



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

## **Judicial Seminar 2019**

*Strengthening the confidence in the judiciary*

Background Document

## Contents

Introduction .....	4
A. Appointment, promotion and dismissal of judges, professional standards.....	4
1. Judicial Appointments.....	4
2. Security of tenure of judges.....	5
3. Judges' duties – ethics .....	6
4. Fundamental rights of judges and restrictions.....	6
a) Freedom of expression.....	6
Public expressions of views.....	6
Judges have to show restraint in expressing criticism in the press regarding their cases .	7
Judges are entitled to speak out in a proportionate way in relation to reforms impacting the judiciary .....	8
Judges have to manifest restraint in expressing criticism towards fellow public officers and, in particular, other judges.....	10
b) Privacy.....	10
Dismissal from the post of judge - interference with private and professional life under Article 8 .....	10
c) Freedom of religion .....	11
Judges should not let their personal religious views get in the way of their impartial judicial role (Article 9 of the Convention).....	11
d) Freedom of assembly.....	12
Judges may be subject to a duty of restraint in their enjoyment of the freedom of assembly and association.....	12
5. Disciplinary proceedings.....	12
a) Applicability of Article 6 § 1 to employment disputes involving judges – judges can rely on fair trial guarantees .....	12
b) Proceedings to remove a judge must comply with fair trial guarantees.....	13
B. Strategies used to strengthen confidence in the judiciary and the responsibility of other authorities to enhance and protect the judiciary.....	15
1. Maintaining the authority of judicial proceedings: comments from the executive on pending procedures.....	15
2. Shortcomings in the enforcement of judicial decisions may undermine judicial authority .....	15
3. Role of the media.....	16
4. Reaction from the judiciary when faced with excessive attacks to their reputation from press campaigns or individuals.....	17
5. Judicial immunity from civil liability for actions taken in professional capacity and right of access to a court under Article 6 § 1 of the Convention .....	19
C. Reasoning of judgments .....	19
1. An essential safeguard reinforcing confidence in the judiciary.....	19
2. A guarantee for fair trial not concerned with the adequacy of the reasons, unless 'denial of justice' .....	19
3. An obligation that varies according to the nature of the decision and the circumstances of the case .....	20
4. Publicity of the judgements and reasons – scrutiny by the public. A flexible approach.....	21
<b>CCJE Opinion n°11 (2008) on "the quality of judicial decisions"</b> .....	22

**Annex..... 23**

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## Introduction

“The Court has on many occasions emphasised 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.” *Baka v. Hungary* [GC], no. 20261/12, § 164, 23 June 2016

The confidence in the judiciary is intimately related to the legitimacy of the courts, as the latter encompasses the legality (acting according to the law), the shared values (values that are shared by those with authority and those subject to that authority), and the consent (the sense amongst the citizens of a moral obligation to obey the authority) that should characterize the judiciary.

The need for public support and confidence is thus all the more critical for the judicial branch, which by virtue of its independence is not directly accountable to any electorate. At all times, and in particular when democratic societies are facing various changes and challenges, strengthening the confidence in the judiciary represents almost an end in itself, as the courts’ first and foremost mission is the protection of the rule of law.

While the confidence in the judiciary has been mentioned expressly in a number of judgments of the European Court of Human Rights (“the Court”), its underlying presence in a number of separate but interconnected Convention provisions can be identified in different contexts.

To open the discussions on this complex topic, this background paper aims to highlight the key case-law of the Court dealing with the following themes: (1) Appointment, promotion and dismissal of judges, professional standards; (2) Strategies used to strengthen confidence in the judiciary and the responsibility of other authorities to enhance and protect the judiciary; and (3) Reasoning of judgments. These themes are divided into a number of sub-themes, according to the Court’s case-law; some of them begin with a reference to recent Council of Europe or other international law texts on the specific topic.

## A. Appointment, promotion and dismissal of judges, professional standards

CCJE [Opinion n°18 \(2015\)](#) on the position of the judiciary and its relation with the other powers of state in a modern democracy

### 1. Judicial Appointments

Judges must be independent from other organs of the state; this is crucial in any democracy. As the Court itself has stated, “the notion of separation of powers between the executive and the judiciary has assumed growing importance in the case-law of the Court” (see *Stafford v. the United Kingdom* [GC], no. 46295/99, § 78, ECHR 2002-IV). The notion of the separation of powers is also important for judicial appointments and selection. Perceptions of judicial independence by the public are influenced by the way in which judges are appointed. The executive and the legislative branches can be involved in judicial appointments as long as the appointed judges are free from influence and pressure.

According to the Court’s case-law, the object of the term “established by law” in Article 6 § 1 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”, and it covers the legal basis not only for the existence of a “tribunal” but also for the composition of the bench in each case. In *Gurov v. Moldova*, no. 36455/02, §§ 34-38, 11 July 2006, the applicant alleged a breach of the right to a fair trial by a “tribunal established by law” as the term of office of one of the judges

who heard her case had expired. The Government did not dispute the expiry of the judge's term of office but argued that he was not dismissed and that at the time there was a practice of allowing judges to continue to exercise their judicial functions for an undetermined period until the question of their tenure had been decided by the President. The applicant argued that this practice was not prescribed by law. The Court concluded that there were no legal grounds for the involvement of the said judge and therefore the applicant's case had not been heard by a "tribunal established by law". Moreover, tacitly prolonging the term of office of judges was in contradiction with the principle that the judicial organisation in a democratic society should not depend on the discretion of the executive. Consequently, there had been a violation of Article 6.

In *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, § 49, ECHR 2013, 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 complained that the State Court was not independent for the purposes of Article 6 § 1, notably because two of its members had been appointed by the Office of the High Representative in Bosnia and Herzegovina for a renewable period of two years. The Court found no reasons to doubt that the international judges of the State Court were independent of the political organs of Bosnia and Herzegovina, of the parties to the case and of the institution of the High Representative. Their appointment had precisely been motivated by a desire to reinforce the independence of the State Court's war crimes chambers and to restore public confidence in the judicial system. The fact that the judges in question had been seconded from amongst professional judges in their respective countries represented an additional guarantee against outside pressure. Although their term of office was relatively short, this was understandable given the provisional nature of the international presence at the State Court and the mechanics of international secondments. The Court therefore found that the complaint was manifestly ill-founded.

The case of *Thiam v. France*, no. 80018/12, ECHR 2018, involved a bank fraud which had been carried out by the applicant against former French President Nicholas Sarkozy whilst he was in office. During the investigation of this crime, the President had joined the proceedings and filed a civil suit against the applicant. The applicant was eventually convicted of this crime and subsequently brought a claim before the Court under Article 6 §1 ECHR arguing that the power of appointment of judges and prosecutors by the President cast doubt on the impartiality of the judicial proceedings to which he was a party. In its judgment, the Court held that the participation, as a claimant in proceedings, of a public figure who played an institutional role in the career development of judges was capable of casting a legitimate doubt on the latter's independence and impartiality. However, the Court reasoned that the fact that the President signed the decrees appointing new judges or ordering their promotion or appointment to a new post marked the formal completion of the decision-making process and did not undermine the independence of the persons concerned. Furthermore, decisions affecting the appointment of members of the judiciary and their career progress, transfer and promotions were taken following the intervention of the High Council of the Judiciary (*Conseil supérieur de la magistrature* – "the CSM") which the court held provided safeguards against pressure from the executive. The Court also pointed to the fact that judges had security of tenure which protected them from political pressure. As a result of these factors, the Court found that there was no violation of Article 6 § 1 ECHR.

## 2. Security of tenure of judges

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. Accordingly, the Court must scrutinize very carefully allegations that mandates have been prematurely terminated because of views and criticisms publicly expressed in a judge's professional capacity. In *Baka v. Hungary* [GC], no. 20261/12, 23 June 2016, the applicant was elected President of the Hungarian Supreme Court for a six-year term. Under new legislation the Hungarian government terminated the applicant's

judicial mandate three and a half years early. The applicant alleged that he had been denied access to a tribunal to contest the premature termination of his mandate as President of the Supreme Court. He also complained that his mandate had been terminated as a result of the views and positions that he had expressed publicly in his official capacity, concerning legislative reforms affecting the judiciary. He relied on Articles 6 § 1 and 10 of the Convention. As a result of legislation, the compatibility of which with the requirements of the rule of law was doubtful, the premature termination of the applicant's mandate was neither reviewed, nor open to review, by any bodies exercising judicial powers. Noting the growing importance which international and Council of Europe instruments, as well as the case-law of international courts and the practice of other international bodies attached to procedural fairness in cases involving the removal or dismissal of judges, the Court considered that the respondent State had impaired the very essence of the applicant's right of access to a court. The conclusions of the Grand Chamber under Article 10 will be dealt with below.

### 3. Judges' duties – ethics

CCJE L [Opinion N° 3 \(2002\)](#) on ethics and liability of judges

### 4. Fundamental rights of judges and restrictions

#### a) Freedom of expression

##### *Public expressions of views*

Judges, like all human beings, enjoy the right to freedom of expression. However, it may be legitimate for a State to impose a duty of discretion on account of their judicial status. The Court has stressed that having regard to the growing importance attached to the separation of powers and the importance of safeguarding the independence of the judiciary, any interference with the freedom of expression of a judge calls for close scrutiny on the part of the Court. In certain circumstances, judges may also play an important role in speaking on matters which concern the judiciary, the courts, or the administration of justice. Fear of sanctions for speaking out in defence of judicial independence and impartiality might have a "chilling effect" (see also 'Counter-action' section).

In *Wille v. Liechtenstein* [GC], no. 28396/95, § 70, ECHR 1999-VII, the Court found that a letter sent to the applicant, who was the President of the Liechtenstein Administrative Court, by the Prince of Liechtenstein announcing his intention not to reappoint him to a public post constituted a "reprimand for the previous exercise by the applicant of his right to freedom of expression". The Court observed that, in that letter, the Prince had criticised the content of the applicant's public lecture on the powers of the Constitutional Court and announced the intention to sanction him because of his opinion on certain questions of constitutional law. The Court therefore concluded that Article 10 was applicable and that there had been an infringement of the applicant's right to freedom of expression.

In *Albayrak v. Turkey*, no. 38406/97, 31 January 2008, 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. The Supreme Council of Judges and Public Prosecutors ("the Supreme Council") found the allegations against the applicant well-founded and, as a sanction, transferred him to another court. The Supreme Council subsequently repeatedly refused to promote the applicant, given his previous disciplinary sanction. As to the proportionality of the interference, the Court 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 Court 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”.

In *Kudeshkina v. Russia*, no. 29492/05, 26 February 2009 the applicant complained that her dismissal from judicial office following her statements in the media constituted a violation of her right to freedom of expression. The Court reiterated that Article 10 applied to the workplace but was mindful that employees owe to their employer a duty of loyalty, reserve and discretion, particularly so in the case of civil servants. The Court held that there had been a violation of Article 10. It found that the manner in which the disciplinary sanction was imposed on the applicant fell short of securing important procedural guarantees. Additionally, the penalty imposed on the applicant (being the most severe one available) was disproportionately severe and was, moreover, capable of having a “chilling effect” on judges wishing to participate in public debate on the effectiveness of the judicial institutions.

In *Harabin v. Slovakia*, no. 58688/11, §§ 150-153, 20 November 2012, it was the applicant’s professional behaviour in the context of the administration of justice which was at issue. The disciplinary proceedings against him (after his refusal to allow an audit by Ministry of Finance staff that he considered should have been conducted by the Supreme Audit Office) related to the discharge of his duties as President of the Supreme Court, and therefore lay within the sphere of his employment in the civil service. Furthermore, the disciplinary offence of which he had been found guilty did not involve any statements or views expressed by him in the context of a public debate. The Court accordingly concluded that the disputed measure did not constitute an interference with Article 10 rights and declared the complaint inadmissible as being manifestly ill-founded.

In *Baka v. Hungary [GC]*, no. 20261/12, § 164, 23 June 2016, the applicant, in his professional capacity as President of the Supreme Court and the National Council of Justice, publicly expressed his views on various legislative reforms affecting the judiciary. 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. A violation of Article 10 was found by the Grand Chamber<sup>1</sup>.

### ***Judges have to show restraint in expressing criticism in the press regarding their cases***

In *Buscemi v. Italy*, no. 29569/95, § 67, ECHR 1999-VI, the applicant asked for the presiding judge of the Youth Court to be replaced. He alleged that the judge was biased since he had had a heated exchange of views with him in the press on the courts’ welfare role. The applicant’s challenge was dismissed and the investigation of the complaint concluded that the judge had not disclosed any confidential information and that there had therefore been no injury to the applicant’s reputation or honour. In this judgment, the Court stressed that judges are required to exercise maximum discretion with regard to the cases they deal with, in order to preserve their image of impartiality. Such discretion should dissuade them from making use of the press, even when provoked. The higher demands of justice and the elevated nature of judicial office impose this duty. The fact that the President of the Youth Court publicly used expressions with unfavourable overtones before presiding, objectively justified the applicant’s fears as to the judge’s impartiality. Accordingly, there had been a violation of Article 6 § 1 of the Convention.

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1. Further analysis of this case is to be found later in the Background document.

In *Lavents v. Latvia*, no. 58442/00, §§ 118 and 119, 28 November 2002, the applicant – a high-profile businessman charged with fraudulent acts related to a bank liquidation – unsuccessfully challenged the President of the Criminal Regional Court of Riga who engaged in public criticism in the press of him and his defence. The Court noted that in the press the judge had criticised the attitude of the defence in the court proceedings, 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 were incompatible with the requirements of Article 6 § 1 and had caused the applicant to fear that the judge in question lacked impartiality. The Court also noted that it appeared from the judge’s statements to the press that she was persuaded of the applicant’s guilt. She had even suggested that he had to prove that he was not guilty, which was at variance with the very principle of the presumption of innocence, one of the fundamental principles governing a democratic State. The Court also held that there had been a violation of Article 6 § 2 of the Convention.

In the case of *Chim and Przywieczerski v. Poland*, nos. 36661/07 and 38433/07, 12 April 2018, the applicants complained under Article 6 § 1 ECHR that a judge in their proceedings had not been impartial. Specifically, the applicants pointed to an interview the judge had given to a Polish newspaper in which he had expressed his strong opinion as being in favour of punishing the so-called “white-collar mafia”; the criminal proceedings in which the applicants had been defendants were considered by many to be white-collar crime proceedings. The judge further argued that he was in favour of imposing harsh punishments on criminals. Moreover, after delivering the verdict, the judge had directly averred in a press conference that one of the applicants was the “mastermind” behind the crimes. The Court held that it would have been preferable if the judge had refrained from expressing his views in the media entirely, in order to avoid any possible misgivings about his impartiality. However, it held that there had been no violation of Article 6 § 1 ECHR in this case as the judge did not make any pronouncement on the question of the applicants’ guilt or otherwise imply that he had formed an unfavourable view of the applicants’ case prior to delivering a verdict. The Court also held that it cannot be inferred from his comments in favour of a harsh criminal policy that the judge considered the applicants guilty.

### ***Judges are entitled to speak out in a proportionate way in relation to reforms impacting the judiciary***

In *Previti v Italy* (dec), no 45291/06, 8 December 2009, the Court considered that judges, in their capacity as legal experts, may 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. As the Court stated, “*the fact that, in application of the principles of democracy and pluralism, certain judges or groups of judges may, in their capacity as legal experts, express reservations or criticism regarding the Government’s legislative proposals does not undermine the fairness of the judicial proceedings to which these proposals might apply*”.

The applicant in that case was a lawyer and a prominent figure in national politics. In 1995, in the context of a widely-publicised case concerning the corporate control of a major chemicals group, IMI/SIR, the applicant was charged with judicial bribery. In November 1999 he and seven co-accused were committed to stand trial before the Criminal Court. In May 2006 the Court of Cassation sentenced him to six years’ imprisonment. The Court took note of the statements made to the press by a number of members of the national legal service and of articles published in a magazine, and also of the paper published by the National Association of Judges and Prosecutors. These documents criticised the political climate in which the trial had taken place, the legislative reforms proposed by the Government and the applicant’s defence strategy. But they did not make any statements as to

the applicant's guilt. The Association of Judges and Prosecutors, again without discussing whether or not the applicant had committed the offences in question, had also expressed opposition to the idea that an accused should have access to a list of members of the national legal service espousing particular views. The fact that, in accordance with the principles of democracy and pluralism, some individuals or groups within the national legal service, in their capacity as legal experts, expressed reservations or criticism concerning draft Government legislation was not capable of adversely affecting the fairness of the judicial proceedings to which that legislation might apply. Moreover, the courts hearing the applicant's case had been made up entirely of professional judges whose experience and training enabled them to rise above external influences. It had also been legitimate for judges not involved in hearing the case to comment on the defence strategy of a leading public figure which had been widely reported on and discussed in the media. Accordingly, the Court was unable to find that the comments made in the context of the IMI/SIR proceedings had reduced the applicant's chances of receiving a fair trial. His complaints were rejected as being manifestly ill-founded.

In the case of *Baka v. Hungary [GC]*, no. 20261/12, 23 June 2016, the applicant complained that his mandate as President of the Supreme Court had been terminated as a result of the views he had expressed publicly in his capacity as President of the Supreme Court and the National Council of Justice. He expressed critical views on constitutional and legislative reforms affecting the judiciary, on issues related to the functioning and reform of the judicial system, the independence and irremovability of judges and the lowering of the retirement age for judges, all of which the Court deemed were questions of public interest. His statements did not go beyond mere criticism from a strictly professional perspective. In the Court's view, having regard to the sequence of events in their entirety, rather than as separate and distinct incidents, 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 concluded that there had been an interference with the exercise of his right to freedom of expression. It proceeded on the assumption that the interference was "prescribed by law", but could not accept that it pursued the legitimate aim invoked by the Government. Although this would have been sufficient to find a violation of the Convention, the Court went on to examine whether the interference was necessary in a democratic society. On the question of the freedom of expression of judges, the Court stated that "*questions concerning the functioning of the justice system fall within the public interest, the debate of which generally enjoys a high degree of protection under Article 10. 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. Issues relating to the separation of powers can involve very important matters in a democratic society which the public has a legitimate interest in being informed about and which fall within the scope of political debate.*" According to the Court, it was not only the applicant's right but also his duty as President of the National Council of Justice to express his opinion on legislative reforms affecting the judiciary, after having gathered and summarised the opinions of lower courts. He also used his power to challenge some of the relevant legislation before the Constitutional Court, and used the possibility to express his opinion directly before Parliament on two occasions, in accordance with parliamentary rules. Furthermore, 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. The interference complained of was not "necessary in a democratic society", notwithstanding the margin of appreciation available to the national authorities and accordingly there had been a violation of the applicant's right to freedom of expression under Article 10.

### ***Judges have to manifest restraint in expressing criticism towards fellow public officers and, in particular, other judges***

In *Di Giovanni v. Italy*, no. 51160/06, 9 July 2013, the applicant – president of a Naples court – stated in a newspaper interview that a member of an examining body had used his influence to help a relative in a public recruitment exercise for judges and public prosecutors. At that time, a criminal investigation had been opened against a member of the board of examiners, suspected of having falsified the results of the competition to favour a particular candidate. Other articles were published connecting the name of a judge from Naples with the alleged tampering with the recruitment process. The disciplinary board of the National Council of the Judiciary (CSM) found the applicant partly guilty for having failed in her duty of respect and discretion *vis-à-vis* members of the CSM and one of her colleagues who could be identified in the newspaper interview, and gave her a warning. The Court recalled the judge's duty of discretion and found the interference with the applicant's freedom of expression to be proportionate, observing that the serious rumours that the applicant had repeated about an identifiable fellow judge, without the benefit of the doubt, in the published interview proved to be totally unfounded and that the sanction was a simple warning. Therefore, the Court found no violation of Article 10.

In *Simić v. Bosnia-Herzegovina*, no. 75255/10, 15 November 2016, the applicant complained under Articles 6 § 1 and 10 of the Convention about his dismissal from office as judge of the Constitutional Court. The reasons for his dismissal were a letter sent to high public officials and a media interview (as well as an unauthorised press conference) in which he discussed the work of the Constitutional Court, accusing it of corruption. As regards the alleged violation of the applicant's right to freedom of expression, the Court observed that the dismissal decision had essentially related to his actions damaging the authority of the Constitutional Court and the reputation of a judge. The Court concluded that the applicant's complaint under Article 10 was manifestly ill-founded and rejected the whole application as inadmissible.

In contrast, in *Kudeshkina v. Russia* (cited above), the applicant complained that her dismissal from judicial office following her statements in the media, during her electoral campaign constituted a violation of her right to freedom of expression. The Court found that the applicant lacked important procedural guarantees in the disciplinary proceedings and that the penalty imposed on her was disproportionately severe and capable of having a "chilling effect" on judges wishing to engage in public debate on the effectiveness of the judicial institutions.

## **b) Privacy**

### ***Dismissal from the post of judge - interference with private and professional life under Article 8***

In *Özpınar v. Turkey*, no. 20999/04, 19 October 2010, the applicant was dismissed from her function as a judge, not merely for professional reasons, but also because of allegations about her private life. The Court concluded that the investigation into her professional and personal life, as well as her resulting dismissal, could be seen as an interference with her right to respect for private life. The Court acknowledged that a judge's duty to observe professional ethics may impinge to a certain extent upon his or her private life. This may occur, for example, where his or her conduct impairs the image or reputation of the judicial institution. However, in this case the Court found that the applicant's dismissal and the significant impact on her career was disproportionate to the legitimate aim pursued, also taking into account the lack of guarantees in the relevant procedure and the reasoning relied upon in the domestic decisions.

In a number of subsequent cases, the Court found that the applicants' dismissal from their post of judges for professional fault constituted an interference with their right to respect for "private life",

given the impact on their career, reputation and social and professional relationships, as well as on their material well-being (*Oleksandr Volkov v. Ukraine*, no. 21722/11, ECHR 2013, *Kulykov and Others v. Ukraine*, nos. 5114/09 and 17 others, § 138, 19 January 2017; *Erményi v. Hungary*, no. 22254/14, 22 November 2016).

In *Denisov v. Ukraine* [GC], no. 76639/11, 25 September 2018, the applicant argued that his right to respect for his private life under Article 8 ECHR was engaged because his career, reputation and social and professional relationships had been irreparably damaged as a result of his dismissal as President of the Kyiv Administrative Court of Appeal. Furthermore, the applicant submitted that his material well-being had been affected given the reduction in his salary and in the prospective pension benefits, which also fell within the scope of Article 8 ECHR. In its response, the Court held that the reasons given for the applicant's dismissal as president of the court were managerial failings, which concerned his performance in the public arena and were not connected to his private life. In the absence of any clear private life issues which could engage article 8, the Court asserted that it therefore had to decide whether the applicant's dismissal as President had worsened the well-being of himself or his family (hence his private life), negatively affected his opportunities to establish and develop relationships with others, or negatively affected his reputation. Whilst the Court was of the view that the pecuniary element of the dispute was sufficient to engage the civil limb of Article 6 ECHR, it stated that this did not mean that it automatically fell within the scope of Article 8 and asserted that the applicant had adduced no evidence to show how his well-being that of his family had been affected by his reduction in salary. In relation to the issue of personal relationships, the Court reasoned that although the applicant was removed from the position of President of the Court, he had been kept in employment as a judge and therefore had remained alongside his colleagues. There was therefore no evidence of a substantial effect on his relationships as a result of his dismissal. Finally, the Court held that the applicant's professional reputation had not been badly damaged as his dismissal as President was for perceived managerial failings and his work as a judge had never been questioned. The Court found overall that the effects of the dismissal on the applicant's private life had not crossed the threshold of seriousness for an issue to be raised under Article 8 and so this part of the application was declared inadmissible.

### **c) Freedom of religion**

#### ***Judges should not let their personal religious views get in the way of their impartial judicial role (Article 9 of the Convention)***

In *Pitkevich v Russia* (dec.), no. 47936/99, 8 February 2001, the applicant judge was a member of the Living Faith Church and was dismissed from her post for professional misconduct. Under Articles 9, 10 and 14 of the Convention the applicant complained that her dismissal amounted to an unjustified and discriminatory interference with the exercise of her freedoms of religion and expression. The Court rejected the applicant's complaints as manifestly ill-founded. The applicant's alleged inappropriate conduct while performing her judicial functions was precisely defined. The factual basis for her dismissal related exclusively to her official activities (intimidating parties to proceedings in court, and promoting the Church to the detriment of the State interest to protect the rule of law), and did not concern an expression of her views in private. Such facts were therefore "relevant" to establishing the applicant's suitability as a judge and called into question her impartiality as well as the authority of the judiciary. Allowing for a certain margin of appreciation in this respect, the Court found that the reasons adduced by the authorities in this case were "sufficient" for the interference with the applicant's rights under Article 10 of the Convention.

## d) Freedom of assembly

### ***Judges may be subject to a duty of restraint in their enjoyment of the freedom of assembly and association***

In *Maestri v. Italy* [GC], no. 39748/98, ECHR 2004-I, disciplinary proceedings, resulting in a reprimand, were brought against the applicant judge for having been a member of a Masonic lodge from 1981 until 1993. The domestic authorities 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 and the particularly strong bonds of hierarchy and solidarity among Freemasons. The Court concluded that the condition of foreseeability of the relevant provisions had not been satisfied and therefore the interference had not been prescribed by law. Accordingly, the Court found a violation of Article 11 of the Convention, however, without ruling on the compatibility of being a Freemason and a judge.

## 5. Disciplinary proceedings

### **a) Applicability of Article 6 § 1 to employment disputes involving judges – judges can rely on fair trial guarantees**

In *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, ECHR 2007-II, the Grand Chamber established criteria for the application of the civil aspect of Article 6 § 1 to employment disputes concerning employees of the State or public officers. It held that, in order for the protection of Article 6 § 1 to be excluded in such cases, not only must national law have expressly excluded access to a court for the position or category of staff concerned, but such exclusion must also be justified on objective grounds in the State's interest.

In *Olujić v. Croatia*, no. 22330/05, 5 February 2009, the applicant was President of the Supreme Court when the National Judicial Council (NJC) brought disciplinary proceedings against him and removed him from office. The NJC decisions were (after initially being quashed and remitted for fresh consideration) confirmed by the Parliament and then the Constitutional Court. The applicant made several complaints under Article 6 § 1 of the Convention but the Croatian government contended that Article 6 did not apply to a dispute involving the removal of a Supreme Court judge due to the nature of his role as a public servant. In this case, while national legislation had excluded access to a court, the scope of this exclusion was not absolute. Consequently, the Court found that Article 6 was applicable, and that the applicant's role as President of the Supreme Court was irrelevant to applicability, as he had already been dismissed both from his post as a judge on the Supreme Court, and as its President. The Court went on to find that there had been a violation of Article 6 § 1 of the Convention on account of four factors, namely, the lack of impartiality of the President and two other members of the National Judicial Council, the exclusion of the public from the disciplinary proceedings against the applicant, a violation of the principle of equality of arms and the length of proceedings.

In *Paluda v. Slovakia*, no. 33392/12, 23 May 2017, disciplinary proceedings were brought against the applicant, who was a Supreme Court Judge, by the Judicial Council and he was temporarily suspended from his duties with immediate effect. The decision to suspend him entailed a 50% reduction in his salary for the duration of the disciplinary proceedings, which could last up to two years. The applicant made several appeals against the suspension, but all were unsuccessful; he thus made a complaint under Article 6 citing his inability to access court to challenge the suspension decision. The Court found that there had been a violation. Specifically, the applicant did not have access to proceedings before a tribunal within the meaning of Article 6 § 1 (as the Judicial Council was not a body of judicial character and did not provide the institutional and procedural guarantees

required by Article 6 § 1. The Government had not provided any conclusive reason for depriving the applicant of such judicial protection.

In *Denisov v. Ukraine* [GC], no. 76639/11, 25 September 2018, the Grand Chamber held that the civil limb of Article 6 § 1 could be brought into play in a public law dispute if the private law aspects of a particular matter outweighed its public law aspects in view of the direct consequences for a civil pecuniary or non-pecuniary right. The Court went on to state that such direct consequences for civil rights exist in “ordinary labour disputes” involving members of the public service, including judges. The Court elaborated on the concept of an “ordinary labour dispute” saying that it concerned (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 relationship.

## **b) Proceedings to remove a judge must comply with fair trial guarantees**

The mission of the judiciary in a democratic state is to guarantee the very existence of the rule of law. When a Government initiates disciplinary proceedings against a judge, public confidence in the functioning of the judiciary is at stake. It is therefore particularly important that the guarantees of Article 6 are complied with.

In *Mitrinovski v. the former Yugoslav Republic of Macedonia*, no. 6899/12, 30 April 2015, the applicant judge complained that the State Judicial Council (SJC) plenary, which dismissed him for professional misconduct, was not an independent and impartial tribunal since the judge who initiated the proceedings also took part in the SJC’s decision to dismiss the applicant. The Court considered that the judge’s dual role in initiating proceedings and taking part in the decision to dismiss the applicant failed both the subjective and objective tests of impartiality. Accordingly, there had been a violation of Article 6.

In *Gerovska Popčevska v. the former Yugoslav Republic of Macedonia* (Application No. 48783/07), 7 January 2016,<sup>2</sup> the applicant was removed from judicial office for professional misconduct in 2007. The applicant complained that the SJC was not “an independent and impartial” tribunal 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. 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. The Court noted that it was not contested that 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. 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. 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. Accordingly, the applicant’s case had not been decided by “an independent and impartial” tribunal as required by Article 6 § 1 of the Convention.

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<sup>2</sup> See also *Jakšovski and Trifunovski v. the former Yugoslav Republic of Macedonia* (Applications nos. 56381/09 and 58738/09), 7 January 2016, *Poposki and Duma v. the former Yugoslav Republic of Macedonia* (Applications nos. 69916/10 and 36531/11), 7 January 2016.

In *Oleksandr Volkov v. Ukraine*, no. 21722/11, ECHR 2013 the applicant brought a claim under Article 6 regarding his dismissal from the post of judge of the Supreme Court by the High Council of Justice (HCJ). The Court found a number of serious issues with both the proceedings before the HCJ and the appearance of personal bias on the part of certain members of the HCJ determining the applicant's case. Additionally, they found that the absence of a limitation period for imposing a disciplinary penalty in cases involving the judiciary posed a serious threat to the principle of legal certainty. So too did the voting system at the plenary meeting of Parliament which had involved many MPs deliberately and unlawfully casting multiple votes belonging to their absent peers. The findings in respect of Article 6 were applied in *Kulykov and others v. Ukraine* (Applications nos. 5114/09 and 17 others), 19 January 2017 where 18 Ukrainian judges had been dismissed for breach of oath under the disciplinary regime in place before 2016.

In *Ramos Nunes de Carvalho e Sá v. Portugal [GC]*, nos. 55391/13, 57728/13 and 74041/13, ECHR 2018 three sets of disciplinary proceedings were brought against the applicant, who was a judge, by the Portuguese High Council of the Judiciary ('CSM'). After grouping together the penalties imposed in each of the disciplinary proceedings, the CSM imposed a single penalty on the applicant of 240 days' suspension from duty. Portugal's Supreme Court of Justice subsequently upheld the CSM's decision holding, 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. In response to these rulings, the applicant instituted proceedings before the Court. Specifically, the applicant argued that as the President of the CSM was also the President of the Supreme Court and was responsible for appointing the members of the division that examined appeals against the CSM's decisions, Portugal had violated her right to an independent and impartial tribunal under Article 6 § 1 of the Convention. The applicant further argued that as she had not had a public hearing, either before the CSM or the Supreme Court, this provided additional grounds for the finding of a violation under Article 6 § 1 ECHR. Finally, the applicant argued that as a single administrative entity (the CSM) had been responsible for establishing the facts in her case, and its factual findings could not be re-visited by the Supreme Court on appeal, she had not had access to a court or tribunal with "full jurisdiction" over her case, which was also a violation of Article 6 § 1 ECHR. In its decision, the Court held that the fact that the President exercised a dual role did not, per se, prove his partiality. In the Court's view, judges of the Portuguese Supreme Court have guaranteed tenure and are subject to rules on incompatibility, which is apt to guarantee their independence. Additionally, the Court held that no evidence existed that the judges of the Supreme Court were appointed for the sole purpose of adjudicating the applicant's case and there were no apparent biases at play, as there were in the Oleksandr Volkov case. As a result, the Court found the applicant's claims in relation to independence and impartiality to be unsubstantiated. In relation to the applicant's arguments concerning her lack of public hearing and limits of the Supreme Court's jurisdiction, the Court held that a hearing had been necessary in this case to undertake a thorough investigation of the facts, which the applicant vigorously contested and which had formed the basis of the proceedings against her. As the CSM had not held a public adversarial hearing to determine these facts and the Supreme Court could not re-visit them due to the constitutional limits of its powers, the Court held that overall, the applicant's case had not been heard in accordance with the requirements of Article 6 § 1 of the Convention. It consequently found a violation of Article 6 § 1 of the Convention by Portugal.

In *Denisov v. Ukraine [GC]*, no. 76639/11, 25 September 2018, the applicant complained under Article 6 § 1 ECHR that the disciplinary proceedings that had led to his dismissal as president of the Kyiv Administrative Court of Appeal had not been compatible with the requirements of independence and impartiality. Relying on its earlier decision in Volkov, the Grand Chamber held that the Ukrainian High Council of Justice (HCJ), which had initially dismissed the applicant, was not sufficiently impartial or independent. Specifically, the Court pointed to the fact that over half of the individuals sitting on the HCJ were non-judges and that many of the judges had been appointed by the executive and legislative branches. The Court also noted that one of the judges on the HCJ had been the chairman of the preliminary inquiry which had recommended the applicant's dismissal and

there was therefore an appearance of bias in the proceedings. The Court further found that the Higher Administrative Court (HAC), to which the applicant appealed, had not carried out a sufficient review of his case. As evidence, the Court pointed to the fact that the HAC had disregarded the applicant's challenge to facts which had formed the basis of his dismissal. Additionally, the Court found that there had been a total failure by the HAC to assess whether the proceedings before the HCJ had complied with the principles of independence and impartiality. The Court also expressed concern over the fact that the judges of the HAC were themselves under the disciplinary jurisdiction of the HCJ and argued that this, in combination with the aforementioned factors, proved that they were not able to demonstrate the independence and impartiality required under Article 6 ECHR.

## **B. Strategies used to strengthen confidence in the judiciary and the responsibility of other authorities to enhance and protect the judiciary**

### **1. Maintaining the authority of judicial proceedings: comments from the executive on pending procedures**

In *Toni Kostadinov v. Bulgaria*, no. 37124/10, 27 January 2015, the Minister of the Interior had commented that the applicant was guilty before he had been brought before a court on a charge of burglary. The applicant complained that such comments constituted a violation of his rights under Article 6 § 2 of the Convention. The Court indicated that the infringement of the presumption of innocence could arise not just from statements made by a judge but from other public officials and authorities as well, including the President of Parliament, the public prosecutor, the Minister of the Interior, or police officers. An infringement could also arise in the absence of an intention to prejudice the presumption of innocence. However the Court observed that a distinction must be drawn between decisions or statements made by public officials that reflect a state of suspicion and those that reflect a belief or perception that the person concerned is guilty. Regard must be had to the particular circumstances in which they were made including the choice and meaning of terms used by the public officials. The Court found there had been a violation of Article 6 § 2 as the comments were made at a press conference the day before the applicant appeared in court. The comments identified the applicant by name and suggested he was an influential member of a criminal gang responsible for a number of burglaries.

### **2. Shortcomings in the enforcement of judicial decisions may undermine judicial authority**

In *Broniowski v. Poland* [GC], no. 31443/96, § 176, ECHR 2004-V the applicant had been entitled to compensatory land in respect of property abandoned as a result of border changes following the Second World War; however the introduction of new legislation by the government prevented his claim from being satisfied. Despite a judgment of the Constitutional Court declaring this new legislation unconstitutional, various government agencies and ministries failed to implement or comply with the judgment and continued to obstruct the applicant (and others) from receiving just compensation. The Court found there had been a violation of Article 1 of Protocol no. 1 and stated that, "*such conduct by State agencies, which involves a deliberate attempt to prevent the implementation of a final and enforceable judgment and which is, in addition, tolerated, if not tacitly approved, by the executive and legislative branch of the State, cannot be explained in terms of any legitimate public interest or the interests of the community as a whole. On the contrary, it is capable of undermining the credibility and authority of the judiciary and of jeopardising its effectiveness, factors which are of the utmost importance from the point of view of the fundamental principles underlying the Convention*".

### 3. Role of the media

The duty of discretion of judges pursues a specific aim: judges' speech, unlike that of lawyers, is received as the expression of an objective assessment which commits not only the person expressing himself or herself, but also, the entire justice system. As the guarantor of justice, the judiciary must enjoy public confidence to be successful in carrying out its duties.

While it may prove necessary to protect the judiciary against gravely damaging attacks that are essentially unfounded, bearing in mind that judges are prevented from reacting by their duty of discretion (*Wingerter v. Germany* (dec.), no. 43718/98, 21 March 2002), this cannot have the effect of prohibiting individuals from expressing their views, through value judgments with a sufficient factual basis, on matters of public interest related to the functioning of the justice system, or of banning any criticism of the latter (*De Haes and Gijssels v. Belgium*, 24 February 1997, *Reports of Judgments and Decisions* 1997-I and *Morice v. France* [GC], no. 29369/10, ECHR 2015).

In *Morice v. France* [GC], no. 29369/10, ECHR 2015, the applicant was convicted of making defamatory comments about two of the judges in a high profile case in which he was acting as a lawyer. The comments had been published in a national French newspaper. The Court reiterated that the phrase "authority of the judiciary" includes the concept that the courts are the correct forum for the resolution of legal disputes and that there is public confidence in their ability to carry out that function. However, the Court emphasised that lawyers should be able to highlight to the public any potential shortcomings in the justice system, and that while it was necessary to maintain the authority of the judiciary and protect them from certain criticism, this should not prevent individuals from expressing "value judgements with a sufficient factual basis, on matters of public interest". The Court found that the judgment against the applicant for complicity in defamation could be regarded as a disproportionate interference with his right to freedom of expression, and was not therefore "necessary in a democratic society" within the meaning of Article 10 of the Convention.

In *Peruzzi v. Italy*, no. 39294/09, 30 June 2015, the applicant, a lawyer, complained of his criminal conviction (with a 400 EUR fine) and an order to pay 15, 000 EUR damages for having defamed an investigating judge in the context of proceedings regarding the division of an estate in which he had been acting for two clients. The applicant sent a circular letter to the judge and other judges of the Lucca District Court containing the text of a previous letter he had written to the Supreme Council of the Judiciary (SCJ) complaining that the judge had adopted unjust and arbitrary decisions and that his conduct included "wilfully committing errors with malice or gross negligence or through lack of commitment". While the circular letter did not refer to the judge by name, it contained elements allowing for him to be identified by his fellow judges. The Court found that the criticism about unjust and arbitrary decisions, was not excessive since the remarks constituted value judgments that had some factual basis, given that the applicant had represented one of the parties in the case. However, the second criticism implied that the judge had disregarded his ethical obligations or had even committed a criminal offence (abuse of official authority). The applicant had not produced any evidence demonstrating an element of malice in the decisions of which he complained. Furthermore, the applicant had circulated the letter without awaiting the outcome of the case he had brought against the judge before the SCJ, so that this had been bound to undermine the judge's reputation and professional image. The Court concluded that the applicant's conviction, the small fine and the amount of compensation for the defamatory remarks could reasonably be considered "necessary in a democratic society" in order to protect the reputation of others and maintain the authority and impartiality of the judiciary. There had been no violation of Article 10 of the Convention.

In *Wingerter v. Germany* (dec.), 43718/98, 21/03/2002, an earlier case, the applicant lawyer complained under Article 10 that the disciplinary reprimand he received for violating professional rules amounted to a violation of his right to freedom of expression. The applicant made remarks in

written appeal submissions against a bill of costs. The appeal arose from criminal proceedings against the applicant's client, Mr K., during which various legal errors had been committed by the Mannheim judge and public prosecutor. However, the domestic courts considered the allegation disparaging and made without good cause, and the Court agreed. It found that, when read in its context, the statement was of a general rather than specific nature, and as such regarded all Mannheim judges, public prosecutors and lawyers as incompetent in legal matters. Even the obvious legal errors committed in the criminal proceedings against Mr K. could not justify disparaging whole groups of professionals. The Court also noted that the applicant was merely reprimanded (the most lenient punishment available) and considered that this was not disproportionate to the legitimate aim pursued by the courts. As such, the reasons advanced by the domestic courts were sufficient and relevant to justify such interference with the applicant's Article 10 rights.

In *Radobuljac v. Croatia*, no. 51000/11, 28 June 2016, the applicant, a lawyer, was convicted of contempt of court towards a judge for comments he made (about that judge) in an appeal against a decision of a local court. The applicant complained that the conviction violated his freedom of expression. The Court applied the case of *Morice* [GC], stating that Article 10 is applicable to lawyers as well as the judiciary and protects both the form and substance of any ideas and information expressed. The Court added that lawyers, in the pursuit of their clients' interests, may sometimes be required to object to or complain about the conduct of the court, but a clear distinction must be made between criticism and insult. The Court reiterated the precedents in its case-law as regards 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. In this case, the applicant's remarks concerned the manner in which the judge was conducting the proceedings and the judge's performance in his client's case; they were not a personal attack on the character or general qualities of the judge. As such the interference with the applicant's Article 10 rights was unjustified.

The case of *Narodni List D.D. v. Croatia*, no. 2782/12, 8 November 2018 concerned a situation in which a journalist – within the context of a debate on a matter of legitimate public interest – had expressed value judgments injurious to the reputation of a judge. The applicant company had been ordered to pay EUR 6,870 in non-pecuniary damage. The Court found that it was difficult to accept that the injury to the judge's reputation had been of such a level of seriousness as to have justified an award of that size. The size of that award might discourage open discussion of matters of public concern. Accordingly, the interference with the applicant company's freedom of expression had not been "necessary in a democratic society".

#### **4. Reaction from the judiciary when faced with excessive attacks to their reputation from press campaigns or individuals**

While judges and the courts may react to what is perceived as particularly excessive attacks, and may take measures to defend the reputation of the judiciary, they should act in a proportionate manner.

In *De Haes and Gijssels v. Belgium*, the applicant journalists published five articles in which they criticised judges of the Antwerp Court of Appeal at length and in virulent terms for having, in a divorce suit, awarded custody of the children to the father, a Belgian notary. In 1984 the notary's wife and parents-in-law had lodged a criminal complaint accusing him of incest and of abusing the children, but it had been ruled that there was no case to answer. The judges took the unusual step of bringing a claim for damages against the journalists, and their claim was upheld by the Brussels *tribunal de première instance* and Court of Appeal. The applicants alleged that the judgments against them entailed a breach of Article 10 of the Convention. The Court held *inter alia* that "the courts - the guarantors of justice, whose role is fundamental in a State based on the rule of law - must enjoy public confidence. They must accordingly be protected from destructive attacks that are unfounded,

*especially in view of the fact that judges are subject to a duty of discretion that precludes them from replying to criticism*". Nevertheless, on the facts of the case, the Court found a breach of Article 10. The comments made by the journalists were without doubt severely critical; however they nevertheless appeared proportionate to the stir and indignation caused by the matters alleged in their articles.

In *Obukhova v. Russia*, no. 34736/03, 8 January 2009, the applicant (a journalist) complained that the restriction on her right to publish materials concerning a traffic accident involving a judge or about the pending court proceedings relating to that accident was incompatible with Article 10 of the Convention. That restriction had been ordered in defamation proceedings lodged by the judge against the applicant, who had published an article reproducing a letter from the defendants in the traffic accident, a letter in which it was claimed that the judge had taken advantage of her office and connections in the judiciary in pending proceedings involving her as a private individual. The Court accepted that the allegation could indeed be damaging to the judge's reputation and to the authority of the judicial system. Nevertheless, although the injunction corresponded to the legitimate aim it sought to achieve, in the Court's view, its scope was excessively broad. The injunction, which restrained the newspaper and the applicant from publishing anything relating to the traffic accident or the court proceedings pending its judgment in the defamation proceedings, had an excessively broad and disproportionate scope. Such an injunction had done a disservice to the authority of the judiciary by reducing transparency and raising doubts about the court's impartiality. The Court found a violation of Article 10.

In *Poyraz v. Turkey*, no. 15966/06, 7 December 2010 the applicant, a chief inspector of the Ministry of Justice, was responsible for conducting an inquiry into the alleged professional misconduct on the part of a judge. In the report he co-authored, the professional conduct of the judge – who had in the meantime been appointed to the Court of Cassation – was severely criticised through witness accounts of, *inter alia*, acts of sexual harassment. The report was leaked to the press and received widespread television coverage, featuring interviews with the applicant, the judge and witnesses. In response to accusations that he was involved in a political conspiracy against the judge, the applicant issued a written statement to the press in which he asserted that the judge was currently the subject of fifteen separate inquiries and that he had not named the harassment victims in order to prevent deaths from occurring. The judge brought an action for damages against the applicant. The applicant was ordered to pay damages and was unsuccessful in his appeal to the Court of Cassation. The Court found no violation of Article 10. The judgment clarifies certain issues concerning the right to freedom of expression of persons who exercise public authority. The Court considered that such persons must exercise restraint in order not to create situations of inequality when they make public statements concerning ordinary citizens, who have more limited access to the media. They must be particularly vigilant when directing investigations which contain information covered by an official secrecy clause designed to ensure the proper administration of justice.

The case of *Stomka v. Poland*, no. 68924/12, 6 December 2018 concerned the applicant's 14-day custodial sentence for contempt of court after shouting slogans during the trial of communist-era generals who ordered martial law in the 1980s. The Court held that the applicant's actions had aimed at criticising the judiciary and a perceived lack of justice, rather than at insulting the judges. He had been sentenced to a custodial penalty by those same judges, without an opportunity to present his arguments. A subsequent appeal decision had not remedied the procedural shortcomings. The circumstances of the case raised an objectively justified fear of a lack of impartiality and there had been a violation of Article 6. There had also been a violation of Article 10 because the interference with his right to freedom of expression had not been necessary in a democratic society.

## **5. Judicial immunity from civil liability for actions taken in professional capacity and right of access to a court under Article 6 § 1 of the Convention**

The case of *Sergey Zubarev v. Russia*, no. 5682/06, 5 February 2015, concerned the national courts' refusal to accept his defamation claim against a judge on grounds of judicial immunity. Mr Zubarev, a lawyer, brought a defamation claim against a judge who had asked the Bar Association in April 2005 to institute disciplinary proceedings against him for his conduct in civil proceedings. The judge notably alleged that Mr Zubarev had caused delays in a set of civil proceedings in which he was one of the representatives due to absence without good reason. In May 2005 the courts refused to accept his claim for consideration because of the judge's judicial immunity from liability in her professional capacity as presiding judge of the civil case. That decision was upheld in June 2005 on appeal. Relying in particular on Article 6 § 1, the applicant alleged that the national courts' refusal to examine his defamation claim on the merits had denied him access to a court. The Court concluded that a reasonable relationship of proportionality could be said to have existed between the judicial immunity in the course of the administration of justice and the legitimate aim pursued in the public interest and found no violation of Article 6 § 1.

### **C. Reasoning of judgments**

#### **1. An essential safeguard reinforcing confidence in the judiciary**

According to the Court's case-law, for the requirements of a fair trial to be satisfied, the parties, and also the public, must be able to understand the verdict – or, more generally, the judgment - that has been given. This is a vital safeguard against arbitrariness. As the Court has often noted, the rule of law and the avoidance of arbitrary power are principles underlying the Convention. In the judicial sphere, these principles serve to foster public confidence in an objective and transparent justice system, one of the foundations of a democratic society (see *Lhermitte v. Belgium* [GC], no. 34238/09, § 67, 29 November 2016).

The Court reiterated in numerous cases that, according to its established case-law, which reflects a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based. Article 6 § 1 obliges courts to give reasons for their judgments, but doesn't require a detailed answer to every argument advanced by the complainant; nevertheless, this obligation presupposes that parties to judicial proceedings can expect to receive a specific and explicit reply to the arguments which are decisive for the outcome of those proceedings (see, among other authorities, see *Ruiz Torija v. Spain*, 9 December 1994, §§ 29-30, Series A no. 303-A, and *Higgins and Others v. France*, 19 February 1998, §§ 42-43, Reports of Judgments and Decisions 1998-I).

Even though a domestic court has a certain margin of appreciation when choosing arguments in a particular case and admitting evidence in support of the parties' submissions, an authority is obliged to justify its activities by giving reasons for its decisions (see *Suominen v. Finland*, no. 37801/97, § 36, 1 July 2003). A further function of a reasoned decision is to demonstrate to the parties that they have been heard. Moreover, a reasoned decision affords a party the possibility to appeal against it, as well as the possibility of having the decision reviewed by an appellate body. It is only by giving a reasoned decision that there can be public scrutiny of the administration of justice (see, *mutatis mutandis*, *Hirvisaari v. Finland*, no. 49684/99, § 30, 27 September 2001).

#### **2. A guarantee for fair trial not concerned with the adequacy of the reasons, unless 'denial of justice'**

The obligation to provide reasons should be distinguished from the adequacy of the reasons stated, as the Court will not, in principle, intervene, unless the decisions reached by the domestic courts

appear arbitrary or manifestly unreasonable and provided that the proceedings as a whole were fair, as required by Article 6 § 1 (see, inter alia, *Khamidov v. Russia*, no. 72118/01, § 170, 15 November 2007, and *Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, § 90, ECHR 2016 (extracts)). It flows from the Court's case-law that a domestic judicial decision cannot be described as arbitrary to the point of prejudicing the fairness of proceedings unless no reasons are provided for it or the reasons given are based on a manifest factual or legal error committed by the domestic court, resulting in a "denial of justice" (see *Moreira Ferreira v. Portugal* (no. 2) [GC], no. 19867/12, § 85, 11 July 2017 and *Anđelković v. Serbia*, no. 1401/08, §§ 24 and 27, 9 April 2013).

### 3. An obligation that varies according to the nature of the decision and the circumstances of the case

The extent to which this duty to give reasons applies may vary according to the nature of the decision (*Ruiz Torija*, cited above, §§29-30 and, for the very specific context of a defendant being tried by a lay jury, *Lhermitte*, précité, § 66 et seq). It is necessary to take into account, inter alia, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments. That is why the question whether a court has failed to fulfil the obligation to state reasons, deriving from Article 6 § 1, can only be determined in the light of the circumstances of the case (see, among many other authorities, *Gorou v. Greece* (no. 2) [GC], no. 12686/03, § 37, 20 March 2009, *Ruiz Torija*, cited above, § 29, and *Van de Hurk v. the Netherlands*, 19 April 1994, § 61, Series A no. 288).

For example, the Court examined the extent to which this obligation applies to superior courts when the latter confirm a decision taken by a lower court. It held that the notion of a fair procedure requires furthermore that a national court which has given sparse reasons for its decision, whether by incorporating the reasons of a lower court or otherwise, does in fact address the essential issues which were submitted to its jurisdiction and does not merely endorse without further ado the findings reached by a lower instance. Where an appellate court simply endorses the reasons for the lower court's decision when dismissing an appeal, the lower court or authority must have provided such reasons as to enable the parties to make effective use of their right of appeal (see, for example, *Helle v. Finland*, judgment of 19 December 1997, Reports of Judgments and Decisions 1997-VIII, pp. 2928-30, §§ 55-60; *García Ruiz v. Spain* [GC], no. 30544/98, § 26, ECHR 1999-I, *Hirvisaari*, cited above, § 30; and *Jokela v. Finland*, no. 28856/95, §§ 72-73, ECHR 2002-IV).

Moreover, the Court held that courts of cassation comply with their obligation to provide sufficient reasoning when they base themselves on a specific legal provision, without further reasoning, in dismissing cassation appeals which do not have any prospects of success (see *Sale v. France*, no. 39765/04, § 17, 21 March 2006, and *Burg and Others v. France* (dec.), no. 34763/02, ECHR 2003-II; for the same approach with regard to constitutional court practice see *Wildgruber v. Germany*, (dec.) no. 32817/02, 16 October 2006). In order to determine whether the requirements of fairness in Article 6 were met, the Court has considered matters such as the nature of the filtering procedure and its significance in the context of the proceedings as a whole, the scope of the powers of the court of appeal, and the manner in which the applicant's interests were actually presented and protected before that court (see e.g. *Hansen v. Norway*, no. 15319/09, § 73, 2 October 2014, with further references to *Ekbatani v. Sweden*, 26 May 1988, § 27, Series A no. 134, and *Monnell and Morris v. the United Kingdom*, 2 March 1987, § 56).

Furthermore, in the context of proceedings concerning a referral for preliminary ruling by the CJEU, while Article 6 § 1 requires the domestic courts to give reasons for any decision refusing to refer (*Dhahbi v. Italy*, no. 17120/09, § 31, 8 April 2014), the Court has also held that where a request to obtain a preliminary ruling was insufficiently pleaded or where such a request was only formulated in broad or general terms, it is acceptable under Article 6 for national superior courts to dismiss the

complaint by mere reference to the relevant legal provisions governing such complaints if the matter raises no fundamentally important legal issue (see *John v. Germany* (dec.) no. 15073/03, 13 February 2007) or for lack of prospects of success without dealing explicitly with the request (see *Wallishauser v. Austria* (No. 2), no. 14497/06, § 85, 20 June 2013 and *Baydar v. the Netherlands*, no. 55385/14, §§ 48-50, 24 April 2018).

#### **4. Publicity of the judgments and reasons – scrutiny by the public. A flexible approach**

Moreover, the public character of proceedings before the judicial bodies referred to in Article 6 § 1 of the Convention protects litigants against the administration of justice in secret with no public scrutiny. It is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention. These principles apply to both the public holding of hearings and to the public delivery of judgments, and have the same purpose (see *Fazliyski v. Bulgaria*, no. 40908/05, § 64, 16 April 2013, *Werner v. Austria*, 24 November 1997, § 54, Reports 1997-VII).

In *Ryakib Biryukov v. Russia*, no. 14810/02, ECHR 2008, at the close of the hearing after examination of the applicant's case on the merits, the first-instance court read out the operative provisions of the judgment, by which the applicant's claims were dismissed with a simple reference to Article 1064 of the Russian Civil Code (RCC), which established general grounds giving rise to liability for the infliction of harm. An obligation to serve later a copy of the reasoned judgment was limited to the parties and other participants to the proceedings, but the relevant regulations restricted public access to the texts of judgments at the court registry. The Court found that there had been a violation of Article 6 § 1 in that the State failed to comply with the requirement of the publicity of judgments (Article 6 § 1 of the Convention) – in order to ensure scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial – given that the reasons which would make it possible to understand why the applicant's claims had been rejected were inaccessible to the public. The operative part of the judgment contained no indication as to the applicable principle derived from Article 1064 RCC, and was thus not informative to members of the public who did not have the relevant legal knowledge.

In the case *Fazliyski v. Bulgaria*, no. 40908/05, §§ 64-70, 16 April 2013, as a result of the classified nature of the proceedings concerning the applicant's dismissal from his post as inspector at the National Security Service of the Ministry of Internal Affairs on disciplinary and psychological grounds, the judgments of the three-member and five-member panels of the Supreme Administrative Court were not delivered publicly. In addition, the materials in the case file – relevant psychological assessment and subsequent judgments – were not accessible to the public, and the applicant was not able to obtain copies of them. The judgments were declassified more than a year and three months after the close of the proceedings, apparently on the basis that they had been incorrectly classified. The Court recalled that, even in cases concerning an expulsion on national security grounds, it held that the complete concealment from the public of the entirety of a judicial decision could not be regarded as warranted. It went on to emphasise that the publicity of judicial decisions aimed to ensure scrutiny of the judiciary by the public and constituted a basic safeguard against arbitrariness, and pointed out that even in indisputable national security cases, such as those relating to terrorist activities, some States had opted to classify only those parts of the judicial decisions whose disclosure would compromise national security or the safety of others, thus illustrating that there existed techniques which could accommodate legitimate security concerns without fully negating fundamental procedural guarantees such as the publicity of judicial decisions (see *Raza v. Bulgaria*, no. 31465/08, § 53, 11 February 2010). Noting that in the given case the Supreme Administrative Court's judgments were not given any form of publicity for a considerable

period of time, and that no convincing justification had been put forward for this situation, the Court concluded that there had been a breach of Article 6 § 1 of the Convention.

**CCJE [Opinion n°11 \(2008\)](#) on "the quality of judicial decisions"**

## Annex

### *The Authority of the Judiciary List of Cases*

- Albayrak v. Turkey*, no. 38406/97, 31 January 2008
- Baka v. Hungary* [GC], no. 20261/12, 23 June 2016
- Broniowski v. Poland* [GC], no. 31443/96, § 176, ECHR 2004-V
- Buscemi v. Italy*, no. 29569/95, § 67, ECHR 1999-VI
- De Haes and Gijssels v. Belgium*, 24 February 1997, *Reports of Judgments and Decisions* 1997-I
- Denisov v. Ukraine* [GC], application no. 76639/11, 2018
- Di Giovanni v. Italy*, no. 51160/06, 9 July 2013
- Erményi v. Hungary*, no. 22254/14, 22 November 2016
- Gerovska Popčevska v. the former Yugoslav Republic of Macedonia*, no. 48783/07, 7 January 2016
- Gurov v. Moldova*, no. 36455/02, §§ 34-38, 11 July 2006
- Guja v. Moldova* [GC], no. 14277/04, ECHR 2008
- Harabin v. Slovakia*, no. 58688/11, §§ 150-153, 20 November 2012
- Ivanovski v. the former Yugoslav Republic of Macedonia*, no. 29908/11, 21 January 2016
- Jakšovski and Trifunovski v. the former Yugoslav Republic of Macedonia*, nos. 56381/09 and 58738/09, 7 January 2016
- Kinský v. the Czech Republic*, no. 42856/06, 9 February 2012
- Kudeshkina v. Russia*, no. 29492/05, 26 February 2009
- Kulykov and others v. Ukraine*, nos. 5114/09 and 17 others, 19 January 2017
- Lavents v. Latvia*, no. 58442/00, §§ 118 and 119, 28 November 2002
- Maestri v. Italy* [GC], no. 39748/98, ECHR 2004-I
- Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, § 49, ECHR 2013
- Mitrinovski v. the former Yugoslav Republic of Macedonia*, no. 6899/12, 30 April 2015
- Morice v. France* [GC], no. 29369/10, ECHR 2015
- Obukhova v. Russia*, no. 34736/03, 8 January 2009
- Oleksandr Volkov v. Ukraine*, no. 21722/11, ECHR 2013
- Olujić v. Croatia*, no. 22330/05, 5 February 2009
- Özpınar v. Turkey*, no. 20999/04, 19 October 2010
- Paluda v. Slovakia*, no. 33392/12, 23 May 2017
- Peruzzi v. Italy*, no. 39294/09, 30 June 2015

*Pitkevich v. Russia* (dec.), no. 47936/99, 8 February 2001

*Poposki and Duma v. the former Yugoslav Republic of Macedonia*, nos. 69916/10 and 36531/11, 7 January 2016

*Poyraz v. Turkey*, no. 15966/06, 7 December 2010

*Previti v. Italy* (dec), no. 45291/06, 8 December 2009

*Radobuljac v. Croatia*, no. 51000/11, 28 June 2016

*Ramos Nunes de Carvalho e Sá v. Portugal* [GC] nos. 55391/13, 57728/13 and 74041/13, ECHR 2018

*Sergey Zubarev v. Russia*, no. 5682/06, 5 February 2015

*Simić v. Bosnia-Herzegovina*, no. 75255/10, 15 November 2016

*Sovtransavto Holding v. Ukraine*, no. 48553/99, ECHR 2002-VII

*Stafford v. the United Kingdom* [GC], no. 46295/99, § 78, ECHR 2002-IV

*Thiam v. France*, no. 80018/12, 18 October 2018

*Toni Kostadinov v. Bulgaria*, no. 37124/10, 27 January 2015

*Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, ECHR 2007-II

*Wille v. Liechtenstein* [GC], no. 28396/95, § 70, ECHR 1999-VII

*Wingerter v. Germany* (dec.), no. 43718/98, 21 March 2002