Strasbourg, 22 October 2019

CDL-JU (2019)019
English only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

18th meeting of the Joint Council on Constitutional Justice

Mini-Conference on

"INDEPENDENCE OF THE JUDICIARY, THE ROLE OF CONSTITUTIONAL COURTS"

Rome, Italy

24 May 2019

ECHR's Case-law on the Independence of the Judiciary

REPORT BY

Ana VILFAN-VOSPERNIK
Lawyer, European Court of Human Rights

Originally given as a PowerPoint slide presentation.

Dialogue between Judges 2018: Seminar on the Authority of the Judiciary

- "… the judicial branch … is faced today, in a number of our countries, with dangers to its authority, its legitimacy, and its effective action as the guardian of the rule of law."

Former ECHR President Guido Raimondi

Creating a European Judicial Space

- —*"Il sistema multilivello di tutela"*
- Interaction between the national legal order, the ECHR and the Court of Justice of the EU (European order/national traditions)
- **Interpretation of the Convention in harmony with international law**, as far as possible: the Court does not operate in a vacuum
- European and international texts, including the opinions of the Venice Commission

The Rule of Law & Article 6 ECHR

- **Right to a fair trial**

"1. 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. …"

Other relevant Articles of the ECHR at stake

- **Article 8: respect for private life**
- **Article 10: freedom of expression**

To a lesser extent:

- Article 11: freedom of assembly and association
- Article 14: prohibition of discrimination

Types of applications

- Applicants complaining about the lack of independence of the tribunal that examined their cases (Art. 6)
- Judges themselves complaining about the appointment or dismissal proceedings, pressure, disciplinary proceedings, etc. (Art. 6, 8 and 10)
- Sources: HUDOC, Case-law Guides, « Dialogue between Judges 2018 », etc.

Art. 6 – "Independence" and "Impartiality"

The right to a fair hearing under Article 6 § 1 requires that a case be heard by an "independent and impartial tribunal". The concepts of "independence" and "impartiality" are closely linked and, depending on the circumstances, may require joint examination (*Ramos Nunes de Carvalho e Sá v. Portugal* [GC], §§ 150 and 152)

Impartiality

- The general principle: The subjective and objective tests also apply to Constitutional Court proceedings (*Mežnarić v. Croatia*, §§ 29-32).
- *Steck-Risch and Others v. Liechtenstein*: Impartiality of a CC judge in a small country where the judiciary is operating part-time and where the same persons function as judges and practising lawyers (*no violation*).
- *Švarc and Kavnik v. Slovenia*: Impartiality of a CC judge who had acted as a legal expert for the applicant's opponent in the civil proceedings at first instance (*violation*).
- *Bellizzi v. Malta*: Alleged lack of impartiality where the judicial assistant of the CC President had acted for one of the parties in prior civil proceedings in the same case (*no violation*; §§ *29-32).*

Applicability to CC proceedings

Article 6 § 1 is applicable to Constitutional Court proceedings, under its civil limb, if they relate to "the determination of civil rights and obligations" (*Pierre-Bloch v. France*, § 48; *Voggenreiter v. Germany*, §§ 30-33).

The fact that proceedings have taken place before a constitutional court does not suffice to remove them from the ambit of Article 6 § 1. Since these proceedings may significantly differ from ordinary court proceedings, the Court is applying the principles developed under Article 6 § 1, or establishing new principles with due regard to the nature of the CC proceedings (fair-trial guarantees, public hearing, length of proceedings, …)

Applicability to CC proceedings

- Type of CC proceedings:
- It matters little that the Constitutional Court considered the case on a referral of a question for a preliminary ruling or on a constitutional appeal lodged against judicial decisions. The same is true, in theory, where the Constitutional Court examines an appeal lodged directly against a law if the domestic legislation provides for such a remedy (*Voggenreiter v. Germany*, §§ 30-33 and the references therein).
- However, a Constitutional Court that can inquire into the contested proceedings, only from the point of view of their conformity with the Constitution without examining all the relevant facts, is not considered to have "full jurisdiction" within the meaning of Article 6 § 1 (*Zumtobel v. Austria*, § 30).

Proceedings before the Italian CC

- "… the Court has observed on many occasions that, in the Italian legal system, litigants are not entitled to apply directly to the Constitutional Court. Only a court which is hearing the merits of a case has the possibility of making a reference to the Constitutional Court, at the request of a party or of its own motion. Accordingly, such an application cannot be a remedy whose exhaustion is required under the Convention … The principles established in judgments nos. 348 and 349 of 24 October 2007 are to be welcomed, particularly regarding the place assigned to the Convention in the Italian legal system and the encouragement given to the national judicial authorities to interpret domestic standards and the Constitution in the light of the Convention and the Court's case-law. … However … the objection [of non-exhaustion] raised by the Government must be rejected." (*Parrillo v. Italy [GC*], §§ 101-105)

Employment disputes concerning judges

- ***Vilho Eskelinen* criteria:**
- (a) the State's national law must have expressly excluded access to court for a relevant post or category of staff; and
- (b) exclusion must be justified on objective grounds in the State's interest.
- The applicant's access to court was impeded by the transitional provisions of the new legislation – to conclude that Article 6 § 1 was applicable, the Court attached weight, in particular, to the fact that the CC did not dismiss the constitutional complaint as lacking a legal basis (*Baka v. Hungary [GC]*, §§ 109 & 111)

An independent tribunal – separation of powers

- The term "independent" refers to **independence vis-à-vis the other powers** (**the executive and the Parliament**) (*Beaumartin v. France*, § 38) and vis-à-vis **the parties** (*Sramek v. Austria*, § 42). Compliance with this requirement is **assessed**, in particular, **on the basis of statutory criteria**, such as the manner of appointment of the members of the tribunal and the duration of their term of office, or the existence of sufficient safeguards against the risk of outside pressures (see, *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], §§ 153-156).
- The question whether the body presents an appearance of independence is also of relevance (ibid., § 144; *Oleksandr Volkov v. Ukraine*, § 103). The defects observed may or may not have been remedied during the subsequent stages of the proceedings (*Denisov v. Ukraine* [GC], §§ 65, 67 and 72).

External and internal independence of judges

Specific case: Judges' independence *vis-à-vis* the High Council of the Judiciary

The fact that judges appealing against decisions of the High Council of the Judiciary (or equivalent body) come under the authority of the same body as regards their careers and disciplinary proceedings against them has been examined in the cases of *Oleksandr Volkov v. Ukraine*, § 130, and *Denisov v. Ukraine* [GC], § 79 (violations), and *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], §§ 157-165 (no violation). The Court assessed and compared the disciplinary systems for the judiciary in the States concerned in order to determine whether there were any "serious structural deficiencies" or "an appearance of bias within the disciplinary body for the judiciary" (*Ramos Nunes de Carvalho e Sá v. Portugal*, §§ 157-160) and whether the requirement of independence was complied with (ibid., §§ 161-163).

Applications lodged by judges

- ***Baka v. Hungary*** [GC], no. 20261/12, 23.6.12
- ***Denisov v. Ukraine*** [GC], no. 76639/11, 25.9.18 no. 76639/11, § ..., 25
- ***Oleksandr Volkov v. Ukraine***, no. 21722/11, 9.1.13
- ***Ramos Nunes de Carvalho e Sá v. Portugal*** [GC], nos. 55391/13, 6.11.18

Baka v. Hungary

- **Article 6 § 1: access to court by a judge to challenge the termination of his mandate**
- **Article 10: termination of his mandate as a result of public comments made by a judge**
- The applicant, a former judge of the ECHR, publicly criticised, in his capacity as President of the Supreme Court, proposed legislative reforms of the judiciary. Subsequent constitutional and legislative changes resulted in the premature termination of his mandate as President and excluded the possibility of judicial review of that termination.
- He complained under Article 6 about a lack of access to court and under Article 10 about a disproportionate interference with his freedom of expression. The GC found a violation of both Articles.
- "121. … the premature termination of the applicant's mandate as President of the Supreme Court was not reviewed, nor was it open to review, by an ordinary tribunal or other body exercising judicial powers. This lack of judicial review was the result of legislation whose compatibility with the requirements of the rule of law is doubtful … Although its above findings with regard to the issue of applicability do not prejudge its consideration of the question of compliance …, the Court cannot but note 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 are attaching to procedural fairness in cases involving the removal or dismissal of judges, including the intervention of an authority independent of the executive and legislative powers in respect of every decision affecting the termination of office of a judge … the respondent State impaired the very essence of the applicant's right of access to a court."
- "168. … the impugned interference was prompted by the views and criticisms that the applicant had publicly expressed in the exercise of his right to freedom of expression … the applicant expressed his views on the legislative reforms at issue in his professional capacity as President of the Supreme Court and of the National Council of Justice. It was not only his right but also his duty …
- 174. .. the impugned restrictions on the applicant's exercise of his right to freedom of expression under Article 10 of the Convention were not accompanied by effective and adequate safeguards against abuse.
- 175. In sum, even assuming that the reasons relied on by the respondent State were relevant, they cannot be regarded as sufficient to show that the interference complained of was "necessary in a democratic society,, notwithstanding the margin of appreciation available to the national authorities."

Denisov v. Ukraine

- **Article 8: the notion of private life in the context of employment disputes**
- The applicant was dismissed from the position of President of the Kyiv Administrative Court of Appeal, on the basis of a failure to perform his administrative duties (managerial skills) properly. He remained as a judge in the same court. He complained, *inter alia*, under Article 6 that the proceedings before the High Council of Justice (HCJ) and the Higher Administrative Court (HAC) about his removal had not been independent or impartial and under Article 8 about a violation of his right to respect for his private life.
- On 25 April 2017 a Chamber relinquished jurisdiction. The Grand Chamber found his complaint under Article 8 to be incompatible *ratione materiae* since neither the reasons for nor the consequences of his dismissal had relevantly affected his "private life". The GC found a violation of Article 6.

Oleksandr Volkov v. Ukraine

- **Article 6 §§ 1 and 3: Disciplinary proceedings brought against a judge of the Supreme Court culminating in his dismissal for acting in breach of professional standards.**
- The Court noted that the domestic law contained no limitation period for application of the sanction. The incidents criticised by the High Council of Justice had taken place seven years earlier. The Court concluded that this had placed the applicant in a difficult position, as he had had to mount his defence with respect, *inter alia*, to events which had occurred in the distant past. While the Court did not find it appropriate to indicate how long the limitation period should have been, it considered that such an open-ended approach to disciplinary cases involving the judiciary posed a serious threat to the principle of legal certainty. There had thus been a violation of Article 6 § 1 on account of the breach of the principle of legal certainty caused by the absence of a limitation period.
- "130. The Court observes that the judicial review was performed by judges of the HAC who were also under the disciplinary jurisdiction of the HCJ. This means that these judges could also be subjected to disciplinary proceedings before the HCJ. Having regard to the extensive powers of the HCJ with respect to the careers of judges (appointment, disciplining and dismissal) and the lack of safeguards for the HCJ's independence and impartiality …, the Court is not persuaded that the judges of the HAC considering the applicant's case, to which the HCJ was a party, were able to demonstrate the "independence and impartiality" required by Article 6 of the Convention." (see *Ramos Nunes [GC]*)

Ramos Nunes de Carvalho e Sá v. Portugal

- **Article 6 §§ 1 and 3: review by a judicial body of disciplinary proceedings against a judge (independence/impartiality, scope of the review and lack of a public hearing)**
- The case concerns three sets of disciplinary proceedings against the applicant judge which led to 240 days suspension from duty imposed by the High Council of the Judiciary ("CSM"). The Judicial Division of the Supreme Court reviewed and upheld those disciplinary decisions and penalties. The applicant complained mainly under Article 6 § 1**.** The Chamber found that there had been a violation of Article 6 § 1 (civil) given the cumulative effect of the lack of independence and impartiality of the CSM, the insufficient scope of the review of the Judicial Division and the lack of a public hearing. The case was referred by the Panel to the Grand Chamber in October 2016. The GC found the complaint about the independence and impartiality of the CSM to be inadmissible (out of time) and her complaint under Article 6 § 3 (a) and (b) incompatible *ratione materiae*. It concluded that there had been no violation of Article 6 § 1 (civil) as regards the independence/impartiality of the Judicial Division of the Supreme Court, but the GC did a find a violation based on the insufficient scope of the Supreme Court's review and the lack of public hearing.
- "158. … regard being had to the arguments advanced by the Chamber which examined the case of *Oleksandr Volkov*, these findings should be regarded as a criticism based on the circumstances of the case and applicable in a system with serious structural deficiencies or an appearance of bias within the disciplinary body for the judiciary, as was the case in the specific context of the Ukrainian system at the time, rather than as a general conclusion …
- 160. By contrast, in the present case, no such serious issues have been established in terms of structural deficiencies or an appearance of bias within the Portuguese CSM. … the Court finds it appropriate to examine together the issues of the independence and impartiality of the Judicial Division of the Supreme Court …"

- "163. In more general terms, the Court considers it normal that judges, in the performance of their judicial duties and in various contexts, should have to examine a variety of cases in the knowledge that they may themselves, at some point in their careers, be in a similar position to one of the parties, including the defendant. However, a purely abstract risk of this kind cannot be regarded as apt to cast doubt on the impartiality of a judge in the absence of specific circumstances pertaining to his or her individual situation. **Even in the context of disciplinary cases a theoretical risk of this nature, consisting in the fact that judges hearing cases are themselves still subject to a set of disciplinary rules, is not in itself a sufficient basis for finding a breach of the requirements of impartiality.**
- 164. Consequently, having regard 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 considers that the applicant's fears cannot be regarded as objectively justified and that the system in place in Portugal for reviewing disciplinary decisions of the CSM does not breach the requirement of independence and impartiality under Article 6 § 1 of the Convention. "

Applications about independence lodged by parties

- *Mutu and Pechstein v. Switzerland*, nos. 40575/10 *et al.* , 2 October 2018
- *Thiam v. France*, no. 80018/12, 18 October 2018

Mutu and Pechstein v. Switzerland

- **Article 6 of the Convention: settlement of disputes by means of arbitration and the implications for procedural fairness guaranteed by that article**
- The applicants, respectively a professional footballer and a professional speed skater, were involved in proceedings before the Court of Arbitration for Sport (CAS) in Lausanne. The CAS operates within the framework of an independent private law foundation. It was set up for the purposes of hearing disputes arising in the international sports sector (for example, contractual disputes between footballers and their clubs in the case of the first applicant/the imposition of disciplinary sanctions in the case of the second applicant). An appeal from the CAS's decisions may be filed with the Swiss Federal Tribunal.
- The applicants complained that the proceedings before the CAS were unfair because the panels which heard their cases lacked independence and impartiality. The applicants' appeals to the Swiss Federal Tribunal were unsuccessful. Both applicants complained in the Convention proceedings under Article 6 (on different grounds) about the alleged lack of independence and impartiality of the CAS. The second applicant also complained that neither the CAS nor the Swiss Federal Tribunal held a public hearing in her case. The Court found a breach of the Convention only in respect to a lack of a public hearing before the CAS in the case of the second applicant.

Thiam v. France

- **Article 6 § 1: criminal proceedings brought against the applicant, in the course of which the former President of the French Republic, Nicolas Sarkozy, applied to join the proceedings as a civil party**
- The Court found that Mr Sarkozy's intervention as a civil party in the criminal proceedings against Mr Thiam had not created an imbalance in the parties' rights and in the conduct of the proceedings. The Court also held 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 for the purposes of Article 6 § 1.

Judicial dialogue President Linos-Alexandre Sicilianos

- "Dialogue with the national courts is truly part of our Court's DNA. In this regard, the Superior Courts Network is a perfect illustration of such dialogue, bringing together a community which is united by the desire to apply the principle of subsidiarity effectively and shares the common aim of ensuring that the decisions reached at domestic level are compatible with European case-law. …
- Like my predecessors, I express my full support for the Superior Courts Network and for strengthening these ties, **without losing sight of each participant court's independence**.
- I … pay tribute to the superior courts which have already joined the Network and thank them for their essential contribution to its success, and look forward to welcoming those superior courts which have not yet joined our number."

Superior Courts Network, (SCN) Dialogue with superior courts

- Initiative of the Court, supported by member States.
- Objective: create a structure for a continuous and practical dialogue with superior courts, focussing on Convention case-law.
- Research Division provides the coordination of the SCN.
- Current membership : 77 courts from 36 member States
  - valued contribution to comparative work of the ECHR
  - sharing their Convention related material