



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

FIRST SECTION

CASE OF JURIČIĆ v. CROATIA

(Application no. 58222/09)

JUDGMENT

STRASBOURG

26 July 2011

FINAL

26/10/2011

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Juričić v. Croatia,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Anatoly Kovler, *President*,

Nina Vajić,

Elisabeth Steiner,

Khanlar Hajiyeu,

George Nicolaou,

Mirjana Lazarova Trajkovska,

Julia Laffranque, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 5 July 2011,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 58222/09) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Croatian national, Ms Mirjana Juričić (“the applicant”), on 18 October 2009.

2. The applicant was represented by Mr V. Miljević, an advocate practising in Zagreb. The Croatian Government (“the Government”) were represented by their Agent, Mrs Š. Stažnik.

3. The applicant alleged, in particular, that there had been a violation of her right to a fair hearing.

4. On 10 November 2010 the President of the First Section decided to give notice to the Government of complaints concerning the equality of arms, a lack of impartiality, and a lack of an oral, public and adversarial hearing. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1954 and lives in Zagreb.

6. On 26 February 2008 the Committee on the Constitution, Rules of Procedure and Political System of the Croatian Parliament, (*Hrvatski Sabor – Odbor za Ustav, Poslovnik i politički sustav* – “the Parliamentary

Committee”) published in the Official Gazette (no. 26/2008 of 29 February 2008) a Call for Applications for the Election of Three Judges to the Constitutional Court, inviting prospective candidates to submit their applications.

7. On 28 April 2008 the applicant, a judge of the Administrative Court, submitted her application for the post of judge of the Constitutional Court. Another eighteen candidates also submitted applications.

8. The Parliamentary Committee eventually compiled a shortlist of four candidates, namely, Mr M.J., Mrs D.Š., Mrs S.B. and the applicant, and submitted it to Parliament for a vote.

9. After a secret ballot in which the applicant received four of the required 77 votes, on 9 May 2008 Parliament adopted a decision electing Mr M.J., Mrs D.Š. and Mrs S.B., who each received 78 votes, as judges of the Constitutional Court.

10. On 26 May 2008 the applicant, relying on section 66 of the Administrative Disputes Act (see paragraph 32 below), lodged a request for the protection of a constitutionally guaranteed right (*zahtjev za zaštitu ustavom zajamčenog prava*) with the Administrative Court (*Upravni sud Republike Hrvatske*) contesting Parliament’s decision of 9 May 2008. She argued that S.B. had not proved that she had at least fifteen years of professional experience and thus did not demonstrate that she satisfied all the statutory criteria for election as a Constitutional Court judge set forth in section 5(1) of the Constitutional Court Act (see paragraph 25 below). Therefore, in the applicant’s view, by electing S.B. instead of her, Parliament had breached her right to equality before the law, the right to equality before the State and other public authorities, the right to equal access to public service and the right to equal access to employment guaranteed in Articles 14(2), 26, 44 and 54(2) of the Constitution (see paragraph 23 below), respectively.

11. On 26 June 2008 the Administrative Court invited M.J. and D.Š. to submit their observations as third (interested) parties (*zainteresirane osobe*). On 7 and 8 June 2008, respectively, they replied that they considered the applicant’s request unfounded and that the election of the Constitutional Court’s judges had been in accordance with the law. They also stated that they did not consider themselves third (interested) parties to the proceedings because the applicant had not challenged their election.

12. On 15 October 2008 the Administrative Court delivered a judgment whereby it allowed the applicant’s request and quashed Parliament’s decision of 9 May 2008 in its part concerning S.B. The court held that the applicant was entitled to lodge her request even though that court’s judgment did not alter her legal status as unelected candidate. It also held that from the evidence submitted by S.B. to the Parliamentary Committee it could not be discerned whether she had the required professional experience and that therefore the applicant’s right to equal access to public service and

her right to equal access to employment, guaranteed by Articles 44 and 54(2) of the Constitution, had been breached by the contested decision.

13. On 4 February 2009 S.B. lodged a constitutional complaint with the Constitutional Court (*Ustavni sud Republike Hrvatske*) against the Administrative Court's judgment. At the same time she asked the Constitutional Court to order an interim measure that would postpone the effects of the contested judgment until that court had decided on her constitutional complaint. S.B. argued in her constitutional complaint that the impugned judgment of the Administrative Court had breached her right to equality before the law, the right to work and the right to equal access to employment guaranteed in Articles 14(2) and 54(1) and (2) of the Constitution (see paragraph 23 below), respectively. She also argued that the election of the Constitutional Court judges was a political rather than a legal issue. Therefore, Parliament's decision of 9 May 2008 constituted a so-called act of State (*akt vladanja*) in respect of which the scope of constitutional review was limited to compliance with procedural rules (that is, to formal constitutionality) and was thus very narrow. In particular, she argued that the Administrative Court had not been authorised to assess whether the evidence she had submitted had been sufficient to prove that she had the required professional experience and to question the Parliamentary Committee's findings in this respect.

14. On the same day, the Constitutional Court, sitting in a plenary session composed of ten judges (including judges M.J. and D.Š.), ordered an interim measure postponing the effects of the Administrative Court's judgment of 15 October 2008. In so doing it held, *inter alia*, that:

“...the contested judgment [of the Administrative Court] requires detailed examination of the limits and scope of judicial review of decisions on appointment of State officials, ..., and in that sense, has a wider importance that goes beyond the limits of an individual case.”

The decision on the interim measure was published in Official Gazette no. 16/2009 of 5 February 2009 but has never been served on the applicant.

15. On 13 February 2009 the Constitutional Court served the constitutional complaint together with the request for an interim measure on the applicant.

16. On 18 February and 3 March 2009 S.B. supplemented her constitutional complaint, alleging a violation of her right to a fair hearing guaranteed by Article 29(1) of the Constitution. On 20 February and 5 March 2006, respectively, the Constitutional Court served the two supplements on the applicant.

17. On 7 March 2009 the applicant submitted her reply to S.B.'s constitutional complaint and two days later to its supplements of 18 February and 3 March 2009. She argued that because the election of the Constitutional Court judges was regulated by law, it was not a political but primarily a legal issue. Consequently, Parliament's decision of 9 May 2008

was not an “act of State” and was therefore justiciable, that is, capable of being challenged in legal proceedings. In any event, section 66 of the Administrative Disputes Act entitled the Administrative Court to review any individual decision capable of violating constitutional rights, regardless of its nature or of whether it emanated from the legislative or the executive branch of government. As regards S.B.’s request for an interim measure, the applicant, after having remarked that the Constitutional Court had granted it on the same day the request had been made, argued that under section 67(2) the Constitutional Court Act such a measure could not postpone “the effects of a contested decision” but only its “enforcement” (see paragraph 25 below). Lastly, the applicant asked the Constitutional Court to “hold a public session (hearing)” and invite her to attend it (“*održi javnu sjednicu (raspravu) na koju molim da me se pozove*”).

18. During the proceedings, the Constitutional Court requested and obtained observations from the Parliamentary Committee, expert opinions from six law-faculty professors and two former judges of that court as well as opinions and information from the Croatian National Bank, the State Central Office for Administration, the Croatian Bar Association, the Ministry of Justice, the State Bureau of Statistics and a private bank Zagrebačka banka d.d.. The remaining nine law faculty professors from whom the Constitutional Court also requested expert opinions did not submit them. The attempt to obtain information from the Danish Red Cross failed because the NGO in question could not be found at the address indicated in the relevant register.

19. On 31 March 2009 the applicant wrote to the Constitutional Court asking it to serve her with “the expert opinions requested (from individuals and institutions)”, which she had found out about from the media.

20. On 30 April 2009 the Constitutional Court, sitting in a plenary formation of ten judges (including judges M.J. and D.Š.), held a session to which the applicant was not invited, and adopted a decision whereby it quashed the Administrative Court’s judgment of 15 October 2008. It held that the election of Constitutional Court judges was a hybrid (political and legal) issue and that, even though Parliament’s decision of 9 May 2008 was “an act of State”, the Administrative Court could have reviewed not only whether the prescribed procedure had been followed but also whether the candidates had satisfied the required statutory conditions. Nevertheless, the Administrative Court had overstepped the bounds of its jurisdiction when it had (re)assessed the evidentiary value of the documents S.B. had furnished as proof that she had possessed the required professional experience. By so doing the Administrative Court had not only encroached on matters within the exclusive jurisdiction of Parliament, but had also breached S.B.’s right to work and her right to equal access to employment guaranteed by Article 54(1) and (2) of the Constitution, as well as her right to equality before the law guaranteed by Article 14(2) of the Constitution.

21. On the same day, the President of the Constitutional Court and her Deputy held a press conference at which they announced that the Administrative Court's judgment of 15 October 2008 had been quashed, that S.B. remained a judge of the Constitutional Court and that the case would not be remitted to the Administrative Court in order to "stop this agony".

22. On 4 May 2009 the Constitutional Court served its decision, together with the opinions and information obtained during the proceedings, on the applicant. On 5 June 2009 the decision of the Constitutional Court was published in the Official Gazette (no. 65/2009).

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution

1. Relevant provisions

23. The relevant provisions of the Constitution of the Republic of Croatia (*Ustav Republike Hrvatske*, Official Gazette of the Republic of Croatia nos. 56/1990, 135/1997, 8/1998 (consolidated text), 113/2000, 124/2000 (consolidated text), 28/2001 and 41/2001 (consolidated text), 55/2001 (corrigendum) and 76/2010) read as follows:

Article 14

"Everyone in the Republic of Croatia shall enjoy rights and freedoms regardless of their race, colour, sex, language, religion, political or other beliefs, national or social origin, property, birth, education, social status or other characteristics.

All shall be equal before the law."

Article 26

"All nationals of the Republic of Croatia and foreigners shall be equal before the courts and other State or public authorities."

Article 29(1)

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

Article 44

“Every national of the Republic of Croatia shall have the right, under equal conditions, to take part in the conduct of public affairs, and to be admitted to public service.”

Article 54

“Everyone shall have the right to work and enjoy freedom of work.

Everyone shall be free to choose his or her vocation and occupation, and every job or duty shall be accessible to everyone under equal conditions.”

Article 125

“The Constitutional Court of the Republic of Croatia shall consist of thirteen judges elected among eminent lawyers, especially judges, State attorneys, advocates and university professors of law, by the Croatian Parliament for a term of eight years.

The Croatian Parliament’s Committee on the Constitution shall conduct proceedings related to candidatures for election to the Constitutional Court of the Republic of Croatia and propose candidates to the Croatian Parliament.

The Constitutional Court of the Republic of Croatia shall elect its President for a term of four years.”

2. The case-law of the Administrative Court

24. In its judgment no. Zpa-5/2004-5 of 2 December 2004, following a request for the protection of a constitutionally guaranteed right (see paragraph 32 below) the Administrative Court quashed the decision of the National Judicial Council on the appointment of a Municipal Court judge. It held that every candidate satisfying the statutory requirements had the right to equal participation in a competition for public office. Therefore, by appointing a candidate who did not satisfy the statutory requirements to be a judge of a Municipal Court, the National Judicial Council had violated the other candidate’s constitutional right to equal access to public service guaranteed by Article 44 of the Constitution (see the preceding paragraph).

B. The Constitutional Court Act and related subordinate legislation*1. The Constitutional Court Act***(a) Relevant provisions**

25. The relevant part of the 1999 Constitutional Act on the Constitutional Court of the Republic of Croatia (*Ustavni zakon o Ustavnom*

sudu Republike Hrvatske, Official Gazette of the Republic of Croatia no. 99/1999 of 29 September 1999 – “the Constitutional Court Act”), as amended by the 2002 Amendments (*Ustavni zakon o izmjenama i dopunama Ustavnog zakona o Ustavnom sudu Republike Hrvatske*, Official Gazette of the Republic of Croatia no. 29/2002 of 22 March 2002), which entered into force on 15 March 2002, reads as follows:

II. CONDITIONS FOR THE ELECTION OF THE CONSTITUTIONAL COURT JUDGES,
[THEIR] ELECTION AND TERMINATION OF THEIR OFFICE

Section 5

“(1) A Croatian national who is a bachelor of laws with at least fifteen years of experience in the legal profession, and who has become eminent in that profession by virtue of his or her academic or professional work or his or her public activities, may be elected as a judge of the Constitutional Court.

(2) A person who has obtained a doctoral degree in legal science and satisfies the other conditions referred to in paragraph 1 of this section may be elected as a judge of the Constitutional Court if he or she has at least twelve years of experience in the legal profession.”

Section 6

“(1) The Croatian Parliament’s Committee on the Constitution (hereinafter: ‘the competent committee’) shall institute the procedure for electing judges of the Constitutional Court by publishing a call in the Official Gazette inviting judicial institutions, law faculties, the Bar Association, lawyers’ associations, political parties and other legal entities and individuals to nominate candidates for the election of one or more judges of the Constitutional Court (hereinafter: ‘the call’). An individual may also put himself or herself forward as a candidate.

(2) The call shall set down the conditions for electing a judge of the Constitutional Court set forth in the Constitution and this Constitutional Act, the time-limit for submission of a candidate’s nomination to the competent committee, and the enclosures to be delivered with the nomination.

(3) After the time-limit referred to in paragraph 2 of this section expires, the competent committee shall examine whether the candidates satisfy the conditions for being elected as judges of the Constitutional Court set forth in the Constitution and this Constitutional Act, and shall reject invalid candidatures.

(4) The competent committee shall hold a public interview with each candidate who satisfies the conditions for being elected as a judge of the Constitutional Court and shall, on the basis of information collected and the results of the interviews, compile a shortlist of candidates for judges of the Constitutional Court. The shortlist shall, as a rule, comprise more candidates than the number of judges ... who are to be elected.

(5) The competent committee shall submit to the Croatian Parliament, together with its proposal, the list of all candidates who satisfy the conditions for being elected as judges of the Constitutional Court. The proposal of the competent committee shall

contain reasons showing why the committee gave a particular candidate priority over other candidates.

(6) Representatives in the Croatian Parliament shall vote individually for each proposed candidate.

(7) A candidate proposed for election to the Constitutional Court shall be considered to have been elected as a judge of the Constitutional Court if a majority of the total number of representatives in the Croatian Parliament have voted for him.”

III. PROCEEDINGS BEFORE THE CONSTITUTIONAL COURT – GENERAL PROVISIONS

Section 27(6)

“A judge of the Constitutional Court may not abstain from voting, unless he has participated in the enactment of a statute or subordinate legislation or the adoption of a decision upon which the Constitutional Court is required to rule.”

Section 34

“Unless provided otherwise by this Constitutional Act, in the proceedings before it the Constitutional Court shall apply *mutatis mutandis* the provisions of the relevant procedural laws of the Republic of Croatia as subsidiary rules.”

IV. REVIEW OF THE CONSTITUTIONALITY OF STATUTES AND THE CONSTITUTIONALITY AND LEGALITY OF SUBORDINATE LEGISLATION

Section 50

“(1) The Constitutional Court may, in a [plenary] session, conclude to decide the merits [of a case] on the basis of a public hearing.

(2) A public hearing shall be scheduled by the President of the Constitutional Court.

(3) The participants in the proceedings and the representatives of State authorities, local government and associations, as well as [other] persons whose participation at the public hearing is required, shall be summoned to the public hearing.

(4) The failure of the summoned participants ... and other summoned persons to attend [the hearing] shall not prevent the Constitutional Court from continuing the proceedings and reaching a decision, if it considers that the conditions for doing so exist.

(5) In justified cases, the Constitutional Court may postpone the public hearing and schedule a new one.”

V. PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Section 62

“(1) Anyone may lodge a constitutional complaint with the Constitutional Court if he or she deems that the decision of a State authority, local or regional government, or a legal person vested with public authority, on his or her rights or obligations, or as regards suspicion or accusation of a criminal offence, has violated his or her human rights or fundamental freedoms, or the right to local or regional government, guaranteed by the Constitution (‘constitutional rights’)...

(2) If another legal remedy is available in respect of the violation of the constitutional rights [complained of], the constitutional complaint may be lodged only after this remedy has been exhausted.

(3) In matters in which an administrative action or, in civil and non-contentious proceedings, an appeal on points of law [*revizija*] is available, remedies shall be considered exhausted only after a decision on these legal remedies has been given.”

Section 67

“(1) The constitutional complaint, as a rule, does not prevent the application of the contested decision.

(2) The Constitutional Court may, at the request of the complainant, postpone the enforcement [of the contested decision] until it decided on the constitutional complaint, if the enforcement would cause the complainant a harm that would be difficult to repair, and the postponement is not contrary to the public interest nor would cause greater harm to anyone.”

Section 68

“(1) A panel composed of six judges shall decide on a constitutional complaint.

(2) ...

(3) The panel may only decide unanimously and with all its members present.

(4) If the panel does not reach a unanimous decision, or if the panel considers that the issue [raised in] the constitutional complaint is of wider importance, the constitutional complaint shall be decided by the [plenary] session of the Constitutional Court.”

Section 69

“The judge rapporteur shall:

- ...

- serve, if need be, a copy of the constitutional complaint to interested persons and invite them to respond to it,

...”

26. Section 72 provides that, if a constitutional complaint is successful, the Constitutional Court must quash the impugned decision and remit the case to the competent authority.

(b) The Constitutional Court’s practice

27. On 8 April 2011 the Constitutional Court for the first time in its history held a public hearing in the proceedings following an individual constitutional complaint. The complainant Mr. P.T., who had taught a denominational (Catholic) religious education course in a public school, had been dismissed from his job because the Catholic Church had revoked his canonical mandate of catechist after he had remarried. The President of the Constitutional Court explained a decision to hold a public hearing by saying that the Constitutional Court’s decision in that case “[went] beyond the limits of a particular case” and “[would] mark future relations with religious communities”.

2. The Constitutional Court Rules

28. The relevant provision of the Rules of the Constitutional Court (*Poslovnik Ustavnog suda Republike Hrvatske*, Official Gazette of the Republic of Croatia nos. 181/2003 and 30/2008 – “the Constitutional Court Rules”) reads as follows:

Rule 31

“(1) In the proceedings before the Constitutional Court ... a judge rapporteur is authorised to:

....

4. seek expert opinions on particular cases from jurisconsults of the Constitutional Court,

...”

C. The Administrative Disputes Act

29. The Administrative Disputes Act (*Zakon o upravnim sporovima*, Official Gazette of the Socialist Federal Republic of Yugoslavia no. 4/1977, and Official Gazette of the Republic of Croatia nos. 53/1991, 9/1992 and 77/1992) in its relevant part provides as follows:

30. Section 34 reads as follows:

“The [Administrative Court] decides administrative disputes in closed session.

The [Administrative Court] may decide to hold an oral hearing on account of the complexity of the dispute or if it otherwise finds it useful for better clarification of the matter at issue.

For the same reasons a party may ask that an oral hearing be held.”

31. Section 60 provides that if the Administrative Disputes Act does not contain specific provisions on the procedure before the Administrative Court, the provisions of the Civil Procedure Act should apply *mutatis mutandis*.

32. Section 66 reads as follows:

“A request for the protection of a constitutionally guaranteed right or freedom ... if such a right or freedom has been violated by a final individual act [that is, decision], and no other judicial protection is secured, shall be decided by the [Administrative Court], by applying *mutatis mutandis* the provisions of this Act.”

D. The Civil Procedure Act

33. The relevant part of the Civil Procedure Act (*Zakon o parničnom postupku*, Official Gazette of the Socialist Federal Republic of Yugoslavia nos. 4/1977, 36/1977 (corrigendum), 36/1980, 69/1982, 58/1984, 74/1987, 57/1989, 20/1990, 27/1990 and 35/1991, and Official Gazette of the Republic of Croatia nos. 53/1991, 91/1992, 58/1993, 112/1999, 88/2001, 117/2003, 88/2005, 2/2007, 84/2008 and 123/2008) provides as follows:

Section 71

“A judge ... shall be disqualified from exercising his functions:

1. if he or she himself or herself is a party...;

...

5. if, in the same case, he or she participated in the proceedings before a lower court or some other authority;

...

7. if other circumstances exist which cast doubt on his or her impartiality.”

34. The grounds enumerated in section 71 subparagraphs 1-6 are considered absolute grounds for withdrawal, in that the judge concerned is automatically disqualified from sitting.

35. Section 72(1) provides that, from the moment he or she becomes aware of an absolute ground disqualifying him from sitting, the judge must take no further part in the case and bring the circumstances which disqualify

him or her from sitting to the immediate attention of the president of the court of which he or she is a member, whereupon the president designates another judge to hear the case.

36. Section 73(6) provides that the party has to make a request for withdrawal of a judge as soon as he or she learns of a reason for withdrawal and at the latest before the conclusion of the trial before the first-instance court, or, if there was no trial, before the decision is rendered.

37. Section 73(7) provides that the withdrawal of a judge of a higher court may be requested by the party in the legal remedy or in the reply to the legal remedy.

38. Section 74(1) reads as follows:

Section 74

“Unless the law provides otherwise, the party’s request for withdrawal [of a judge] shall be decided by the president of the court.”

39. Section 75 reads as follows:

Section 75

“When a single judge, the president of the panel, a member of the panel or the president of the court learns that his or her withdrawal has been requested, he shall immediately stop all work on the case, and, if the withdrawal was requested on the ground provided in section 71(1), subparagraph 7 of this Act, he or she may, until a the request is decided, undertake only those actions which entail the risk of a delay.”

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 6 § 1 OF THE CONVENTION ON ACCOUNT OF THE UNFAIRNESS OF THE PROCEEDINGS

40. The applicant complained that the above-mentioned proceedings had not been fair because: (a) a public hearing had not been held, (b) the proceedings had not been adversarial and the principle of equality of arms had not been respected in that the expert opinions of eminent lawyers and opinions and information obtained from various institutions by the Constitutional Court had been served on her only after the proceedings had ended, and (c) the Constitutional Court had not been impartial given that judges M.J. and D.Š. had sat in the panel of that court that delivered the decision in her case even though these two judges had acted as third parties in the previous proceedings before the Administrative Court, in which they, *inter alia*, had expressed their opinion that the election of the three judges to

the Constitutional Court had been lawful. The applicant relied on Article 6 § 1 of the Convention, which reads as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

41. The Government contested these arguments.

A. Admissibility

42. The Government disputed the admissibility of these complaints arguing that Article 6 was inapplicable. In addition, they argued that the applicant had failed to exhaust domestic remedies in respect of her complaint concerning the alleged lack of impartiality.

1. Applicability

(a) The arguments of the parties

(i) The Government

43. The Government first referred to the Court’s case-law according to which Article 6 § 1 of the Convention was applicable to disputes over civil “rights and obligations” which were, at least on arguable grounds, recognised under domestic law (see *James and Others v. the United Kingdom*, 21 February 1986, § 81, Series A no. 98).

44. In that connection the Government first argued that in the Croatian legal system there was no right to be elected as judge of the Constitutional Court. Such a right was not recognised by the Constitution, the Constitutional Court Act or any other domestic legislation. In particular, the constitutional guarantee of equal access to public service, provided for in Article 44 of the Constitution (see paragraph 23 above), did not imply the right to be admitted to public service, that is, to be appointed to the position of a State official. It followed that the applicant could not have had the right to be elected to the Constitutional Court.

45. In any event, the Government explained, a judge of the Constitutional Court was one of the highest State officials who wielded a portion of the State’s sovereign power. The procedure for election of a Constitutional Court judge thus did not involve determination of “civil” rights and obligations within the meaning of Article 6 § 1 of the Convention.

46. The Government further noted that the Administrative Court's judgment of 15 October 2008, by which it had quashed Parliament's decision of 9 May 2008, had not resulted in the applicant's election as judge of the Constitutional Court instead of Mrs S.B. That was expressly acknowledged by the Administrative Court itself, which in its judgment stated that its ruling did not alter the applicant's legal status as unelected candidate (see paragraph 12 above). Her status would not have been altered even if the Constitutional Court had upheld the Administrative Court's judgment. In that case the post of Constitutional Court judge would have remained vacant. A new call for applications would have been published and a new election procedure conducted. For the Government, that meant that the proceedings in question had not been directly decisive for the applicant's "rights and obligations".

47. Lastly, the Government submitted that under Croatian law there was no right to challenge a decision of Parliament on the election of a Constitutional Court judge either. Such a decision could only be reviewed under section 66 of the Administrative Disputes Act (see paragraph 32 above), if it was not in accordance with the constitutionally guaranteed rights or freedoms. However, the right to use that remedy had no features of private law and thus had no elements which could make it akin to a "civil" right required to render Article 6 applicable.

48. Having regard to the foregoing, the Government considered that Article 6 was not applicable in the present case.

(ii) The applicant

49. The applicant conceded that in the Croatian legal system there was no right to be elected as a judge of the Constitutional Court. However, in the proceedings complained of she had attempted to protect her constitutional right to equal access to the public service, as guaranteed by Article 44 of the Constitution.

50. She further disagreed with the Government's argument that the proceedings in question had not been directly decisive for her "rights and obligations". She explained that had the Constitutional Court upheld the Administrative Court's judgment of 15 October 2008, Parliament could either have decided to compile a new shortlist from the candidates that had initially not been shortlisted, or publish a new call for applications and initiate a new election procedure. In either case she would have had a chance to run for the post again and hope to be elected.

(b) The Court's assessment

51. The Court reiterates that Article 6 § 1 of the Convention secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. The right of access, namely the right to institute proceedings before a court in civil matters, constitutes

one aspect of this “right to a court” (see, notably, *Golder v. the United Kingdom*, 21 February 1975, §§ 28-36, Series A no. 18). This right extends only to “civil rights and obligations” which can be said, at least on arguable grounds, to be recognised under domestic law (see *James and Others*, cited above, § 81). Therefore, in order to establish whether the civil head of Article 6 is applicable in the present case, and, consequently, whether the applicant could rely on the guarantees of that Article, the Court should first examine whether she had a “right” which could arguably be said to be recognised under Croatian law, and secondly whether that right was a “civil” one.

(i) *Existence of a right*

52. The Court notes in this connection that, according to the Administrative Court’s case-law, every candidate satisfying the statutory requirements has the right to equal participation in a competition for public office, which right is a corollary of the right to equal access to the public service guaranteed by Article 44 of the Constitution (see paragraph 24 above). It also notes that in the present case the Administrative Court found in its judgment of 15 October 2008 that the applicant’s constitutional rights to equal access to the public service, and to equal access to employment, as guaranteed by Articles 44 and 54(2) of the Croatian Constitution, had been violated by S.B.’s election (see paragraph 12 above). While it is true that the Administrative Court’s judgment was subsequently quashed following S.B.’s constitutional complaint, the Constitutional Court in its decision of 30 April 2009 did not call into question the applicant’s entitlement to rely on those constitutional rights. In these circumstances, the Court considers that the applicant had a “right” which could arguably be said to be recognised under Croatian law (see, for example, *Kübler v. Germany*, no. 32715/06, § 46, 13 January 2011; *Lombardi Vallauri v. Italy*, no. 39128/05, § 62, ECHR 2009-... (extracts), and *Fiume v. Italy*, no. 20774/05, § 35, 30 June 2009).

(ii) *Civil nature of the right*

53. As regards the “civil” nature of the right, the Court held that the approach developed in the case of *Vilho Eskelinen and Others v. Finland* ([GC], no. 63235/00, ECHR 2007-IV, see paragraph 54 below) also applied to the right of access to public office (see, notably, *Kübler*, cited above, § 45; and, implicitly, *Josephides v. Cyprus*, no. 33761/02, § 54, 6 December 2007; *Lombardi Vallauri*, cited above, § 62, and *Penttinen v. Finland* (dec.), no. 9125/07, 5 January 2010).

54. Before the judgment in the *Vilho Eskelinen* case, the Court held that employment disputes between the authorities and public servants whose duties typified the specific activities of the public service, in so far as the latter was acting as the depositary of public authority responsible for

protecting the general interests of the State, were not “civil” and were excluded from the scope of Article 6 § 1 of the Convention (see *Pellegrin v. France* [GC], no. 28541/95, § 66, ECHR 1999-VIII). Likewise, employment disputes involving posts in the judiciary were also excluded from the scope of Article 6 § 1 because the judiciary, while not being part of the ordinary civil service, was nonetheless considered part of typical public service (see *Pitkevich v. Russia* (dec.), no. 47936/99, 8 February 2001).

55. In the *Vilho Eskelinen* case the Court revisited the applicability of Article 6 § 1 and held that it was for the Contracting States, in particular the competent national legislature, and not the Court, to identify expressly those areas of public service involving the exercise of the discretionary powers intrinsic to State sovereignty where the interests of the individual must give way. If a domestic system barred access to a court, the Court would verify that the dispute was indeed such as to justify the application of the exception to the guarantees of Article 6. If it did not, then there was no issue and Article 6 § 1 would apply (see *Vilho Eskelinen and Others*, cited above, § 61).

56. Following the *Vilho Eskelinen* case, the Court found Article 6 to be applicable to disputes concerning payment of judges’ salaries and other benefits (see *Petrova and Chornobryvets v. Ukraine*, nos. 6360/04 and 16820/04, § 15, 15 May 2008) as well as to those concerning their transfer (see *Tosti v. Italy* (dec.), no. 27791/06, 12 May 2009) and removal from office (see *Olujić v. Croatia*, no. 22330/05, §§ 31-44, 5 February 2009, and *G. v. Finland*, no. 33173/05, § 34, 27 January 2009), in cases where the domestic law allowed access to a court to challenge relevant decisions. In this connection the Court notes that Croatian law allows decisions of the Croatian Parliament on the election of Constitutional Court judges to be challenged before the judicial authorities in so far as those decisions may be contrary to the constitutional rights to equal access to the public service, and to equal access to employment. In the present case the applicant contested the impugned decision before the Administrative Court by lodging a request for the protection of a constitutionally guaranteed right under section 66 of the Administrative Disputes Act (see paragraphs 10 and 32 above).

(iii) *Conclusion*

57. In the light of the foregoing, the Court finds that Article 6 of the Convention under its civil head is applicable to the present case (see, *mutatis mutandis*, *Josephides*, cited above, § 55; *Penttinen*, cited above; *Kravchenko and Others (military housing) v. Russia*, nos. 11609/05, 12516/05, 17393/05, 20214/05, 25724/05, 32953/05, 1953/06, 10908/06, 16101/06, 26696/06, 40417/06, 44437/06, 44977/06, 46544/06, 50835/06, 22635/07, 36662/07, 36951/07, 38501/07, 54307/07, 22723/08, 36406/08 and 55990/08, § 23, 16 September 2010, and *Kübler*, cited above, § 46) and, consequently, that the applicant could rely on the guarantees of that Article.

58. It follows that the Government's objection to the applicability of Article 6 of the Convention must be dismissed.

2. Non-exhaustion of domestic remedies

(a) The arguments of the parties

59. The Government further argued that the applicant had failed to exhaust domestic remedies in respect of her complaint concerning the alleged lack of impartiality of the Constitutional Court, in that she had never requested the withdrawal of judges M.J. and D.Š. In this connection the Government pointed out that section 34 of the Constitutional Court Act provided that in the proceedings before it the Constitutional Court applied *mutatis mutandis* the provisions of the relevant procedural laws as subsidiary rules (see paragraph 25 above). Therefore, the applicant could have, relying on sections 71 and 73 of the Civil Procedure Act (see paragraphs 33 and 36-38 above) taken in conjunction with section 60 of the Administrative Disputes Act (see paragraph 31 above), requested judges M.J. and D.Š. to withdraw. If the president of the Constitutional Court were to find such a request well-founded, she would have decided to exempt them from sitting in the applicant's case. However, the applicant had not made such a request. Furthermore, the Government averred that, contrary to the applicant's arguments (see the next paragraph), she must or should have been aware that judges M.J. and D.Š. would sit in her case because: (a) the Constitutional Court regularly published decisions on the composition of its two panels deciding on constitutional complaints in the Official Gazette, and had published such a decision on 23 June 2008 from which it had been evident that judge D.Š. had been a member of the first panel and judge M.J. of the second panel, (b) on 4 February 2009 the Constitutional Court had decided on S.B.'s request for an interim measure – lodged simultaneously with her constitutional complaint – sitting in a plenary session including judges M.J. and D.Š. (see paragraph 14 above), (c) that court's decision ordering an interim measure had been published in the Official Gazette of 5 February 2009 (see paragraph 14 above), and (d) the applicant herself had referred to that decision in her reply to S.B.'s constitutional complaint (see paragraph 17 above).

60. The applicant argued that, before the Constitutional Court rendered its decision of 30 April 2009, she had not known, nor could have known, that judges M.J. and D.Š. would sit in the case. This was so for two reasons. First, given that under section 68 of the Constitutional Court Act that court, as a rule, decided on constitutional complaints in a panel of six judges and only exceptionally in a plenary session (see paragraph 25 above), she could not have known in advance in what formation the Constitutional Court would be sitting when deciding on S.B.'s constitutional complaint. In fact, she could not even have imagined that judges M.J. and D.Š. would sit in the

case after having acted as (third/interested) parties in the proceedings before the Administrative Court and after having expressed their opinion that her request had been unfounded and that the election of the Constitutional Court judges had been in accordance with the law (see paragraph 11 above). Rather, those judges should have been *ex lege* disqualified from sitting. Second, given the lack of an oral and public hearing, the applicant could not have requested judges M.J. and D.Š. to withdraw before the decision had been taken.

(b) The Court's assessment

61. The Court first notes that the Croatian Constitutional Court has thirteen judges (see paragraph 23 above). Their names are well known to the general public, and even more so to legal professionals. It further notes that section 68 of the Constitutional Court Act provides that the Constitutional Court decides on constitutional complaints in a plenary session if the panel of six judges does not reach a unanimous decision, or if the panel considers that the issue raised in the constitutional complaint is of wider importance (see paragraph 25 above). That being so, and given that the applicant's case stirred a great deal of controversy and attracted wide media attention, the Court considers that the applicant could have expected that the Constitutional Court would decide S.B.'s constitutional complaint in a plenary session.

62. More importantly, the Court notes that on 4 February 2009 the Constitutional Court, sitting in a plenary session and including judges M.J. and D.Š., ordered an interim measure postponing the effects of the Administrative Court's judgment of 15 October 2008 (see paragraph 14 above). The Constitutional Court's decision on the interim measure was published in the Official Gazette (see paragraph 14 above), was widely reported in the media and the applicant referred to it in her reply to S.B.'s constitutional complaint (see paragraph 17 above). Therefore, even though it has never been served on her, the Court considers that the applicant must have been aware of the decision in question and of the composition of the Constitutional Court bench by which it was taken.

63. In the light of the foregoing, the Court considers that it was not only possible but very likely that S.B.'s constitutional complaint would be decided in a plenary session of the Constitutional Court including judges M.J. and D.Š., and that the applicant must have been aware of that possibility, regrettable though it may be. In these circumstances, the Court finds that the applicant should have requested their withdrawal. However, she did not do so.

64. It follows that the applicant's complaint concerning the alleged lack of impartiality is inadmissible under Article 35 § 1 of the Convention for non-exhaustion of domestic remedies and must be rejected pursuant to Article 35 § 4 thereof.

65. The Court further notes that the applicant's complaints concerning the lack of a public hearing, the breach of the principle of equality of arms and the right to an adversarial hearing are not manifestly ill-founded, within the meaning of Article 35 § 3 (a) of the Convention. It also notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. Equality of arms and adversarial hearing

(a) The arguments of the parties

(i) The Government

66. The Government submitted that the principles of an adversarial hearing and equality of arms, as developed in the Court's case-law, applied only to parties to the proceedings. However, the applicant in the present case had not been a party to the proceedings before the Constitutional Court. This was so because the proceedings before the Constitutional Court were *sui generis* proceedings in which there were no two opposing parties but a complainant who contested a decision of a judicial, administrative or other public authority alleging that his or her constitutional rights had been violated. In those proceedings, pursuant to section 69 of the Constitutional Court Act, a copy of the constitutional complaint was sent to interested persons and they were invited to respond to it only if necessary (see paragraph 25 above).

67. The Government further argued that in the instant case no evidence had been taken in the proceedings before the Constitutional Court on which the applicant had not been able to make a statement, nor had there been any oral hearing to which the applicant had not been summoned. More importantly, S.B.'s constitutional complaint together with all her written pleadings and evidence had been sent in due time to the applicant as an interested person, to respond, and she had done so on 7 March and 9 March 2009 (see paragraph 17 above). Therefore, the fundamental requirement of an adversarial hearing, that is, to send the pleadings of one party to the other and the right to reply to them, had been respected in the Constitutional Court proceedings.

68. As regards the expert opinions sought by the judge rapporteur under Rule 31 of the Constitutional Court Rules (see paragraph 28 above), the Government explained that it was in that judge's discretion to seek such opinions where he or she deemed that they would be helpful in decision-making. Such opinions did not have any formal status or any legal effect,

and were not binding for anyone. Neither could they be viewed as evidence (unlike, for example, reports and opinions of a court's expert witnesses) or another party's pleadings. Therefore, there was no obligation to send them either to a complainant or to an interested person. The judge rapporteur was not obliged to communicate them even to the other judges of the Constitutional Court. To hold otherwise would mean that each time a court intended to use an article from a law journal in its decision, it would have to inform the parties thereof and give them a chance to submit their comments. That being so, the expert opinions that the judge rapporteur requested and obtained in the applicant's case had not been sent to the complainant S.B., Parliament (whose decision had been contested) or the applicant. Therefore, in a situation such as that in the present case, where the applicant had been served with all S.B.'s submissions and had been given an opportunity to comment on them, the fact of not sending the expert opinions to any of the participants in the proceedings, including the applicant, could not be viewed as a breach of her right to an adversarial hearing or contrary to the principle of equality of arms.

(ii) *The applicant*

69. The applicant first reiterated her complaint that the expert opinions of eminent lawyers and opinions and information obtained from various institutions in the Constitutional Court proceedings had been served on her only after the proceedings had ended.

70. She then challenged the Government's argument that she had not been a party to the proceedings before the Constitutional Court. In particular, the applicant first wondered why S.B.'s constitutional complaint and its supplements had been forwarded to her and why she had been afforded a chance to respond to those submissions, if she had not been a party to the proceedings before the Constitutional Court. Furthermore, if the Government's contention was to be accepted, that would mean that she had not been recognised as a party to the proceedings (before the Constitutional Court) in which the (Administrative Court's) judgment rendered in her favour had been contested and eventually quashed. That would certainly have been contrary to the basic principles of the rule of law.

71. Lastly, the applicant noted that the Constitutional Court had requested information, *inter alia*, from the Croatian Bar Association, a private bank Zagrebačka banka d.d. and the Danish Red Cross. Given that S.B. had previously worked as an advocate's trainee as well as for the bank and NGO in question, the applicant concluded that the Constitutional Court must have been looking for evidence of S.B.'s professional experience. In these circumstances it could not be argued, as the Government had, that in the proceedings before the Constitutional Court no evidence had been taken.

(b) The Court's assessment

72. The Court reiterates that the principle of equality of arms, which is one of the elements of the broader concept of a fair trial, requires each party to be given a reasonable opportunity to present its case under conditions that do not place it at a substantial disadvantage *vis-à-vis* its opponent (see, among many other authorities, *Dombo Beheer B.V. v. the Netherlands*, 27 October 1993, § 33, Series A no. 274, and *Ankerl v. Switzerland*, 23 October 1996, § 38, *Reports of Judgments and Decisions* 1996-V). In the present case it is undisputed that: (a) the expert opinions of eminent lawyers and opinions and information obtained from various institutions by the Constitutional Court were not communicated to either the applicant or S.B. prior to that court's decision of 30 April 2009, and (b) that all S.B.'s submissions in the proceedings before the Constitutional Court (the constitutional complaint of 4 February 2009 and its supplements of 18 February and 3 March 2009) were forwarded to the applicant and that she was given an opportunity to respond to them, of which she availed herself. Accordingly, the Court finds that the principle of equality of arms has not been breached in the present case (see, for example and *mutatis mutandis*, *Nideröst-Huber v. Switzerland*, 18 February 1997, § 23, *Reports* 1997-I, and *Krčmář and Others v. the Czech Republic*, no. 35376/97, § 39, 3 March 2000).

73. However, the Court further reiterates that the concept of a fair hearing also implies the right to adversarial proceedings. That right means that the parties to criminal or civil proceedings must in principle have the opportunity not only to make known any evidence needed for their claims to succeed, but also to have knowledge of, and comment on, all evidence adduced or observations filed, with a view to influencing the court's decision (see, for example, *Lobo Machado v. Portugal*, 20 February 1996, § 31, *Reports* 1996-I; *Vermeulen v. Belgium*, 20 February 1996, § 33, *Reports* 1996-I, and *Krčmář and Others v. the Czech Republic*, no. 35376/97, § 40, 3 March 2000). This position is not altered when the observations are neutral on the issue to be decided by the court or, in the opinion of the court concerned, they do not present any fact or argument which has not already appeared in the impugned decision (see *Kukkonen v. Finland*, no. 57793/00, § 20, 7 June 2007, and *Sharomov v. Russia*, no. 8927/02, § 44, 15 January 2009). Therefore, although the Court has not found a breach of the principle of equality of arms (see the previous paragraph), it nevertheless has to examine whether the same set of facts breached the applicant's right to adversarial proceedings.

74. The Court notes that the main legal issue in the present case was the scope of constitutional review of decisions on appointment of State officials, in particular of Parliament's decision of 9 May 2008 on the election of three Constitutional Court judges. The main factual issue in the instant case was whether S.B. had the required professional experience to

stand as a candidate for, and be elected to, the office of judge of the Constitutional Court. For the Court, it is evident that the Constitutional Court requested opinions from eminent lawyers and various institutions in order to reach an informed decision on the main legal issue it had to resolve, whereas the information sought from the Croatian Bar Association, Zagrebačka banka d.d. and the Danish Red Cross were requested in order to establish the relevant facts, that is, with regard to S.B.'s professional experience. Therefore, it cannot but be concluded that those opinions and information were manifestly aimed at influencing that court's decision (see, *mutatis mutandis*, *Nideröst-Huber v. Switzerland*, 18 February 1997, § 26, *Reports* 1997-I, and *Krčmář and Others*, cited above, § 41). In those circumstances, the Constitutional Court could have been expected to observe strictly the principle of an adversarial hearing as it was of paramount importance to give the applicant an opportunity to comment on them (see, *mutatis mutandis*, *Krčmář and Others*, cited above, § 41). However, those documents were sent to the applicant only after the Constitutional Court had adopted its decision of 30 April 2009, leaving her without any opportunity to comment on them.

75. In any event, the Court reiterates that it is for the parties to a dispute alone to say whether or not a document calls for their comment. What is particularly at stake here is the litigants' confidence in the workings of justice, which is based on, *inter alia*, the knowledge that they have had the opportunity to express their views on every document in the file (see, for example, *Nideröst-Huber*, cited above, § 29; *Beer v. Austria*, no. 30428/96, § 18, 6 February 2001; *F.R. v. Switzerland*, no. 37292/97, § 40, 28 June 2001, and *Pellegrini v. Italy*, no. 30882/96, § 45, ECHR 2001-VIII). Thus they may legitimately expect to be consulted as to whether a specific document requires their comments (see, *Krčmář and Others*, cited above, § 43). It follows that, in the present case it was for the applicant to assess whether the opinions and information obtained by the Constitutional Court required her comments. The onus was therefore on that court to afford the applicant an opportunity to comment on those opinions and information prior to its decision of 30 April 2009 (see, *mutatis mutandis*, *K.S. v. Finland*, no. 29346/95, § 23, 31 May 2001, and *S.H. v. Finland*, no. 28301/03, § 35, 29 July 2008).

76. Having regard to the requirements of the principle of an adversarial hearing guaranteed by Article 6 § 1 of the Convention and to the role of appearances in determining whether those requirements have been complied with (see *Komanický v. Slovakia*, no. 32106/96, § 55, 4 June 2002), the Court finds that in the present case the opinions and information obtained in the proceedings before the Constitutional Court should have been notified to the applicant and she should have been given the opportunity to comment on them.

77. Given that those opinions and information obtained in the Constitutional Court proceedings were notified to the applicant only after the proceedings before that court had ended, the foregoing considerations are sufficient to enable the Court to conclude that the applicant's right to an adversarial hearing was not respected in the proceedings in question (see, *mutatis mutandis*, *Milatová and Others v. the Czech Republic*, no. 61811/00, §§ 60-61 and 63-66, ECHR 2005-V).

78. There has accordingly been a violation of Article 6 § 1 in the present case on account of the lack of an adversarial hearing.

2. Public hearing

(a) The arguments of the parties

(i) The Government

79. The Government pointed out that, according to the Court's case-law, the obligation to hold a (public) hearing was not absolute. Most of the cases in which no oral hearing had been held and where the Court had found no violation of Article 6 were civil cases, in contrast to criminal cases where the requirement to hold a public hearing was more imperative. In particular, in the *Jussila* case the Court held that: "the character of the circumstances that may justify dispensing with an oral hearing essentially comes down to the nature of the issues to be decided by the competent national court" (see *Jussila v. Finland* [GC], no. 73053/01, § 42, ECHR 2006-XIII). Therefore, a (public) hearing was not required where a tribunal was only called upon to decide on questions of law of no particular complexity (see *Valová, Slezák and Slezák v. Slovakia*, no. 44925/98, § 64, 1 June 2004), or in cases that raised no questions of fact or law which could not be adequately resolved on the basis of the case-file and the parties' written observations (see *Döry v. Sweden*, no. 28394/95, § 37, 12 November 2002, and *Pursiheimo v. Finland* (dec.), no. 57795/00, 25 November 2003). Where cases were better dealt with in writing than in oral argument, the Court had held that it was "understandable that in this sphere the national authorities should have regard to the demands of efficiency and economy" (see *Schuler-Zgraggen v. Switzerland*, 24 June 1993, § 58, Series A no. 263).

80. The Government further pointed out that the Constitutional Court Act in its section 50 provided for a possibility of holding a public hearing but only in the abstract constitutional review proceedings (see paragraph 25 above), and that the Constitutional Court had held only two public hearings since 1990. However, such a possibility was not at all provided for in respect of the proceedings following an individual constitutional complaint, and was therefore excluded. Consequently, the applicant's request for an

oral hearing could not have been granted, and she, as a legal professional, must or should have been aware of this.

81. The Government explained that the absence of hearings before the Constitutional Court was the result of its special position in the constitutional order of Croatia (it was not a regular court), but also of the specific nature of the proceedings and remedies before it. Moreover, the proceedings following individual constitutional complaints involved exclusively legal issues and not the establishment of facts. As in the present case, in such proceedings the Constitutional Court decided on the basis of written pleadings and documents furnished by complainants and interested persons and no witness or expert witnesses were heard. Therefore, as the parties would only have recapitulated what they had already stated in their written pleadings, to hold a hearing in the proceedings following a constitutional complaint would not have added to their fairness or served any useful purpose. Rather, if a hearing were held just for the sake of it, this would be in conflict with the principles of economy and efficiency.

(ii) The applicant

82. The applicant replied that the fact that the Constitutional Court Act expressly provided for a possibility of holding a public hearing only in abstract constitutional review proceedings did not mean that holding such a hearing in the proceedings following an individual constitutional complaint was prohibited. In any event, the Government's argument had been disproved by the practice of the Constitutional Court, which on 8 April 2011 had held a public hearing in proceedings instituted by the constitutional complaint of Mr P.T. (see paragraph 27 above) and had invited him to attend it.

83. The applicant also argued that the election of the Constitutional Court judges was an issue of wider public importance, which had been demonstrated by the media attention that her case had attracted. For the applicant, this in itself had been a sufficient reason to hold a public hearing in her case.

(b) The Court's assessment

84. The Court reiterates that the public character of proceedings before the judicial bodies referred to in Article 6 § 1 protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, higher and lower, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention (see, for example, *Axen v. Germany*, 8 December 1983, § 25, Series A no. 72; *Pretto and*

Others v. Italy, 8 December 1983, § 21, Series A no. 71, and *Martinie v. France* [GC], no. 58675/00, § 39, ECHR 2006-...).

85. The Court further reiterates that the right to a public hearing generally includes a right to an oral hearing (see, for example, *Fischer v. Austria*, 26 April 1995, § 44, Series A no. 312, and *Döry*, cited above, § 37).

86. The Court notes that in the present instance neither the Administrative Court nor the Constitutional Court held a hearing in the applicant's case. The Court therefore has to examine whether the lack of an oral and public hearing in the present case contravened Article 6 § 1 of the Convention.

87. In this connection the Court first reiterates that the obligation to hold a hearing is not absolute. For example, a hearing may be dispensed with if a party unequivocally waives his or her right thereto and there are no questions of public interest making a hearing necessary. A waiver can be made explicitly or tacitly, in the latter case for example by refraining from submitting or maintaining a request for a hearing (see, for example, *Döry*, cited above, § 37; *Lundevall v. Sweden*, no. 38629/97, § 34, 12 November 2002; *Håkansson and Sturesson v. Sweden*, 21 February 1990, Series A no. 171-A, § 66; and *Schuler-Zgraggen v. Switzerland*, 24 June 1993, Series A no. 263, § 58).

88. The Court notes that section 34 of the Administrative Disputes Act establishes as a rule that the Administrative Court decides the cases before it in a closed session. Exceptionally, it may hold an oral hearing. It also establishes the right of a party to the proceedings before that court to ask for an oral hearing to be held (see paragraph 30 above). That being so, the applicant could have been expected to request a hearing before that court if she attached importance to it (see *Döry*, cited above, § 38, and *Lundevall*, cited above, § 35). However, in her request for the protection of a constitutionally guaranteed right lodged with the Administrative Court on 26 May 2008 the applicant did not ask for an oral hearing to be held. She has not submitted to the Court any other evidence showing that she did so at any later stage of the proceedings before the Administrative Court. The Court therefore takes it as established that the applicant did not ask for an oral hearing before the Administrative Court. It must therefore be considered that she unequivocally waived her right to a hearing (see *Schuler-Zgraggen*, cited above, § 58, Series A no. 263; *Zumtobel v. Austria*, 21 September 1993, § 34, Series A no. 268-A; *Fischer*, cited above, § 44, Series A no. 312; *Döry*, cited above, § 38; *Lundevall*, cited above, § 35; and *Šikić v. Croatia*, no. 9143/08, § 29, 15 July 2010).

89. It remains to be determined whether, in these circumstances, the lack of an oral hearing before the Constitutional Court involved a breach of Article 6 § 1 of the Convention. In this connection, the Court reiterates that in establishing whether the absence of a hearing before a second or third instance court may be justified depends on the special features of the

proceedings at issue. Moreover, account must be taken of the entirety of the proceedings in the domestic legal order and of the role of such courts therein. Where the proceedings before higher courts involve only questions of law, as opposed to questions of fact, an oral and public hearing is generally not required, provided that such a hearing was held or waived at first instance (see, among many other authorities, *Ekbatani v. Sweden*, 26 May 1988, §§ 27 and 31, Series A no. 134; *Hermi v. Italy* [GC], no. 18114/02, §§ 60-61, ECHR 2006-XII, and *Döry*, cited above, § 40). In applying these principles to Constitutional Courts the Court has held that a hearing was normally not required in proceedings before such courts because, having been limited to an examination of constitutional issues, they had entailed an assessment not of points of fact but of points of law (see, for example, *Zippel v. Germany* (dec.), no. 30470/96, 23 October 1997; *Siegl v. Austria* (dec.), no. 36075/97, 8 February 2000; *Weh and Weh v. Austria* (dec.), no. 38544/97, 4 July 2002; *Breierova and Others v. Czech Republic* (dec.), no. 57321/00, 8 October 2002; *Milatová and Others*, cited above, § 62; *Novotka v. Slovakia* (dec.), no. 74459/01, 8 November 2005; *Prischl v. Austria*, no. 2881/04, §§ 20-22, 26 April 2007; and, by contrast, *Kugler v. Austria*, no. 65631/01, §§ 47-53, 14 October 2010).

90. The Government argued that the absence of a hearing before the Constitutional Court in proceedings following an individual constitutional complaint was justified by that court's special role and the specific nature of the proceedings before it, which involved exclusively legal issues and not the establishment of facts (see paragraph 81 above).

91. The Court first notes in this connection that the present case concerned alleged irregularities in the election of a Constitutional Court judge and that the main legal issue was the scope of constitutional review of decisions on appointment of State officials, in particular of Parliament's decision of 9 May 2008. It is true, as already noted above (see paragraph 74) that the Constitutional Court also requested information on S.B.'s professional experience. However, from the reasoning of its decision of 30 April 2009, in particular from the finding that the Administrative Court had acted *ultra vires* when it (re)assessed the evidentiary value of the documents S.B. had furnished as proof of her professional experience (see paragraph 20 above), it is clear that the Constitutional Court ultimately did not ascertain or review facts or (re)assess evidence. It follows that the proceedings before it were limited to an examination of the above-mentioned constitutional issue, that is, they entailed an assessment not of points of fact but exclusively of points of law. What is more, in contrast to the *Kugler* case, where the Court found a violation of Article 6 § 1 of the Convention on account of the lack of a public hearing before the Constitutional Court because the Administrative Court "had no jurisdiction concerning the lawfulness of the area zoning plan" and the Constitutional Court "was the only body which could have determined this aspect of the

dispute” (see *Kugler*, cited above, §§ 50-53), in the present case both the Administrative Court and the Constitutional Court dealt with the same (constitutional) issue.

92. Having regard to the foregoing, the Court finds that in the circumstances such as those in the present case where the applicant waived her right to an oral and public hearing at first instance, Article 6 § 1 of the Convention does not require such a hearing to be held before the higher court where that court is called upon to examine the same questions of law as the first-instance court.

93. There has accordingly been no violation of Article 6 § 1 of the Convention in the present case on account of the lack of an oral and public hearing.

II. OTHER ALLEGED VIOLATIONS OF ARTICLE 6 § 1 OF THE CONVENTION

94. The applicant further complained, also under Article 6 § 1 of the Convention, about the outcome and the length of the above-mentioned proceedings.

95. In so far as the applicant complains of the excessive length of the above proceedings, the Court notes that they lasted less than a year, during which period the case was examined at two levels of jurisdiction. That being so, the Court considers, in the light of the criteria established in its case-law on the question of “reasonable time” (the complexity of the case, the applicant’s conduct and that of the competent authorities), and having regard to all the information in its possession, that such a period cannot be considered excessive. Consequently, the length of the proceedings in the present case was not unreasonable.

96. The Court further reiterates that that it is unable to examine the outcome of proceedings under Article 6 § 1 of the Convention unless that outcome was arbitrary. In the light of all the material in its possession, the Court considers that the present case discloses no appearance of arbitrariness. The applicant was able to submit her arguments before courts which addressed those arguments in decisions that were duly reasoned and not arbitrary.

97. It follows that these complaints are inadmissible under Article 35 § 3 (a) of the Convention as manifestly ill-founded and must be rejected pursuant to Article 35 § 4 thereof.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

98. The applicant also complained, without further substantiating this complaint, that she had not had an effective remedy. She relied on Article 13 of the Convention, which reads as follows:

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

99. The Court first notes that the applicant had a remedy by which to challenge Parliament’s decision of 9 May 2008, namely the possibility of lodging a request for the protection of a constitutionally guaranteed right, and that she successfully availed herself of that remedy.

100. To the extent that the applicant may be understood to complain of the absence of a remedy against the Constitutional Court’s decision of 30 April 2009, the Court reiterates that where, as in the instant case, the applicant alleges a violation of the rights conferred by the Convention by the last-instance judicial authority of the domestic legal system, the application of Article 13 is implicitly restricted (see, *mutatis mutandis*, *Times Newspapers Ltd. and Andrew Neil v. the United Kingdom*, no. 14644/89, Commission’s report of 8 October 1991, Decisions and Reports (DR) 73, p. 41 at p. 58, and *Crociani et al. v. Italy*, nos. 8603/79, 8722/79, 8723/79 & 8729/79 (joined), Commission decision of 18 December 1980, DR 22, p. 224, § 15). Therefore, the absence of a remedy against the Constitutional Court’s decision does not raise an issue under Article 13 of the Convention (see *Wendenburg and Others v. Germany* (dec.), no. 71630/01, ECHR 2003-II).

101. It follows that this complaint is inadmissible under Article 35 § 3 (a) of the Convention as manifestly ill-founded and must be rejected pursuant to Article 35 § 4 thereof.

IV. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

102. Lastly, the applicant complained, also without further substantiating this complaint, that she had been discriminated against. She relied on Article 14 of the Convention, which reads as follows:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

103. The Court considers this complaint wholly unsubstantiated as the applicant provided no details whatsoever. It is therefore inadmissible under Article 35 § 3 (a) of the Convention as manifestly ill-founded and must be rejected pursuant to Article 35 § 4 thereof.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

104. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

105. The applicant claimed 50,000 euros (EUR) in respect of pecuniary and non-pecuniary damage.

106. The Government contested that claim.

107. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it considers that a finding of a violation of Article 6 § 1 of the Convention constitutes in itself sufficient just satisfaction in the circumstances for any non-pecuniary damage the applicant might have sustained.

B. Costs and expenses

108. The applicant did not submit any claim for costs and expenses incurred in the proceedings before the domestic courts or before this Court. The Court therefore considers that there is no call to award her any sum under this head.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints concerning the lack of an adversarial hearing and the lack of an oral and public hearing admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the lack of an adversarial hearing;
3. *Holds* that there has been no violation of Article 6 § 1 of the Convention on account of the lack of an oral and public hearing;
4. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage the applicant might have sustained;

5. *Dismisses* the applicant's claim for just satisfaction.

Done in English, and notified in writing on 26 July 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Anatoly Kovler
President