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Overview of the European Court of Human Rights case-law on the Conventional Rights of Judges

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Content

ABBREVIATIONS

CoE	Council of Europe
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
NJC	National Judicial Council
SCJ	Supreme Council of Judicature

Summary
This study presents the case law of the European Court of Human Rights (ECtHR) in which the applicants were members of the national judiciary and complained that their human rights and fundamental freedoms reflected in the European Convention on Human Rights (ECHR) were violated by the national authorities. The number of ECtHR case law concerning a judge as an applicant is constantly growing. This study reflects those ECtHR judgments and decisions in which:

- the applicant was a judge serving in the domestic courts to which she/he was appointed in accordance with domestic law;
- the applicant judge sought a remedy before the ECtHR in relation to judicial disciplinary proceedings instituted against him/her;
- the term 'judge' is used to refer to all members of the domestic judiciary (e.g. judge, President of the court etc.).

In all presented cases the National Judicial Council (NJC) played a determining role in the disciplinary proceedings against the applicant judge.

Analyses of ECHR cases shows that in the vast majority of cases, the domestic disciplinary sanction imposed on a judge was removal from office (e.g., ***Oleksandr Volkov v. Ukraine, Saghatelyan v. Armenia, Baka v. Hungary, Ivanovski v. The Former Yugoslav Republic of Macedonia, Erményi v. Hungary, Kamenos v. Cyprus, Denisov v. Ukraine, Sturua v. Georgia, Gerovska Popčevska v. The Former Yugoslav Republic of Macedonia, Jakšovski, Trifunovski v. The Former Yugoslav Republic of Macedonia, Poposki and Duma v. The Former Yugoslav Republic of Macedonia, Kulykov and Others v. Ukraine, Mitrinovski v. The Former Yugoslav Republic of Macedonia, Olujić v. Croatia, Özpinar v. Turkey***), however some other sanctions were also imposed:

- In ***Erményi v. Hungary*** - a reduction of the mandatory retirement age,
- In ***Harabin v. Slovakia*** - 70% reduction of salary,
- In ***Albayrak v. Turkey, Bilgen v. Turkey*** -a transfer and withholding of a promotion,
- In ***Ramos Nunes de Carvalho e Sá v. Portugal*** - suspension from duty,
- In ***Kudeshkina v. Russia*** - removal from continuing to hear a specific pending case the judge was seized of.

The principle that judges are independent means that they can exercise their rights enshrined in the ECHR. However, this raises a number of problems, including that of the judge's impartiality; for how will a judge who has exercised his right to private life or freedom of expression be able to adjudicate with all due impartiality.

The question is therefore whether a judge is totally free to exercise his rights contained in the ECHR, and if so what the consequences of such actions will be for him or her as a judge.

Through its judicial activism the ECtHR contributed to the progressive development of the principles in its case law where judges were applicants. The scope of this overview concerns those ECtHR judgments and decisions in which the applicant judge referred to right to fair trial, freedom of expression, freedom of religion, freedom of assembly and association, right to an effective remedy, right to protection from discrimination.

I. Conventional rights of a judge

a. Right to respect for private life

1. According to the ECtHR well established case law the notion of "private life" did not exclude professional activities: restrictions in that area could have repercussions for the development of a person's relationships with other human beings and therefore for his or her social identity. Article 8 had been at stake[1].
2. In several cases listed below dismissal from office has been found to interfere with the right to respect for private life. In all these cases the ECtHR found that professional role as a judge had been touched upon and the domestic decisions had affected career of a judge and called into question the moral or ethical aspect of his personality and character.
3. ***Özpinar v. Turkey:*** In 2002 a disciplinary investigation was opened against the applicant, who was a judge. She was criticised for allegedly having a close relationship with a lawyer, whose clients had apparently benefited, as a result, from favorable decisions on her part, and also for repeatedly arriving late for work and for her unsuitable clothing and make-up. Testimony was taken from many witnesses, who gave contradictory statements, and the cases that the applicant had dealt with were examined. No information from the investigation was disclosed to her. The disciplinary investigation file was transmitted to the National Legal Service Council, which decided in 2003 to remove her from office as a judge, mainly on the grounds that she had "undermined the dignity and honor of the profession". A request by the applicant for a review of that decision was denied. She then challenged her removal from office, which was confirmed by the National Legal Service Council in 2004, after a hearing in which she had taken part. She was notified of the refusal to reinstate her but was not told the reasons for that decision.
4. The applicant relied on Articles 8 (right to respect for private and family life) alleging that her dismissal by the National Legal Service Council had been based on aspects of her private life.
5. The Court reiterated that the notion of "private life" did not exclude professional activities: restrictions in that area could have repercussions for the development of a person's relationships with other human beings and therefore for his or her social identity. In the case of Ms Özpınar the dismissal decision had been directly related to her conduct both professionally and in private. Moreover, her right to respect her reputation, as protected by Article 8, had been at stake. There had therefore been an interference with Ms Özpınar's right to respect for her private life and it could be said to have had a legitimate aim in relation to the duty of judges to exercise restraint in order to preserve their independence and the authority of their decisions. The ethical duties of judges might encroach upon their private life when their conduct tarnished the image or reputation of the judiciary. As regards the criticisms in the proceedings against the applicant, concerning her conduct as a judge, they had not constituted interference with her private life. However, the applicant nevertheless remained a private person entitled to Article 8 protection. The ECtHR noted that even if certain aspects of the conduct attributed to her – in particular decisions allegedly driven by personal considerations – might have warranted her dismissal, the investigation had not substantiated those accusations and had taken into account numerous actions by Ms Özpınar that were unrelated to her professional activity. Moreover, she had been afforded few safeguards in the proceedings against her, whereas any judge who faced dismissal on grounds related to private or family life must have guarantees against arbitrariness, and in particular a guarantee

[1] Bărbulescu v. Romania [GC], no. 61496/08, ECHR 2017 (extracts), para. 71.

of adversarial proceedings before an independent and impartial supervisory body. Such safeguards were more important in the case of Ms Özpınar as, with her dismissal, she automatically lost the right to practice law. The applicant had appeared before the Council only at the point when she had challenged the dismissal and she had not received beforehand the reports of the inspector or of the witness's testimony.

6. ***Ivanovski v. The Former Yugoslav Republic of Macedonia***: In 2009 the applicant – who was then the President of the Constitutional Court – submitted a declaration of non-collaboration with the security services to the Lustration Commission, pursuant to the Lustration Act 2008, which made collaboration with the State security services between 1944 and 2008 an impediment to holding public office. On 29 September 2010 the Lustration Commission found on the basis of materials obtained from the State Archives that the applicant did not fulfil the requirement for holding public office under the Lustration Act as there was evidence that he had collaborated after being interrogated by the secret police in 1964 in connection with his involvement in a high-school nationalist group. He had been deregistered in 1983.
7. In this case the ECtHR noted that the decision of the Lustration Commission had constituted interference with the applicant's right to respect for his private life.
8. It was based on the relevant provisions of the Lustration Act and was thus "in accordance with the law" and the ECtHR accepted that it pursued the legitimate aim of protecting national security.
9. As to whether the interference was justified, the ECtHR noted that, having regard to the relevant European standards, it should in some manner be a qualifying condition for the imposition of a lustration measure that the person being lustrated was not acting under compulsion when he/she collaborated with the secret police. That was an essential factor in the exercise of balancing the interests of national security against the protection of the affected individual's rights. However, under the applicable domestic law, the authorities, including the courts, had not been called on to address that issue. As a result, the applicant's arguments that he had not consented to the collaboration had been dismissed as irrelevant. It followed that the domestic authorities' analysis in the applicant's case was not, and could not be, sufficiently thorough to satisfy the test of "necessity in a democratic society".
10. In any event, the interference with the applicant's rights under Article 8 had been disproportionate. He had not only been removed from office, but he had also been banned from taking any employment in the public service or academia for a period of five years, while the opportunities for him finding a job as a private-sector lawyer that would correspond to his professional qualifications and experience had been reduced to an extent which made practicing his profession right impossible. Furthermore, the Lustration Act was enacted some sixteen years after the respondent State adopted its democratic Constitution and any threat which persons being lustrated could initially have posed to the newly created democracy must have considerably decreased with the passage of time.
11. The ECtHR did not overlook the fact that the applicant's recruitment process with the former secret police had commenced while he was still a minor. While it was true that he had continued to collaborate as an adult, his contact with the secret police had ceased twenty-seven years before the lustration proceedings were instituted. The ECtHR was not convinced that after such a lapse of time he posed such a threat, if any, to a democratic society as to justify wide-ranging restrictions on his professional activities for a period of five years and the related stigma of a collaborator which he would continue to carry even longer.

12. Oleksandr Volkov and others v. Ukraine: From 2003 the applicant was a judge of the Supreme Court of Ukraine and from 2007 President of the Military Chamber of that court. In 2007 he was elected to the post of member of the High Council of Justice ("the HCJ") but did not assume the office following the refusal of the Chairman of the Parliamentary Committee of the Judiciary ("the Parliamentary Committee") to allow him to take the oath. In 2008 and 2009 two members of the HCJ – one of whom was elected president of the HCJ later – conducted preliminary inquiries into possible misconduct by the applicant. They concluded that he had reviewed decisions delivered by his wife's brother – some of them dating back to 2003 – and that he had been culpable of gross procedural violations, some of his actions dating back to 2006. Following these inquiries, the President of the HCJ submitted two applications to the Parliament for the applicant's dismissal from the post of judge. In 2010 the Parliament, having considered these applications by the HCJ, a recommendation by the Parliamentary Committee, voted for the applicant's dismissal for "breach of oath". According to the applicant, during the electronic vote the majority of the Members of Parliament were absent and those present used voting cards which belonged to their absent colleagues. The applicant challenged his dismissal before the Higher Administrative Court, which found that the HCJ's application to dismiss him following the inquiry of the president of the HCJ had been lawful and substantiated. The Higher Administrative Court further found that the HCJ's decision based on the results of the other inquiry had been unlawful, because the applicant and his wife's brother had not been considered relatives under the legislation in force at the time. However, it refused to quash the HCJ's acts in that case, noting that under the applicable provisions it had no power to do so. The Higher Administrative Court further noted that there had been no procedural violations either before the parliamentary committee or at the Parliament.
13. The applicant complained that his dismissal from the post of judge had amounted to an interference with his private and professional life which was incompatible with Article 8 of the Convention.
14. The ECtHR found that the applicant's dismissal had constituted interference with his right to respect for private and family life. The ECtHR's finding that the parliamentary vote on the decision to remove him from office had not been lawful under national law was sufficient to find that the interference in question had not been justified and was therefore in breach of Article 8. At the time the applicant's case had been 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 in place to prevent arbitrary application of the relevant provisions. In particular, national law had not set any time-limits for proceedings against a judge for "breach of oath", which had made the discretion of the disciplinary authorities 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, there had been no appropriate framework for independent and impartial review of a dismissal for "breach of oath".
15. ***Kulykov and Others v. Ukraine:*** ECtHR reached the same conclusion as in Volkov v. Ukraine noting that the interference breached the requirements of "quality of law" and this made it unlawful in terms of Article 8 of the Convention.
16. Similarly, in ***Xhoxhaj v. Albania*** the ECtHR found that the dismissal of a judge through a vetting procedure interfered with her right to respect for her private life because the loss of

remuneration had serious consequences for her inner circle and her dismissal stigmatised her in the eyes of society.

17. Applying the above described principles in ***Denisov v. Ukraine***, the ECtHR did not record a violation of Article 8. Recalling a number of relevant precedents set out the principles by which to assess whether employment related disputes fall within the scope of "private life" under Article 8, the ECtHR held that there are some typical aspects of private life which may be affected in such disputes by dismissal, demotion, non-admission to a profession or other similarly unfavourable measures. In *Denisov* case, the applicant was dismissed from his post as the president of a court on the basis of a failure to perform his administrative duties (managerial skills) properly. Whilst he was dismissed as president, he remained a judge in the same court. The decision concerned only his managerial skills while his professional role as a judge was not touched upon. Further, the decision did not affect his future career as a judge and neither did the decision call into question the moral or ethical aspect of his personality and character. In summary, in this situation, 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. For these reasons the ECtHR did not find Article 8 applicable in this case[2].

b. Freedom of expression

18. The general approach of the ECtHR is that judges enjoy the right to freedom of expression like any other citizen. However, in exercising this right, they should bear in mind their specific responsibilities and duties in society, besides the professional secrecy obligations related to their judicial role. Even if an issue under debate has political implications, this is not in itself sufficient to prevent a judge from making a statement on the matter[3]. At the same time, it can be expected of the public officials serving in the judiciary 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 in question[4]. As far as the general right to freedom of expression of judges to address matters concerning the functioning of the justice system is concerned, the ECtHR held that such right may be transformed into a corresponding duty to speak out in defence of the rule of law and judicial independence when those fundamental values come under threat[5].
19. Below some of the landmark cases where the ECtHR referred to the general right to freedom of expression of judges.
20. ***Albayrak v. Turkey:*** The applicant was working as a judge when in 1995 the authorities brought disciplinary proceedings against him for, among other things, reading PKK legal publications and watching a PKK-controlled television channel. The applicant denied all accusations, arguing that he believed in the fundamental principles of the State and served it faithfully. He admitted to reading certain biased publications, but solely for the purpose of keeping himself informed about incidents reported in the region. The Supreme Council found the allegations against the applicant well-founded and, as a sanction, transferred him to another jurisdiction. The Supreme Council subsequently repeatedly refused to promote the

[2] See also Erményi v. Hungary.

[3] Wille v. Liechtenstein [GC], para. 67.

[4] Ibid. para. 64.

[5] Żurek v. Poland, para. 222.

applicant, given his previous disciplinary sanction. The applicant eventually unwillingly resigned from his post.

21. Invoking Article 10 of the Convention the applicant among others complained that he was punished for reading a daily newspaper which was a legal publication at the material time and for watching a television channel which broadcasts from abroad in his mother language, Kurdish.
22. The ECtHR noted that disciplinary sanction imposed on the applicant had undisputedly interfered with his right to freedom of expression. It was based on domestic law and pursued the legitimate aim of maintaining the authority and impartiality of the judiciary. However, as to the proportionality of the interference, the ECtHR found no reference to any known incident to suggest that the applicant's impugned conduct, including looking at PKK-related media, had had a bearing on his performance as a judge. Nor was there any evidence to demonstrate that he had associated himself with the PKK or behaved in a way which could call into question his capacity to deal impartially with related cases coming before him. Consequently, the ECtHR concluded that, in deciding to discipline the applicant, the authorities had attached decisive weight to the fact that he looked at PKK-related media. Their decision in this respect was therefore not based on sufficient reasons that showed that the interference complained of was "necessary in a democratic society".
23. ***Baka v. Hungary:*** The applicant, a former judge of the ECtHR, was elected President of the Supreme Court of Hungary for a six-year term ending in 2015. In his capacity as President of that court and of the NJC (National Judiciary Council), he expressed his views on various legislative reforms affecting the judiciary. The transitional provisions of the new Constitution provided that the legal successor to the Supreme Court would be the Kúria and that the mandate of the President of the Supreme Court would end following the entry into force of the new Constitution. As a consequence, the applicant's mandate as President of the Supreme Court ended on 1 January 2012. According to the criteria for the election of the President of the new Kúria, candidates were required to have at least five years' experience as a judge in Hungary. Time served as a judge in an international court was not counted. This led to the applicant's ineligibility for the post of President of the new Kúria.
24. In a judgment of 27 May 2014, a Chamber of the ECtHR held unanimously found a breach of the applicant's right to freedom of expression under Article 10 after finding that the premature termination of the applicant's mandate had been as a result of views expressed publicly in his professional capacity.
25. The case was referred to the Grand Chamber at the Government's request.
26. **Existence of an interference:** The ECtHR noted that that in 2011 the applicant, in his professional capacity as President of the Supreme Court and the NJC, had publicly expressed critical views on various legislative reforms affecting the judiciary. Despite the assurance given by two members of the parliamentary majority and the Government in the same year to the effect that the legislation being introduced would not be used to unduly put an end to the terms of office of persons elected under the previous legal regime, the proposals to terminate the applicant's mandate were made public and submitted to Parliament shortly after he gave a parliamentary speech in November 2011 and were adopted within a strikingly short time. 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. Thus, the burden of proof shifted to the Government.
27. ***Whether the interference was justified***: Although it was doubtful that the legislation in question complied with the requirements of the rule of law, the ECtHR proceeded on the

assumption that the interference was prescribed by law. State Parties could not legitimately invoke the independence of the judiciary in order to justify a measure such as the premature termination of the mandate of a court president for reasons that had not been established by law and which did not relate to any grounds of professional incompetence or misconduct. In these circumstances, the impugned measure appeared to be incompatible with the aim of maintaining the independence of the judiciary.

28. In the present case, the impugned interference had been prompted by criticisms the applicant had publicly expressed in his professional capacity as President of the Supreme Court and of the NJC. It was not only his right but also his duty to express his opinion on legislative reforms which were likely to have an impact on the judiciary and its independence. The applicant had expressed his views and criticisms on questions of public interest and his statements had not gone beyond mere criticism from a strictly professional perspective. Accordingly, his position and statements called for a high degree of protection for his freedom of expression and strict scrutiny of any interference, with a correspondingly narrow margin of appreciation being afforded to the domestic authorities. Furthermore, he was removed from his office more than three years before the end of the fixed term applicable under the legislation in force at the time of his election. This could hardly be reconciled with the particular consideration to be given to the nature of the judicial function as an independent branch of State power and to the principle of the irremovability of judges, which was a key element for the maintenance of judicial independence. The premature termination of the applicant's mandate undoubtedly had a chilling effect in that it must have discouraged not only him but also other judges and court presidents in future from participating in public debate on legislative reforms affecting the judiciary and more generally on issues concerning the independence of the judiciary. Finally, the impugned restrictions had not been accompanied by effective and adequate safeguards against abuse. In sum, the reasons relied on by the respondent State could not be regarded as sufficient to show that the interference complained of was necessary in a democratic society.
29. ***Kudeshkina v Russia:*** The applicant stood as a candidate in a general election to the Russian Duma[6]. During her campaign, which included a programme for judicial reform, she gave interviews to two newspapers and a radio station in which she was highly critical of the Russian judiciary. Among other things, she expressed doubts as to the independence of the courts in Russia and fears of "judicial lawlessness" within the country. She was not elected to the Duma but was reinstated in her previous judicial office.
30. The applicant complained that her dismissal from judicial office following her statements in the media constituted a violation of the freedom of expression provided for in Article 10 of the Convention.
31. The ECtHR reiterated that freedom of expression applied to the workplace and that civil servants also enjoyed it. However, the latter owed a duty of loyalty, reserve and discretion to their employer and that disclosure of information obtained in the course of their duties had to be examined in the light of these duties even if it happens to be a matter of public interest. The judiciary play a special role in society as they are the guarantors of justice yet when criticised they are subject to a duty of discretion that precludes them from replying. Judges, because of their functus officio, had to show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary was likely to be called into

[6] During the election period the Judiciary Qualification Board granted the applicant's request for suspension from her judicial functions pending the elections in which she was standing as a candidate.

question. Judges have also to disseminate accurate information with moderation and propriety. An act motivated by a personal grievance, personal antagonism or the expectation of personal advantage, including pecuniary gain, did not justify a particularly strong level of protection. Nevertheless, political speech is of a different nature. Indeed, a judge is not prevented in making any statements on issues having political implications. Apart from the fact that important procedural guarantees where not secured in this case, the ECtHR observed that the sanction of dismissal was disproportionately severe. It could have had a chilling effect on those judges participating in the public debate on the judicial institutions' effectiveness.

32. Contrary to the above listed cases, in ***Simić v. Bosnia and Hercegovina*** the ECtHR did not find any violation of Article 10. In this case the ECtHR unanimously ruled that the Constitutional Court had not violated the applicant's right to freedom of expression by removing him from his office as a constitutional judge. The applicant, during his judicial mandate, wrote a letter to the then prime minister stating that he was at the disposal of the prime minister. The letter was published by local media and it was also revealed that the applicant had had close ties with the executive branch of government. The applicant also gave two interviews and had held a press conference without the permission of the Constitutional Court. The Constitutional Court decided to remove the applicant from the office for violation of the Court's Rules. The ECtHR ruled that the applicant as a judge had been obliged to show restraint in exercising his freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called into question. The ECtHR also reasoned that the removal from office was primarily based on the applicant's inability to perform his judicial function impartially and on the damage that he had done to the Constitutional Court's reputation, behavior incompatible with the role of a judge and not because of his publicly made statements. In that respect the ECtHR distinguished this case from other cases, notably from *Baka* and *Kudeshkina*, in which the decisions to remove the applicants from office were prompted by the views they had publicly expressed and therefore constituted an interference with their right to freedom of expression.

c. Freedom of religion

33. The importance of freedom of thought, conscience and religion has been emphasised on several occasions by the ECtHR. Broadly speaking, freedom of thought, conscience and religion is considered as one of the foundations of democratic society. In several cases, the ECtHR referred to the right to freedom of conscience and religion of the applicant judges. In those cases, the ECtHR either did not found a violation, or considered the complaint inadmissible on the grounds that the interference with the right to freedom of conscience and religion was based not on the applicant's religious opinions and beliefs or the manner in which he discharged his religious duties, but on his behaviour and actions.
34. ***Pitkevich v. Russia:*** This case concerned the dismissal of a judge, a member of the Living Faith Church, belonging to the Russian Union of Evangelical Christian Churches, for allegedly misusing her position for the purpose of proselytising. The applicant submitted in particular that she had never abused her office by way of improper exercise of her views, and that she had legitimately used her religious and moral principles to assist in the resolution of cases before her.
35. The ECtHR declared the applicant's complaint inadmissible as being manifestly illfounded, finding that, 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 reasons adduced by the

authorities were sufficient to justify the interference. The ECtHR noted in particular that the applicant had been dismissed for having expressed her religious belief whilst performing her judicial functions, which had constituted an interference with her freedom of expression. However, the measure was prescribed by law and pursued the legitimate aims of protecting the rights of others and maintaining the authority of the judiciary. Moreover, concerning the proportionality of the interference in the present case, nothing, in particular, in the case-file suggested that the authorities had 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 had been 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 favorable outcome of their cases if they joined her religious community. In addition, those activities had resulted in delayed cases and a number of challenges against her. Such behavior was found to be incompatible with the requirements of judicial office and had prompted her dismissal. The grounds for her dismissal had related exclusively to her official activities and not the expression of her views in private.

d. Freedom of assembly and association

36. ***Maestri v. Italy***: The applicant, a judge, complained in particular that the decision by the National Council of the Judiciary, upheld by the Court of Cassation, to impose a disciplinary sanction on him in the form of a reprimand for being a Freemason, from 1981 until March 1993, had infringed his right to freedom of assembly and association.
37. The applicant complained that the decision to impose a disciplinary sanction on him in the form of a reprimand for being a Freemason, from 1981 until March 1993, had infringed his right to freedom of assembly and association.
38. The ECtHR held that there had been a violation of Article 11 (freedom of association) of the Convention, finding that the interference with the applicant's right to freedom of association had not been foreseeable and had therefore not been prescribed by law. It noted in particular that, although a directive on the incompatibility of judicial office with membership of the Freemasons had been adopted by the NJC in 1990, the debate before the Council had sought to formulate, rather than solve, a problem. Furthermore, 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. That being so, the condition of foreseeability had not been satisfied either.

e. Right to an effective remedy

39. In ***Özpinar v. Turkey***[7], the applicant judge was unsuccessful in her judicial appeal against the National Legal Service Council's decisions. The ECtHR found that the impartiality of the Council panel that examined challenges to its decisions was highly questionable. Accordingly, the applicant had not had access to a remedy meeting the minimum requirements of Article 13 for the purposes of her Article 8 complaint.
40. In ***Mishgjoni v. Albania,*** the applicant was a judge of the District court. The High Council of Justice, during the applicant's absence on sick leave, dismissed her on account of flagrant violations of professional discipline. The applicant unsuccessfully challenged her dismissal before the domestic courts. The applicant's subsequent constitutional complaint to the was

[7] See the facts of the case on page 5.

accepted and the Constitutional Court detected violations of Article 42 of the Constitution and Article 6 of the Convention given the *in-absentia* proceedings. The applicant complained about the lack of an effective remedy for the enforcement of the Constitutional Court's decision. The ECtHR concluded that the applicant had no remedy to prevent the continuation of the violation of her fair trial right or else to obtain compensation in relation to the excessive length of the dismissal proceedings.

f. Right to protection from discrimination

41. In ***Pitkevich v. Russia,***[8] the ECtHR found 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. There is no evidence that in this respect the applicant has been subjected to discrimination within the meaning of Article 14 of the Convention.

II. Right to Fair Trail

a. Applicability of Article 6

42. In the case of ***Massa v. Italy*** the ECtHR ruled that "Disputes relating to the recruitment, careers and termination of service of public servants are as a general rule outside the scope of Article 6 (1). 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"[9]. This ruling was adopted in subsequent case law[10].
43. The ***Massa v Italy*** judgment was applied by ***Pitkevich v Russia*** to include applicant judges which extended the narrow meaning of a "civil servant" to include also that of a "public servant": "The Court observes that the judiciary, while not being part of ordinary civil service, is nonetheless part of typical public service. A judge has specific responsibilities in the field of administration of justice which is a sphere in which States exercise sovereign powers. Consequently, the judge participates directly in the exercise of powers conferred by public law and perform duties designed to safeguard the general interest of the State".
44. In Vilho Eskelinen and Others v. Finland the ECtHR decided to adopt a new approach in this area, according to which in order for the respondent State to be able to rely on the applicant's status as a civil servant to exclude the application of Article 6, two conditions had to be fulfilled:
    - firstly, the State in its national law must have expressly excluded access to a court for the post or category of staff in question;
    - secondly, the exclusion must be justified on objective grounds in the State's interest.

45. The mere fact that the applicant was in a sector or department which participated in the exercise of power conferred by public law was not in itself decisive. In order for the exclusion

[8] See the facts of the case on page 12.

[9] Massa v. Italy.

[10] Pitkevich v Russia and Zubko and others v. Ukraine.

to be justified, it was not enough for the State to establish that the civil servant in question participated in the exercise of public power or that there existed a "special bond of trust and loyalty" between the civil servant and the State, as employer. The State would also have to show that the subject matter of the dispute in issue was related to the exercise of State power or that it had called into question the special bond. Thus, there could in principle be no justification for the exclusion from the guarantees of Article 6 of ordinary labour disputes, such as those relating to salaries, allowances or similar entitlements, on the basis of the special nature of relationship between the particular civil servant and the State in question. There would, in effect, be a presumption that Article 6 applied. It would be for the respondent Government to demonstrate, first, that a civil-servant applicant did not have a right of access to a court under national law and, second, that the exclusion of the rights under Article 6 for the civil servant was justified. In the case under review, it was not disputed that the applicants had all had access to a court under national law.

46. **The principle is now that there will be a presumption that Article 6 applies, and it will be for the respondent Government to demonstrate, firstly, that a civil-servant applicant does not have a right of access to a court under national law and, secondly, that the exclusion of the rights under Article 6 for the civil servant is justified.**
47. Although in ***Vilho Eskelinen and Others v. Finland [GC]*** the ECtHR stated in its judgment, that its reasoning was limited to the situation of civil servants, it has held that the judiciary forms part of typical public service even if it is not part of the ordinary civil service[11]. Accordingly, judges cannot be excluded from the protection of Article 6 on the grounds of their status alone; moreover, the ECtHR has taken judges into account not only in their adjudicating role, but also in the context of other official functions that they may be called upon to perform with a close connection with the judicial system[12].
48. Furthermore, the employment relationship of judges with the State must be understood in the light of the specific guarantees essential for judicial independence. Thus, when referring to the "special trust and loyalty" that they must observe, it is loyalty to the rule of law and democracy and not to holders of State power. This complex aspect of the employment relationship between a judge and the State makes it necessary for members of the judiciary to be sufficiently distanced from other branches of the State in the performance of their duties, so that they can render decisions a fortiori based on the requirements of law and justice, without fear or favour[13].
49. In ***Bilgen v. Turkey***, the ECtHR emphasized importance of safeguarding the autonomy and independence of the judiciary for the preservation of the rule of law. Accordingly, in disputes of this kind it had to determine whether the national judicial system ensured the protection of judges against a potentially arbitrary decision affecting their career or professional status[14].
50. In ***Denisov v. Ukraine [GC]***, the ECtHR gave a detailed summary of the case-law and relevant principles concerning the application of Article 6 to ordinary labour disputes involving judges[15]. It should be borne in mind that disciplinary proceedings are also concerned. In ***Bilgen v. Turkey***, the ECtHR clarified that this included disputes concerning a measure that

[11] Baka v. Hungary, para. 104.

[12] Grzęda v. Poland, para. 303.

[13] Ibid., para. 264.

[14] Bilgen v. Turkey, para. 57-63.

[15] Denisov v. Ukraine, para. 46-49. See also Ramos Nunes de Carvalho e Sá v. Portugal, para. 120, and Eminağaoğlu v. Turkey, para. 62-63

had considerable effects on a judge's professional life and career even without any direct impact in pecuniary terms or on private or family life[16].

51. From a study of the outcome of the ECtHR judgments it is manifest that Article 6 applies to all types of disputes concerning judges, including those relating to:
    - recruitment or appointment (***Juričić v. Croatia***);
    - career and promotion (***Dolińska-Ficek and Ozimek v. Poland, Dzhidzheva-Trendafilova v. Bulgaria***);
    - transfer (***Tosti v. Italy, Bilgen v. Turkey***);
    - suspension (***Paluda v. Slovakia, and Camelia Bogdan v. Romania***);
    - dismissal (***Saghatelyan v. Armenia, Oleksandr Volkov v. Ukraine, Kulykov and Others v. Ukraine, Sturua v. Georgia, Kamenos v. Cyprus, and Olujić v. Croatia***);
    - reduction in salary (***Harabin v. Slovakia***);
    - removal from post (for example, President of the Supreme Court, President of the Court of Appeal or Vice-President of the Regional Court) while remaining a judge (***Baka v. Hungary, Denisov v. Ukraine, Broda and Bojara v. Poland***, 2021);
    - judges being prevented from exercising their judicial functions after legislative reform (***Gumenyuk and Others v. Ukraine***);
    - judicial review of the appointment of a court president (***Tsanova-Gecheva v. Bulgaria***).

52. In ***Kamenos v. Cyprus***, the ECtHR reinstates that the offence of misconduct is a disciplinary offence and is limited and linked to the exercise of judicial functions. It does not belong to the criminal sphere and the penalty for misconduct is dismissal. Such proceedings were therefore of a purely disciplinary nature and accordingly not involve the determination of a criminal charge against the applicant and Article 6 is not applicable under its criminal head.

b. Violations of Article 6 (1) in relation to applicant judges

53. The ECtHR found a number of violations of the ECHR where the applicants were judges sitting on national courts. Below are the rights and freedoms which have been recognized by the ECtHR.

i. Access to a Court

54. ***Saghatelyan v. Armenia:*** The applicant worked as a judge of the first instance court. The case concerned her complaint that she had been unable to obtain judicial review of her dismissal from the post of judge. The applicant was dismissed from her post at the first instance court in April 2004 by a decree issued by the President of Armenia following a motion filed by the Minister of Justice and approved by the Council of Justice. The motion stated in particular that she had previously been severely reprimanded on three occasions for gross violations of the rules of criminal procedure and that another set of disciplinary proceedings was initiated against her on the same grounds. The applicant lodged a claim with the District court seeking to annul the decree. She argued in particular: that the motion for her dismissal had been based on matters which had been the subject of earlier disciplinary proceedings and in respect of which penalties had already been imposed; that the motion did not contain any reasoning and was not accompanied by any supporting documentation; and that the commission of gross violations of the law could only have been found by a higher court and

[16] Bilgen v. Turkey, para. 68-69.

not by non-judicial bodies and officials, such as the Council of Justice or the Minister of Justice. The District court terminated the proceedings on the ground that her claim was not subject to examination by the courts of general jurisdiction. On appeal, the appeal court examined and dismissed the applicant's claim as unsubstantiated. In September 2005 the Court of Cassation eventually terminated the proceedings on the same grounds as the District court.

55. Relying in substance on Article 6 § 1 of the ECHR, the applicant complained that she had been denied access to court to contest her dismissal.
56. The ECtHR found it significant that at the time when the applicant's case was examined by the Council of Justice, it was presided over by the representatives of the executive. Accordingly, the Council of Justice, as it was composed at the material time, cannot be regarded as an independent and impartial tribunal capable of ensuring compliance with the requirement of fairness laid down by Article 6 of the Convention. Thus the applicant should have had the benefit of subsequent control of the decision reached by the President upon the recommendation of the Council of Justice by a judicial authority meeting the requirements of Article 6.
57. The ECtHR observed that the applicant was unable to contest before the domestic courts the lawfulness of the President's Decree dismissing her from her post within the judiciary, which was adopted on the basis of the recommendation of the Council of Justice. In line with this general practice which existed at the relevant time, the courts refused to examine the applicant's claim against the Presidential Decree, notwithstanding the fact that she sought to dispute its unlawfulness as distinct from its compliance with the Constitution, the determination of the latter issue being within the exclusive competence of the Constitutional Court to which, in any event, the applicant had no right of access. In such circumstances, and given the lack of access to the Constitutional Court for individuals at the material time, the applicant was completely denied access to any court or to any other competent body satisfying the requirements of Article 6 of the Convention in order to dispute the Presidential Decree concerning the early termination of her term of office. Consequently, the ECtHR found that the restriction imposed in the present case to review the Presidential Decree concerning the applicant's dismissal from office, impaired the very essence of her "right to a court".
58. Unlike the Saghtelyan v. Armenia, in the case ***Ivanovski v. 'the former Yugoslav Republic of Macedonia'*** the EctHR did not find a violation of the right to access to court.
59. In this case the applicant complained that of lack of access to court, since the courts had not established full jurisdiction over the facts of the case, and had erred on the facts. Moreover, he argued that he could not have effectively challenged the decisive evidence against him, which had put him in a disadvantaged position vis-à-vis the State.
60. The ECtHR noted that in the lustration proceedings in the applicant's case the decision of the Commission had been reviewed by the Administrative Court, and subsequently by the Supreme Court. An expert assistant had been invited at the applicant's suggestion. The courts therefore had and did exercise full jurisdiction over the facts and law in addressing the substance of the case and it follows that in the lustration proceedings the applicant had access to court. According to the ECtHR, the applicant's arguments concern the taking and assessment of evidence rather than access to court. Accordingly, the ECtHR did not find a violation of Article 6 § 1 of the Convention on account of lack of access to court.

ii. Tribunal Established by Law

61. In ***Oleksandr Volkov v. Ukraine***[17]*,* the applicant made, among others, complaint under Article 6 § 1 of the Convention that his case had not been heard by a "tribunal established by law" since by the time the president of the HAC had set up that chamber and had made proposals for its individual composition, his term of office had expired and he had therefore been occupying his administrative post without any legal basis.
62. In this case the ECtHR concluded, that under domestic law, the personal composition of the special chamber that was to examine the applicant's case was to be defined by the President of the Higher Administrative Court, but his five-year term as President had already expired when this was done. The relevant provisions of national law regulating the procedure for appointing presidents of the courts had been declared unconstitutional and new provisions had not yet been introduced. In the meantime, the appointment of presidents of the courts had been a matter of serious controversy among the Ukrainian authorities. Thus, the chamber deciding the case had not been composed in a manner satisfying the requirement of a "tribunal established by law".

iii. Impartiality and Independence of a court or tribunal

63. The ECtHR referred to "Impartiality and Independence of a court or tribunal'' in several cases, among which are ***Olujić v. Croatia; Harabin v. Slovakia; Oleksandr Volkov v. Ukraine; Gerovska Popčevska v. The Former Yugoslav Republic of Macedonia; Ramos Nunes de Carvalho e Sá v. Portugal; Mitrinovski v. The Former Yugoslav Republic of Macedonia; Ivanovski v. The Former Yugoslav Republic of Macedonia; Kulykov and Others v. Ukraine; Jakšovski and Trifunovski v. The Former Yugoslav Republic of Macedonia; Poposki and Duma v. The Former Yugoslav Republic of Macedonia; Sturua v. Georgia; Kamenos v. Cyprus; and Denisov v. Ukraine.***

- *Prejudice through objective impartiality*

64. There were cases where the person initiating the disciplinary procedure subsequently participated in the decision-making process, finding the applicant judge guilty as charged. Such was the case with ***Kamenos v. Cyprus, Sturua v. Georgia.*** In ***Oleksandr Volkov v. Ukraine*****,** there was a lack of personal impartiality as HCJ's members could not withdraw from hearing the case as no withdrawal procedure was envisaged by law. There were no appropriate guarantees to ensure that the proceedings were objectively impartial. In ***Harabin v. Slovakia*** two judges who had been excluded for lack of impartiality in earlier cases involving the applicant subsequently took part in the disciplinary proceedings.
65. ***Kamenos v. Cyprus:*** At the material time the applicant was a judge and the president of the Industrial Disputes Court in Cyprus. Following complaints by third parties of judicial misconduct by the applicant, the Supreme Court appointed an independent investigating judge to look into the matter. After receiving the investigating judge's report and rather than appointing a prosecutor, the Supreme Court itself framed charges of misconduct against the applicant and called him to appear before the Supreme Council of Judicature (SCJ), which was composed of all the judges of the Supreme Court. The disciplinary proceedings were carried out before the SCJ, which ultimately found the charges proved and, after hearing the applicant, removed him from office.
66. In this regard the ECtHR noted that it was clear from the proceedings and the SCJ's decision that the SCJ did its best to avoid a procedure that was prosecutory in nature in an attempt to

[17] See the facts of the case on page 8.

prevent an atmosphere of hostility and confrontation in the proceedings. In its efforts to achieve such a goal, it decided not to assign the duties of a prosecutor to the investigating judge or to any other judicial official and did not put questions to the witnesses, other than for clarification purposes. As it observed in its decision, it essentially acted as an audience for the statements by the witnesses. It also put no questions to the applicant.

67. Nonetheless, the fact remained that the Supreme Court had itself framed the charges against the applicant and then, sitting as the SCJ, conducted the disciplinary proceedings. It had also decided on and dismissed an objection by the applicant concerning the charge sheet.
68. According to the ECtHR, in such a situation, confusion between the functions of bringing charges and those of determining the issues in the case could prompt objectively justified fears as to the SCJ's impartiality.
69. ***Harabin v. Slovakia:*** The applicant, the President of the Slovakian Supreme Court, was the subject of disciplinary proceedings before the Constitutional Court (plenary session) after he refused to allow an audit by Ministry of Finance staff which he considered should have been conducted by the Supreme Audit Office. The applicant challenged four of the judges due to hear his case, including two who had earlier been excluded from other sets of proceedings in which he had been involved, on the grounds that his past dealings with certain of the judges in question meant that there was a risk of bias. His opponent in the proceedings, the Minister of Justice, challenged a further three judges on like grounds. The Constitutional Court rejected all the challenges. It subsequently found the applicant guilty of a serious disciplinary offence and reduced his annual salary by 70%. In his application to the ECtHR, the applicant complained, *inter alia*, of a violation of his right to a fair hearing by an impartial tribunal.
70. The ECtHR noted that in the applicant's case seven of the thirteen judges making up the Constitutional Court plenary session had been challenged for bias. Of the four challenged by the applicant, two had been excluded for bias in earlier proceedings involving the applicant before a chamber of the Constitutional Court. The Constitutional Court had not, however, attached decisive weight to that fact (or to the fact that two other constitutional judges challenged by the Minister of Justice had also been excluded for bias in the past) and had decided not to exclude any of the judges on the grounds that the disciplinary proceedings were within the exclusive jurisdiction of its plenary session and that excessive formalism and overlooking the statements of the individual judges posed the risk of rendering the proceedings ineffective. In so doing, it failed to answer the arguments for which the judges' exclusion had been requested. In the ECtHR view, it was only once the parties' arguments had been answered and a decision taken on the merits of the challenges that the question whether there was any need and justification for not excluding any of the judges could arise. The reasons invoked by the Constitutional Court could not therefore justify the participation of two judges who had been excluded for lack of impartiality in earlier cases involving the applicant and in respect of whom objective doubts had not been convincingly dissipated. Accordingly, the ECtHR found that the applicant's right to a hearing by an impartial tribunal had not been respected.

- *Prejudice through subjective impartiality*

71. In ***Olujić v. Croatia***, the impartiality of three NJC members was established on the basis of interviews given by the President and two other NJC members during the disciplinary proceedings, expressing bias against the applicant. In ***Oleksandr Volkov v. Ukraine***, two HCJ members, who carried out the preliminary inquiries in the applicant's case and submitted requests for his dismissal, subsequently took part in the applicant's removal from office

proceedings. One such member was subsequently appointed HCJ President and presided over the hearing of applicant's case.

72. In ***Olujić v. Croatia,*** the applicant was the President of the Supreme Court. In 1996 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. Disciplinary proceedings were brought against him before the National Judicial Council ("the NJC"). In January 1997 the NJC found it established that the applicant had used his position in an improper way by fraternising in public with two individuals who had a criminal background, and decided to remove him from judicial office. Over the following months, three members of the NJC – A.P., V.M. and M.H. – gave interviews in the press expressing unfavourable views on the applicant's case. The NJC's decision was subsequently upheld by the Parliament's Chamber of the Counties. However, in April 1998 the Constitutional Court quashed both decisions and remitted the case for fresh consideration. In the resumed proceedings, the applicant filed unsuccessful motions for the withdrawal of A.P., V.M. and M.H. and for the proceedings to be held in public. In October 1998 the applicant was again found guilty and removed from office. The Chamber of the Counties upheld the NJC's decision. In December 1998 the applicant lodged a complaint with the Constitutional Court alleging, among other things, that the disciplinary proceedings had not been held in public, that three members of the NJC had not been impartial, and that witnesses in his favour had not been heard. In December 2004 the Constitutional Court dismissed his complaint as ill-founded.
73. The applicant, inter alia, made the complaint under Article 6 § 1 of the Convention that three members of the National Judicial Council had not been impartial.
74. In this regard the ECtHR noted that an interview with V.M. had been published in a national daily newspaper in February 1997, when the applicant's case was pending before the Chamber of the Counties for the first time. The revelation that V.M. had voted against the applicant's appointment as President of the Supreme Court, coupled with the fact that he himself had been a potential candidate for the same post and had considered therefore that he should have withdrawn from the disciplinary proceedings against the applicant, had created a situation which could raise legitimate doubts as to his impartiality. As to A.P., who at the time was the President of the NJC, the Court noted that an interview with him had been published in the same newspaper in March 1997, when the case was pending before the Constitutional Court. In that interview A.P. had stated that the applicant had used his personal influence and contacts in order to protect the interests of two people with a criminal background and had added that the defense's allegations that the case was politically motivated had been untrue. Those statements implied that A.P. had already formed an unfavorable view of the applicant's case and were clearly incompatible with his further participation in the resumed proceedings against the applicant. In September 1997, while the case was still pending before the Constitutional Court another national daily newspaper published an interview in which M.H. described the applicant as lacking experience and knowledge, and as a corpus alienum in the Croatian judiciary. The ECtHR 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.
75. In ***Kulykov and Others v. Ukraine,*** the applicants were 18 Ukrainian nationals. The case concerned their dismissals from their positions as judges in the domestic courts. The applicants were all domestic court judges in Ukraine, who were dismissed from their posts as a result of proceedings brought against them. The facts giving rise to their dismissals were

established by the High Council of Justice (HCJ). In each case, the HCJ found between 2004 and 2012 that the applicant had breached the judicial oath. The HCJ's decisions were submitted to Parliament or to the President of Ukraine (depending on which of those authorities had appointed the applicant to the post of judge) for final decisions on their dismissal. The applicants further unsuccessfully challenged their dismissals before the Higher Administrative Court or other courts.

76. Relying in particular on Article 6 (right to a fair hearing), the applicants complained that their dismissal proceedings had been unfair and incompatible with the principle of an independent and impartial tribunal.
77. With regard to the complaints that the domestic bodies dealing with the applicants' cases lacked independence and impartiality, the ECtHR referred to its findings in *Oleksandr Volkov* . In that case, it concluded that the procedure before the HCJ and Parliament had disclosed a number of structural and general shortcomings which had compromised the principles of independence and impartiality, and that the subsequent judicial review had not remedied those shortcomings. The ECtHR considered that those findings were equally relevant to the present applications.

- *Prejudice through objective and subjective impartiality*

78. There were cases where the key members of the NJC had expressed an unfavourable view to the applicant and subsequently participated in the impugned professional misconduct proceedings before the NJC. Such was the case with ***Gerovska Popčevska v. The Former Yugoslav Republic of Macedonia*****,** ***Mitrinovski v. The Former Yugoslav Republic of Macedonia*****,** ***Denisov v Ukraine***. The same situation repeated itself in the case of other judges *in* ***Jakšovski and Trifunovski v. The Former Yugoslav Republic of Macedonia and in Poposki and Duma v. The Former Yugoslav Republic of Macedonia***.
79. ***Gerovska Popčevska v. The Former Yugoslav Republic of Macedonia:*** In 2007 the applicant was removed from office as a judge for professional misconduct. The State Judicial Council ("the SJC"), whose intervention had been prompted by a request of the State Anti-Corruption Commission, found that she had wrongly applied the law in a case which she had decided without following the established order of priority.
80. In her application to the ECtHR the applicant complained that the SJC had not been "an independent and impartial" tribunal in line with Article 6 § 1 of the Convention because two of its members, Judge D.I. and the then Minister of Justice, had participated in the preliminary stages of the proceedings against her and had therefore had a preconceived idea about her dismissal. Moreover, the Minister's participation in the SJC's decision constituted interference by the executive in judicial affairs.
81. In this regard the ECtHR noted that in its decision to remove the applicant from office, the SJC relied on two opinions of the Supreme Court finding that there were grounds for establishing professional misconduct. Judge D.I., a member of the plenary of the SJC that decided the applicant's case, had also been a member of the division and plenary of the Supreme Court that had adopted the two opinions. It further appeared that Judge D.I. had voted in favour of the plenary's opinion although he must have been aware that it would be used in the pending SJC proceedings against the applicant. In such circumstances, the applicant had legitimate grounds for fearing that Judge D.I. was already personally convinced that she should be dismissed for professional misconduct before that issue came before the SJC. According to the ECtHR, his participation in the professional misconduct proceedings before the SJC was thus incompatible with the requirement of impartiality under Article 6 § 1 of the Convention.

82. The same applied to the participation of the then Minister of Justice in the SJC's decision to remove the applicant from office, since he had previously requested, in his former capacity as President of the State Anti-Corruption Commission, that the SJC review the case adjudicated by her. Moreover, his presence on that body as a member of the executive had impaired its independence in this particular case.
83. In ***Denisov v. Ukraine***, the applicant's case was heard and determined by eighteen members, only eight whereof were judges. The non-judicial members constituted a majority capable of determining the proceedings' outcome. Moreover, the majority of the HCJ's members were not employed full-time by the HCJ and the Prosecutor General was an HCJ member. Certain members of the HCJ had shown personal bias. One HCJ judge member, as chairman of the Council of Administrative Court Judges, had proposed Denisov's dismissal to the HCJ. Accoding to the ECtHR, this preliminary involvement had casted objective doubt on this judge's impartiality when he subsequently took part in the HCJ decision on the merits of applicant's case.
84. In ***Mitrinovski v. The Former Yugoslav Republic of Macedonia***, a judge who was a member of the SJC had sought the impugned proceedings. He subsequently took part in the decision to remove the applicant from office. His role in the proceedings failed both the subjective and objective impartiality tests notwithstanding the fact that the said judge was only one of fifteen SJC members. The same situation repeated itself in the case of other judges in ***Jakšovski and Trifunovski v. The Former Yugoslav Republic of Macedonia and in Poposki and Duma v. The Former Yugoslav Republic of Macedonia***.

iv. Legal Certainty (the absence of a limitation period for the proceedings against the applicant)

85. ***Oleksandr Volkov v. Ukraine[18]:*** The applicant had been placed in a difficult position, as he had had to mount his defence before the HCJ in 2010 with respect to events some of which had occurred in the distant past (in 2003 and 2006). Domestic law did not provide any time bars on proceedings for dismissal of a judge for "breach of oath". While the ECtHR did not find it appropriate to indicate how long the limitation period should be, such an open-ended approach to disciplinary cases involving the judiciary posed a serious threat to the principle of legal certainty.

v. Adequate time and facilities for defense preparation

86. ***Ramos Nunes de Carvalho e Sá v. Portugal****:* The proceedings 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 applicant did not have 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 ECtHR found, that the CSM had not exercised its discretionary powers on an adequate factual basis.

vi. Right to a Public Hearing

[18] See the facts of the case on page 8.

87. ***Olujić v. Croatia***[19]***:*** The applicant made complained under Article 6 § 1 of the Convention that the exclusion of the public from the proceedings had not been justified.
88. The ECtHR noted that, contrary to the applicant's request, the public was excluded from the proceedings conducted before the National Judicial Council on the ground of protection of the applicant's dignity and the dignity of the judiciary as such. As regards the first of these grounds, namely, the protection of the applicant's dignity, the ECtHR noted firstly that the applicant himself asked that the proceedings be public and thus showed that he himself did not consider that his dignity required protection through the exclusion of the public. As to the nature of the proceedings at issue, given that the proceedings in question concerned such a prominent public figure as the President of the Supreme Court and that public allegations had already been made suggesting that the case against him was 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 susceptible to public scrutiny.

vii. Equality of Arms

89. ***Olujić v. Croatia:*** The NJC had justified its refusal to hear evidence from any of the witnesses called on behalf of the applicant by stating that the circumstances referred to in the evidence on which he relied had already been established or had not been important for the case. However, even though it was not for the ECtHR to express an opinion on the relevance of the evidence or on whether the allegations against the applicant were well-founded, it considered that the evidence of the witnesses concerned had been relevant to the applicant's case in that it would have been likely to support his line of defence. Moreover, the reasons relied on by the NJC had not been sufficient to justify the refusal to hear any of the witnesses called on behalf of the applicant, which ultimately limited his ability to present his case in a manner compatible with the guarantees of a fair trial.

viii. Excessive Length of Proceedings

90. ***Mishgjoni v. Albania***[20]: In 1996 the applicant was appointed as a judge. In December 2001 a disciplinary inquiry was opened against her by the inspectors of the High Council of Justice ("HCJ"). On the basis of the results of this inquiry, the prosecutor's office was asked to open a criminal investigation against the applicant. The investigation was opened on 12 January 2002. This resulted in the applicant being suspended from work on the same day.
91. On 26 April 2002 the prosecutor discontinued the criminal investigation for lack of evidence. On 15 July 2002 the HCJ, during the applicant's absence on sick leave, dismissed her on account of flagrant violations of professional discipline. The records of previous HCJ meetings indicated that the applicant had been summoned on several occasions to appear before it. However, she was on extended sick leave because of depressive neurosis. The HCJ continued the proceedings *in absentia*. On 22 July 2002 the applicant challenged the HCJ's decision of 15 July 2002 by filing an appeal with the Supreme Court, which was competent to determine issues of both fact and law. On 18 November 2002 the Supreme Court Joint Benches rejected the appeal. The applicant's subsequent constitutional complaint to the Constitutional Court was accepted on 12 November 2004. It quashed both decisions (of the Supreme Court Joint Benches and the HCJ) and remitted the case for re-examination to the HCJ. On 6 February 2009 the Supreme Court Joint Benches quashed the HCJ decision of 24

[19] See also Ramos Nunes de Carvalho e Sá v. Portugal.

[20] See also Olujić v. Croatia.

October 2008. It found that the proceedings relating to the disciplinary measure had taken too long and as a result the said measure could not produce any effect and was therefore invalid.

92. On 27 February 2009 the applicant was reinstated as a judge at the District Court.

93. The applicant complained under Article 6 § 1 of the Convention, among others, about the length of the administrative and judicial proceedings concerning her dismissal.

94. The ECtHR noted that the dismissal proceedings started at least on 22 July 2002 and ended on 6 February 2009. It considered that the period to be taken into account should cover the entire length of the dismissal proceedings, which thus lasted more than eight years for three levels of jurisdiction. The ECtHR noted that the dismissal proceedings did not disclose any element of complexity. It could not be said that the applicant remained passive or failed to display the necessary diligence. The ECtHR did not accept the Government's arguments that the changes in the composition of the HCJ in 2005 and the refocusing of its priorities could justify an almost four-year delay in the re-examination of the applicant's case.

III. Structural deficiencies of the NJC's indicated in the ECtHR judgments

95. From the ECtHR judgments studied in the previous chapters, the following observations can be made in relation to National Judicial Councils:

(a) in some cases a NJC had a **decision making authority**:

- ***Albayrak v. Turkey and Özpinar v. Turkey*** where the NJC was the Supreme Council of Judges and Prosecutors;
- ***Olujić v. Croatia*** where the NJC was the National Judicial Council;
- ***Kudeshkina v. Russia*** where the NJC was the Judiciary Qualification Board;
- ***Mishgjoni v. Albania*** where the NJC was the High Council of Justice;
- ***Ramos Nunes de Carvalho e Sá v. Portugal*** where the NJC was the High Court of the Judiciary;
- ***Gerovska Popčevska v. The Former Yugoslav Republic of Macedonia***, ***Mitrinovski v. The Former Yugoslav Republic of Macedonia, Jakšovski and Trifunovski v. The Former Yugoslav Republic of Macedonia, and Poposki and Duma v. The Former Yugoslav Republic of Macedonia***, where the NJC was the State Juridical Council;
- ***Sturua v. Georgia*** where the NJC was the Disciplinary Council of Judges Panel;
- ***Kamenos v. Cyprus*** where the NJC was the Supreme Council of Judicature and
- ***Denisov v. Ukraine*** where the NJC was the High Council of Justice,

(b) in some cases a NJC was involved **without a decision making authority**:

- ***Oleksandr Volkov v. Ukraine*** where the NJC was the High Council of Justice which recommended to the Parliamentary Committee on the Judiciary;
- ***Kulykov and Others v. Ukraine*** where the NJC was the High Council of Justice which recommended to the Parliamentary Committee on the Judiciary in the case of sixteen applicant judges and to the President in the case of two applicant judges;
- ***Saghatelyan v. Armenia*** where the NJC was the High Council of Justice which recommended to the President,

(c) in some cases, an NJC was **not involved at all**:

- ***Harabin v. Slovakia*** where discipline was exercised by the Constitutional Court;
- ***Baka v. Hungary and Erményi v. Hungary*** where discipline was administered by Parliament;
- ***Ivanovski v. The Former Yugoslav Republic of Macedonia*** where discipline was inflicted by Parliament relying on the conclusion of the (non-NJC) Lustration Commission.

96. In the vast majority of cases the NJC decisions **were reviewable by a higher authority**, e.g., by the Constitutional Court[21], by the Supreme Court[22], by the Supreme Court and

[21] Olujić v. Croatia.

[22] Kudeshkina v. Russia, Ramos Nunes de Carvalho e Sá v. Portugal, Gerovska Popčevska v. The Former Yugoslav Republic of Macedonia, Mitrinovski v. The Former Yugoslav Republic of Macedonia, Jakšovski and Trifunovski v. The Former Yugoslav Republic of Macedonia, and Poposki and Duma v. The Former Yugoslav Republic of Macedonia.

subsequently the Constitutional Court[23], by the Superior Council's Appeal Panel[24], by the Higher Administrative Court[25].

97. There are some cases where the decisions of the NJC's are not reviewable by the higher authority. There were the below-listed cases where NJC decisions **were not reviewable by a higher authority**:
    - ***Harabin v. Slovakia*** where discipline was exercised by the Constitutional Court;
    - ***Saghatelyan v. Armenia*** where discipline was exercised by the President of Armenia on the recommendation of the Council of Justice;
    - ***Kamenos v. Cyprus*** where discipline was exercised by the Supreme Council of Judicature;
    - ***Erményi v. Hungary*** where discipline was administered by Parliament; and
    - ***Baka v. Hungary*** where discipline was administered by Parliament.

98. **An analysis of the ECtHR case law indicates that structural deficiencies of the NJCs have contributed to human rights breaches indicated in the ECtHR's judgments.**

(a) Shortcomings of composition of the NJC's

99. The ECtHR reiterated in **Saghatelyan** case that "when disputes to which Article 6 is applicable are determined by organs other than courts, the Convention calls at least for one of the following systems: either the jurisdictional organs themselves comply with the requirements of Article 6 § 1 or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 § 1.[26]" The ECtHR indicated deviation from this principles in the cases listed below.

100. In ***Oleksandr Volkov v. Ukraine***, the non-judicial staff appointed directly by the executive and the legislative authorities comprised the vast majority of the HCJ's members such that the applicant's case was determined by sixteen HCJ members attending the hearing, only three whereof being judges. Judges constituted an insignificant decision-making minority.

101. In ***Saghatelyan v. Armenia***, the NJC was composed of the President of Armenia, the Minister of Justice and the Prosecutor General. The Council of Justice was presided over by representatives of the executive. The applicant could not contest the NJC's decision before a judicial authority.

102. In ***Kamenos v. Cyprus***, the Supreme Court itself framed the charges against the applicant and then, sitting as the SCJ, conducted disciplinary proceedings. It then decided on and dismissed the applicant's objection concerning the charge sheet which it had framed and also dismissed the applicant from office on the merits.

103. In ***Sturua v. Georgia***, four members of the Disciplinary Council of Judges had first gathered as a Panel to examine the disciplinary charge brought against the applicant. After holding a hearing and examined all the evidence, the Panel found the applicant guilty of a disciplinary offence and dismissed him from office. The same four judges sat as part of the eight-member plenary session of the Disciplinary Council which reviewed on appeal the issues of fact and points of law raised by the applicant before the Panel. On appeal, the same four judges reconsidered their own decision. Half of the bench, including its President, had already expressed their view thereupon.

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[23] Mishgjoni v. Albania.

[24] Albayrak v. Turkey and Özpinar v. Turkey.

[25] Kulykov and Others v. Ukraine, Denisov v. Ukraine, and Oleksandr Volkov v. Ukraine.

[26] Saghatelyan v. Armenia, para. 39.

104. In ***Kulykov and Others v. Ukraine***, as in *Oleksandr Volkov v Ukraine*, the Court concluded that the procedure before the HCJ and Parliament had disclosed a number of structural and general shortcomings, which had compromised the principles of independence and impartiality, and that the subsequent judicial review had not remedied those shortcomings.

(b) Subordination of the reviewing authorities to the NJCs'.

105. In ***Denisov v. Ukraine*** the judges of the Higher Administrative Court (HAC) were also under the disciplinary jurisdiction of the High Council of |Justice (HCJ). This meant that those judges could also be the subject of disciplinary proceedings before the HCJ. The HCJ was not merely a disciplinary authority but an authority with extensive powers with respect to the careers of judges in relation to appointment, discipline and dismissal. The HAC judges were placed in an awkward position being themselves subject to disciplinary proceedings before the HCJ, that same body whose decision they were reviewing. Thus, the HCJ suffered from lack of adequate safeguards as to independence and impartiality.

(c) Manner of appointment of judiciary on NJCs.

106. The manner of appointment of judges on NJCs has also a bearing in establishing an NJCs independence and impartiality. According to **Oleksandr Volkov v. Ukraine**, the appointed judges on the NJC were not elected by the judicial corps or through election by their peers. Judicial self-governance has to consider the manner of judicial appointment on the NJC. Although ten HCJ members were to be appointed from the judiciary, only three judges were elected by their peers. Seven out of ten judges were appointed from judicially extraneous bodies[27].

(d) Status of the Ex Officio NJC members

107. The loss of NJC members' primary job, in case of ex officio NJC members, means that their NJC membership (as is their salary) is contingent upon an outside source. Pressure can be put by the outside source on NJC members simply because the primary employer enjoys more clout in terms of salary and allowances, conditions of employment, career prospects, security of tenure, etc. than does the NJC. In **Oleksandr Volkov v. Ukraine**, the Court recalled that had the Minister of Justice and the Prosecutor General to lose their primary job, this would have brought to an end their automatic, ex officio, NJC membership.

(e) Substantial judicial representation in the NJC.

108. In ***Oleksandr Volkov v. Ukraine***, the ECtHR stressed the need for substantial representation of judges on the relevant disciplinary body. Otherwise there would be an interference in the judicial body from the two other organs of the state, very much in breach of the doctrine of the separation of powers.

(f) *Prosecutor General as an Ex Officio member of the NJC*.

[27] See also Dolińska - Ficek and Ozimek v. Poland.

109. In ***Oleksandr Volkov v. Ukraine*** (also in ***Saghatelyan v. Armenia***), the ECtHR censored the Prosecutor General's ex offico HCJ membership as this could have contributed to a deterrent effect on judges whilst being perceived as a potential threat to the judiciary once he participated actively in court cases. His presence on the NJC which appointed, disciplined and removed judges risked that the latter acted or would act partially in the case of judges with whose decisions he took issue.

(g) Illegitimate set up of a Judicial Disciplinary Body (Lack of a tribunal established by law)

110. In ***Oleksandr Volkov v. Ukraine***, the ECtHR determined that as the HAC chamber dealing with the applicant's case was not set up and composed in a legitimate way, there could be no adherence to the principle of a tribunal established by law.

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