BULGARIA**

(Application No. 34529/10)
15 October 2013

1. Principal Facts

The applicants were Mr Borislav Gutsanov Gutsanov (a well-known local politician) (the “first applicant”), his wife and two minor daughters. The authorities suspected the first applicant of involvement in a criminal group accused of abusing power and embezzling public funds.

At around 6.30 a.m. on 31 March 2010 a special team, which included armed and masked police officers, arrived at the applicants’ home. A caretaker alerted them of the presence of the wife and children. After the applicants did not respond to the order to open the door, the police officers forced entry. The house was searched and various items of evidence were taken. The first applicant was arrested and escorted off the premises at 1.00p.m., recorded by journalists and television crew. A press conference was held on the same day, during which the prosecutor announced the charges against the arrested individuals, including the first applicant, as part of a criminal group. At 10.55 p.m. a prosecutor formally charged the first applicant with various offences and ordered a detention for 72 hours to ensure his attendance in court.

On 1 April a newspaper published the prosecutor’s speech, together with extracts of an interview with the Interior Minister, during which he referred to the closeness of the first applicant with another suspect and their involvement in a “plot”. On 3 April 2010, a tribunal placed him in pre-trial detention on the grounds that there was a risk that he might commit new offences. On 5 April 2010 the Prime Minister gave a live interview on current affairs, at the end of which he was asked to comment on the recent arrests, and mentioned the closeness of the first applicant with another suspect and “material profits”.

The first applicant’s appeal against pre-trial detention on 13 April 2010 and a further request for release on 18 May 2010 were rejected. On 25 May 2010 the Court of Appeal placed the first applicant under house arrest, noting that the danger of him committing new offences no longer existed. On 26 July 2010 the tribunal decided to release him on bail.

2. Decision of the Court

Relying on Article 3 (prohibition of torture and inhuman and degrading treatment), Article 5 (right to liberty and security) and Article 6 (the right to a fair trial) the applicants complained that the first applicant's arrest, detention and trial had violated the Convention. The applicants also alleged under Article 8 (right to respect for private and family life) that the search of their house had not been properly authorised and under Article 13 (right to an effective remedy) that they had no effective remedy in relation to their treatment during the first applicant's arrest.

Article 3

The police operation pursued the legitimate aim of carrying out an arrest, search and find in the general interest of the prosecution of criminal offences. However, its planning and execution did not take into account several important factors, such as the nature of offences the first applicant was accused of, the fact that he did not have any violent history and the presence of his wife and children. These factors indicated that the use of special, armed and masked agents and methods like arriving very early in the morning were excessive, rather than strictly necessary to apprehend a suspect and gather evidence. The four applicants had been subjected to a psychological ordeal generating feelings of fear, anguish and feelings of helplessness, qualifying it as degrading treatment. The Court hence found a violation of Article 3.

Article 5

The first applicant began his complaints under Article 5 by alleging that he had not been brought promptly before a judge in violation of Article 5 § 3. The first applicant was detained without trial for three days and six hours but had not been participating in any investigatory measures after the first day. He was not suspected of involvement in violent activity and was in a psychologically fragile state during the initial stages of detention following the degrading treatment suffered during the police operation, which was exacerbated by his public notoriety. He was detained in the same city as the tribunal and no exceptional security measures were necessary. These elements led the Court to find a violation of the requirement in Article 5 to promptly present a suspect before a judge.

The first applicant also complained under Article 5 § 3 that his rights had been violated in relation to the length of his detention. The first applicant was detained for a period of 118 days (31 March to 30 July 2010), two months of which were house arrest. The domestic tribunals' decisions to keep him in detention was based on a

risk that he might commit a new offence, specifically that he would interfere with evidence. However, on 25 May 2010, the Court of Appeal decided that following the first applicant's resignation from his post, this danger had passed. Yet, contrary to its obligations under domestic law, the same court placed the first applicant under house arrest without offering any particular reason to justify this decision. Hence, the Court concluded that the authorities failed in their obligation to provide pertinent and sufficient reasons for the first applicant's detention after 25 May 2010, and therefore violated Article 5 § 3.

The first applicant also complained to the Court that he did not have access to an effective remedy under Article 5 § 5. The State Liability Act did not provide the first applicant with an effective remedy for the action of damages suffered by him during detention, as it required a formal finding by a domestic court that the detention had been unlawful. As the proceedings against the first applicant were still pending, it did not apply to him, as his detention was still considered lawful by the domestic courts. Since no other domestic provision for compensation existed, the Court found a violation of Article 5 § 5 for the same reasons for which it had dismissed the State's objection on the ground of non-exhaustion of domestic remedies.

Article 6

The Court examined the first applicant's claims that various public officials had violated his right to a presumption of innocence. He alleged that the Prime Minister had suggested in a television interview that the first applicant had made material profits from his political connections, this being an element of the charges against him. He also alleged that the regional prosecutor, as a representative of the public prosecutor's office, had listed the potential charges against the first applicant and insisted that he would face long sentences for such crimes. The first applicant also claimed that the Minister of the Interior had referred to the first applicant as indisputably guilty of several serious offences. Finally, the applicant alleged that a judge designated to rule on whether there was sufficient evidence to suspect that the first applicant had committed a criminal offence, instead stated that he was certain an offence had been committed.

After finding no violation regarding the Prime Minister's interview and the prosecutor's conference speech, as neither were considered likely to suggest that the first applicant was guilty of a crime for which he had not yet been tried, the Court considered the case of the Interior Minister. In his interview, the Minister declared that what "the first applicant and another suspect have done represents an elaborate plot during a period of several years". The Court distinguished the nature

of this interview, exclusively concerned with the operation, from the spontaneous words of the Prime Minister several days later. In addition, the fact that this speech was published the day after the first applicant's arrest (and before his appearance before a court) by a high government official who in the circumstances should have taken precautions to avoid confusion was significant. The words were more than a simple communication of information and were instead suggestive of the first applicant's guilt. The Court confirmed that the absence of a proven intent to interfere with the presumption of innocence did not mean a violation of Article 6 under that heading could not be found. Therefore there had been a violation of Article 6 § 2.

Finally, a judge ruling on the first applicant's application for release stated that the court "remains of the view that a criminal offence was committed and that the accused was involved". This phrase was considered by the court to be more than a mere description of suspicion, and rather a declaration of guilt before any decision on the merits of the case had been made. Therefore this statement also violated the first applicant's right to a presumption of innocence under Article 6 § 2.

Article 8

The Court noted that the search at issue was based on legislative provisions that posed no problem as regards their accessibility and predictability for the purposes of the search being "in accordance with the law." As regards the last qualitative condition to be met by domestic legislation, namely compatibility with the rule of law, the Court recalled that in the context of seizures and searches it required that domestic law offer adequate guarantees against arbitrariness. In the instant case, the search of the applicants' house was carried out without a judge's prior authorisation. Such a search was permitted on the condition that a tribunal reviewed the search retrospectively to ensure that it met certain material and procedural conditions. In this case, the judge in question did not, however, give any reasons for his approval – he had simply signed and stamped the record followed by the word "approved". As a result, the Court considered that he did not demonstrate effective control over the lawfulness and necessity of the search. Hence, the Court considered that the interference with the right to respect for home was not "prescribed by law" and therefore violated Article 8.

Article 13 in combination with Articles 3 and 8

No effective remedy existed in domestic law by which the applicants could assert their right not to be submitted to treatment contrary to Article 3 and to respect for

their home under Article 8. A violation of Article 13 in combination with these two articles was therefore found.

Article 41

A joint sum of €40,000 was awarded to the applicants in just satisfaction and €4,281 for costs and expenses.

Disciplinary action against a judge on the basis of his membership of the Freemasons held to breach freedom of association under Article 11

GRAND CHAMBER JUDGMENT IN THE CASE OF
MAESTRI v. ITALY

(Application no. 39748/98)
17 February 2004

1. Principal facts

The applicant, Angelo Massimo Maestri, was born in 1944 and lived in Italy. At the time of lodging his application, he was a judge and acting president of the La Spezia District Court. In November 1993 disciplinary proceedings were brought against him, under the Royal Legislative Decree of 31 May 1946 (“the 1946 decree”), for having been a member of a Masonic lodge from 1981 until March 1993.

In a decision of 10 October 1995 the disciplinary section of the National Council of the Judiciary found that the applicant had committed the offence of which he was accused and gave him a reprimand. It stated that from 1982 onwards it should have been possible to “have a clear idea of the loss of integrity resulting from membership of the Freemasons”, this being a reference to Law no. 17 of 25 January 1982 (“the 1982 law”) which contained provisions on the implementation of Article 18 of the Italian Constitution (right of association) in respect of secret associations and which made membership of a secret associations a criminal offence.

The disciplinary section also stated that it was contrary to disciplinary rules for a judge to be a Freemason, on account of the incompatibility between the Masonic and judicial oaths, the hierarchical relationship between Freemasons, the rejection of State justice in favour of Masonic justice and the indissoluble nature of the bond between Freemasons. It also referred to the directives issued by the National Council of the Judiciary which highlighted the conflict between membership of the Freemasons and membership of the judiciary in March 1990 (“the 1990 directive”) and July 1993. According to the 1990 directive, “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 applicant appealed on three points of law to the Court of Cassation. He alleged a breach of Article 18 of the Italian Constitution, defended the compatibility

of judicial office with membership of the Freemasons and complained about the lack of evidence behind the finding that a judge would be discredited by belonging to the Freemasons. His appeal was dismissed on 20 December 1996.

The applicant also maintained that his career had been at a standstill following the imposition of the disciplinary sanction.

2. Decision of the Court

The applicant alleged that the imposition of a sanction on him for being a Freemason amounted to a violation of Articles 9 (right to freedom of thought, conscience and religion), 10 (freedom of expression) and 11 (freedom of assembly and association). Jurisdiction was relinquished in favour of the Grand Chamber under Article 30.

Article 11

The Court considered that the applicant's complaints fell more particularly within the scope of Article 11. Accordingly, it considered the complaints submitted to it under this provision alone.

The Court considered that there had been an interference with the applicant's right to freedom of association as guaranteed by Article 11. Regarding whether the interference had been prescribed by law, the Court reiterated that the measure in question had to have had a basis in domestic law and to have been accessible and foreseeable.

In that connection the Court observed that Article 18 of the 1946 decree, construed in the light of the 1982 law on the right of association and the 1990 directive, had been the legal provision used as the basis for the sanction imposed on the applicant.

With regard to the quality of the law, the Court noted at the outset that Article 18 of the 1946 decree was accessible in that it was public and the applicant, on account of his profession, could easily have learned of it. Secondly, as regards whether the law had been foreseeable, namely whether Italian law had laid down with sufficient precision the conditions in which a judge should refrain from joining the Freemasons, the Court considered that a distinction had to be made between two periods: the period prior to the adoption by the National Council of the Judiciary of the 1990 directive, and the subsequent period.

Regarding the period from 1981 to March 1990, the Court considered that Article

18 did not satisfy the condition of foreseeability and that, even after Italy had passed the 1982 law on the right of association, the applicant could not have foreseen that a judge's membership of a Masonic lodge could give rise to a disciplinary issue.

The same was true of the period from the adoption of the directive in March 1990 until March 1993. Although the directive in question had been issued in the context of an examination of the question of judges' membership of the Freemasons the debate before the National Council of the Judiciary had sought to formulate, rather than solve, a problem. The Court held that the wording of the directive had not been sufficiently clear to enable the applicant, despite being a judge, to realise that his membership of a Masonic lodge could lead to sanctions being imposed on him. The Court's assessment was confirmed by the fact that the National Council of the Judiciary had itself felt the need to come back to the issue in July 1993 and state in clear terms that the exercise of judicial functions was incompatible with membership of the Freemasons.

Accordingly, the interference had not been prescribed by law. There had therefore been a violation of Article 11.

Article 41

The Court awarded the applicant €10,000 for non-pecuniary damage and €14,000 for costs and expenses.

The applicant's fears as to the impartiality of a judge who had publicly supported a colleague criticised by the applicant was deemed to be objectively justified in violation of Article 6, and his conviction for defamation constituted a violation of Article 10

GRAND CHAMBER JUDGMENT IN THE CASE OF **MORICE v. FRANCE**

(Application no. 29369/10)

23 April 2015

1. Principal facts

The applicant, Mr Olivier Morice, was a French lawyer and member of the Paris Bar. He represented Ms Elisabeth Borrel, a judge and the widow of the French judge Bernard Borrel, whose dead body was found, on 19 October 1995, 80 kilometres from the city of Djibouti.

In 1997 the French judicial investigation into Mr Borrel's death as a premeditated murder was assigned to the investigating Judges Ms M. and Mr L.L. On 21 June 2000, on an appeal lodged by the applicant and his colleague, the Indictments Division of the Paris Court of Appeal set aside a decision of the two judges in which they refused to organise an on-site reconstruction in the presence of the civil parties, removed those judges from the case and transferred it to a new investigating judge, Judge P..

The new investigating judge presented a report on 1 August 2000 with the following observations regarding the Mr Borrel's case: a video-recording made in Djibouti in March 2000 during an on-site visit by the former investigating judges and experts was not in the judicial investigation file forwarded to him and was not registered as an exhibit; at his request, the cassette had subsequently been given to him by Judge M., in an envelope showing no sign of having been placed under seal and bearing that judge's name as addressee, together with a handwritten card to her from the public prosecutor of Djibouti as sender; the card, written in an informal language and revealing a surprising and regrettable complicit intimacy between Judge M. and the public prosecutor of Djibouti, cast aspersions on Ms Borrel and her lawyers, accusing them of "orchestrating their manipulation".

On 6 September 2000 the applicant and his colleague wrote a letter to the French Minister of Justice to complain about the facts noted by Judge P. in his report. They referred to the conduct of Judges M. and L.L. as being "completely at odds with the principles of impartiality and fairness" and requested an investigation to be carried

out by the General Inspectorate of Judicial Services into the numerous shortcomings brought to light in the course of the judicial investigation. The following day, extracts from that letter were included, together with statements made by the applicant to the journalist and the handwritten note, in an article in the newspaper *Le Monde*. The article also referred to disciplinary proceedings against Judge M. which were pending before the National Legal Service Commission with regard to a Scientology case for which she was responsible, in particular for the disappearance of documents from the case file. The applicant, who represented the civil parties in that case as well, had obtained Judge M.'s removal from the investigation and, in 2000, a judgment against the State for gross negligence on the part of the courts service on account of the disappearance of the Scientology file from Judge M.'s office.

In October 2000 Judges M. and L.L. filed a criminal complaint against the publication director of *Le Monde*, the journalist who had written the article and the applicant, accusing them of the offence of public defamation of a civil servant. The applicant was ultimately found guilty of complicity in that offence by the Rouen Court of Appeal in 2008.

The applicant appealed the Rouen Court of Appeal's decision. On 10 November 2009 the Court of Cassation dismissed the appeal on points of law, finding in particular that the admissible limits of freedom of expression in criticising the action of the judges had been overstepped. The composition of the Court of Cassation's bench in that case was different from that previously announced to the parties: the presence of Judge J.M. gave rise to a complaint by the applicant as that judge had, at the General Meeting of judges of the Paris *tribunal de grande instance* in July 2000, expressed his support for Judge M. in the context of the disciplinary proceedings for her handling of the Scientology case.

2. Decision of the Court

The applicant alleged that there had been a breach of the principle of independence and impartiality under Article 6 § 1 (right to a fair trial) of the Convention in proceedings before the Court of Cassation and that his freedom of expression enshrined in Article 10 had been breached on account of his conviction for complicity in defamation.

Article 6 § 1

According to the Court's settled case law, the existence of impartiality must be determined according to a subjective test, where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any

personal prejudice or bias in a given case; and also according to an objective test, by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality.

The Court began by finding that the applicant had acknowledged that it was not established that Judge J.M. had displayed any personal bias against him. He had argued nevertheless that his very presence on the bench had created a situation which justified the fear of a lack of impartiality, having expressed his support to Judge M. nine years earlier in the Scientology case. The Court thus examined the case from the perspective of the objective impartiality test, addressing the question whether the applicant's doubts could be regarded as objectively justified in the circumstances of the present case.

First, the language used in 2000 by Judge J.M. in support of Judge M., whose complaint had led to the criminal proceedings against the applicant, had been capable of raising doubts in the defendant's mind as to the impartiality of the panel hearing his case. According to the Court, the very singular context of the case, which concerned a lawyer and a judge who had both been involved at the judicial investigation stage of two particularly high-profile cases, could not be overlooked. In doing so, after pointing out that the applicant had been convicted on the basis of a complaint raised by Judge M., the Court observed that the Court of Appeal's judgment had itself expressly established a connection between the applicant's remarks in the Borrel case and the developments in the Scientology case, concluding that this suggested the existence of personal animosity on the part of the applicant towards Judge M. It was precisely this judgment that the applicant had appealed against on points of law and that had been examined by the bench of the Court of Cassation on which Judge J.M. was sitting.

In addition, as the applicant had not been informed that Judge J.M. would be sitting on the bench, and had had no reason to believe that he would do so, he had thus had no opportunity to challenge J.M.'s presence or to make any submissions on the connected arising issue of impartiality.

The Court held that the applicant's fears could have been considered objectively justified and that consequently there had been a violation of Article 6 § 1.

Article 10

In relation to the applicant's second complaint it was not in dispute between the parties that the applicant's conviction had constituted an interference with

the exercise of his right to freedom of expression, as prescribed by the Freedom of the Press Act 1881, and that the aim of this interference was the protection of the reputation or rights of others. Therefore, the Court proceeded to examine whether the interference was “necessary in a democratic society”, whether it was proportionate to the legitimate aim pursued, and whether the grounds given by domestic courts were relevant and sufficient.

According to the Court, with regard to the status and freedom of expression of lawyers in defending their clients, a distinction had to be drawn depending on whether the lawyer’s remarks were made inside or outside the courtroom. Remarks made in the courtroom warranted a high degree of tolerance to criticism, while remarks made outside the courtroom had to avoid amounting to a gratuitous personal attack without a direct connection to the facts of a case. The Court also recognised that the applicant’s remarks fell within his rights to inform the public about the shortcomings of ongoing criminal proceedings as a matter of public interest. In that context, the authorities had a particularly narrow margin of appreciation when it came to restricting the applicant’s freedom of expression as a lawyer. The Court also took the view that the applicant’s remarks were value judgments and that they had a sufficient factual basis, given that they had a close connection with the facts of the case and could not have been regarded as misleading nor gratuitous.

The Court reiterated that, in the context of Article 10, it had to judge the words of the applicant in the circumstances and overall background of the case. This meant not only the conduct of the investigating judges and the applicant’s relations with one of them, but also the very specific history of the case, its inter-State dimension and substantial media coverage. According to the Court, the applicant’s remarks could not be reduced to a mere expression of personal animosity on his part towards Judge M., as they fell within a broader context. In addition, while the applicant’s remarks did have a negative connotation, they concerned alleged shortcomings in a judicial investigation – a matter to which a lawyer should be able to draw the public’s attention.

The Court recognised that the applicant’s remarks were not capable of undermining the proper conduct of the judicial proceedings. Although the judges were bound by a duty of discretion, and therefore it might be necessary to protect them from gravely damaging and unfounded attacks, this could not have the effect of prohibiting individuals from expressing their views on matters of public interest related to the functioning of the justice system, through value judgments with a sufficient factual basis. Therefore it could not be considered that the applicant’s conviction could serve to maintain the authority of the judiciary.

With regard to the Government's argument that the applicant should have used available legal remedies and not the media to conduct the defence of his client, the Court noted that this indeed had been the applicant's initial intention. He made a referral to the Indictments Division of the Paris Court of Appeal, however, only after that remedy had been pursued and found ineffective.

As to the sanctions imposed, the Court reiterated that in assessing the proportionality of an interference, the nature and severity of the penalties imposed are also factors to be taken into account. It was noted that the applicant's punishment had not been confined to a criminal conviction: the sanction imposed was not the "lightest possible", but was of some significance, especially given his status as a lawyer was relied upon to justify its severity. In view of the foregoing, the Court found that the judgment against the applicant for complicity in defamation constituted a disproportionate interference with his right to freedom of expression, unnecessary in a democratic society, and held that there had been a violation of Article 10.

Article 41

The Court held that France had to pay the applicant €15,000 in respect of non-pecuniary damage, €4,270 in respect of pecuniary damage, and €14,400 for costs and expenses arising from the case.

The investigation by a military court into the circumstances of a death during military service was sufficiently independent and thorough and did not violate Article 2

GRAND CHAMBER JUDGMENT IN THE CASE OF **MUSTAFA TUNÇ AND FECIRE TUNÇ v. TURKEY**

(Application no. 24014/05)

14 April 2015

1. Principal facts

The applicants, a husband and wife, were born in 1946 and 1952 and were the mother and father of Cihan Tunç, who was born on 20 November 1983 and died on 13 February 2004. While carrying out his military service providing security at a site belonging to a private oil company, the applicant's son was injured by gunfire. He was immediately transported to hospital and was pronounced dead shortly after arrival. The military prosecutor's office was informed immediately after the incident and a judicial investigation was opened. A few hours after the incident, the military prosecutor went to the hospital to which Cihan Tunç had been admitted accompanied by a team of experts from the national gendarmerie. He asked the Kocaköy civilian prosecutor to join him to supervise the initial investigations. The private and sergeant who had accompanied Cihan Tunç to the hospital were questioned and an autopsy was carried out. The scientific report concluded that Cihan Tunç had been the victim of a shot fired at point-blank range.

Investigations carried out at the site found that a spent cartridge was lying on the ground and that the deceased man's weapon had been used. As part of the investigations carried out by the military prosecutor's, numerous servicemen were questioned on the day of the incident. The administrative inquiry concluded that the incident had been an accident. In June 2004, holding that there were no grounds for finding that another person had been responsible for the sergeant's death, the prosecutor issued a decision not to bring a prosecution. In October 2004 the military court upheld an appeal lodged by the applicants and ordered the prosecution service to carry out an additional investigation. This investigation found that the incident could not have been a suicide and that the evidence supported the hypothesis of an accident involving the careless handling of a weapon.

On 17 December 2004 the same military court dismissed the applicants' appeal relating to prosecutor's additional investigation finding that that the incident could not have been a suicide. On 10 January 2007 the Supreme Military Administrative

Court upheld in part an action brought by the applicants seeking payment of pecuniary compensation for their son's death. It noted that the death had been caused by careless handling of the service weapon, implying a lack of sufficient training in handling weapons and negligence in the supervision and protection of conscripts. This court found that the death was partly imputable to negligence by the authorities, and awarded the applicants sums in respect of the non-pecuniary and pecuniary damage sustained by them.

2. Decision of the Court

Relying on Article 2, the applicants alleged that the investigation to determine the circumstances surrounding the death of their relative had not satisfied the requirements of the Convention. The applicants claimed that the authorities had failed to conduct an effective investigation into their son's death and that the legislation in force at the time did not provide the necessary guarantees of independence.

On 25 June 2013 a Chamber of the Court delivered a judgment in which it held, by four votes to three, that there had been a violation of Article 2 of the Convention with regard to the independence of the investigation. At the Government's request under Article 43, the case was referred to the Grand Chamber.

Article 2

Firstly, the Court noted that Article 6, which guarantees the right to a fair hearing, also lays down a requirement of independence. However, the Court stated that Article 6 was not applicable in the present case as proceedings brought by one person to challenge a decision not to prosecute another do not themselves seek to determine "civil rights and obligations". The Court considered that while the requirements of a fair hearing may inspire the examination of procedural issues under other provisions, such as Article 2, the safeguards provided were not necessarily to be assessed in the same manner. The Court went on to state that compliance with the procedural requirement of Article 2 is assessed on the basis of several essential parameters: the adequacy of the investigative measures, the promptness of the investigation, the involvement of the deceased person's family and the independence of the investigation. These elements are inter-related and each of them, taken separately, do not amount to an end in itself, as is the case in respect of the independence requirement of Article 6. They are criteria which, taken jointly, enable the degree of effectiveness of the investigation to be assessed.

The Court noted that the prosecutor's office was immediately informed of the incident and that the initial investigative measures were taken on the same day. On 30 June 2004 the prosecution service completed the investigations and issued a decision not to prosecute. On 14 October 2004 the military court allowed the applicants' objections and ordered an additional investigation. The prosecution service issued its report on 8 December 2004, after having carried out the supplementary investigative measures. On 17 December 2004 the military court dismissed the applicants' appeal. A copy of that decision was sent to the applicants' lawyer a few days later. In those circumstances, the Court considered that the investigations in question were conducted with the requisite diligence and that there was no unjustified delay in the investigation. Furthermore, in light of access to the case file the Court found that the applicants had been granted access to the information yielded by the investigation to a degree sufficient for them to participate effectively in the proceedings.

With regard to the independence of the investigation, the Court reiterated that the procedural protection of the right to life inherent in Article 2 of the Convention implies that the investigation must be sufficiently independent. Moreover, where the statutory or institutional independence was open to question, such a situation called for a stricter scrutiny on the part of the Court as to whether the investigation was carried out in an independent manner. Where an issue arises concerning the independence and impartiality of an investigation, the Court stated that the correct approach consisted in examining whether and to what extent the disputed circumstance had compromised the investigation's effectiveness and its ability to shed light on the circumstances of the death and to punish those responsible. The Court stated that it is in relation to this purpose of an effective investigation that the issue of independence must be assessed.

Regarding the independence of the prosecution, the Court noted that the military prosecutor had no ties, hierarchical or otherwise, either with the main suspect or with the gendarmes stationed at the site, or with the central gendarmerie. Secondly, the Court noted that the prosecutor responsible for the investigation gathered all the evidence that it was necessary to obtain, and that he could not reasonably be criticised for failing to take a particular investigative measure. With regard to the non-prosecutorial investigators, the Court noted that although they were members of the gendarmerie, there was no hierarchical relationship between these investigators and the individuals who were likely to have been involved. Furthermore, they were not responsible for steering the investigation, overall control of which remained in the hands of the prosecutor.

With regard to the independence of the military court, the Court noted that, having regard to the regulations in force at the material time, there were factors which cast

doubt on the statutory independence of the military court, the court called upon to examine the applicants' appeal against the decision of the prosecutor's office not to bring a prosecution. One of the three judges of that court was a serving officer and further, like the prosecutors, the military judges at the relevant time were also subject to appraisal by the commander of the military unit in respect of which they exercised their duties. However, it noted that the members of the court had no hierarchical or tangible link with the gendarmes stationed at the site, or even with the gendarmerie in general. The Court noted that there was nothing in the conduct of the court and its judges to indicate that the latter were inclined to refrain from shedding light on the circumstances of the death, to accept without question the conclusions submitted to them or to prevent the instigation of criminal proceedings against possible perpetrators. In fact, the military court initially allowed the applicants' appeal, by ordering additional investigations to test the credibility of the hypothesis of an accident put forward by the prosecutor's office.

Overall, the Court held that the investigation was sufficiently independent within the meaning of Article 2. While accepting the entities which played a role in the investigation did not enjoy full statutory independence, Article 2 did not require absolute independence, and, moreover, the independence of the investigation had to be assessed on the basis of the facts of the specific case. The Court held that there remained an absence of direct hierarchical, institutional or other ties between members of the court and with the gendarmes stationed at the site or with the gendarmerie in general. Secondly, in examining the specific conduct of those members, the Court did not find a lack of independence or impartiality in the handling of the investigation. Finally, the applicant's relatives death did not occur in circumstances which might, a priori, give rise to suspicions against the security forces as an institution, as for instance in the case of deaths arising from clashes involving the use of force in demonstrations, police and military operations or in cases of violent deaths during police custody.

In conclusion, the investigation conducted in this case had been thorough and permitted the applicants' involvement to a degree sufficient to enable them to exercise their rights and had been sufficiently independent. Hence, there had been no violation of Article 2 of the Convention.

The applicant's complaints under Articles 9 and 10 that her dismissal from the judiciary was unjustified were declared inadmissible, as she had breached her duties as a judge and jeopardised the image of impartiality

DECISION IN THE CASE OF
PITKEVICH v. RUSSIA

(Application no. 47936/99)
8 February 2001

1. Principal facts

The applicant was born in 1946 and was a judge at the Noyabrsk City District Court. She was also a member of the Living Faith Church, which belonged to the Russian Union of Evangelical Christian Churches. In February and March 1997, she stood for mayor of Noyabrsk. The candidate who was later elected accused her during the campaign of belonging to a sect. After his election, he sent a letter to the President of the Noyabrsk City District Court, requesting the applicant's dismissal from the judiciary on the ground that she was a "cultist". Disciplinary proceedings were instituted against her by an association of judges before the Judiciary Qualification Panel.

The panel heard the applicant and several witnesses, including officials of the Noyabrsk City Council and City District Court, who testified against her. It scrutinised written statements of 41 persons, including many private persons complaining about the way in which the applicant had handled their cases, however according to the applicant she was refused to call several witnesses on her own behalf. The Judiciary Qualification Panel dismissed the applicant from the office and removed her "third qualification grade" of a judge on the ground that she had "damaged her reputation as a judge" and abused her office for proselytism. The panel ruled that she had misused her office to "pursue religious activities in the interests of the Church" *inter alia* by recruiting as Church members several officials of the Noyabrsk City District Court.

The applicant unsuccessfully appealed to the Supreme Judiciary Qualification Panel of the Russian Federation, where she claimed her representative had not been allowed to attend the hearing. The applicant then appealed to the Supreme Court, which held that the applicant had been involved in propaganda of the Church and religious intimidation of parties to proceedings under her examination and that this gave rise to doubts as to the impartiality and independence of the court. The applicant claimed that she had not been able to attend the hearing at the Supreme Court as the date had changed without her being informed.

2. Decision of the Court

Relying on Article 6 § 1 the applicant alleged that the proceedings in the determination of her dismissal were “civil”, and that they involved a breach of the principle of fairness. Under Articles 9, 10 and 14 she complained that her dismissal from the judiciary amounted to an unjustified and discriminatory interference with the exercise of her freedoms of religion and expression. Under Article 1 of Protocol No. 1 the applicant argued that her dismissal from the office and the removal of the “third qualification grade” interfered unjustly with her property rights.

Article 6

As to the applicability of Article 6 § 1 to the proceedings at issue, the Court stated that employment disputes between the authorities and public servants whose duties typified the specific activities of the public service, in so far as the latter was acting as the depositary of public authority responsible for protecting the general interests of the State, were not “civil” and were excluded from the scope of Article 6 § 1. The manifest example of such activities was provided by the armed forces and the police and the judiciary, while not being part of ordinary civil service, is part of typical public service. A judge participates directly in the exercise of powers conferred by public law and performs duties designed to safeguard the general interests of the State. It followed that the dispute concerning the applicant’s dismissal from the judiciary did not concern her “civil” rights or obligations within the meaning of Article 6, and this part of the application was declared inadmissible under Article 35 § 3.^[416]

Articles 9 and 10

The Court observed that the applicant was dismissed for her specific activities while performing her judicial functions, whereby she expressed her religious views. In this regard there had been an interference with the applicant’s freedom of religion and freedom of expression under Articles 9 and 10. The Court first examined under Article 10 whether this interference was justified.

The Court found the measure was prescribed by law and pursued the legitimate aims of protecting the rights of others and maintaining the authority of the judiciary. As to whether it was necessary in a democratic society, by expressing herself on the

416 Please see the case of *Baka v. Hungary*, Grand Chamber judgment of 23 June 2016, no. 20261/12, (included as a summary in this publication), for how the interpretation of the applicability of Article 6 in relation to proceedings concerning employment disputes for judges has developed since the present judgment.

morality of a party a judge may give the impression of being biased - unless such an opinion appears to be necessary to resolve the case. Concerning the proportionality of the interference in the present case, the applicant's case was examined in her presence at two instances, including the supreme disciplinary panel of 23 judges. The panels' conclusions were confirmed later by the Supreme Court. Nothing in the casefile suggested that the authorities lacked competence or good faith in the establishment of the facts. On the basis of numerous testimonies and complaints by State officials and private persons, it was established that the applicant had, *inter alia*, recruited colleagues of the same religious persuasion, prayed openly during hearings and promised certain parties to proceedings a favourable outcome of their cases if they joined her religious community. Moreover, those activities had resulted in delayed cases and a number of challenges against her.

The Court held that such behaviour was found to be incompatible with the requirements of judicial office and prompted her dismissal. The grounds for her dismissal related exclusively to her official activities and not the expression of her views in private. Moreover, she was not prevented from running as a candidate in the local elections and thus expressing her political opinion. The fact that the mayor and local officials criticised her serving on the judiciary during the disciplinary proceedings did not result in an interference with her freedom to express her political views. Overall, it clearly appeared that the applicant had breached her statutory duties as a judge and had jeopardised the image of impartiality which a judge must give to the public. Thus, allowing a certain margin of appreciation in this respect, the Court found that the reasons adduced by the authorities were sufficient to justify the interference.

Consequently, the applicant's dismissal from her position as a judge was proportionate to the legitimate aims pursued. It followed that this part of the application was manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and declared inadmissible. The Court also found for similar reasons that the complaint under Article 9 was manifestly ill-founded within the meaning of Article 35 § 3.

Article 14

The Court reiterated that the applicant was not dismissed on the basis of her belonging to the Church or having any other "status", but by reason of her specific activities incompatible with the requirements for judicial office. This complaint was therefore also manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

Article 1 of Protocol No. 1

The Court observed that the applicant's dismissal and the deprivation of her "qualification grade" might have involved certain pecuniary and non-pecuniary consequences, and an interference with her property rights in this respect. However, the Court recalled its finding that the dismissal at issue was compatible with the applicant's rights under Articles 9, 10 and 14. It found no indication of a breach of Article 1 of Protocol No. 1 and held this aspect was manifestly ill-founded within the meaning of Article 35 § 3, and was consequently rejected.

(11) Court of Justice of the European Union Case Summaries

Introduction to the Court of Justice of the European Union

Prior to the Lisbon Treaty, the Community Courts comprised the Court of Justice (“ECJ”), the Court of First Instance (“CFI”) and judicial panels. The Lisbon Treaty altered this. The term “Court of Justice of the European Union” now includes the ECJ, the General Court, (the successor to the CFI) and specialised courts (previously, judicial panels). All three judicial institutions of The Court of Justice of the European Union (“CJEU”) give rulings on the cases brought before it.

The five most common types of cases are: requests for preliminary ruling, actions for failure to fulfil an obligation (brought against EU governments for not applying EU law), actions for annulment (brought when EU laws are thought to violate the EU treaties or fundamental rights), actions for failure to act (brought against EU institutions for failing to make decisions required of them), and direct actions.

The following collection of CJEU case summaries will provide examples drawn from the preliminary ruling procedure, and actions for failure to fulfil an obligation.

The CJEU and the ECtHR

The CJEU and ECtHR are independent court systems: the CJEU derives its authority from the legal system of the European Union and rules on the application and interpretation of EU law while the ECtHR derives its authority from the legal system of the CoE and rules on the application and interpretation of the ECHR. However, as explained in more detail in sections 1 and 2 of the narrative to this Guide, the two court systems informally share a broad set of values and principles and in some circumstances formally rely on each other’s reasoning and interpretations in relation to certain, shared, fundamental rights. Therefore, in order to fully understand the principles of independence and impartiality in the context of the jurisprudence of the ECtHR, it is also necessary to understand how the CJEU approaches the same principles in its own jurisprudence.

The cases presented below provide examples of instances in which the CJEU has formally integrated the jurisprudence of the ECtHR into part of the general principles

of EU law.^[417] Aspects of the following cases have also been explicitly relied upon by the Grand Chamber of the ECtHR in its own judgments.^[418]

Preliminary Ruling Procedure

National courts in each EU member state are responsible for ensuring that EU law is properly applied in that state. To avoid the risk that courts in different states might interpret EU law in different ways, under Article 267 Treaty on the Functioning of the European Union (“TFEU”) the “preliminary ruling procedure” enables a national court to ask about the interpretation or validity of an EU law if the presiding national judge considers the point of EU law is in doubt. All courts at whatever level applying EU law have the right to make references to the CJEU, and national rules cannot prevent them from doing so. However, they are not obliged to do so. Only the highest courts, against whose judgments there is no domestic appeal, are required to make references. Only courts can make references in this way. The parties to the case may ask the court hearing their case to make a reference, but the decision to do so remains that of the court alone.

The reply by the CJEU takes the form of a judgment, or reasoned order. Normally this is preceded by an “Opinion” delivered by the Advocate General appointed to the case. The opinion typically contains a more detailed analysis of relevant EU law than the more succinct judgment. The CJEU does not rule on the merits of the case, which is the task of the national court, but the court that requested the ruling is bound by the interpretation that it has been given by the CJEU and which it must then apply it to the facts of the case, including by identifying any facts the CJEU has indicated will be necessary to establish the correct application of EU law. The CJEU’s interpretation also binds all other national courts in EU member states in other comparable cases.

Action for Failure to Fulfil an Obligation

The national courts in each EU Member State are responsible for ensuring that EU law is properly applied in their respective jurisdictions. However, Article 17(1) TEU (Treaty on the European Union) also entrusts to the Commission, as “guardian of the treaties”, the task of ensuring and overseeing the application of EU law in Member States. Article 258 TFEU (Treaty on the Functioning of the European Union) gives

417 *A.K. v. Krajowa Rada Sądownictwa and CP and DO v. Sądnajwyższy*, judgment of 19 November 2019, nos. C-585/18, C-624/18 and C-625/18 (included as a summary in this publication)

418 For example: *Guðmundur Andri Ástráðsson v Iceland*, Grand Chamber judgment of 1 December 2020, no. 26374/18, § 239 (included as a summary in this publication)

the Commission broad powers to bring infringement proceedings against Member States when it considers them to be in breach of their EU law obligations, although this power is rarely exercised.

Interim Measures During an Action for Failure to Fulfil an Obligation

As an action for failure to fulfil an obligation may take years to complete, the Commission, under Article 279 TFEU, may request that the CJEU orders interim measures to prevent irreversible damage from being caused by the EU Member State in the period before the final judgment. The CJEU will only order interim measures in exceptionally urgent and serious cases.

Independence and Impartiality of the Judiciary in Poland

The first five cases below all refer to an ongoing dispute over the independence of the Polish judiciary. In 2017 the Polish government introduced a series of measures to reorganise the Polish judicial system that were judged by the EU Commission to have compromised the independence and impartiality of the Polish courts. These cases concern, *inter alia*:

1. The importance of the principle of independence and impartiality for the rule of law;
2. The importance of the principle of irremovability for the independence and impartiality of the judiciary;
3. How the disciplinary regime governing a legal system may affect its independence and impartiality; and
4. How independence and impartiality affect the execution of European arrest warrants.

These cases have been arranged below in date order to highlight the progression and breadth of the dispute between Poland and the Commission.

If an EU Member State considers that there is a real risk that the individual subject to a European arrest warrant would face an unfair trial at the hands of the judiciary that issued the warrant, they must not execute the warrant

JUDGMENT BY THE COURT OF JUSTICE OF THE EUROPEAN UNION IN THE CASE OF LM

(Case No. C-216/18)

25 July 2018

In this case a request for a preliminary ruling under Article 267 TFEU was made to the CJEU by the Court of Appeal in Brussels, Belgium. See the introduction to this section above for a more detailed explanation of this process.

1. Principal Facts

In 2012 Polish courts issued three separate European arrest warrants (“EAWs”) for the apprehension of Mr LM so that he could be prosecuted for drug trafficking. In May 2017 LM was arrested under those EAWs in Ireland. In his hearing before the High Court, LM refused to consent to his surrender to the Polish authorities, arguing that to do so would expose him to a real risk of suffering a violation of Article 6 (right to a fair trial) of the ECHR. Specifically, LM argued that recent legislative reforms in Poland would deny him his right to a fair trial and undermined the system of mutual trust between EU nations upon which the authority of EAWs was based.

These legislative reforms had been examined by the Commission in a ‘reasoned proposal’ in December 2017 which found that there was no independent and legitimate constitutional review in Poland, and that the relevant reforms posed a threat to the independence of the ordinary judiciary. The proposal invited the European Council to conclude that there were clear risks in Poland of a serious breach of the values laid down in Article 2 of the TEU: respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights including the rights of persons belonging to minorities.

The Irish High Court also independently decided that the independence of the judiciary from the executive in Poland had been severely undermined by political interference and that the State was no longer subject to the rule of law. The High Court ruled that executing the EAW would expose LM to a risk of an Article 6 violation and so his surrender should be refused. In its decision-making the Irish court referred to the 2016 CJEU case of *Aranyosi and Căldăraru*, in which the CJEU established that

an EU Member State could refuse to surrender the subject of an EAW when there was a risk that the individual would suffer a violation of Article 3 as a result of general or systemic problems in the issuing Member State. The Irish court in this case was uncertain as to whether they were required to assess the specific risks facing LM in Poland after already finding systemic violations of the rule of law. Indeed, given these systemic violations, the Irish court wondered if objective, specific, guarantees could ever be given regarding the fairness of LM's trial by the Polish authorities.

The Irish court referred two questions to the CJEU for a preliminary ruling. The first question was whether it was still necessary for the Irish court to make any further assessment, specific and precise, as to the exposure of LM to the risk of an unfair trial, in the context of the Irish court having already concluded that the Polish system of justice was no longer operating under the rule of law. The second question was that if the Irish court was required to make a specific assessment of LM's risk of suffering a denial of justice, was the Irish court required to request information from Poland that could overturn their prior conclusion that LM faced a risk of a violation of Article 6 and what would such information look like in practice.

2. Decision of the CJEU

The CJEU joined the two questions and stated that the foundation of EU law is the sharing of the common values listed in Article 2 TEU. The sharing of these values develops mutual trust between Member States, allowing the common implementation of EU law. This trust means that Member States, save in exceptional cases, may not check whether other Member States are observing fundamental rights in specific cases. The EAW system relied on the principle of mutual trust and so, EAWs could only be refused on certain grounds, which were to be strictly interpreted, listed in Framework Decision 2002/584. The CJEU had, however, in *Aranyosi and Căldăraru*, recognised that limitations can be placed on the principles of mutual recognition and mutual trust between Member States in "exceptional circumstances". Specifically, where the individual subject to the EAW was at risk of suffering inhuman or degrading treatment. This decision was based on the principle listed in Framework Decision 2002/584 which stated EAWs could not be used in such a way as to modify the fundamental rights, values and legal principles found in Article 2 TEU.

The CJEU went on to state that judicial independence was essential to the protection of the right to a fair trial. Under EU law it is up to national courts and the CJEU to ensure that Member States apply EU law and protect individuals under the law. To do so effectively, national authorities must ensure that their courts meet

basic standards, one of those standards is judicial independence. Under Framework Decision 2002/584, the EAW system had to have the same guarantees as any other judicial process, with the courts issuing EAWs required to be independent and impartial. It followed therefore that the EAW system would break down if there were risks that individuals could suffer a breach of their right to an independent tribunal and so their right to a fair trial.

The CJEU noted that judicial independence had different aspects. Courts had to operate without outside pressure and interference and make objective decisions with no considerations other than the application of the rule of law. Courts also had to be governed by a set of rules to dispel any doubts over their independence and impartiality, as did the bodies and institutions tasked with overseeing the courts and judiciary. If systemic or generalised deficiencies in an issuing authority's judiciary meant that there was a real risk of an individual suffering a violation of their rights, the executing judicial authority then had to assess whether the specific individual concerned faced that same risk.

In the current case, as LM argued that there were systemic deficiencies in Poland that were liable to affect the independence of the judiciary in that country, the Irish executing authorities were required to assess whether there was a real risk that LM individually would suffer a breach of his rights. The CJEU noted that this second, specific, assessment was also necessary when the issuing Member State was made the subject of a reasoned proposal, adopted by the Commission, which determined that there was a clear risk of a serious breach of the values referred to in Article 2 TEU in that State as a consequence of the impairment of the independence of the national courts, and when the executing judicial authority had material showing that there were systemic deficiencies in relation to the values of Article 2 TEU at the level of the issuing Member State's judiciary. Under Framework Decision 2002/584 the implementation of an EAW could only be suspended in the event of a serious and persistent breach of the principles set out in Article 2 TEU and an EAW could only be automatically refused after the adoption by the European Council of a decision determining that there were serious and persistent breaches of the principles set out in Article 2 TEU.

The assessment of the risks to the individual subject to the EAW had to, in particular, examine the impact the systemic or generalised deficiencies in the issuing Member State's judiciary would have on the specific court proceedings. The assessment then had to consider whether there were substantial grounds for believing that the subject of the EAW would run a real risk of suffering a breach of his right to a fair trial, having regard to the individual's personal situation, the nature of

the offence for which the individual was being prosecuted, and the factual basis for the issuing of the EAW. As part of the assessment, the executing judicial authority had to request any supplementary information that it considered necessary from the issuing judicial authority. However, if after this request the executing judicial authority still believed there was a real risk that the individual concerned would suffer a violation of their fundamental right to a fair trial, the executing authority had to refrain from executing the EAW.

In its final answer to the Irish Court's questions the CJEU stated that a judicial authority that had been asked to execute an EAW, but which had material indicating that there were systemic or generalised deficiencies in the judiciary of the issuing Member State, would have to investigate the risk that the individual subject to the EAW would suffer a violation of their right to a fair trial if the EAW was executed. The executing judicial authority would have to determine, specifically and precisely, in the context of the individual's personal situation, the nature of the offence for which they were being prosecuted, and the factual context forming the basis of the EAW, and whether there were substantial grounds for believing that the individual faced a real risk of having their fundamental right to a fair trial violated if the EAW was executed. If a real risk was established then the executing authority would have to refuse to give effect to the EAW to prevent the individual concerned from suffering a violation of Article 6.

Laws regulating the retirement age of Polish Supreme Court judges and the President of Poland's discretionary power over their continued employment were held to infringe the principle of judicial independence and impartiality

JUDGMENT BY THE COURT OF JUSTICE OF THE EUROPEAN UNION IN THE CASE OF EUROPEAN COMMISSION v. REPUBLIC OF POLAND

(Case No. C-619/18)

24 June 2019

In this case the Commission brought an action for failure to fulfil an obligation against the Republic of Poland before the CJEU. See the introduction to this section above for a more detailed explanation of this process.

1. Principal Facts

On 20 December 2017 the President of the Republic of Poland signed the ‘New Law on the Supreme Court’ of 8 December 2017 (the “New Law”). This New Law entered into force on 3 April 2018. Article 37 of the New Law lowered the retirement age of Supreme Court judges from 70 to 65 and made an extension of service beyond retirement age conditional on the authorisation of the Polish President (the “President”). Article 39 of the New Law also explicitly stated that the President of the Republic would “ascertain the date on which a judge of the Supreme Court retires or is retired”. Article 111 of the New Law then specified that any judge of the Supreme Court who had already reached the age of 65 upon the date of the New Law’s entry into force would automatically be retired within three months unless the President granted them authorisation to continue in their job. The Polish Government also introduced an Amending Law of 10 May 2018, Article 5 of which gave the President further powers to allow or deny Supreme Court judges to continue working after the age of 65.

In response to the introduction of the New Law, and after Poland denied that the New Law infringed EU law provisions, the Commission decided to bring the present action before the CJEU. In its main action the Commission raised two complaints. The first was that by introducing the New Law the Republic of Poland had failed to comply with its obligations under Article 19(1) (the obligation on Member States to provide an effective remedy to ensure the effective legal protection of EU law, and the responsibility of the CJEU to ensure that in the interpretation and application of EU Treaties the law is observed) TEU and Article 47 (right to an effective remedy and to a fair trial) of the the European Charter on the Statute for Judges. Specifically, the New

Law infringed the principle of judicial independence, particularly the principle of the irremovability of judges. The second complaint was that the Member State had also infringed those same obligations by granting the Polish President the discretion to extend the employment of the Supreme Court judges once they had reached the new retirement age.

2. Decision of the CJEU

The CJEU began by commenting that in order to comply with Article 19(1) TEU, Member States had to establish a legal system that provided effective remedies to ensure effective judicial protection for individuals. In this case Article 19(1) required Poland to provide remedies that were sufficient to ensure effective legal protection, within the meaning in particular of Article 47 of the European Charter on the Statute for Judges, in the fields covered by EU law. Specifically, every Member State was required by Article 19(1) to ensure that their courts and tribunals met the standards of effective judicial protection in fields covered by EU law. As the Polish Supreme Court could be called upon to rule on questions concerning the application or interpretation of EU law, it was therefore required by Article 19(1) to meet the requirements of effective judicial protection. The CJEU considered that to provide effective judicial protection the Supreme Court had to be independent, as independence was inherent to the essence of effective judicial protection. As such, the New Law could be reviewed in light of Article 19(1) and therefore it was necessary to examine whether that Article had been infringed.

The First Complaint

The CJEU then proceeded to address the Commission's first complaint, regarding the fact that the New Law's reduced retirement age would apply to judges who had already been appointed to the court and thus would infringe the principle of judicial independence, in particular the principle of the irremovability of judges. The CJEU noted that the requirement that courts be independent had two aspects. The first was that courts had to function autonomously, without being subject to hierarchical constraint or external intervention or pressure. The second was that judges should be objective and have no interest in the outcome of the case other than the strict application of the rule of law. To ensure such independence the courts had to be governed by rules that would dispel any reasonable doubt that their members could be made subject to external pressure or interventions. While it was noted by the CJEU that it was widely accepted that judges might be dismissed if they were deemed unfit for office, the requirement of independence and the principle of irremovability required the governing disciplinary regime to have guarantees to prevent the

disciplinary regime from being used as a system of political control over judicial decision-making.

In the present case the CJEU recognised that the New Law raised concerns regarding the principle of the irremovability of judges. In these circumstances the CJEU ruled that the application of the New Law would only be acceptable if it were justified by a legitimate objective, if it was proportionate, and if it would not raise reasonable doubts in the mind of individuals as to the courts' independence. Poland claimed in its submissions that its legitimate objective was to standardise the age of retirement across all workers in the country and to improve the age balance among senior members of the Supreme Court.

The CJEU recognised that such an objective could be legitimate, but that the European Commission for Democracy through Law (the Venice Commission) had raised serious doubts that the New Law had been introduced in pursuance of the stated objectives. The CJEU also observed that the reduction in retirement age was accompanied by a mechanism that allowed the President to decide, on a discretionary basis, whether a judge would be allowed to continue working after retirement age. Furthermore, under the New Law the President could exercise their discretion to extend the working life of a Supreme Court judge by a further six years after retirement, while at the same time the law lowered their standard retirement age by five years. This cast doubt on whether the New Law genuinely sought to standardise retirement age or to improve the age balance on the Supreme Court. Indeed, the CJEU noted that the fact that the President could choose to maintain judges in their posts even if they had reached the new retirement age gave the impression that the aim of the New Law might have been designed to exclude a pre-determined group of judges from the Supreme Court. The CJEU also noted that as the New Law would force the immediate retirement of 27 of the 72 judges then sitting on the Supreme Court, including the President of the Court, and that such a major restructuring of the court raised doubts about the genuine nature of the reform and the aims it actually pursued.

The Republic of Poland also admitted to the CJEU that the general retirement age for workers did not require the retirement of workers aged 65, as did the New Law, but only gave them the right to cease their professional activity and receive a retirement pension. In this regard the CJEU considered that Poland had not demonstrated that the New Law constituted an appropriate means for standardising the retirement age. Furthermore, the CJEU stated that, with regard to the objective of standardising retirement ages, the forcible lowering of automatic retirement age without introducing any transitional measures to protect the legitimate expectations of

those judges affected was disproportionate. The CJEU also observed that the judges of the Supreme Court could not challenge the immediate application of the reform, and that this could not be justified by Poland's arguments that to allow challenges would enable discrimination between judges already serving on the Supreme Court and those who would join that court in the future.

Regarding all the foregoing considerations, the CJEU ruled that the measure in the New Law lowering the retirement ages of the judges of the Supreme Court was not justified by a legitimate objective. Therefore, the measure undermined the principle of the irremovability, and so independence, of judges and the Commission's first complaint had to be upheld.

The Second Complaint

The Commission's second complaint was in relation to the aspect of the New Law that allowed the President the discretion to twice extend the employment period of any Supreme Court judge who had reached the new retirement age of 65. As it explained in relation to the first complaint, the CJEU stated that for a court to be independent and impartial it had to exercise its functions wholly autonomously, without external intervention or pressure. The rules that governed the independence and impartiality of the courts also had to dispel any reasonable doubt that the courts were influenced by external factors. In this case the CJEU noted that the power entrusted to the President to decide or not to decide to grant an extension of employment in the Supreme Court did not automatically undermine the independence of that court. However, there had to be procedural rules and substantive conditions that meant there could be no reasonable doubts that the independence or impartiality of the judges was affected by such a power. These procedural rules had to ensure that judges were protected from external pressure or influence, both direct and indirect, that might have an effect on the decisions of the judges concerned.

The CJEU confirmed that the procedural rules governing the extension of a Supreme Court judge's employment beyond retirement age provided for by the New Law did not satisfy the requirements of independence and impartiality. Firstly, the CJEU noted that the extension of a Supreme Court judge's employment was purely subject to the discretion of the President and not governed by any verifiable criterion for which reasons had to be given. Furthermore, the President's decision could not be challenged in court. Secondly, the CJEU noted that while the National Council of the Judiciary was required to deliver an opinion to the President before he or she adopted a particular decision regarding a judge's extension of employment, the National Council of the Judiciary was neither required to nor in practice did give reasons for its

opinions. As such, the CJEU did not believe that the National Council of the Judiciary's opinions were able to provide the President with objective information regarding the exercise of his or her power. Finally, the Republic of Poland's argument that other States possessed similar rules was rejected by the CJEU as it ruled that a Member State could not justify its own infringements by relying on the infringements of other Member States. Consequently, the CJEU concluded that the discretion held by the President to determine the length of a Supreme Court judge's career gave rise to reasonable doubts over the independence and impartiality of that court.

The CJEU concluded that the Commission's second complaint, and the action as a whole, had to be upheld, and therefore the Republic of Poland had failed to fulfil its obligations under the second paragraph of Article 19(1) TEU in relation to Article 47 of the European Charter on the Statute for Judges. Under Article 138(1) of the Rules of Procedure of the Court of Justice the Republic of Poland, as the unsuccessful party, was ordered to pay costs.

Laws regulating the retirement age of Polish judges and granting the Minister of Justice discretion over these judges' ability to continue in their positions were held to be discriminatory and to infringe the principle of judicial independence and impartiality

ORDER OF THE COURT OF JUSTICE OF THE EUROPEAN UNION IN THE CASE COMMISSION v. POLAND

(Case No. C-192/18)

5 November 2019

In this case the Commission brought an action for failure to fulfil an obligation against the Republic of Poland before the CJEU. See the introduction to this section above for a more detailed explanation of this process.

1. Principal Facts

On 12 July 2017 the Republic of Poland adopted a law amending the retirement ages for judges of ordinary Polish courts (the “Amending Law”). These amendments reduced normal retirement ages from 70 to 65 years for men, and 60 years for women. Furthermore, the Amending Law required judges who had reached the new retirement ages to ask the Polish Minister of Justice (the “Minister”) for authorisation to continue working until they had reached the upper age of retirement, 70.

The Commission took the view that this law failed to comply with European law, specifically Article 157 TFEU and Articles 5(a) and 9(1)(f) of Directive 2006/54, as the creation of different retirement ages for men and women constituted discrimination based on sex. Article 157 provided that men and women had to receive equal pay for equal work or work of equal value. Article 5(a) of Directive 2006/54 provided that there should be no discrimination on the grounds of sex in occupational social security schemes as regards to the scope of such schemes and the conditions of access to them. Finally, Article 9(1)(f) of that same Directive stated that an example of discrimination prohibited by that Directive was the fixing of different retirement ages based on sex.

The Commission also took the view that the aspects of the Amending Law granting the Minister of Justice authority over judges' retirement ages failed to comply with the requirements of judicial independence held in Article 19(1) TEU. Article 19(1) TEU obliged Member States to ensure that any national body that was competent to rule on questions relating to the application or interpretation of EU law, for example the Polish courts, had to meet the requirement of judicial independence. This was

because judicial independence formed part of the essence of the fundamental right to a fair trial under Article 47 of the Charter of Fundamental Rights of the European Union (the “Charter”). Specifically, the Commission considered that the criteria guiding the Minister’s decisions were too vague, that the Minister had discretion to ignore these criteria when making a decision, that no time period was specified by the Amending Law within which a decision had to be taken, that no information had been published indicating in what circumstances a judge’s career would be authorised to continue and that there was no possibility for the Minister’s decision to be judicially reviewed. Consequently, the Commission had concluded that the Amending Law undermined the independence of Polish judges.

On 28 July 2017 the Commission issued a formal notice to Poland that it was in breach of its obligations under EU law. In August 2017 Poland responded by denying any infringement of EU law. In September 2017 the Commission issued a reasoned opinion stating that the relevant provisions of the Amending Law of 12 July 2017 infringed EU Law. Despite the Commission calling on Poland to amend the infringing law within one month, the Polish government continued to deny that an infringement had taken place. In response the Commission brought the action for failure to fulfil an obligation against Poland that is summarised here.

2. Decision of the CJEU

The CJEU began by confirming that according to its settled case law it must consider an action for failure to fulfil an obligation in reference to the conditions that existed in a Member State at the end of the period laid down in the reasoned opinion. Therefore, despite the fact that Poland had made adjustments to the Amending Law these had not been introduced by the end of October 2017. It followed therefore that the Court should adjudicate on the action brought by the Commission.

The First Complaint

The CJEU’s body of case law confirmed that the benefits granted under a pension scheme come within the scope of Article 157 TFEU and Directive 2006/54 as they were granted to a worker by reason of the employment relationship between that worker and their employer. Furthermore, the CJEU stated that it was clear that the period of service completed by a judge played a decisive role in the calculation of their pension.

It was not disputed by the parties that the Amending Law fixed the retirement ages for certain judges on the basis of their sex. It was therefore clear to the CJEU

that the Amending Law introduced directly discriminatory conditions based on sex into the relevant pension schemes and that they failed to comply with both Article 157 TFEU and Article 5(1)(a) of Directive 2006/54, especially when read in conjunction with Article 9(1)(f) of that Directive.

The CJEU further ruled that although Article 157(4) TFEU did authorise Member States to maintain or adopt measures that provided specific advantages to women in order to compensate for other disadvantages they might suffer in their professional careers, these measures had to contribute to helping women to conduct their professional life on an equal footing with men. The CJEU was of the opinion that an earlier retirement did not offset any disadvantages suffered by women in their careers and could not be considered a remedy for these disadvantages either. The CJEU therefore found that the Commission's complaint alleging infringements of Article 157 TFEU and Articles 5(a) and 9(1)(f) of Directive 2006/54 were to be upheld.

The Second Complaint

The CJEU began by confirming that Member States are obliged to comply with EU law when organising their justice systems. Under Article 19(1) TEU, anybody competent to rule on the application or interpretation of EU law must meet the requirements of effective judicial protection. To ensure that Polish courts met the requirements of effective judicial protection the CJEU reiterated that they must be independent, as confirmed in Article 47 of the European Charter on the Statute for Judges. Independence was held to be part of the essence of the right to a fair trial, which itself was reiterated as being of cardinal importance to the protection of individual rights derived from EU law. Therefore, the CJEU held that the national rules contained in the Amending Law regarding the retirement of judges could be reviewed in light of Article 19(1) TEU.

Independence under Article 19(1) TEU was held by the CJEU to be made up of two parts. The first was that the relevant body had to function wholly autonomously, without being subject to constraints or subordinated to another body and without taking orders or instructions from any source whatsoever. The second aspect was that judges had to be objective and have no interest in the outcome of court proceedings except in ensuring that the rule of law was upheld. Further, the CJEU confirmed that the principle of independence and impartiality had to be safeguarded by rules protecting judges from pressure that could impair their independent judgment, such as guarantees against removal from office. The principle of irremovability, a key practical requirement for independence, guaranteed that judges were to remain in their posts until they reached the age of obligatory retirement or until the expiry

of their mandate, if it was for a fixed term. Exceptions to this requirement had to be warranted by legitimate and compelling grounds and be proportionate to those grounds. The principle of irremovability consequently required that there had to be sufficient guarantees to prevent the disciplinary regime overseeing judges from being used as a system of control over judicial decisions.

In this context the CJEU noted that entrusting the Minister with the power to decide whether or not a judge could continue with their career did not automatically mean that judicial independence had been undermined. What was crucial was whether the substantive conditions and detailed procedural rules governing the Minister's decisions were sufficient to prevent reasonable doubts from arising as to the independence of the judges and as to their neutrality towards cases brought before them. Conditions and procedural rules that could satisfy the requirements of Article 19(1) had to preclude any direct influence over judicial decision-making and any potential for indirect influence to affect the decisions of judges.

The CJEU went on to find that the Minister was not required to state his reasoning when deciding whether to allow a judge to continue their career. The criteria for making such a decision were also too vague and unverifiable and the Minister's decision could not be challenged in court proceedings. Further, as a judge was required to submit a request for their careers to be extended before they reached their normal retirement age, combined with the fact there was no set timetable for the Minister to make his decision, the CJEU concluded that the length of time between the request and the Minister's answer would constitute a period of uncertainty in which a judge's career would be at the discretion of the Minister. Consequently, this situation would give rise to reasonable doubts as to the independence and impartiality of judicial decision-making.

The CJEU then considered whether the powers granted to the Minister of Justice under the Amending Law failed to comply with the principle of irremovability. Firstly, the dual effect of lowering the retirement age of ordinary judges and granting the Minister discretion to remove judges above that age had led to reasonable doubts as to whether the purpose of the Amending Law was in fact to allow the Minister to remove certain groups of serving judges. Secondly, the Amending Law had created a situation in which the final ten years of a female judge's career, and the final five years of a male judge's career, would be entirely at the discretion of the Minister. Thirdly, once judges had requested under the Amending Law permission to continue working after normal retirement age, these judges were to continue working until the Minister rejected or approved their request. This meant that judges were exposed to the possibility of serving as a judge for a relatively long period of time

during which the continuation of their career was at the discretion of the Minister. Consequently, the Amending Law created a situation that failed to comply with the principle of irremovability and the CJEU ruled that it had infringed the principle of judicial independence and impartiality.

Therefore, the Commission's action for failure to fulfil an obligation was upheld in its entirety and the CJEU ruled that Poland had failed to meet its obligations under Article 19(1) TEU. As the unsuccessful party, the Republic of Poland was ordered to pay the costs of both parties.

In a case involving the Polish Disciplinary Chamber, the CJEU ruled that EU law prevented a court that was not independent or impartial from hearing cases concerning the interpretation of EU law, and that any law that gave such a court jurisdiction to do so had to be disapplied in keeping with the primacy of EU law

JUDGMENT BY THE COURT OF JUSTICE OF THE EUROPEAN UNION IN THE CASE OF A.K. v. KRAJOWA RADA SĄDOWNICTWA; AND CP AND DO v. SĄD NAJWYŻSZY

(Case Nos. C-585/18, C-624/18 and C-625/18)

19 November 2019

In this case a request for a preliminary ruling under Article 267 TFEU was made to the CJEU by the Court of Appeal in Brussels, Belgium. See the introduction to this section above for a more detailed explanation of this process.

1. Principal Facts

This judgment by the CJEU ruled on a request for a preliminary ruling that had arisen from a combination of two cases that had come before national courts in Poland. The first, *A.K. v. Krajowa Rada Sądownictwa* (the “First Case”), and the second, *CP and DO v. Sąd Najwyższy* (the “Second Case”), were both concerned with the introduction of a new law by the Polish government regarding the retirement ages of Polish judges. This New Law on the Supreme Court (“the New Law”), *inter alia*, lowered the retirement ages of judges on the Polish Supreme Court from 70 years old to 65 years old. Any judges who wished to continue to work beyond this new retirement age would have to apply to do so to the Polish President, who would base his decision on an assessment given by the National Council of the Judiciary (“KRS”), a body that included the Minister for Justice and members of the Polish Parliament, and whose judges would be elected to their positions by members of the Polish Parliament.

In the First Case, *A.K.*, a Supreme Court judge who had reached the age of 65 before the New Law entered into force, applied to continue in his position after the age of 65 but was rejected by the KRS. In August 2018 *A.K.* appealed to the Polish Supreme Court on the basis that KRS’s decision infringed EU law, specifically Article 19(1) TEU (the obligation on Member States to provide an effective remedy to ensure the effective legal protection of EU law, and the responsibility of the CJEU to ensure that in the interpretation and application of EU Treaties the law is observed) and Article 47 of the Charter of Fundamental Rights of the European Union (“the Charter”)

(the right to an effective remedy and to a fair trial by an independent and impartial tribunal), and Directive 2000/78 (the right to equal treatment and freedom from discrimination). Article 9(1) of Directive 2000/78 specifically provided for procedures to be available for anyone to challenge any alleged discrimination they might have faced.

In the Second Case, CP and DO, two judges of the Polish Supreme Court, had also reached the age of 65 before the New Law entered into force. Neither requested permission to continue working after the age of 65 and they were consequently retired by the Polish President in July 2018. Both appealed the President's action to the Supreme Court under Article 2(1) of Directive 2000/78, which prohibited discrimination on the basis of age.

Two issues faced the Supreme Court in these cases. The first was that the judicial body that was supposed to hear these cases was the Disciplinary Chamber, a new body created by the New Law. However, as the judges of the Disciplinary Chamber had not yet been appointed the chamber was not yet in existence. Further, the Supreme Court was concerned that the Disciplinary Chamber would not meet the EU's independence and impartiality requirements as the body's judges would be appointed by the Polish President on the advice of the KRS. As there was evidence that the KRS was subject to political control this arrangement was potentially disregarding the principle of the separation of powers and the rule of law.

Consequently, the Supreme Court made a request for a preliminary ruling to the CJEU. Regarding the First Case the Supreme Court (the "referring court") asked whether, under Article 47 of the Charter and Article 9(1) of Directive 2000/78, it should disapply the New Law's requirement that the Disciplinary Chamber had jurisdiction as that Chamber was not yet operational. Further, if the answer to that question was negative, did Article 267 TFEU in conjunction with Article 19(1) TEU, Article 2 TEU (which sets out the principles of respect for human dignity, freedom, democracy the rule of law and respect for human rights) and Article 47 of the Charter mean that the Supreme Court had to hear the case itself?

Regarding the Second Case, the Supreme Court asked the CJEU whether Article 47 of the Charter, in conjunction with Article 9(1) of Directive 2000/78, required the Supreme Court, to disapply the New Law's requirement that the Disciplinary Chamber had jurisdiction as that Chamber was not yet operational. The referring court also asked whether the Disciplinary Chamber could be considered an independent court or tribunal within the meaning of EU law and, if the answer to that second question was negative, should Article 267 TFEU, in conjunction with Article 19(1) TEU, Article 2

TEU and Article 47 of the Charter, mean that the Supreme Court should disregard the New Law and instead hear the case itself?

2. Decision of the CJEU

The CJEU began by joining the two referrals into one case. It then considered the first question raised in the Second Case, namely, should the Supreme Court have disapplied the relevant parts of the New Law given that the Disciplinary Chamber had not been appointed yet. Here, the CJEU noted the Disciplinary Chamber had since been formed and therefore this question was no longer relevant and did not need to be answered.

Beginning to answer the other questions that had been referred to it, the CJEU reiterated that while Member States were responsible for organising their own justice systems they were still required to meet their obligations under EU law, including by guaranteeing the fundamental rights contained in the European Charter on the Statute for Judges. The matter was therefore within the CJEU's jurisdiction in so far as it concerned questions of the application or interpretation of EU law. Further, despite the fact that the New Law had been amended to disapply the retirement age of 65 for judges who had entered into service with the Supreme Court before 1 January 2019, the CJEU ruled that as it had competence to explain points of EU law to referring courts which might settle problems of jurisdiction, this amendment to the New Law did not affect the outstanding questions brought with regard to the Second Case. However, as the KRS was now in existence and A.K. was able to continue in his position, it was no longer necessary to rule on those questions raised with regard to the First case.

Turning to the two remaining questions, the CJEU stated that as the Charter rights corresponded to rights guaranteed by the ECHR, the protections afforded by Article 47 of the Charter could not fall below the level of protection established by Article 6 of the ECHR (right to a fair trial) as interpreted by the ECtHR. Therefore, Article 47 of the Charter guaranteed that everyone was entitled to a fair hearing by an independent and impartial tribunal.

The principle of independence and impartiality was held by the CJEU to be made up of two parts. The first was that the relevant body had to function wholly autonomously, without being subject to constraints or subordinated to another body and without taking orders or instructions from any source whatsoever. The second aspect was that judges had to be objective and have no interest in the outcome of the cases before them except to uphold the rule of law. Further, the principle of

independence and impartiality had to be safeguarded by rules protecting judges from pressure that could impair their independent judgment and that such rules also confirmed the principle of the separation of powers, specifically the independence of the judiciary; a key part of the rule of law. Article 47 was deemed by the CJEU to reflect the requirements of Article 6(1) ECHR, which also gave weight to, *inter alia*, the mode of appointment of judges to a judicial body and their term of office, the existence of guarantees against outside pressure on judges, and whether the body presented an appearance of independence.

The CJEU ruled that in essence there was doubt as to whether the Disciplinary Chamber satisfied the requirements of independence and impartiality as set out in EU law and the ECHR. This doubt arose from the circumstances of the chamber's creation, its jurisdiction, its composition, and how the chamber's judges were appointed. While the fact that the Disciplinary Chamber's judges were appointed by the Polish President did not automatically imply that a relationship of subordination existed between them, the appointment of judges still required substantive conditions and detailed procedural rules so as to prevent reasonable doubt from arising that judges might not be independent and impartial. In this case, judges were appointed to the Disciplinary Chamber via recommendations from the KRS. While the presence of such a specialised body in the appointment process could have minimised the possibility of the chamber lacking independence, this would have required the KRS to be sufficiently independent of the legislature, the executive and the President.

Amongst the factors brought to the CJEU's attention by the referring court regarding the KRS's independence were: the fact that the New Law had reduced the length of the term KRS members served, thereby reducing the number of members of that body; that members of the KRS who had previously been elected to that body by other members of the judiciary were now elected by members of the legislature, thereby ensuring that 23 of the 25 members of the KRS were appointed by the political authorities or were members of the executive or legislature; and that there was clear potential for irregularities that could adversely affect the process of appointments to the KRS. These factors were important given the constitutional role of the KRS, its responsibility to ensure the independence of the courts and the judiciary and the fact that the only possible avenue of challenging appointments to the Supreme Court lay in challenging a resolution of the KRS.

Turning to the Disciplinary Chamber itself, under the New Law it had been granted exclusive jurisdiction over cases regarding employment, social security, and the retirement of judges of the Supreme Court; matters that had been dealt with

by the ordinary courts. The CJEU noted that this change was made in the context of various other changes to the organisation of the Polish Supreme Court that had occurred at roughly the same time, in particular that the Polish Government had lowered the retirement ages of Supreme Court judges, and that the CJEU had found these measures to have compromised the irremovability and independence of the judges of the Supreme Court and that Poland had failed to fulfil its obligations under Article 19(1) TEU.^[419] Under the New Law the Disciplinary Chamber was also required to be constituted solely of newly appointed judges, none of whom could have served on the Supreme Court already. The CJEU noted that all these factors meant that the Disciplinary Chamber enjoyed a particularly high degree of autonomy within the Supreme Court. The CJEU reasoned that while each of these factors alone might not be enough to call the independence of the Disciplinary Chamber into question, together that might not be true, especially given the further questions surrounding the independence of the KRS.

The CJEU ruled that it was up to the referring court to determine whether, taken together and in context, these factors were capable of giving rise to legitimate doubts as to the independence and impartiality of the Disciplinary Chamber, including in relation to the possibility of direct or indirect influence being brought to bear on the body by the legislature and the executive. In order to decide that the chamber was independent and impartial, the referring court had to be satisfied that the chamber was not seen as prejudicing the trust in justice that a democratic society must inspire. If there were legitimate doubts as to the independence and impartiality of the Disciplinary Chamber then the CJEU confirmed that the chamber would not meet the requirements arising from Article 47 of the Charter and Article 9(1) of Directive 2000/78.

The second question to be answered by the CJEU was: if the Disciplinary Chamber did not meet the requirements arising from Article 47 of the Charter and Article 9(1) of Directive 2000/78, did the primacy of EU law require the Supreme Court to disapply the provisions of the New Law that conferred jurisdiction onto that chamber. The CJEU began by setting out that EU law had primacy over the laws of Member States and that the principle of primacy required all Member States to give full effect to the provisions of EU law and for their national law to not undermine EU law. It therefore followed that national law had to be interpreted in conformity with EU law to the greatest extent possible. Where national law could not be interpreted into conformity with EU law, national courts were required to disapply such national law and directly apply EU law. Therefore, if the New Law had created a chamber that did not meet

419 *Commission v. Poland*, C-619/18, judgment of 24 June 2019 (included as a summary in this publication).

the requirements arising from Article 47 of the Charter and Article 9(1) of Directive 2000/78 then the primacy of EU law dictated that the national court had to ensure the effectiveness of that EU law and disapply the contrary elements of national law. In such a situation the court, which would have had jurisdiction had it not been for the provisions that contravened EU law, and which did meet the requirements of EU law, would be required to take on the relevant duties.

Given all the considerations listed above, the CJEU concluded that Article 47 of the Charter and Article 9(1) of Directive 2000/78 had to be interpreted as disallowing a court which was judged not to be independent or impartial from hearing cases concerning the application of EU law. Such a judgment could be reached when the characteristics and circumstances in which the court was formed and its members appointed were capable of raising reasonable doubts as to the independence and impartiality of that court. However, it was for the referring court, the Polish Supreme Court, to determine whether the Disciplinary Chamber fell short of the requirements of independence and impartiality. The CJEU also concluded that the principle of the primacy of EU law required the referring court to disapply any provision of national law which reserved jurisdiction to hear and rule on matters of EU law to a body that fell short of EU law requirements. The CJEU ruled that costs were to be determined by the referring court.

The European Commission's request for interim measures suspending the functioning of the Disciplinary Chamber overseeing the Polish Supreme Court pending the final outcome of the case was accepted by the CJEU

ORDER OF THE COURT OF JUSTICE OF THE EUROPEAN UNION IN THE CASE COMMISSION v. POLAND

(Case No. C-791/19 R)

8 April 2020

In this case the Commission brought an action for failure to fulfil an obligation against the Republic of Poland before the CJEU. See the introduction to this section above for a more detailed explanation of this process.

1. Principal Facts

In 2017, the Polish government introduced legislation to create a new disciplinary regime for judges sitting on Poland's Supreme Court and ordinary courts. The legislation provided for the creation of a Disciplinary Chamber with the jurisdiction to hear disciplinary cases concerning judges of the Polish Supreme Court and ordinary courts. The Disciplinary Chamber was composed entirely of judges selected by another body of judges, the National Council of the Judiciary, who were in turn elected to their positions by members of the lower chamber of the Polish parliament. On 17 July 2019 the Commission issued a reasoned opinion which argued that the new disciplinary regime was not in keeping with EU law.

On 17 September 2019 the Republic of Poland replied to the Commission, stating that the Commission's opinion was unfounded and that the disciplinary regime complied with EU law. In response, on 25 October 2019, the Commission brought an action before the CJEU under Article 258 on the basis that the Republic of Poland had breached its EU law obligations, specifically that under the disciplinary regime in place, the Disciplinary Chamber could not be considered independent and impartial.

On 19 November 2019, in cases C-585/18, C-624/18 and C-625/18, which had already been referred to the CJEU by the Polish Supreme Court, the CJEU found that EU law did not allow cases concerning the application of EU law, in this case Directive 2000/78/EC for the creation of a general framework for equal treatment in employment and work, from falling within the exclusive jurisdiction of a judicial body which was independent or impartial. The CJEU went on to state that the objective circumstances in which the Disciplinary Chamber was formed, its characteristics and the means by

which its members were appointed, were capable of giving rise to legitimate doubts as to the influence of the legislature and the executive on the Chamber and its neutrality in the cases before it. The CJEU passed responsibility to the referring Polish Supreme Court to apply this interpretation of EU law to the Disciplinary Chamber.

The Polish Supreme Court, in judgments of 5 December 2019 and 15 January 2020, ruled that, amongst other things, the involvement of the National Council of the Judiciary in the Disciplinary Chamber's composition meant that the Chamber could not be considered a legitimate tribunal under EU or Polish law as it was not, *inter alia*, an impartial body independent of the legislative and executive branches of government. However, despite these judgments, the Disciplinary Chamber continued to perform its functions as before.

In the context of the action brought on 25 October 2019 and the continuing operation of the Disciplinary Chamber, the Commission further applied to the CJEU on 23 January 2020 under Article 279 TFEU for interim measures to be applied to prevent irreversible damage being caused to the EU legal order in Poland by the Polish disciplinary regime. Specifically, the Commission requested that the CJEU order the Republic of Poland to suspend the provisions of Polish law that constituted the basis of the authority of the Disciplinary Chamber to rule on disciplinary cases relating to judges, and to refrain from passing cases that would have gone before the Disciplinary Chamber to any other tribunal that did not meet the requirements of independence and impartiality. Finally, in the event of the CJEU granting interim measures, Poland was required to notify the Commission, no later than one month after the CJEU's order, of all the measures it had taken to fully comply with the interim measures imposed.

2. Decision of the CJEU

The CJEU began by ruling on the admissibility of the application for interim measures. The CJEU noted that while the organisation of the justice systems of each Member State was within the competence of each Member State, the organisation of each justice system was still required to respect the obligations placed on it by EU law, including Article 19(1) TEU. This provision required Member States to establish their justice systems in such a way as to ensure that the judicial bodies that were tasked with ensuring the proper application of EU law themselves met the EU's legal standards for effective independence and impartiality. The CJEU then set out that judicial independence included a requirement that the disciplinary regime tasked with overseeing the judiciary possessed sufficient safeguards to ensure its independence and avoid any risk of the regime being used as a tool of political

control over judicial decision-making. In this context the CJEU ruled that it did have competence to rule on whether the disciplinary regime applicable to judges called upon to rule on matters of EU law were themselves compatible with EU law. As it was not disputed that the Disciplinary Chamber had authority to decide disciplinary cases concerning the judges of the Supreme Court and ordinary courts and matters of EU law under Directive 2000/78/EC, then the CJEU had authority to adopt the interim measures requested by the Commission. Therefore, the request for interim measures was judged to be admissible.

The CJEU went on to explain that interim measures could only be ordered if it was established that granting such measures were justified in fact and in law, and that the measures were urgent, meaning that they were necessary to avoid serious and irreparable harm to the interests of the EU. The CJEU was also required to weigh up the interests involved.

The CJEU ruled that the interim measures would be justified in fact and law if at least one of the arguments in law relied upon by the applicant in support of the main action appeared, *prima facie*, to be not unfounded. The CJEU laid out that the applicant's arguments in law in the main action related to the question of whether the Disciplinary Chamber complied with the requirement of independence and impartiality under Article 19(1) TEU. The CJEU went on to note that it had already considered questions of independence and impartiality under Article 19(1) TEU in its judgments of 19 November 2019. In these cases, the CJEU ruled that the disciplinary regime in Poland led it to doubt that a body such as the National Council of the Judiciary, and by implication the Disciplinary Chamber which it oversaw, was independent. While the CJEU left it for the Supreme Court of Poland to decide whether those two bodies were independent and impartial, this was in keeping with established jurisprudence of the CJEU and did not mean that the Supreme Court's own decisions that the bodies were not independent and impartial were not relevant in the current case. Given these facts, the CJEU ruled that the Commission's arguments in law in the main action were, *prima facie*, not unfounded and so the request for interim measures was justified in fact and law.

In relation to whether the interim measures requested by the Commission were urgent, the CJEU laid out that the purpose of interim measures was to guarantee the full effectiveness of any future final decision by the CJEU by preventing any serious and irreparable harm to the applicant party occurring before that final decision. In this case the Commission requested the granting of interim measures to prevent serious and irreparable harm to the functioning of the EU legal order in Poland. The CJEU recognised that it was not necessary to prove that such harm would occur with

absolute certainty, simply that such harm was foreseeable with a sufficient degree of probability. The CJEU pointed out that any compromise of the Polish Supreme Court's independence was likely to cause serious damage to the EU legal order in Poland and thus to the rights of EU citizens that are derived from EU law and its values, in particular the rule of law. In this context, granting disciplinary oversight of the Supreme Court to the Disciplinary Chamber, whose independence could not be guaranteed, was likely to cause serious and irreparable harm to the EU legal order in Poland. As the Disciplinary Chamber was to retain oversight of the Supreme Court until the final judgment of the CJEU, the probability of harm to the EU legal order would remain until that point. Therefore, the Court ruled that the interim measures requested by the Commission were indeed urgent.

Weighing up the competing interests involved in applying interim measures, the CJEU considered that granting the requested measures would not necessarily mean the dissolution of the Disciplinary Chamber, nor the removal of its administrative and financial support, but would be restricted to temporarily suspending its activities until delivery of the final judgment. The CJEU also considered that the potential harm caused by the suspension of the Disciplinary Chamber's functions until the final judgment was less than the potential harm caused by the normal functioning of a body whose lack of independence and impartiality could not be *prima facie* ruled out. Therefore, the CJEU considered that the competing interests in the case weighed towards granting the interim measures.

After establishing that the interim measures requested by the Commission were justified in fact and law, urgent, and the positive effects of the measures were not undermined by the competing interests in the matter, the CJEU granted the Commission's application for interim measures.

As public prosecutors in the Netherlands lacked independence from the executive, they could not be considered a judicial authority under EU law

JUDGMENT BY THE COURT OF JUSTICE OF THE EUROPEAN UNION IN THE CASE OF AZ

(Case Nos. C-510/19)

24 November 2020

In this case a request for a preliminary ruling under Article 267 TFEU was made to the CJEU by the Court of Appeal in Brussels, Belgium. See the introduction to this section above for a more detailed explanation of this process.

1. Principal Facts

On 26 September 2017 the Court of First Instance in Leuven, Belgium, issued a European arrest warrant (“EAW”) against AZ, a Belgian national. The warrant sought AZ’s surrender so that a criminal prosecution could be brought against him in respect of charges of forgery, fraud and use of fraudulent documents. AZ was arrested in December 2017 in the Netherlands and surrendered to the Belgian authorities under an order of the Amsterdam District Court. In January 2018 a further EAW was issued against AZ by the Leuven court in relation to further charges relating to charges of forgery, fraud and use of fraudulent documents separate to those contained in the first EAW. In February 2018 the Amsterdam public prosecutor gave his consent to the Leuven court for AZ to be prosecuted for the offences referred to in the second EAW.

AZ was subsequently prosecuted and convicted of having committed the acts listed in both the first and second arrest warrants and sentenced to three years’ imprisonment. AZ appealed this conviction, arguing that Netherlands law regarding the surrender of an individual under a EAW was not consistent with the requirements of EU law.

Under EU law, specifically Article 6(2) of Framework Decision 2002/584, the judicial authority executing a EAW had to be competent to do so under national law. Under Article 14 and 19(2) of the same framework decision, if an arrested person did not consent to their surrender they were entitled to a hearing on the matter before the executing judicial authority in such a way as provided for by the national law of the executing Member State and subject to conditions determined by mutual agreement between the issuing and executing Member States. Finally, under Article 27 of that decision, it was stated that a person surrendered under a EAW could not

be prosecuted or sentenced for offences committed prior to his surrender or for offences not included in the arrest warrant unless the issuing judicial authority formally applied for the consent of the executing judicial authority and this consent was given, or if both member States had already notified the relevant EU body that consent for this to occur was presumed to have been given and any opposition to this presumption had not been explicitly stated.

Under the Netherlands national law in force at the time, which had been introduced to give effect to the requirements of Article 27 of Framework Decision 2002/584, the surrender of a suspect to another EU Member State under a EAW was only allowed on the condition that the suspect not be prosecuted for offences committed prior to his surrender or for offences not included in the arrest warrant, unless the prior consent of the *public prosecutor* (the Netherlands' designated executing judicial authority) had been requested and obtained.

In response to AZ's appeal, the Brussels Court of Appeal requested a preliminary ruling from the CJEU. Specifically, the Brussels Court asked a series of questions regarding the application of Framework Decision 2002/584. The first question was whether the term "judicial authority" under Article 6(2) of the relevant framework decision constituted an autonomous concept under EU law, and if so what were the criteria for determining what qualified as a judicial authority. The second question was whether a EAW executed by a judicial authority constituted a judicial decision. The third question was that if a judicial authority was an autonomous concept under EU law and the execution of a EAW a judicial decision, was it permissible for an initial surrender under a EAW to be assessed by a judicial authority, and then for a supplementary surrender to be assessed by a different authority in circumstances where the subject of the warrant might not have their right to be heard or have access to the courts guaranteed. The fourth question was that if the answer to the second question was yes, should a public prosecution service acting as an executing judicial authority provide for the right of the subject to access a court before consent was given for execution of a warrant that related to an offence for which the subject's surrender was not requested. The final and fifth question was whether the Amsterdam public prosecutor who surrendered AZ was the executing judicial authority in this case, as per Article 6(2) of the Framework Decision 2002/584.

2. Decision of the CJEU

The CJEU began by considering the first question asked by the referring court, namely, whether the term "judicial authority" under Article 6(2) of Framework

Decision 2002/584 constituted an autonomous concept under EU law, and, if so, what were the criteria for determining what qualified as a judicial authority?

Under Article 6(1) and (2) of the relevant framework decision, Member States were required to designate the competent judicial authority under their own national law. However, the CJEU stated that while each Member State could designate the judicial authority, the term had an autonomous and uniform interpretation and therefore the concept of “executing judicial authority” was an autonomous concept of EU law.

The CJEU then went on to set out the criteria for determining the meaning of “executing judicial authority”. In prior case law the CJEU had held that the concept of a “judicial authority” essentially described an authority participating in the administration of criminal justice but which was distinct from those authorities which were part of the executive, such as government ministries and police services. Further, the CJEU stated that an “issuing judicial authority” had to be capable of exercising its responsibilities objectively, with no risk that its decision-making was subject to external directions or instructions, especially from the executive. Crucially, it had to be beyond doubt that the decision to issue the EAW lay solely with the judicial authority, not with the executive. Accordingly, the issuing authority had to be in a position to give assurances to the executing judicial authority that it was independent. Such assurances required the presence of statutory rules and an institutional framework capable of guaranteeing that the issuing judicial authority was not exposed to any risk of being given instructions in any specific case by the executive. These requirements still applied if the issuing judicial authority was not a court. Any issuing judicial authority had to meet the full requirements of effective judicial protection. The CJEU confirmed that the status and nature of executing and issuing judicial authorities were identical, bar the fact that one issued and the other executed the warrants.

The CJEU further explained that the aim of the EAW was to introduce a system of surrender between judicial authorities that operated without intervention from the executive. Framework Decision 2002/584 was founded on the principle that decisions relating to EAWs were attended by appropriate guarantees. It was clear therefore that both the decision to execute and issue the warrant had to be accompanied by all the guarantees inherent in effective judicial protection, including independence and impartiality. EU law therefore required the entire surrender procedure between Member States to be subject to judicial supervision at every stage. This reinforced the CJEU’s interpretation that a judicial authority had to take the decision to issue or execute a warrant independently.

The procedure for issuing a EAW was described by the CJEU as guaranteeing a dual level of protection for the person concerned, both for their fundamental and their procedural rights. This meant that a decision meeting the requirements inherent in effective judicial protection had to be adopted at least at one of the two levels of that protection and the entity ultimately taking the decision to issue the EAW had to be able to act objectively and independently in the exercise of its responsibilities, even where the warrant was based on a national decision delivered by a judge or a court. However, under Framework Decision 2002/584 it was the executing judicial authority that was responsible for ensuring that the person concerned enjoyed all the appropriate guarantees relating to their fundamental and their procedural rights.

Therefore, the autonomous concept of “executing judicial authority” under Article 6(2) of Framework Decision 2002/584 was either a judge or a court, or a judicial authority such as a national public prosecution service, which participated in the administration of justice in a Member State and enjoyed independence from the executive. Where such a body was granted competence to act as an executing judicial authority by national law, that body had to ensure that its procedures for exercising its responsibilities complied with the requirements inherent in effective judicial protection; including that its decisions be subject to an effective judicial remedy.

The CJEU then went on to answer the second and fifth questions together, namely, did the public prosecutor in this case constitute an executing judicial authority within the meaning of Article 6(2) and Article 27 of Framework Decision 2002/584. Having established the conditions under which a judicial authority could decide to surrender the subject of a EAW, the CJEU then considered whether a judicial authority was also required to give consent to the surrender of a subject of a EAW who would be prosecuted or sentenced for offences committed prior to his surrender or for offences not included in the arrest warrant, as per the requirements of Article 27.

A decision to grant consent under Article 27 was described by the CJEU as distinct from a decision to execute a EAW as it led to different effects for the person concerned. While the person concerned may have already been surrendered to the issuing Member State before consent under Article 27 was requested, the decision regarding this consent was still liable to prejudice the liberty of that person as it was liable to lead to a heavier sentence being imposed. Therefore, the CJEU concluded that the body giving consent under Article 27 was also required to satisfy the conditions required to be an “executing judicial authority” as per the autonomous meaning of that concept set out above.

In this case, Netherlands law dictated that the public prosecutor had to request the local district court to examine the EAW and to decide on whether it should be executed. Therefore, it was the district court that ultimately took the decision to execute the warrant, not the public prosecutor. However, the subsequent decision to grant consent under Article 27 relating to the second EAW had been taken exclusively by the public prosecutor. The CJEU noted that under Netherlands law it was possible for the public prosecutor to be given instructions in specific cases by the Ministry of Justice and therefore it could not be sufficiently independent from the executive to be an “executing judicial authority”. The availability of a judicial remedy with regard to the decision of the public prosecutor was not considered to be sufficient to negate the risk that their decision-making might not be independent. Therefore, given this lack of independence, the Amsterdam Public Prosecutor could not constitute an executing judicial authority under the relevant provisions of EU law.

Given the answers set out above, the CJEU ruled that there was no need to consider the other questions referred to it. As this preliminary ruling was just one part of the main proceedings before the national court the CJEU ruled that a decision on costs was a matter for that court.

The procedure to appoint members to the judicial council responsible for conducting investigations and bringing disciplinary proceedings against judges did not comply with EU law where that procedure gave rise to reasonable doubts that the powers and functions of the council may be used to exert pressure on or political control over, the activity of judges and prosecutors

JUDGMENT BY THE COURT OF JUSTICE OF THE EUROPEAN UNION IN THE CONJOINED CASES OF ASOCIAȚIA ‘FORUMUL JUDECĂTORILOR DIN ROMÂNIA’ V INSPECȚIA JUDICIARĂ AND FIVE OTHERS

(Case Nos. C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 & C-397/19)

18 May 2021

In this case a request for a preliminary ruling under Article 267 TFEU was made to the CJEU by various Romanian courts. See the introduction to this section above for a more detailed explanation of this process.

1. Principal facts

The broader context to the present case was a set of wide-ranging reforms aimed at combatting judicial corruption in Romania. The so-called ‘Justice Laws’ had been introduced in 2004, around the time of Romania’s accession to the European Union. They concerned the rules governing judges and prosecutors, the organisation of the judicial system and the Supreme Council of the Judiciary. Amongst the various changes was the establishment of the Judicial Inspectorate, a body tasked with investigating allegations of breaches of the disciplinary rules by magistrates. Allegations of corruption, on the other hand, were dealt with by the National Anti-Corruption Directorate (“DNA”). Between 2017 and 2019, Romania made a series of amendments to the Justice Laws. One of these amendments established the Section for the Investigation of Offences in the Judiciary (“SIJ”), a division of the Romanian High Court of Cassation and Justice. The main objective of the SIJ was to investigate allegations of crimes committed by judges and prosecutors.

The present proceedings arose out of six cases in which the applicants disputed the compatibility of those amendments with various provisions of EU law. Amongst those six proceedings were three key applications. The first was Case C-83/19, brought by the Romanian Judges’ Forum (“RJF”) against the Judicial Inspectorate. The applicant complained that the appointment of the signatory to the Judicial Inspectorate’s defence, the chief inspector, was flawed due to the fact that his term of office had expired by the time the defence was lodged. Although there was

legislation, stemming from Government Ordinance No 77/2018, which stated that a chief inspector whose term of office had expired would act as a substitute until the post was filled, the RJF argued this was unconstitutional as it undermined the role of the Supreme Council of the Judiciary as guarantor of the independence of the judiciary. Secondly, Case C-127/19 was brought by the RJF and the association ‘Movement for the Defence of the Status of Prosecutors’ against the Supreme Council of the Judiciary. In this case, the applicants challenged two decisions concerning the appointment of prosecutors in the SIIJ, arguing that they infringed Article 148 of the Romanian Constitution, according to which Romania is required to comply with the obligations under the EU Treaties. Lastly, Case C-355/19 was brought against the Prosecutor General of Romania by the RJF, the Movement for the Defence of the Status of Prosecutors and an individual. This was a direct challenge to an order of the Prosecutor General concerning the organisation of the SIIJ, in which the applicants argued that the creation of the SIIJ was incompatible with EU law.

2. Decision of the CJEU

Legal status of Decision 2006/928 and the reports drawn up by the Commission on the basis of that decision

The Court first held that the Decision and the reports drawn up under it were acts of an EU institution for the purpose of Article 267. As such, they were amenable to interpretation through the preliminary ruling mechanism. The Decision and the benchmarks it contained were also binding in their entirety, and Romania was required to take due account of them when adopting any measures in the areas covered by them.

Interim appointments to the management positions of the Judicial Inspectorate

The Court reiterated the duty of Member States to ensure that the various ‘courts or tribunals’ which deal with matters of EU law must meet the requirements of effective judicial protection. The central requirement was that the courts be independent, so as to guarantee the right to a fair trial and to ensure that those rights common to all EU Member States, as set out in Article 2 TFEU, could be protected. Such safeguards could only exist where the principle of the separation of powers was adhered to.

The fundamental issue at stake was the independence of the judiciary and the need to ensure that they were free from undue influence. In the context of judicial regulation, this meant guaranteeing the independence of judges from political control and providing a genuinely independent and accessible regulator or

disciplinary body which was itself independent from external pressure and control. Whilst the mere fact that a government had the power to appoint members of that disciplinary body did not amount to evidence of undue influence, the rules governing such appointments must be designed so as to protect the principles outlined above. The Court found that the national legislation in question was contrary to EU law as it allowed the Government to make interim appointments to the management positions of the judicial disciplinary body without following the proper procedure as laid down by national law. This gave rise to reasonable doubts that the powers and functions of that body could be used as an instrument to exert pressure on, or political control over, the activity of judges and prosecutors.

The creation of a special prosecution unit to investigate and prosecute offences committed by judges

The Court then considered whether the national legislation providing for the creation of a specialised section of the Public Prosecutor's Office with exclusive competence to investigate judicial offences was compatible with EU law. The relevant criteria were that the national legislation must, firstly, be justified by objective and verifiable requirements relating to the sound administration of justice and, secondly, guarantee that that section cannot be used as an instrument of political control and that the section operates in accordance with the Charter of Fundamental Rights of the European Union ("the Charter"). The Court found that it was for the national courts to determine whether these requirements were met. In particular, regarding the Charter, the national courts must be satisfied that the case of the judges and prosecutors was heard within a reasonable time.

The State's financial liability and personal liability of judges in the event of judicial error

Next, the Court considered whether the national legislation regarding the financial liability of the State and the personal liability of judges concerning the damage caused by judicial error could be compatible with EU law. It was found that it could be compatible in exceptional cases where an action for indemnity was governed by objective and verifiable criteria, and where there were guarantees to safeguard against external pressure. The bare fact of a judicial error having been established was not an adequate basis on which to find a judge personally liable.

The principle of primacy of EU law

The Court reiterated the principle of primacy of EU law and the requirement that national courts are required to interpret national law in accordance with the

requirements of EU law. As regards any national legislation which deprives a lower court of the right to disapply a national provision engaged by the Decision which is contrary to EU law, this had the effect of countering that legislation. In practice, where a national court finds that the EU Treaty or the Decision has been infringed, that court was required to disapply the provision in question, regardless of its legal basis.

Costs

Given that the applications were an intermediary part of proceedings before the domestic courts, the Court left the question of costs to those domestic courts.

The AIRE Centre

The AIRE Centre is a specialist non-governmental organisation that promotes the implementation of European Law and supports the victims of human rights violations. Its team of international lawyers provides expertise and practical advice on European Union and Council of Europe legal standards and has particular experience in litigation before the European Court of Human Rights in Strasbourg, where it has participated in over 150 cases.

For twenty years now, the AIRE Centre has built an unparalleled reputation in the Western Balkans, operating at all levels of the region's justice systems. It works in close cooperation with ministries of justice, judicial training centres and constitutional and supreme courts to lead, support and assist long term rule of law development and reform projects. The AIRE Centre also cooperates with the NGO sector across the region to help foster legal reform and respect for fundamental rights. The foundation of all its work has always been to ensure that everyone can practically and effectively enjoy their legal rights. In practice this has meant promoting and facilitating the proper implementation of the European Convention on Human Rights, assisting the process of European integration by strengthening the rule of law and ensuring the full recognition of human rights, and encouraging cooperation amongst judges and legal professionals across the region.

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Civil Rights Defenders is a human rights organisation that protects civil and political rights and strengthens human rights defenders at risk. For more than 30 years we have been supporting civil society in repressive countries. Our unique approach involves working closely with activists on the ground, developing channels for international cooperation and communication, and building activists' capacity to effectively advocate for human rights on the domestic and international levels. During the past decade we have evolved from primarily providing financial support to partners, to a human rights player that supports partners with a combination of dialogue on strategy; long-term financial support; emergency support; preventive security measures; advocacy; networking; and capacity building with a focus on substantive human rights skills. We support human rights defenders in Europe, Euroasia, East Africa, Latin America and Southeast Asia.



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