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This Factsheet does not bind the Court and is not exhaustive

# Independence of the justice system

**Article 6 § 1 (right to a fair trial – independent tribunal) of the [European Convention on Human Rights](#) (“the Convention”):**

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

## Independence and right to a fair trial

### Remli v. France

23 April 1996

This case concerned an Assize Court’s refusal of an application by a French defendant of Algerian origin to have formal note taken of a racist remark allegedly made by one of the jurors outside the courtroom and which had been recorded in a written witness statement. The applicant complained in particular that he had not had a hearing by an impartial tribunal.

The Court held that there had been a **violation of Article 6 § 1** of the Convention. It noted in particular that Article 6 § 1 imposed an obligation on every national court to check whether, as constituted, it was “an impartial tribunal” where, as in the applicant’s case, this was disputed on a ground that did not immediately appear to be manifestly devoid of merit. In the instant case, however, the Assize Court had not made any such check, thereby depriving the applicant of the possibility of remedying, if it proved necessary, a situation contrary to the requirements of the Convention. This finding, **regard being had to the confidence which the courts must inspire in those subject to their jurisdiction**, sufficed for the Court to hold that there has been a breach of Article 6 § 1.

### Stafford v. the United Kingdom

28 May 2002 (Grand Chamber)

The applicant, formerly sentenced to a life sentence, was released on parole. He was recalled to prison following charges of counterfeiting and the Secretary of State later ordered his continued detention pursuant to the original life sentence.

**The Court noted in particular that the notion of separation of powers between the executive and the judiciary had assumed growing importance in its case-law.** In that case the power to release the applicant lay with the Secretary of State and not the Parole Board. In the applicant’s case, the Court held, in particular, that there had been a **violation of Article 5 § 1** (right to liberty and security) of the Convention, finding that a decision-making power by the executive to detain on the basis of perceived fears of future non-violent criminal conduct unrelated to the original murder conviction did not accord with the spirit of the Convention, with its emphasis on the rule of law and protection from arbitrariness.

### Luka v. Romania

21 July 2009

After being dismissed in 1999 by the company for which he had been working as one of the managers and head of the IT department, the applicant brought an action to have that decision set aside, also seeking damages. The domestic courts found in his favour

in both respects, but there ensued several further sets of proceedings relating to the calculation of the damages and the execution of the decision. The applicant alleged that the courts had not been impartial and independent because, in particular, lay judges (“judicial assistants”) had sat on the tribunal hearing his case.

The Court held that there had been a **violation of Article 6 § 1** of the Convention, finding that the applicant’s concerns about the tribunal’s lack of independence and impartiality had been objectively justified. It recalled in particular that, in order to establish whether a tribunal can be considered as “independent”, regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence. In the applicant’s case, the Court did not deny the advantage of courts composed of a mixture of professional and lay judges in fields where the experience of the latter was necessary to determine specific questions that could arise in such matters. It further noted that this system, which existed in a number of States Parties to the Convention, was not in itself contrary to the Convention. However, the role and duties of the “judicial assistants”, as laid down in Romanian legislation at the relevant time, had made them vulnerable to outside pressure, and the domestic law had not afforded sufficient guarantees as to their independence in the performance of their duties. Among other things, they had not been irremovable or protected against the premature termination of their duties, and they could discharge other functions and activities assigned to them by the organisations on whose behalf they had been elected (employers’ associations and trade unions).

## Independence criteria

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### Tribunal established by law

#### **Zand v. Austria**

12 October 1978 (report of the European Commission of Human Rights<sup>1</sup>)

The applicant had at one time worked as a goldsmith in a workshop and was sued by his employer for the compensation of certain damages. He complained that the labour court which dealt with his case was not an independent and impartial tribunal established by law.

The European Commission of Human Rights held that there had been **no breach of Article 6 § 1** of the Convention in the applicant’s case, finding, in particular, that the labour court was an independent tribunal. The Commission recalled in particular that the term “independent”, as interpreted in the case-law of the Commission and of the European Court of Human Rights, comprises two elements, namely the courts’ independence from the Executive, and their independence from the parties. It also noted that, according to the case-law of the Court, the object of the term “established by law” in Article 6 § 1 of the Convention 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.

#### **Kleyn and Others v. the Netherlands**

6 May 2003 (Grand Chamber)

The applicants – individual and companies, whose homes or business premises were located on or near the track of a new railway, which was being constructed, running across the Netherlands from the Rotterdam harbour to the German border – had taken part in proceedings objecting to the decision on the determination of the exact routing of the railway. This routing decision had been taken under the procedure

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<sup>1</sup>. Together with the European Court of Human Rights and the Committee of Ministers of the Council of Europe, the European Commission of Human Rights, which sat in Strasbourg from July 1954 to October 1999, supervised Contracting States’ compliance with their obligations under the European Convention on Human Rights. The Commission ceased to exist when the Court became permanent on 1<sup>st</sup> November 1998.

provided for in the Transport Infrastructure Planning Act. They submitted that the Administrative Jurisdiction Division of the Council of State, which had ruled in the dispute, could not be regarded as an independent and impartial tribunal in that the Council of State exercised both advisory functions, by giving advisory opinions on draft legislation, and judicial functions, by determining appeals under administrative law.

The Court held that there had been **no violation of Article 6 § 1** of the Convention, finding that the applicants' fears regarding the Administrative Jurisdiction Division's lack of independence and impartiality could not be regarded as being objectively justified. The Court noted in particular that although the notion of the separation of powers between the political organs of government and the judiciary had assumed growing importance in the Court's case-law, neither Article 6 nor any other provision of the Convention required States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interaction. The question was always whether, in a given case, the requirements of the Convention were met and the Court was faced solely with the question whether, in the circumstances of the case, the Administrative Jurisdiction Division had the requisite "appearance" of independence, or the requisite "objective" impartiality.

### **Gurov v. Republic of Moldova**

11 July 2006

Following a dispute with an insurance company about a contract concluded by her, the applicant brought civil proceedings seeking an order compelling the insurance company to pay her a pension. The applicant complained that she had not had a fair hearing before a tribunal established by law, on account of the expiry of the term of office of one of the judges involved in her case.

The Court held that there had been a **violation of Article 6 § 1** of the Convention, finding that the applicant's case had not been heard by a tribunal established by law. It noted in particular that the Moldovan Government had acknowledged that, at the relevant time, judges whose term of office had expired were authorised to continue to exercise their functions for an undetermined period, until such time as the President decided the question of their appointment, and that there was no legislation governing this matter. In those circumstances, the Court considered that the participation of a judge whose term of office had expired in the hearing on the applicant's case had not had a legal basis. In addition, that practice was contrary to the principle that the organisation of the courts in a democratic society must not depend on executive discretion.

### **Maktouf and Damjanović v. Bosnia and Herzegovina**

18 July 2013 (Grand Chamber)

Both applicants were convicted by the Court of Bosnia and Herzegovina of war crimes committed against civilians during the 1992-1995 war. The first one complained in particular that he had not been afforded a fair hearing by an independent tribunal. He submitted that the adjudicating tribunal had not been independent within the meaning of that provision, notably because two of its members had been appointed by the Office of the High Representative for Bosnia and Herzegovina for a renewable period of two years.

The Court declared the first applicant's complaint under Article 6 § 1 of the Convention **inadmissible** as being manifestly ill-founded, seeing no reason for calling into question the finding of the Constitutional Court of Bosnia and Herzegovina in this case that the State Court had been independent. It found in particular that there were 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. The international judges' appointment had precisely been motivated by a desire to reinforce the independence of the State Court's war crime chambers and to restore public confidence in the judicial system. Moreover, 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. Admittedly, their term of office was relatively short, but this was understandable given the provisional nature of the international presence at the State Court and the mechanics of international secondments.

### **Guðmundur Andri Ástráðsson v. Iceland**

1 December 2020 (Grand Chamber)

This case concerned the applicant's allegation that the new Icelandic Court of Appeal (*Landsréttur*) which had upheld his conviction for road traffic offences was not a tribunal "established by law", on account of irregularities in the appointment of one of the judges who heard his case.

The Court held that there had been a **violation of Article 6 § 1** of the Convention, finding that the applicant had been denied his right to a tribunal established by law on account of the participation in his trial of a judge whose appointment had been undermined by grave irregularities which had impaired the very essence of that right. In particular, given the potential implications of finding a violation and the important interests at stake, the Court took the view that the right to a tribunal established by law should not be construed too broadly such that any irregularity in a judicial appointment procedure would risk compromising that right. It thus formulated a three-step test to determine whether irregularities in a judicial appointment procedure were of such gravity as to entail a violation of the right to a tribunal established by law. It then proceeded to find as follows. Over the past decades, the legal framework in Iceland governing judicial appointments had seen some important changes aimed at limiting ministerial discretion in the appointments process and thereby strengthening the independence of the judiciary. Controls on ministerial power had been further intensified in connection with the appointment of judges to the newly established Court of Appeal, where Parliament had been tasked with approving every candidate proposed by the Minister of Justice, in order to enhance the legitimacy of this new court. However, as found by the Icelandic Supreme Court, this legal framework had been breached, particularly by the Minister of Justice, when four of the new Court of Appeal judges had been appointed. While the Minister had been authorised by law to depart from the Evaluation Committee's proposal, subject to certain conditions, she had disregarded a fundamental procedural rule that obliged her to base her decision on sufficient investigation and assessment. This rule was an important safeguard to prevent the Minister from acting out of political or other undue motives that would undermine the independence and legitimacy of the Court of Appeal, and its breach had been tantamount to restoring the discretionary powers previously held by her office in the context of judicial appointments, thereby neutralising the important gains and guarantees of the legislative reforms. Lastly, the Court recalled that here had been further legal guarantees in place to remedy the breach committed by the Minister, such as the parliamentary procedure and the ultimate safeguard of judicial review before domestic courts, but all those safeguards had proved ineffective, and the discretion used by the Minister to depart from the Evaluation Committee's assessment had remained unfettered.

### **Xhoxhaj v. Albania** (see also below, under "Relationship with the other Convention Rights")

9 February 2021

This case concerned a Constitutional Court judge who had been dismissed from office following the outcome of proceedings commenced in relation to her, as part of an exceptional process for the re-evaluation of suitability for office of all judges and prosecutors in the country, otherwise known as the vetting process<sup>2</sup>. The applicant

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<sup>2</sup>. In 2016 the Albanian Parliament amended the Constitution and passed the Transitional Re-evaluation of Judges and Prosecutors Act (otherwise referred to as the "Vetting Act") to enable reform. All judges and prosecutors would be subject to vetting by the newly established Independent Qualification Commission at first instance and the Appeal Chamber on appeal. Vetting would consist of re-evaluation of three criteria: an evaluation of assets owned by the person to be vetted and his or her immediate family members, an integrity background check regarding possible links to organised crime and an evaluation of professional competence.

complained, inter alia, that the vetting bodies had lacked independence and impartiality, in particular its members' lacking the requisite professionalism and experience, having been appointed without any involvement of the judiciary.

The Court held that there had been **no violation of Article 6 § 1** of the Convention as regards the alleged lack of independence and impartiality of the vetting bodies. In particular, the Court considered that, having regard to the sufficiently clear legal basis (that is to say the Constitution and the Vetting Act) which provided for the setting up of the Independent Qualification Commission and the Appeal Chamber, their exclusive jurisdiction and competence to carry out the transitional re-evaluation of judges, prosecutors, legal advisors and assistants as well as their formation in the applicant's case, the vetting bodies had been set up and composed in a legitimate way and had been thus "tribunal[s] established by law". The Court further noted that, once appointed, the vetting bodies had not been subject to any pressure by the executive during the examination of the applicant's case. That their members had not been drawn from the corps of serving professional judges had been consistent with the spirit and goal of the vetting process, specifically in an attempt to avoid any individual conflicts of interest and to ensure public confidence in the process. The fixed duration of their terms of office was understandable given the extraordinary nature of the vetting process. The Court was also satisfied that the domestic legislation had provided guarantees for their irremovability and for their proper functioning.

#### **Xero Flor w Polsce sp. z o.o. v. Poland**

7 May 2021

This case concerned proceedings brought by the applicant company claiming compensation for damage to its property, and its complaint about the appointment of one judge in particular to the Constitutional Court which had examined its case. The applicant company complained in particular of the domestic courts' refusal to refer legal questions to the Constitutional Court. It also alleged that the bench of five judges of the Constitutional Court which had examined its case had been composed in violation of the Constitution. In particular, one judge had been elected by the *Sejm* (the lower house of the Parliament), despite that post having already been filled by another judge elected by the preceding *Sejm*.

The Court held that there had been a **violation of Article 6 § 1** of the Convention as regards the right to a fair hearing and a **violation Article 6 § 1** as regards the right to a tribunal established by law. It found in particular that – despite the applicant company's repeated raising of the matter – the domestic courts had not answered its arguments that the law applied in its case had been incompatible with the Constitution and, consequently, had failed in their duty under the Convention to provide reasoned decisions. The Court furthermore adjudged that the actions of the authorities in appointing one of the judges who had been on the bench in the applicant company's case and the ignoring of the Constitutional Court's judgments in that connection had meant that the panel that had tried the case had not been a tribunal established by law.

#### **Reczkowicz v. Poland**

22 July 2021

The applicant, a barrister who had been suspended for three years following several incidents when she was representing a client, submitted that the Disciplinary Chamber of the Polish Supreme Court, which had decided on a case concerning her, had not been a "tribunal established by law" and had lacked impartiality and independence.

The Court held that there had been a **violation of Article 6 § 1** of the Convention, finding that the Disciplinary Chamber of the Supreme Court, which had examined the applicant's case, was not a "tribunal established by law". It noted, in particular, that the procedure for appointing judges to the Disciplinary Chamber had been unduly influenced by the legislative and executive powers. That amounted to a fundamental irregularity that adversely affected the whole process and compromised the legitimacy of the Disciplinary Chamber.



See also: [Dolińska-Ficek et Ozimek c. Pologne](#), arrêt du 8 novembre 2021.

### **Advance Pharma Sp. z o.o. v. Poland**

3 February 2022<sup>3</sup>

This case concerned a complaint brought by the applicant company that the Civil Chamber of the Supreme Court, which had decided on a case concerning it, had not been a “tribunal established by law” and had lacked impartiality and independence. It complained in particular that the Civil Chamber of the Supreme Court had been composed of judges appointed by the President of Poland on the recommendation of the National Council of the Judiciary (“the NCJ”), the constitutional organ in Poland which safeguards the independence of courts and judges and which has been the subject of controversy since the entry into force of new legislation providing, among other things, that its judicial members are no longer elected by judges but by the *Sejm* (the lower house of Parliament).

The Court held that there had been a **violation of Article 6 § 1** of the Convention, finding that The Civil Chamber of the Supreme Court was not an “independent and impartial tribunal established by law” within the meaning of the Convention. It noted, in particular, that the procedure for appointing judges to the Civil Chamber of the Supreme Court had been unduly influenced by the legislative and executive powers. That amounted to a fundamental irregularity that adversely affected the whole process and compromised the legitimacy of the Civil Chamber of the Supreme Court, which had examined the applicant’s case. In addition, under **Article 46** (binding force and execution of judgments) of the Convention, the Court found that the violation of the applicant company’s rights originated in the amendments to Polish legislation which deprived the Polish judiciary of the right to elect judicial members of the NCJ and enabled the executive and the legislature to interfere directly or indirectly in the judicial appointment procedure, thus systematically compromising the legitimacy of a court composed of the judges appointed in that way. It was an inescapable conclusion that the continued operation of the NCJ as constituted by the 2017 Amending Act and its involvement in the judicial appointments procedure perpetuated the systemic dysfunction established by the Court and might lead to further aggravation of the rule of law crisis in Poland. Therefore, rapid action on the part of the Polish State to remedy this was required. It fell upon the State of Poland to draw the necessary conclusions from this judgment and to take appropriate measures in order to resolve the problems at the root of the violations found by the Court and to prevent similar violations from taking place in the future.

### **Grzeda v. Poland**

15 March 2022 (Grand Chamber)

This case concerned the removal of the applicant, a judge, from the National Council of the Judiciary (NCJ) before his term had ended and his inability to get judicial review of that decision. His removal had taken place in the context of judicial reforms in Poland. The applicant complained in particular of having been denied access to a court.

The Court held that there had been a **violation of Article 6 § 1** (right to a fair trial) of the Convention, finding that the lack of judicial review in the case had impaired the applicant’s right of access to a court. The Court emphasised, in particular, that it was fully aware of the context of the case – the weakening of judicial independence and adherence to rule-of-law standards brought about by Government reforms. In particular, successive judicial reforms had been aimed at weakening judicial independence, starting with the grave irregularities in the election of judges of the Constitutional Court in December 2015, then, in particular, the remodelling of the NCJ and the setting up of new chambers of the Supreme Court, while extending the Minister of Justice’s control over the courts and increasing his role in matters of judicial discipline. The Court also referred to its judgments related to the reorganisation of the Polish judicial system, as well as the

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<sup>3</sup> This judgment will become final in the circumstances set out in Article 44 § 2 (final judgments) of the [European Convention on Human Rights](#).

cases decided by the Court of Justice of the European Union and the relevant rulings of the Supreme Court and Supreme Administrative Court of Poland. It held that as a result of these successive reforms, the judiciary had been exposed to interference by the executive and legislature and its independence had been substantially weakened. The applicant's case was one example of this general trend.

## Stable legislation

### **Zielinski and Pradal and Gonzalez and Others v. France**

28 October 1999 (Grand Chamber)

The applicants, who were working for social-security bodies in Alsace-Moselle, complained that the State's intervention in a lawsuit affecting it, by means of retrospective legislation, had contravened the principle of equality of arms and rendered the proceedings unfair.

The Court held that there had been a **violation of Article 6 § 1** of the Convention in respect of the right to a fair trial. It reaffirmed in particular that while in principle the legislature was not precluded in civil matters from adopting new retrospective provisions to regulate rights arising under existing laws, the principle of the rule of law and the notion of fair trial enshrined in Article 6 of the Convention precluded any interference by the legislature – other than on compelling grounds of the general interest – with the administration of justice designed to influence the judicial determination of a dispute.

## Statutory independence

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### Objective and subjective criteria

#### **Piersack v. Belgium**

1 October 1982

The applicant submitted that the president of the Court of Assize by which he had been convicted for a double murder and sentenced to hard labour had been involved in his case during the investigation in his capacity as deputy public prosecutor. He complained that his case had been heard by an independent and impartial tribunal.

The Court held that there had been a **violation of Article 6 § 1** of the Convention, finding that the impartiality of the tribunal which had to determine the merits of the charge in the applicant's case was capable of appearing open to doubt. The Court noted in particular that, whilst impartiality normally denoted absence of prejudice or bias, its existence or otherwise could, notably under Article 6 § 1, be tested in various ways. A distinction could be drawn in this context between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect. The Court further stressed that, in order that the courts may inspire in the public the confidence which is indispensable, account must also be taken of questions of internal organisation. If an individual, after holding in the public prosecutor's department an office whose nature is such that he may have to deal with a given matter in the course of his duties, subsequently sits in the same case as a judge, the public are entitled to fear that he does not offer sufficient guarantees of impartiality. This was what had occurred in the present case.

#### **Langborger v. Sweden**

22 June 1989

The applicant complained in particular that an action he had brought with a view to having a clause deleted from his lease had not been heard by an independent and impartial tribunal. The clause in question stipulated that the rent should be fixed by negotiation between a named landlord's association and a named tenant's association.

Limiting its examination to the Housing and Tenancy Court – which, when it decided the applicant's case, was composed of two professional judges and two lay assessors

nominated respectively by the Swedish Federation of Property Owners and the National Tenants' Union, and then appointed by the Government – which was the last national organ to determine both the questions of fact and the legal issues in dispute, the Court held that there had been a **violation of Article 6 § 1** of the Convention in the present case. It noted in particular that, in order to establish whether a body can be considered independent, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence. As to the question of impartiality, a distinction must be drawn between a subjective test, whereby it sought to establish the personal conviction of a given judge in a given case, and an objective test, aimed at ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect. As regards the lay assessors, the Court considered it difficult in this case to dissociate the question of impartiality from that of independence. While the latter appeared in principle extremely well qualified to participate in the adjudication of disputes between landlords and tenants and the specific questions which may arise in such disputes, the Court accepted, however, that their independence and impartiality might be open to doubt in a particular case. In the present case there was no reason to doubt their personal impartiality in the absence of any proof. As regards their objective impartiality and the question whether they presented an appearance of independence, however, the Court noted that they had been nominated by, and had close links with, two associations which both had an interest in the continued existence of the negotiation clause. As the applicant sought the deletion from the lease of this clause, he could legitimately fear that the lay assessors had a common interest contrary to his own and therefore that the balance of interests, inherent in the Housing and Tenancy Court's composition in other cases, was liable to be upset when the court came to decide his own claim. The fact that the Housing and Tenancy Court also included two professional judges, whose independence and impartiality were not in question, made no difference in this respect.

### **Luka v. Romania**

21 July 2009

See above, under "Independence and right to a fair trial".

### **Mustafa Tunc and Fecire Tunc v. Turkey**

14 April 2015 (Grand Chamber)

This case concerned the death of a young man during his military service, while assigned to a site belonging to a private oil company for which the national gendarmerie was providing security services. The applicants alleged that the investigation to determine the circumstances surrounding the death of their relative had not satisfied the requirements of Article 2 (right to life) of the Convention.

In its judgment, the Court considered it useful to provide some clarification concerning the requirement that the investigation be independent for the purposes of Article 2 of the Convention, and particularly as to whether the investigative authorities in the broad sense must meet similar criteria of independence as those which prevail under Article 6 of the Convention. At the outset, the Court considered that while the requirements of a fair hearing may inspire the examination of procedural issues under other provisions, such as Articles 2 or 3 of the Convention, the safeguards provided were not necessarily to be assessed in the same manner. In the applicants' case, the Court held that there had been **no violation of Article 2** of the Convention under its procedural aspect, finding that the investigation conducted in the case had been sufficiently thorough and independent and that the applicants had been involved in it to a degree sufficient to protect their interests and to enable them to exercise their rights. With regard to the independence of the review carried out by the military court, the Court noted in particular that, having regard to the regulations in force at the material time, there were factors which cast doubt on the statutory independence of the military court which was called upon to examine the applicants' appeal against the decision by the prosecutor's office not to bring a prosecution. The Court considered, however, that under Article 2,



these considerations were not in themselves sufficient to conclude that the investigation had lacked independence. Article 2 did not require absolute independence, and, moreover, the independence of the investigation had to be assessed on the basis of the facts of the specific case. While accepting that it could not be considered that the entities which played a role in the investigation enjoyed full statutory independence, the Court found that the investigation had been sufficiently independent within the meaning of Article 2 of the Convention.

## Absence of outside influence

### Sramek v. Austria

22 October 1984

The applicant, a United States citizen, complained of a procedure under the Tyrol Real Property Transactions Act whereby authorisation to acquire certain land was refused to her as an alien on the ground that there was a danger of foreign property ownership becoming excessive. She alleged in particular that the Regional Real Property Transactions Authority, which had heard her case, was not an independent and impartial tribunal. The latter was composed of, *inter alia*, three civil servants from the governmental services of the Land dealing with agricultural and forestry real property matters, one of whom acted as rapporteur.

The Court noted in particular that, in order to determine whether a tribunal could be considered to be independent as required by Article 6 of the Convention, appearances may also be of importance. It held that there had been a **violation of Article 6 § 1** of the Convention in respect of the applicant, finding in particular that, where, as in the present case, a tribunal's members included a person who was in a subordinate position, in terms of his duties and the organisation of his service, *vis-à-vis* one of the parties, litigants may entertain a legitimate doubt about that person's independence. Such a situation, the Court stressed, seriously affected the confidence which the courts must inspire in a democratic society.

### ***Non-intervention of the executive or the legislature in a case pending before the courts***

### Campbell and Fell v. the United Kingdom

28 June 1984

The first applicant, a prisoner at the time of facts, alleged, *inter alia*, that he had not received a fair hearing before the Board of Visitors which had convicted him of disciplinary charges amounting in substance to criminal charges. He contended in particular that Boards were not seen by prisoners to be independent and were, in practice, an arm of the executive.

The Court held that there had been **no violation of Article 6 § 1** of the Convention regarding the first applicant's complaints that the Board of Visitors had not been an independent and impartial tribunal. It did not consider that the fact that members of the Board were appointed by the Home Secretary, who was himself responsible for the administration of prisons in England and Wales, established that they were not independent of the executive. To hold otherwise would have meant that judges appointed by or on the advice of a Minister having responsibilities in the field of the administration of the courts were also not independent. Moreover, although it was true that the Home Office may issue the Board with guidelines as to the performance of its functions, it was not subject to its instructions in its adjudicatory role. Further, concerning the question of the Board's independence having regard to the fact that it has both adjudicatory and supervisory roles, the Court noted in particular that the impression which prisoners may have that the Board was closely associated with the executive and the prison administration was a factor of weight, particularly bearing in mind the importance of the maxim "justice must not only be done: it must also be seen to be done". However, the existence of such sentiments on the part of inmates, which was probably unavoidable in a custodial setting, was not sufficient to establish a lack of

“independence”. This requirement of Article 6 would not be satisfied if prisoners were reasonably entitled, on account of the frequent contacts between a Board and the authorities, to think that the former was dependent on the latter; however, the Court did not consider that the mere fact of these contacts, which exist also with the prisoners themselves, could justify such an impression.

### **Toni Kostadinov v. Bulgaria**

27 January 2015

This case concerned the pre-trial detention of the applicant, a former officer of the national police, who had been arrested on suspicion of being part of a criminal gang, and respect for his right to be presumed innocent. The applicant alleged in particular that remarks made by the Minister of the Interior at a press conference, unequivocally identifying him as one of the most influential members of a gang of burglars, had breached his right to be presumed innocent.

The Court held that there had been a **violation of Article 6 § 2** (presumption of innocence) of the Convention, finding that the remarks by the Minister of the Interior had breached the applicant’s right to be presumed innocent. Having recalled that the presumption of innocence was one of the elements of a fair criminal trial, the Court observed in particular that the violation of the presumption of innocence could emanate not only from a judge but also from other public authorities: the Speaker of Parliament, the prosecutor, the Minister of the Interior or police officers. In the particular circumstances of the case and in view of his position as a senior official of the Government in office, the Court considered that the Minister of the Interior had been under an obligation to take the necessary precautions to avoid any confusion as to the scope of his remarks on the conduct and results of the operation.

*On the issue of the non-intervention of the executive or the legislature in a case pending before the courts, see also, among others: [Schuesser v. Switzerland](#), judgment of 4 December 1979; [Beaumartin v. France](#), judgment of 24 November 1994; [Daktaras v. Lithuania](#), judgment of 10 October 2000; [Sovtransavto Holding v. Ukraine](#), judgment of 25 July 2002; [Mosteanu and Others v. Romania](#), judgment of 26 November 2002; [Filippini v. San Marino](#), decision of 26 August 2003; [Y.B. and Others v. Turkey](#), judgment of 28 October 2004.*

### ***No intervention by parties to the dispute***

#### **Holm v. Sweden**

25 November 1993

The applicant, an economist who, at the material time, was employed by the Swedish Federation of Industries, complained that a libel action, brought by him against the author and the publisher of a book, had not been determined by an independent and impartial tribunal on account of the political nature of the case and, in particular, of the participation of five active members of the Swedish Social Democratic Workers Party ("SAP") in the jury at the District Court.

The Court held that there had been a **violation of Article 6 § 1** of the Convention, finding that the independence and impartiality of the District Court had been open to doubt and that the applicant’s fears in this respect had been objectively justified. The Court noted, in particular, that the fact that the defendants had been given benefit of certain safeguards, typical of a criminal trial involving a jury, not available to the applicant as a private prosecutor, had not as such constituted a legitimate reason to fear a lack of independence and impartiality. However, there were links between the defendants and the jurors who had been challenged by the applicant which could give rise to misgivings as to the jurors’ independence and impartiality (one of the defendants, the publishing house, was indirectly owned by SAP, and the other was employed by that company and had been ideological adviser to SAP). Furthermore, the impugned passages of the book were clearly of political nature and undoubtedly raised matters of concern to the SAP. Lastly, since the Court of Appeal’s jurisdiction, like that of the District Court, had been limited by the terms of the jury’s verdict, the defect in

the proceedings before the latter court could not have been cured by an appeal to the former.

### **Thaler v. Austria**

3 February 2005

The applicant, who was a doctor at the time, brought two sets of doctor's fee proceedings against the Tyrol Regional Health Insurance Board. He claimed, inter alia, that the rate for doctor's fees, which was determined by a general agreement between the Association of Social Insurance Boards and Tyrol Regional Health Insurance Board, was too low. His case was dismissed by the Regional Appeals Commission and his further complaint that the Regional Appeals Commission was not independent was dismissed by the Constitutional Court. The applicant claimed that the Regional Appeals Commission could not be regarded as an independent and impartial tribunal.

The Court held that there had been a **violation of Article 6 § 1** of the Convention. It noted in particular that the assessors appointed to the Regional Appeals Commission were nominated by and had close links with the two bodies which had drawn up the general agreement at issue. In the first set of proceedings, the mere fact that the two bodies had appointed the assessors to the Regional Appeals Commission was in itself sufficient to justify the applicant's fears about the Commission's lack of independence and impartiality. In the second set of proceedings, the two assessors appointed by the Association of Social Insurance Boards were also senior officials of the Tyrol Regional Health Insurance Board which must have aggravated the applicant's fears. Nor was the lack of independence or impartiality of the Regional Appeals Board remedied on appeal; its decision was not subject to review by a judicial body, an appeal to the administrative court being excluded by law and the jurisdiction of the constitutional court being confined to questions of constitutional law.

### **Beg S.p.a. v. Italy**

20 May 2021

The case concerned the arbitration of a dispute involving a hydroelectric-power agreement for power generation in Albania involving the applicant company and ENELPOWER, a company which had been spun off from ENEL, the former State power company. It related to, in particular, the impartiality of the arbitration panel, as one of its members (N.I.) had been on the board of ENEL and had worked as that company's lawyer.

The Court held that there had been a **violation of Article 6 § 1** of the Convention on account of the lack of impartiality of the arbitration panel in the present case. It noted in particular that N.I. had been acting as ENEL's lawyer when appointed arbitrator, and that that company had owned 100% of ENELPOWER and had had close ties at that time. In the light also of N.I.'s having previously been vice-chairman and on the board of ENEL, the Court considered that the applicant company's fears concerning the impartiality of N.I. had been objectively justified.

### ***Military criminal courts***

#### **İbrahim Gürkan v. Turkey**

3 July 2012

The applicant was convicted by a military criminal court, during his military service, for wilfully disobeying a superior. He alleged that his case had not been heard by an independent tribunal because the court was made up of a military officer with no legal background and two military judges.

The Court held that there had been a **violation of Article 6 § 1** of the Convention, finding that the military criminal court that had convicted the applicant could not be considered to have been independent and impartial. Noting in particular that participation of lay judges as such was not contrary to Article 6 of the Convention, the Court did not consider that the military officer's lack of legal qualifications had hindered his independence or impartiality. However, he was a serving officer who remained in the service of the army and was subject to military discipline. He had also been appointed to

the bench by his hierarchical superiors and did not enjoy the same constitutional safeguards as the other two military judges.

See also: [Önen v. Turkey](#), decision (inadmissible) of 10 February 2004.

### **No influence from within the justice system**

#### **Agrokompleks v. Ukraine**

6 October 2011

This case concerned the insolvency proceedings initiated by a private company against the biggest oil refinery in Ukraine, in an attempt to recover its outstanding debts. The applicant company complained in particular about the unfairness of the insolvency proceedings, alleging that the domestic courts had not been independent or impartial given the intense political pressure surrounding the case, the State authorities having a strong interest in its outcome.

The Court held that there had been a **violation of Article 6 § 1** of the Convention as regards the lack of independence and impartiality of the domestic courts. It noted in particular that, as confirmed by documentary evidence, various Ukrainian authorities had intervened in the judicial proceedings on a number of occasions. The Court also recalled that it had already condemned in the strongest terms attempts by non-judicial authorities to intervene in court proceedings, considering them to be incompatible with the notion of an “independent and impartial tribunal”. Admittedly, given the fact that the proceedings in the present case had concerned the insolvency of what was, at the time, the country’s biggest oil refinery and in which the State was the major shareholder, it was natural that the proceedings had attracted the State authorities’ close attention. It was, however, unacceptable that the authorities had not confined themselves to passive monitoring of the court proceedings but that they had blatantly interfered. The Court emphasised that the scope of the State’s obligation to ensure a trial by an independent and impartial tribunal was not limited to the judiciary, but also implied obligations on any other State authority to respect and abide by the judgments and decisions of the courts. Judicial independence further demanded that individual judges be free from undue influence, including from within the judiciary. The fact that, in the present case, the president of the Higher Arbitration Court had given direct instructions to his deputies to reconsider the court’s ruling by which it had rejected the application of the biggest oil refinery in Ukraine for the revision of the amount of its debt had therefore been contrary to the principle of internal judicial independence.

See also: [Parlov-Tkalčić v. Croatia](#), judgment of 22 December 2009.

## Objective guarantees as to the career of judges

### ***Appointments or dismissals by the executive or legislature***

#### **Filippini v. San Marino**

26 August 2003 (decision on the admissibility)

The applicant, who was prosecuted for defamation, was sentenced to a fine. He claimed that the fact that the San Marino judges were appointed by Parliament meant that his case could not be examined by an independent and impartial tribunal.

The Court declared the applicant’s complaint **inadmissible** as being manifestly ill-founded, finding that political sympathies, which may play a part in the process of appointing judges, could not in themselves give rise to legitimate doubts as to their independence and their impartiality. The Court noted in particular that the fact that the judges were elected by Parliament did not affect their independence if it was clear from their status that, once appointed, they were not subject to any pressure and received no instructions from the Parliament and that they acted in complete independence. The San Marino law in question defined the status of the judges in that sense and the sole fact that the judges were appointed by Parliament did not justify the conclusion that Parliament issued instructions to the judges in the context of their judicial powers. In the present case, there was no objective reason to suspect that the judges dealing with the

matter had not acted consistently with their legal status. Lastly, the applicant had not alleged that the judges concerned had acted under instructions or showed bias.

### **Clarke v. the United Kingdom**

25 August 2005 (decision on the admissibility)

This case concerned the alleged lack of independence and impartiality of district and circuit judges in proceedings against the Lord Chancellor's Department. Judgment had been given against the applicant in an action he had brought against a local authority and an insurance company, and costs had been ordered against him. The applicant never met the judgment debt and he was declared bankrupt. He subsequently brought proceedings against the Lord Chancellor's Department in respect of a form which the courts had supplied him in his original action which he claimed had misled him.

The Court declared the applicant's complaint **inadmissible** as being manifestly ill-founded. It noted in particular that the central question was whether the district and circuit judges which had determined the applicant's action at first and second instance had been independent and impartial, as they had been appointed by the Lord Chancellor. In the present case, the Court accepted that the manner of appointment of both these judges had been compatible with the requirements of the Convention. Moreover, there being no hierarchical or organisational connection between the judges and the Lord Chancellor's Department, there had been no reason for concern or risk of any outside pressures for these judges to decide cases in a particular way. Furthermore, concerning the subjective impartiality test, there had been no claim in the case that either judge had been animated by personal prejudice or bias. Lastly, as to whether there were any elements which could give rise to an objective appearance of lack of independence, although the Lord Chancellor had power to remove circuit and district judges, any such removal was subject to judicial review. Moreover, there had been no cases where the power of removal had affected impartiality, and, in fact, practically no instances of removal of district or circuit judges had existed as such. Thus, an objective observer would have had no cause for concern about the removability of a judge in the circumstances of the present case.

### **Sacilor-Lormines v. France**

9 November 2006

This case concerned the unfairness of proceedings before the *Conseil d'État* due to the presence of a certain member of that body, who was then appointed General Secretary of the Ministry of the Economy, Finance and Industry, on the bench which rendered a judgment concerning a dispute between the applicant company and this Ministry.

The Court held that there had been a **violation of Article 6 § 1** of the Convention in respect of the right to an independent and impartial tribunal, on account of the applicant company's objectively well-founded doubts concerning the *Conseil d'État* formation which had delivered the judgment in question. The Court was of the opinion that the impugned appointment had been capable of casting doubt on the impartiality of the *Conseil d'État*, as during the proceedings in question, or even some time before, one of the members of the formation hearing the case had been approached about taking up a senior position in the very ministry which had been opposing the applicant company in a large number of significant disputes.

See also, among others: **Brudnicka and Others v. Poland**, judgment of 3 March 2005; **Zolotas v. Greece**, judgment of 2 June 2005; **Majorana v. Italy**, decision of 26 May 2005; **Flux (no. 2) v. Moldova**, judgment of 3 July 2007.

### **Pending applications**

#### **Żurek v. Poland (no. 39650/18)**

Application communicated to the Polish Government on 14 May 2020

This case concerns the premature termination of a judge's mandate as a member of the National Council of the Judiciary ("NCJ"), the constitutional organ in Poland which safeguards the independence of courts and judges, his dismissal as spokesperson for



that organ, and the alleged campaign to silence him. The applicant alleges in particular that he was denied access to a tribunal and that there was no procedure, judicial or otherwise, to contest the premature termination of his mandate.

The Court gave notice of the application to the Polish Government and put questions to the parties under Article 6 § 1 (right to a fair trial), Article 13 (right to an effective remedy) and Article 10 (freedom of expression) of the Convention.

**Sobczyńska and Others v. Poland (nos. 62765/14, 62769/14, 62772/14 and 11708/18)**

Applications communicated to the Polish Government on 14 May 2020

This case concerns the Polish President's refusal to appoint the applicants to vacant judicial posts in various courts in Poland. The applicants argue that they met the legal conditions in force at the relevant time, and complain about the administrative courts' and the Constitutional Court's refusal to examine their appeals, declining jurisdiction in that sphere.

The Court gave notice of the applications to the Polish Government and put questions to the parties under Article 6 § 1 (right to a fair trial), Article 8 (right to respect for private and family life) and Article 13 (right to an effective remedy) of the Convention.

**Brodowiak and Dżus v. Poland (nos. 28122/20 and 48599/20), Biliński v. Poland (no. 13278/20), Pionka v. Poland (no. 26004/20) and Juszczyszyn v. Poland (no. 35599/20)**

Applications communicated to the Polish Government on 30 April 2021

These applications concern various aspects of the reform of the judicial system in Poland.

The Court gave notice of the applications to the Polish Government and put questions to the parties under, in particular, Article 6 § 1 (right to a fair trial) of the Convention.

**Tuleya v. Poland (no. 2) (no. 51751/20)**

Application communicated to the Polish Government on 16 July 2021

This application concerns the suspension and lifting of immunity of a well-known Regional Court judge and the ensuing proceedings.

The Court gave notice of the application to the Polish Government and put questions to the parties under Article 6 § 1 (right to a fair trial), Article 8 (right to respect for private life) and Article 10 (freedom of expression) of the Convention.

***Freedom of judges in their adjudicatory duties***

**Pabla Ky v. Finland**

22 June 2004

The applicant company, which was running a restaurant, brought civil proceedings against the owner of the restaurant premises, after having paid a rental increase to cover renovation work which was not completed according to plan. It complained that the court of appeal which sat in his civil proceedings was not independent or impartial since one of the judges was a Member of the Finnish Parliament.

The Court held that there had been **no violation of Article 6 § 1** of the Convention, finding that the applicant's fear as to a lack of independence and impartiality of the Court of Appeal, due to the participation of an expert member who was also a Member of Parliament, could not be regarded as being objectively justified. The Court noted in particular that there was no indication that the judge who was a Member of the Parliament was actually, or subjectively, biased against the applicant when sitting in the Court of Appeal in his case. Nor was the Court persuaded that the mere fact that he was a member of the legislature at the time when he sat on the applicant's appeal was sufficient to raise doubts as to the independence and impartiality of the Court of Appeal. While the applicant relied on the theory of separation of powers, the principle was not decisive in the abstract.

### **Thiam v. France**

18 October 2018

This case concerned criminal proceedings brought against the applicant, in the course of which a former President of the French Republic applied to join the proceedings as a civil party. The applicant alleged in particular that the fact that the President of the Republic had joined in the proceedings as a civil party had infringed the right to an independent and impartial court.

The Court held that there had been **no violation of Article 6 § 1** of the Convention in the applicant's case, finding that the intervention of a former President of the French Republic as a civil party in the criminal proceedings against the applicant had not created an imbalance in the parties' rights and in the conduct of the proceedings. It noted in particular that the participation in the 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, after examining the manner in which judges were appointed, their statutory condition and the particular circumstances of the case, it saw no reason to conclude that the judges called upon to decide in the applicant's case were not independent.

### ***Security of judicial tenure***

### **Baka v. Hungary**

23 June 2016 (Grand Chamber)

This case concerned the premature termination of the mandate of the applicant, President of the Hungarian Supreme Court, following his criticism of legislative reforms and the fact that he was unable to challenge that decision before a court. His six-year term of office was brought to an end, three and a half years before its normal date of expiry, through the entry into force of the Fundamental Law (the new Constitution), which provided for the creation of the *Kúria*, the highest court in Hungary, to succeed and replace the Supreme Court.

The Court held that there had been a **violation of Article 6 § 1** of the Convention, finding that Hungary had impaired the very essence of the applicant's right of access to a court. It noted in particular that the premature termination of the applicant's term of office had not been reviewed by an ordinary tribunal or by another body exercising judicial powers, nor was it open to review. The Court considered that this lack of judicial review had resulted from legislation whose compatibility with the requirements of the rule of law was doubtful. The Court also emphasised 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, were attaching to procedural fairness in cases involving the removal or dismissal of judges, including intervention by an authority which was independent of the executive and legislative powers in respect of every decision affecting the termination of a judge's office.

### **Broda and Bojara v. Poland**

29 June 2021

This case concerned the applicants' complaint that they did not have any remedy allowing them to challenge the decisions of the Minister of Justice to put a premature end to their term of office as vice-presidents of the Kielce Regional Court. The applicants alleged in particular that their removal had been unlawful and arbitrary and that there had been no specific judicial remedy enabling them to challenge the decision.

The Court held that there had been a **violation of Article 6 § 1** of the Convention in the present case. As the premature termination of the applicants' term of office as court vice-presidents had not been examined either by an ordinary court or by another body exercising judicial duties, the Court found that the respondent State had infringed the very essence of the applicants' right of access to a court. The Court emphasised, in particular, the importance of safeguarding the independence of the judiciary and respect for procedural fairness in cases concerning the careers of judges. It observed that the national legal framework applicable to the applicants' removal did not clarify the

conditions in which the heads of a court could be removed from office, by way of exception to the principle that a judge should be guaranteed security of tenure during his or her term of office. In addition, almost all the powers in such matters were concentrated in the hands of the representative of the executive, and the National Council of the Judiciary, in particular, was excluded from the process. The Court further noted that the applicants had not been heard or informed of the reasons for the ministerial decisions. Lastly, there had been no review of those removal decisions by a body that was independent of the Ministry of Justice.

### **Bilgen v. Turkey**

9 March 2021

This case concerned a senior judge at the Ankara Regional Administrative Court who had been transferred without his consent to another court in a lower judicial district by a decree of the High Council of Judges and Prosecutors that had not been subject to judicial review. The applicant complained of his having been denied the possibility of judicial review of the dismissal of his application for review of the decision to transfer him to another court.

The Court held that there had been a **violation of Article 6 § 1** of the Convention, finding that, in the present case, the applicant's lack of access to a court, for an important career matter, had not pursued a legitimate aim. The Court stressed, in particular, the importance of separation of powers and the independence of the judiciary. It also noted, among other things, the international concern about the improper use of the transfer mechanism against judges in Turkey. Ultimately, what was at stake was trust in the judiciary and personal independence of judges.

See also, among others: **Sacilor-Lormines v. France**, judgment of 9 November 2006; **Oleksandr Volkov v. Ukraine**, judgment of 9 January 2013; **Denisov v. Ukraine**, judgment (Grand Chamber) of 25 September 2018; **Ramos Nunes de Carvalho e Sá v. Portugal**, judgment (Grand Chamber) of 6 November 2018.

***No civil or criminal liability of judges except in cases of malicious intent or serious negligence***

### **Sergey Zubarev v. Russia**

5 February 2015

This case concerned the national courts' refusal to accept a defamation claim brought by the applicant, a lawyer, against a judge on grounds of judicial immunity. The judge in question had asked the Bar Association to institute disciplinary proceedings against the applicant for his conduct in civil proceedings, notably alleging that he had caused delays in a set of civil proceedings in which he was one of the representatives due to absence without good reason. The courts subsequently refused to accept the applicant's claim for consideration because of the judge's judicial immunity from liability in her professional capacity as presiding judge of the civil case.

The Court held that there had been **no violation of Article 6 § 1** of the Convention, finding that, in the exercise of their responsibility to regulate the conduct of the civil proceedings, the national authorities had not exceeded their margin of appreciation in limiting the applicant's access to a court, and 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. The Court noted in particular that judicial immunity was a legal practice that existed in some form in many States Parties to the Convention. It had been established for the benefit of the public, in whose interest it was that the judges should be at liberty to exercise their functions with independence and without fear of consequences, while litigants could protect themselves from judicial errors by taking their complaints to an appeal court without resorting to suits for personal liability. Accordingly, the Court accepted that in the present case immunity from liability accorded to the judge in connection with her actions in a professional capacity as a presiding judge in a civil case

could be regarded as having a legitimate aim namely pursuing the interests of the administration of justice.

## Doctrine of appearances

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### Impression of independence

#### **Findlay v. The United Kingdom**

25 February 1997

The applicant, who served in the army, complained that the martial court, that had sentenced him to two years' imprisonment, demoted him to the rank of guardsman and dismissed him from the army, had not been an independent and impartial tribunal, because, inter alia, all the officers appointed to it were directly subordinate to the convening officer who also performed the role of prosecuting authority.

The Court held that there had been a **violation of Article 6 § 1** of the Convention, finding that, on account in particular of the central role played by the convening officer in the organisation of the court martial, the applicant's misgivings about the independence and impartiality of the tribunal which had dealt with his case had been objectively justified. It noted in particular that the convening officer had played a central role in the applicant's prosecution and had been closely linked to the prosecuting authorities, in that inter alia he had decided which charges should be brought, appointed the members of the court-martial board and the prosecuting and defending officers and secured the attendance of witnesses at the hearing. The question therefore arose whether the members of the court-martial were sufficiently independent of him and whether the organisation of the trial offered adequate guarantees of impartiality. In this respect, the Court noted that all the members of the court-martial were military personnel subordinate in rank to the convening officer who, as confirming officer, had also the power to vary the sentence imposed.

#### **Incal v. Turkey**

9 June 1998

The applicant, who was convicted for participating in the preparation of a leaflet inciting to hatred and hostility, submitted in particular that he had not had a fair trial before the National Security Court which, he submitted, could not be regarded as an independent and impartial tribunal.

The Court held that there had been a **violation of Article 6 § 1** of the Convention, finding that the applicant could legitimately fear that because one of the judges of the National Security Court was a military judge it might allow itself to be unduly influenced by considerations which had nothing to do with the nature of his case, and that he therefore had legitimate cause to doubt the independence and impartiality of the National Security Court. It noted in particular that there could have been some doubt as to the independence and impartiality of the State Security Court, as it was partly made up of army officers, whereas the applicant was a civilian. In particular, the Court attached great importance to the fact that the applicant, a civilian, had had to appear before a court composed, even if only in part, of members of the armed forces. It also noted that, in this respect, even appearances may be of a certain importance. What was at stake was the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. In deciding whether there is a legitimate reason to fear that a particular court lacks independence or impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified.

See also: **Oleksandr Volkov v. Ukraine**, judgment of 9 January 2013.

## Concurrent judicial functions in the same case

### Ettl and Others v. Austria

23 April 1987

The applicants were farmers whose land had been the subject of consolidation proceedings. According to them, the agricultural authorities before which the relevant proceedings were held, each of which consisted of three judges and five civil servants, did not constitute independent and impartial tribunals.

The Court held that there had been **no violation of Article 6 § 1** of the Convention, finding that the Provincial and Supreme Land Reform Boards, to which the applicants to which the applicants had appealed against a number of consolidation decisions affecting their land, were independent and impartial tribunals. The independence and impartiality of the judge members, it noted, were not in issue. As to the civil servants, their presence did not in itself contravene Article 6 § 1 of the Convention: the Constitution and the relevant legislation made provision for their independence and prohibited public authorities from giving them any instructions concerning their judicial duties. Moreover, the applicants did not claim that the civil servants who heard their case had received any such instructions as to the matters in dispute. The boards were independent not only of the executive but also of the parties to the case, namely the owners of the land concerned. Given this situation, the hierarchical links which existed in other contexts between civil servants from the same division within the Provincial or Federal civil service to which, they belonged were of no consequence either. Nor could the membership of the civil servants who sat on account of their experience of agronomy, forestry and agriculture give rise to doubts about the independence and impartiality of the boards. They were experts in their fields, and such experts are needed in cases concerning land consolidation, which is an operation that raises issues of great complexity.

### McGonnell v. the United Kingdom

8 February 2000

In proceedings concerning the use of a farmland packing shed, the applicant complained in particular of the lack of independence and impartiality of the Royal Court of Guernsey on account of the presence of the Bailiff as a judge of the Royal Court, the latter being in addition vested with legislative and executive functions in Guernsey.

The Court held that there had been a **violation of Article 6 § 1** of the Convention in the present case. It observed in particular that there was no question in the case of actual bias on the part of the Bailiff: the case turned on whether the Bailiff had the required appearance of independence, or the required objective impartiality. In applying this test to the case, the Court noted that the Bailiff had had initial personal, direct involvement in the case in that he presided over the States of Deliberation when the relevant Development Plan was adopted. He was then the President of the Royal Court which decided the applicant's planning appeal. The Court found that this accumulation of functions gave rise to doubts as to the impartiality of the Bailiff when sitting in the Royal Court.

### Morel v. France

6 June 2000

This case concerned the role of the insolvency judge, first in judicial reorganisation proceedings and later in liquidation proceedings concerning companies owned by the applicant. The applicant alleged in particular a lack of impartiality by the insolvency judge in the commercial Court on the ground that insolvency judges not only intervened during the period when a company was under observation during the judicial reorganisation phase but subsequently presided over the court dealing with liquidation proceedings.

The Court held that there had been **no violation of Article 6 § 1** of the Convention, finding that the applicant's concerns had not been objectively justified. It noted in particular that the mere fact that a judge had already taken pre-trial decisions could not



by itself be regarded as justifying concerns about his impartiality. What mattered was the scope and nature of the measures taken by the judge before the trial. Likewise, the fact that the judge had detailed knowledge of the case file did not entail any prejudice on his part that would prevent his being regarded as impartial when the decision on the merits was taken. Nor did a preliminary analysis of the available information mean that the final analysis had been prejudged. What was important was for that analysis to be carried out when judgment was delivered and to be based on the evidence produced and argument heard at the hearing. In the applicant's case, the Court did not find any objective grounds for believing that the nature and extent of the insolvency judge's duties during the observation period (which were intended to ensure the day to day management of the companies) gave rise to any prejudice on the – separate – issue which the Commercial Court had to decide regarding the viability of the applicant's plan for the companies continued trading at the end of the observation period and of the financial guarantees produced at the hearing.

### **Wettstein v. Switzerland**

21 December 2000

The applicant complained of the lack of impartiality of two judges (lawyers acting as part-time judges) in administrative proceedings to which he was a party. The judges had acted either directly as lawyers, or through their office partner, against the applicant in separate proceedings.

The Court held that there had been a **violation of Article 6 § 1** of the Convention as regards the requirement of an impartial tribunal. It noted in particular that, while there was no material link between the applicant's case and the separate proceedings in which the two lawyers had acted as legal representatives, there was in fact an overlap in time, since the latter proceedings were still pending before the Federal Court when the former were instituted and indeed only ended two months before the Administrative Court's judgment. The applicant could therefore have reason for concern that the judge in question would continue to see him as the opposing party and this situation could have raised legitimate fears that the judge was not approaching the case with the requisite impartiality. The fact that another colleague had represented the applicant's opponent in further proceedings, while of minor relevance, could be seen as confirming these fears.

See also, among others: **Pabla Ky v. Finland**, judgment of 22 June 2004; **Mežnarić v. Croatia**, judgment of 15 July 2005; **Švarc and Kavnik v. Slovenia**, judgment of 8 February 2007.

### **Fazli Aslaner v. Turkey**

4 March 2014

This case concerned administrative proceedings in which judges at the Turkish Supreme Administrative Court had been involved on more than one occasion, in the context of successive appeals on points of law. The applicant complained that some of the judges who had sat on the bench of the Division of the Supreme Administrative Court which had heard and determined his case had also sat in the General Assembly. He submitted that those judges could not have been impartial because they had already given their opinion on the merits of the case.

The Court held that there had been a **violation of Article 6 § 1** of the Convention, finding that the applicant's concerns regarding the impartiality of the General Assembly as it was composed in the instant case could be regarded as objectively justified. It noted in particular that the fact that certain judges had previously formed an opinion did not in itself suffice to conclude that the impartiality of the general assembly of administrative divisions had been affected. Equally, the Court considered in the instant case that the number or (relatively low) proportion of judges concerned by the issue of objective impartiality was not decisive, and that quantitative considerations did not have an impact on examination of the case, given that there had existed no serious ground rendering absolutely necessary the participation of the three judges in question on the bench with voting capacity. In addition, one of the three judges, in her capacity as

deputy president of the Supreme Administrative Court, had presided over the assembly of administrative divisions, and had accordingly led the discussions during the deliberations, which amounted to an additional circumstance undermining the appearance of impartiality.

See *also*, among others: [Toziczka v. Poland](#), judgment of 24 July 2012; [Kamenos v. Cyprus](#), judgment of 31 October 2017.

### **Dual functions of certain supreme administrative courts**

#### **Procola v. Luxembourg**

28 September 1995

The applicant, a dairy constituted as an agricultural association, complained in particular that the Judicial Committee of the *Conseil d'État* was not independent and impartial, on the ground that some of the members of the Committee who had ruled on its application for judicial review of ministerial orders fixing the milk quantities had previously given their opinion on the lawfulness of the impugned provisions.

The Court held that there had been a **violation of Article 6 § 1** of the Convention, finding that the applicant had had legitimate grounds for fearing that the members of the Judicial Committee had felt bound by the opinion previously given, and that that doubt in itself, however slight its justification, was sufficient to vitiate the impartiality of the tribunal in question. The Court noted in particular that four members of the *Conseil d'État* had carried out both advisory and judicial functions in the same case. In the context of an institution such as Luxembourg's *Conseil d'État* the mere fact that certain persons had successively performed these two types of function in respect of the same decisions was capable of casting doubt on the institution's structural impartiality.

#### **Kress v. France**

7 June 2001 (Grand Chamber)

This case concerned the presence of the Government Commissioner (*commissaire du gouvernement*) at the deliberations of the *Conseil d'État*. The applicant submitted that she had not had a fair trial in the administrative courts. She complained in particular that the fact that the Government Commissioner had been present at the trial bench's deliberations – which were held in private – when he had earlier submitted that her appeal should be dismissed, had cast doubt on the court's impartiality.

The Court held that there had been a **violation of Article 6 § 1** of the Convention on account of the Government Commissioner's participation in the deliberations of the trial bench, finding that, irrespective of the Government Commissioner's acknowledged objectivity, and despite the fact that he did not vote, his participation in the deliberations could afford him an additional opportunity to bolster his submissions in favour of one of the parties in the privacy of the deliberations room. In particular, the Court drew attention once again to the public's increased sensitivity to the fair administration of justice and again referred to the importance to be attached to appearances. Admittedly, as the last person to have seen and studied the file, the Government Commissioner was able to answer any questions put by the judges during the deliberations. However, that purely technical assistance given to the trial bench was to be weighed against the higher interest of the litigant, who had to have a guarantee that the Government Commissioner would not be able, through his presence at the deliberations, to influence their outcome. That guarantee was not afforded by the French system at the time.

See *also*: [Martinie v. France](#), judgment (Grand Chamber) of 12 April 2006.

#### **Kleyn and Others v. the Netherlands**

6 May 2003 (Grand Chamber)

See above, under "Independence criteria" > "Tribunal established by law".

### Sacilor-Lormines v. France

9 November 2006

See above, under “Statutory independence” > “Objective guarantees as to the career of judges” > “Appointments or dismissals by the executive or legislature”.

### UFC Que Choisir Côte d’Or v. France

30 June 2009 (decision on the admissibility)

In proceedings concerning a high-speed railway line, the applicant association denounced in particular the lack of independence and impartiality of the *Conseil d’État*. In particular, it complained about the lack of (structural) impartiality of the high court resulting from the fact that the *Conseil d’État* had both advisory and judicial powers, as well as the principle of “dual assignment”. Members of the court would thus have been led to examine administrative acts on which they had previously given an opinion.

The Court declared the applicant association’s complaints **inadmissible**, as being manifestly ill-founded, finding that its fears regarding the independence and impartiality of the section that had decided its case could not be regarded as objectively justified. In the Court’s view, the issue was whether, in the circumstances of the case, the *Conseil d’État* possessed the required appearance of independence or the required objective impartiality, it being understood that these questions had to be examined together, the concepts of independence and objective impartiality being closely linked. In this connection, the Court referred to its case-law, and more particularly to the *Sacilor-Lormines v. France* judgment (see above), in which it had stressed that the fact that the *Conseil d’État* was organically close to the executive was not sufficient to establish a lack of independence, and held that the arrangements for the appointment and career development of the members of the *Conseil d’État* were compatible with the requirements of Article 6 § 1. The Court also pointed out, firstly, that it was not for it to rule in the abstract on the question whether the advisory powers of the *Conseil d’État* were compatible with its judicial functions and the requirements of independence and impartiality which they implied, and secondly, that the principle of the separation of powers was “not determinative in the abstract”. It was up to it to determine in each case whether the opinion issued by the high court had constituted “a kind of prejudice” to the judgment under review, “leading to doubt as to the ‘objective’ impartiality of the formation of the judgment due to the successive exercise of advisory and judicial functions”. In the present case, however, on the latter point and in the light of the parties’ observations, the Court held that it was established that no member of the bench hearing the application for annulment of the decree in question had previously participated in the bench which had delivered the opinion on that text.

### **Judicial or administrative role of public prosecutors**

### Vasilescu v. Romania

22 May 1998

This case concerned the continued retention of valuables unlawfully seized by the *miliția*, and the impossibility for the applicant to have access to an independent tribunal competent to order their return. The Romanian Supreme Court of Justice had held that, because her application for restitution had been tantamount to an appeal against a criminal investigation measure, the State Counsel had sole jurisdiction to deal with it.

The Court held that there had been a **violation of Article 6 § 1** of the Convention, finding that the State Counsel could not be considered an independent tribunal according to the Convention’s criteria and that the applicant had therefore not had access to a court. The Court noted in particular that, even where, as in the instant case, the State Counsel for a county exercised powers of a judicial nature, he acted as a member of the Procurator-General’s department, subordinated firstly to the Procurator-General and then to the Minister of Justice. Having reiterated that only an institution that had full jurisdiction and satisfied a number of requirements, such as independence of the executive and also of the parties, merited the description “tribunal” within the meaning

of Article 6 § 1, it concluded that neither the State Counsel nor the Procurator-General met those requirements.

### **Medvedyev and Others v. France**

29 March 2010 (Grand Chamber)

The applicants in this case, who were crew-members of a cargo vessel registered in Cambodia, had been arrested on the high seas after the interception of their ship by the French authorities on suspicion of drug trafficking, before being presented to an investigating judge when their ship reached France. They complained that they had been deprived of their liberty unlawfully and that it had taken too long to bring them before a judge or other officer authorised by law to exercise judicial power.

The Court held that there had been a **violation of Article 5 § 1** (right to liberty and security) and **no violation of Article 5 § 3** (right to be brought promptly before a judge or other officer authorised by the law to exercise judicial power) of the Convention in respect of the applicants. It noted in particular that the “judicial officer” must offer the requisite guarantees of independence from the executive and the parties, which precludes his subsequent intervention in criminal proceedings on behalf of the prosecuting authority, and he or she must have the power to order release, after hearing the individual and reviewing the lawfulness of, and justification for, the arrest and detention.

### **Moulin v. France**

23 November 2010

The applicant, a lawyer, was arrested and placed in police custody on suspicion of breaching the secrecy of judicial investigations concerning a case of drug trafficking. At the end of her detention in police custody, she was brought before a deputy public prosecutor, who ordered that she be held in prison with a view to her subsequent transfer to the investigating judges. The latter brought charges and she was remanded in custody by a liberties and detention judge. She alleged that she had not been brought promptly before a judge or other officer authorised by law to exercise judicial power.

The Court held that there had been a **violation of Article 5 § 3** (right to be brought promptly before a judge or other officer authorised by the law to exercise judicial power) of the Convention in respect of the applicant. It noted in particular that deputy prosecutors, who were not irremovable, were members of the *ministère public* (prosecuting authorities) under the authority of the Minister of Justice, a member of government, and therefore that of the executive. The hierarchical relationship between the Minister of Justice and the prosecuting authorities was at the time a subject of debate in France and it was not for the Court to take a stance in a debate which was a matter for the domestic authorities. For its own purposes, the Court took the view that, owing to their status, public prosecutors in France did not satisfy the requirement of independence from the executive which was, like impartiality, one of the guarantees inherent in the autonomous notion of “officer”. Moreover, the law entrusted the prosecuting authorities with the conducting of criminal proceedings on behalf of the State. The prosecuting authorities were represented in the form of an indivisible body at each first-instance and appellate criminal court. However, the requisite guarantees of independence from the executive and the parties precluded the officer, in particular, from intervening against the accused in the subsequent criminal proceedings. It was of little consequence that, in the present case, the deputy public prosecutor served in a different judicial district from that of the two investigating judges; in a previous case, the fact that a deputy public prosecutor, after extending deprivation of liberty, had transferred the case-file to a different prosecuting authority, had not been considered by the Court to be a convincing argument in this connection. Accordingly, the deputy public prosecutor, a representative of the *ministère public*, did not offer the guarantees of independence required in order to be described as a judge or other officer authorised by law to exercise judicial power within the meaning of that provision.

## Relationship with the other Convention rights

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### Principle of impartiality

#### **De Cubber v. Belgium**

26 October 1984

The applicant alleged in particular that the criminal court that had given judgment on the charges against him had not constituted an impartial tribunal, since one of the judges had previously acted as investigating judge in the same case.

The Court held that there had been a **violation of Article 6 § 1** of the Convention, finding that the impartiality of the criminal court was capable of appearing to the applicant to be open to doubt. Although the Court itself had no reason to doubt the impartiality of the member of the judiciary who had conducted the preliminary investigation, it recognised that his presence on the bench provided grounds for some legitimate misgivings on the applicant's part. In the present case, the Court recalled that a restrictive interpretation of Article 6 § 1, notably in regard to observance of the fundamental principle of the impartiality of the courts, would not be consonant with the object and purpose of the provision, bearing in mind the prominent place which the right to a fair trial holds in a democratic society within the meaning of the Convention.

#### **Ramos Nunes de Carvalho e Sà v. Portugal**

6 November 2018 (Grand Chamber)

This case concerned disciplinary proceedings brought against a judge, resulting in the imposition of disciplinary penalties by the High Council of the Judiciary ("CSM"), and the review conducted by the Supreme Court on appeal. The applicant submitted in particular that there were objective reasons to doubt the independence and impartiality of the Judicial Division of the Supreme Court. She argued, *inter alia*, that the President of the CSM was also the President of the Supreme Court and that in the latter capacity, he or she appointed each year the members of the *ad hoc* division that examined appeals against the CSM's decisions in disciplinary cases. In such circumstances, in the applicant's submission, the *ad hoc* division was not, and could not appear to the public to be, separate from the CSM.

The Court held that there had been **no violation of Article 6 § 1** of the Convention with regard to the complaint alleging a lack of independence and impartiality on the part of the Judicial Division of the Supreme Court. It considered, in particular, that the dual role of the President of the Supreme Court was not such as to cast doubt on the independence and objective impartiality of that court in ruling on the applicant's appeals against the CSM's decisions. Furthermore, regard being had to all the specific circumstances of the case and to the guarantees aimed at shielding the Judicial Division of the Supreme Court from outside pressures, the Court found that the applicant's fears could not be regarded as objectively justified, and that the system in place for reviewing disciplinary decisions of the CSM, namely an appeal to the Judicial Division, did not breach the requirement of independence and impartiality under Article 6 § 1 of the Convention.

See *also*, among others: **Le Compte, Van Leuven and De Meyere v. Belgium**, judgment of 23 June 1981; **Langborger v. Sweden**, judgment of 22 June 1989; **Padovani v. Italy**, judgment of 26 February 1993; **Ferrantelli and Santangelo v. Italy**, judgment of 7 August 1996; **Castillo Algar v. Spain**, judgment of 28 October 1998; **Morel v. France**, judgment of 6 June 2000; **Wettstein v. Switzerland**, judgment of 21 December 2000; **Cooper v. the United Kingdom**, judgment (Grand Chamber) of 16 December 2003; **Cianetti v. Italy**, judgment of 22 April 2004; **Mancel and Branquart v. France**, judgment of 24 June 2010; **Mutu and Pechstein v. Switzerland**, judgment of 2 October 2018; **Donev v. Bulgaria**, judgment of 26 October 2021.



### ***Ethics of the judiciary***

#### **Oberschlick v. Austria (no. 1)**

23 May 1991

The applicant, a journalist, complained about his conviction for defamation of a politician. He alleged in particular that the proceedings at first and second instance, which had led to his conviction and sentence, had constituted a violation of his right to a fair trial, submitting, inter alia, that the Court of Appeal, when hearing his case in the second set of proceedings, was not an independent and impartial tribunal, as it was presided over by the same judge as in the first set and the other two appeal judges had also participated on both occasions.

The Court held that there had been a **violation of Article 6 § 1** of the Convention as regards the impartiality of the Court of Appeal. It noted in particular that a domestic rule laid down that the Court of Appeal shall not comprise, in a case like this, any judge who had previously dealt with it in the first set of proceedings, manifesting the national legislature's concern to remove all reasonable doubts as to the impartiality of that court. Accordingly the failure to abide by this rule meant that the applicant's appeal had been heard by a tribunal whose impartiality was recognised by national law to be open to doubt. In the applicant's case, the Court therefore found that, not only the President but also the other two members of the Court of Appeal should have withdrawn *ex officio*.

#### **Demicoli v. Malta**

27 August 1991

The applicant, editor of a political satirical periodical, who had been found guilty of breach of privilege by the House of Representatives concerning alleged defamation of Members of the House, submitted in particular that in the proceedings before the House he had not received a fair hearing by an independent and impartial tribunal.

The Court held that there had been a **violation of Article 6 § 1** of the Convention, finding that the impartiality of the adjudicating body in the proceedings in question would appear to be open to doubt and the applicant's fears in this connection had been justified. It noted in particular that the two Members of the House whose behaviour in Parliament had been criticised in the impugned article and who had raised the breach of privilege in the House had participated throughout in the proceedings against the accused, including the finding of guilt and (except for one of them who had meanwhile died) the sentencing.

See also, among others: **H.B. v. Switzerland (no. 26899/95)**, judgment of 5 April 2001.

### Right to respect for one's private life

#### **M.D.U. v. Italy**

28 January 2003 (decision on the admissibility)

In proceedings concerning tax offences, the applicant, who belonged to a political party, alleged in particular that the chamber of the Court of Cassation which had ruled on his appeal had not been an impartial court on account of the political opinions of judges composing the chamber which contrasted with his own.

The Court declared the complaint **inadmissible**, as being manifestly ill-founded, finding that that the situation complained of by the applicant could not in itself justify apprehensions as to the impartiality of the chamber of the Court of Cassation which had ruled on his appeal. It noted in particular that, in the present case, the fear of a lack of impartiality was based on the political opinions of two of the judges composing the chamber. Although it was true that this fact might give rise to doubts on the part of the appellant, it could not, however, be regarded as objectively justified. In particular, the Court considered that the fact that a judge had different political convictions from those of the accused could not, in itself, give rise to a conflict of interest such as to justify the withdrawal of the judge in question. In the applicant's case, however, there was no objective reason to doubt that the judges implicated had not regarded the

oath they had taken on taking office as taking precedence over any other social or political commitment.

### **Özpınar v. Turkey**

19 October 2010

The applicant in this case was removed from office as a judge by a decision of the Supreme Council of the Judiciary following a disciplinary investigation concerning, among other subjects, her alleged close relationships with several men, her appearance and her repeated lateness for work. She alleged in particular that her dismissal had been based on aspects of her private life.

The Court held that there had been a **violation of Article 8** (right to respect for private life) of the Convention, finding that the interference with the applicant's private life had not been proportionate to the legitimate aim pursued in relation to the duty of judges to exercise restraint in order to preserve their independence and the authority of their decisions. It noted in particular that the ethical duties of judges might encroach upon their private life when their conduct tarnished the image or reputation of the judiciary. In the applicant's case, however, even if certain aspects of the conduct attributed to might have warranted her dismissal, the investigation had not substantiated those accusations and had taken into account numerous actions by her 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 of adversarial proceedings before an independent and impartial supervisory body. Such safeguards were all the more important in the case of the applicant as, with her dismissal, she automatically lost the right to practise 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 testimony.

**Xhoxhaj v. Albania** (see also above, under "Independence criteria" > "Tribunal established by law")

9 February 2021

The applicant, a Constitutional Court judge who had been dismissed from office following the outcome of proceedings commenced in relation to her, as part of an exceptional process for the re-evaluation of suitability for office of all judges and prosecutors in the country, complained in particular that there had been a breach of her right to respect for private life on account of her unlawful and arbitrary dismissal from office and the lifetime ban from re-entering justice system imposed on her.

The Court held that there had been **no violation of Article 8** (right to respect for private life) of the Convention in the applicant's case. It found in particular that the dismissal from office had been proportionate and that the statutory lifetime ban on rejoining the justice system on the grounds of serious ethical violations had been consistent with ensuring the integrity of judicial office and public trust in the justice system, and thus had not breached the applicant's rights under Article 8.

See also, recently: **Samsin v. Ukraine**, judgment of 14 October 2021.

### **Pending application**

#### **Tuleya v. Poland (no. 21181/19)**

Application communicated to the Polish Government on 1 September 2020

This case originates in the new disciplinary regime for judges in Poland. The applicant, a well-known judge, alleges that seven sets of disciplinary proceedings initiated against him in 2018 have brought his reputation into dispute.

The Court gave notice of the application to the Polish Government and put questions to the parties under Article 8 (right to respect for private life), Article 13 (right to an effective remedy) and Article 10 (freedom of expression) of the Convention.

## Freedom of religion

### Pitkevich v. Russia

8 February 2001 (decision on the admissibility)

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.

The Court declared the applicant's complaint **inadmissible** as being manifestly ill-founded, 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 Court 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 favourable 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 behaviour 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.

## Freedom of expression

### *Freedom of expression for members of the judiciary*

### Albayrak v. Turkey

31 January 2008

This case concerned disciplinary proceedings against the applicant, who was working as a judge, for, among other things, reading PKK (the Kurdistan Workers' Party, an illegal armed organisation) legal publications and watching a PKK-controlled television channel. He denied all accusations, arguing that he believed in the fundamental principles of the State and served it faithfully. The applicant complained in particular that the disciplinary sanction imposed on him had infringed his right to freedom of expression.

The Court held that there had been a **violation of Article 10** (freedom of expression) of the Convention in respect of the applicant. It found, in particular, that there was no reference in the case file to suggest that the applicant's conduct had not been impartial and that the Turkish authorities had attached considerable importance to the fact that the applicant had followed or attempted to follow PKK-associated media. The Court therefore considered that the interference with the applicant's freedom of expression had not been based on sufficient reasons and had not been necessary in a democratic society.

### Eminağaoğlu v. Turkey

9 March 2021

This case concerned the imposition on a judicial officer of a disciplinary sanction (post relocation), decided by the Council of Judges and Prosecutors, on account of statements

and criticisms that he had made to the media about certain high-profile court cases. At the material time the applicant was also the Chairman of *Yarsav*, an association of judges and prosecutors.

The Court held that there had been a **violation of Article 10** (freedom of expression) of the Convention in respect of the applicant. Particularly in view of the fact that the decision-making process followed in the present case had been highly defective and had not afforded the safeguards that were indispensable to the applicant's status as a judicial officer and as the chair of an association of judges and prosecutors, it found that the impugned restrictions on the applicant's right to freedom of expression had not been accompanied by effective and adequate safeguards against abuse. The Court also held that there had been a **violation of Article 6 § 1** of the Convention in the present case, on account of the breach of the principle that a case must be examined by a tribunal established by law. It further held that there had been a **violation of Article 8** (right to respect for private life) of the Convention, as regards the use, in the context of a disciplinary investigation, of recordings of the applicant's telephone conversations that had been obtained in a criminal investigation.

### **Miroslava Todorova v. Bulgaria**

19 October 2021

This case concerned two sets of disciplinary proceedings against the applicant, who was a judge and the President of the main professional association of judges in Bulgaria (the BUJ) at the relevant time. As part of those proceedings, the Supreme Judicial Council (SJC) ordered a reduction in her salary, and then her dismissal, on the grounds that there had been delays in dealing with her cases. However, this latter sanction was set aside by the Supreme Administrative Court and the applicant was ultimately sanctioned by a two-year demotion in post. The applicant alleged, in particular, that the disciplinary proceedings had been motivated by her statements as President of the BUJ.

The Court held that there had been a **violation of Article 10** (freedom of expression) of the Convention in respect of the applicant, finding that the domestic authorities had failed to accompany their decisions with relevant and sufficient reasons to explain why the disciplinary proceedings and the sanctions imposed on the applicant had been necessary and proportionate to the legitimate aims pursued in the present case, and that these measures had not been "necessary in a democratic society". It added that this finding did not rule out the possibility of prosecuting judges for breaches of their professional duty following the exercise of their freedom of expression, provided that such action could not be suspected of constituting retaliation for the exercise of that fundamental right. In order to dispel any suspicion in this connection, the domestic authorities had to be able to establish that the proceedings in question had exclusively pursued one or more of the legitimate aims set out in the second paragraph of Article 10. The Court also held that there had been a violation of Article 18 ((limitation on the use of restrictions on rights) taken together with Article 10 of the Convention, finding that, having regard to all the facts of the case, and regardless of the fact that the applicant's dismissal had ultimately been set aside by the Supreme Administrative Court, the predominant purpose of the disciplinary proceedings against the applicant and of the sanctions imposed on her by the SJC had not been to ensure compliance with the time-limits for concluding cases, but rather to penalise and intimidate the applicant on account of her criticism of the SJC and the executive. The Court held, however, that there had been no violation of Article 6 § 1 of the Convention in the present case, seeing no evidence of a lack of independence or impartiality on the part of the Supreme Administrative Court. The Court also held that there had been a **violation of Article 18** ((limitation on the use of restrictions on rights) **taken together with Article 10** of the Convention, finding that, having regard to all the facts of the case, and regardless of the fact that the applicant's dismissal had ultimately been set aside by the Supreme Administrative Court, the predominant purpose of the disciplinary proceedings against the applicant and of the sanctions imposed on her by the SJC had not been to ensure compliance with the time-limits for concluding cases, but rather to penalise and

intimidate the applicant on account of her criticism of the SJC and the executive. The Court held, however, that there had been **no violation of Article 6 § 1** of the Convention in the present case, seeing no evidence of a lack of independence or impartiality on the part of the Supreme Administrative Court.

### **Kozan v. Turkey**

1 March 2022<sup>4</sup>

This case concerned a disciplinary sanction (reprimand) imposed on the applicant, a serving judge, for having shared in May 2015, in a private Facebook group, a press article headed “Judicial rehabilitation for closing the 17 December investigation, dismissal for conducting the investigation”, without posting any comment himself. The applicant submitted, in particular, that the reprimand had undermined his freedom to receive and impart information.

The Court held that there had been a **violation of Article 10** (freedom of expression) of the Convention, finding that the disciplinary sanction imposed on the applicant had not met any pressing social need and, consequently, had not constituted a measure that was “necessary in a democratic society”. It noted, in particular, that the press article in question was part of a debate of particular interest for members of the judiciary, since it concerned the impartiality and independence of judges vis-à-vis the executive with respect to events surrounding proceedings for suspected corruption dating from the period 17-25 December 2013 and the government’s opposition to those proceedings. The fact that a judge had shared with his colleagues certain views in the press about the independence of the justice system, and had allowed them to comment in response, had necessarily fallen within his freedom to impart or receive information in a crucial area for his professional life. The Court also observed that the Council of Judges and Prosecutors had not appropriately weighed in the balance the applicant’s freedom of expression on the one hand and his duty of discretion as judge on the other. Lastly, it reiterated that the Council was a non-judicial organ and that the proceedings before its Chamber and Plenary Assembly did not afford the safeguards of judicial review. In the present case, the Court also held that there had been a **violation of Article 13** (right to an effective remedy) of the Convention **taken together with Article 10**, finding that no judicial remedy had been available to the applicant in respect of the measure taken against him by the Council.

See *also*, among others: **Wille v. Liechtenstein**, judgment (Grand Chamber) of 28 October 1999; **Toni Kostadinov v. Bulgaria**, judgment of 27 January 2015; **Baka v. Hungary**, judgment (Grand Chamber) of 26 June 2016.

### ***Necessary restraint***

### **Buscemi v. Italy**

16 September 1999

This case concerned the repeated refusals of a Youth Court to award custody of a child to his father. The applicant complained in particular of bias on the part of the President of the Youth Court and injury to his reputation and to his family life as a result of the statements made by him to the press.

The Court held that there had been a **violation of Article 6 § 1** of the Convention, finding that the public statements made by the President of the Youth Court had been such as to objectively justify the applicant’s fears as to his impartiality. It pointed out, in particular, that the duty of impartiality required the judicial authorities to maintain maximum discretion with regard to the cases with which they deal, even where they were provoked.

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<sup>4</sup> This judgment will become final in the circumstances set out in Article 44 § 2 of the [Convention](#).



### Čivinskaitė v. Lithuania

15 September 2020

This case concerned disciplinary proceedings against the applicant, a senior prosecutor, for failing to carry out her duties properly in a high-profile investigation into the alleged sexual abuse of a child. The proceedings led to her demotion. She submitted in particular that the disciplinary proceedings against her and the administrative court decisions had not been fair because of the political and media interference in her case.

The Court held that there had been no violation of Article 6 § 1 of the Convention in respect of the applicant. It found in particular no grounds to believe that the independence and impartiality of the administrative courts had been compromised by the public statements of State officials and politicians or by media reporting on the case. Nor, furthermore, had there been anything in the case file to make the Court doubt the overall fairness of the proceedings in the Lithuanian courts.

See also: Salaman v. the United Kingdom, decision on the admissibility of 15 June 2000.

### Lavents v. Latvia

28 November 2002

The applicant, a former businessman, argued that the criminal charges against him had been examined by a court which lacked any guarantee of independence and impartiality. In particular, the national press had published statements by the President of the bench of the Regional Court dealing with the case, expressing her views on the applicant's numerous requests that she withdraw from the case and on the grounds of defence prepared by the applicant's lawyers, which she claimed not to understand.

The Court held that there had been a **violation of Article 6 § 1** of the Convention, finding that the court examining the applicant's case had not been impartial. It noted in particular that, in her statements published in the press, the President of the bench of the Regional Court dealing with the case had criticised the applicant's means of defence. She had also made predictions as to the outcome of the case and dismissed the possibility of a full acquittal. What was more, she had expressed her astonishment at the applicant's persistence in pleading not guilty to all the charges and had suggested that he proved his innocence. In the eyes of the Court, such statements did not constitute a mere negative assessment of the applicant's case but amounted to adopting a definite position on the outcome of the case, with a clear preference for finding the accused guilty. Apart from the reasons which had led the judge to express her views in that manner, the Court concluded, her statements had not been compatible with the requirements of Article 6 § 1 of the Convention and the applicant had had the strongest reasons to fear that she lacked impartiality.

### ***Criticism / defamation of judges and reputation of the judiciary***

### De Haes and Gijssels v. Belgium

24 February 1997

This case concerned a judgment against the applicants, two journalists, for defamation of *magistrats*. They applicants alleged in particular that the judgments against them had infringed their right to freedom of expression and that they had not had a fair trial by an independent and impartial tribunal.

The Court held that there had been a **violation of Article 10** (freedom of expression) of the Convention, finding that, regard being had to the seriousness of the circumstances of the case and of the issues at stake, the necessity of the interference with the exercise of the applicants' freedom of expression has not been shown, except as regards the allusion to the past history of the father of one of the judges in question. The Court reiterated in particular that the press played an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest, including those relating to the functioning of the judiciary. It further noted 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. In this matter as in others, it is primarily for the national authorities to determine the need for an interference with the exercise of freedom of expression. What they may do in this connection is, however, the Court pointed out, subject to European supervision embracing both the legislation and the decisions applying it, even where they have been given by an independent court. In the present case, although the applicants' comments had without doubt been severely critical, they had nevertheless appeared proportionate to the stir and indignation caused by the matters alleged in their articles. The Court also held that there had been a violation **of Article 6 § 1** of the Convention, finding that there had been a breach of the principle of equality of arms in respect of the applicants.

### **Previti v. Italy**

8 December 2009 (decision on the admissibility)

In the context of a widely-publicised case concerning the corporate control of a major chemicals group, the applicant, a lawyer and a prominent figure in national politics, was charged with judicial bribery and sentenced to a prison term. He complained about the criminal proceedings against him and alleged in particular that the domestic courts had not been impartial.

The Court declared the application **inadmissible** as being manifestly ill-founded. It noted in particular that the impartiality or otherwise of the judges, at both the investigation and the trial stage, had been a source of controversy throughout the domestic proceedings and the subject of continuing public debate in Italy. The applicant considered that his trial had been tainted by ideological prejudice because of his involvement in politics. He argued that left-wing elements in the Italian national legal service had publicly opposed draft legislation liable to have a favourable impact on his position before the courts. In addition, some of the members of the national legal service involved in the case had been left-wing or even extreme left-wing activists and had repeatedly demonstrated their aversion to him. The Court took the view that, while it would have been preferable for the members of the national legal service concerned to be more circumspect in their public comments, there was no proof of the existence of bias in relation to the applicant. Similarly, there was no proof that their ideological beliefs had prevailed over the oath of impartiality they had sworn on taking up office.

### **Morice v. France**

23 April 2015 (Grand Chamber)

This case concerned the conviction of the applicant, a lawyer, for complicity with a newspaper in the defamation of investigating judges.

The Court held that there had been a **violation of Article 10** (freedom of expression) of the Convention, finding that the judgment against the applicant for complicity in defamation could be regarded as a disproportionate interference with his right to freedom of expression. It noted in particular that the impugned remarks by the applicant had not constituted gravely damaging and essentially unfounded attacks on the action of the courts, but criticisms levelled at the investigating judges as part of a debate on a matter of public interest concerning the functioning of the justice system, and in the context of a case which had received wide media coverage from the outset. While those remarks could admittedly be regarded as harsh, they nevertheless constituted value judgments with a sufficient factual basis. The Court also held that there had been a **violation of Article 6 § 1** of the Convention in the present case, finding that there were serious doubts as to the impartiality of the Court of Cassation and the applicant's fears in this connection could be regarded as objectively justified.

## Permissible restrictions on freedom of assembly and association

### **Maestri v. Italy**

17 February 2004 (Grand Chamber)

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.

The Court 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 National Council of the Judiciary 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. The Court's assessment was lastly confirmed by the fact that the National Council of the Judiciary had itself felt the need to come back to the issue in July 1993 and state in clear terms that the exercise of judicial functions was incompatible with membership of the Freemasons.

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**Press Contact:**

Tel: +33 (0)3 90 21 42 08