



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

THIRD SECTION

CASE OF KAMENOS v. CYPRUS

(Application no. 147/07)

JUDGMENT

STRASBOURG

31 October 2017

FINAL

31/01/2018

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

In the case of Kamenos v. Cyprus,

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

Helena Jäderblom, *President*,

Luis López Guerra,

Dmitry Dedov,

Pere Pastor Vilanova,

Alena Poláčková,

Jolien Schukking, *judges*,

Costas Pamballis, *ad hoc judge*,

and Stephen Phillips, *Section Registrar*,

Having deliberated in private on 3 October 2017,

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

PROCEDURE

1. The case originated in an application (no. 147/07) against the Republic of Cyprus lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Cypriot national, Mr Costas Kamenos (“the applicant”), on 24 November 2006.

2. The applicant was represented by Mr E. Efstathiou, a lawyer practising in Nicosia. The Cypriot Government (“the Government”) were represented by their Agent at the time, Mr P. Clerides, Attorney General of the Republic of Cyprus.

3. The applicant complained principally under Article 6 of the Convention of the lack of fairness of disciplinary proceedings against him before the Supreme Council of Judicature (“the SCJ”). He complained firstly, under Article 6 § 1, that he had been charged, tried and convicted by the same judges, in breach of the principle of impartiality. Secondly, relying on Article 6 § 2, he alleged that he had not been given adequate information concerning the specific Industrial Disputes Court (“the IDC”) proceedings to which the complaint against him had related and on which the SCJ had relied.

4. On 10 December 2008 both complaints were communicated to the Government under Article 6 § 1 of the Convention.

5. As the judge that had been elected in respect of Cyprus at the time, George Nicolaou, was exempted from sitting in the case (Rule 28 of the Rules of Court), on 27 January 2009 the Government appointed Mr Costas Pamballis to sit as an *ad hoc* judge (former Article 27 § 2 of the Convention and former Rule 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1949, he is a lawyer and lives in Nicosia.

7. The applicant was appointed as an IDC judge on 1 October 1997 and as its President on 6 December 2001.

8. By a letter dated 18 July 2005 the two main trade unions and the two corresponding employers' federations submitted a complaint to the Supreme Court, alleging misconduct on the part of the applicant in the exercise of his judicial functions. The letter referred, in general, to complaints received by members of trade unions and employers' federations who had carried out duties as lay members of the IDC, concerning the applicant's conduct towards litigants, witnesses, lawyers and lay members of the court during proceedings.

9. The applicant was served with a written notice from the Supreme Court dated 1 September 2005, informing him of the allegations against him and noting that the Supreme Court had decided that it was justified to activate Rule 3 of the Procedural Rules concerning the exercise of the SCJ's disciplinary authority ("the Procedural Rules"; see paragraph 41 below). The applicant was provided with a copy of the letter of complaint and was requested to send his comments within seven days.

10. By a letter dated 7 September 2005 the applicant submitted his comments to the Supreme Court with regard to the allegations against him. The applicant observed, *inter alia*, that the complaint was so general and vague that he was unable to identify the precise events on which it was based as he had presided over numerous proceedings. He also informed the Supreme Court that the authors of the letter had given a copy to the press and that it had been published in a newspaper on 21 July 2005.

11. On 16 September 2005 the Supreme Court decided, in accordance with Rules 4 and 5 of the Procedural Rules (see paragraph 41 below), to appoint an investigating judge to look into the allegations against the applicant.

12. On 19 September 2005 the Supreme Court appointed the then President of the District Court of Nicosia as investigating judge.

13. In a letter dated 5 December 2005 the investigating judge informed the applicant of his appointment. He also provided the applicant with statements he had taken from twenty-eight people during his investigation and invited the applicant to submit a supplementary statement, if he so wished, within ten days.

14. On 16 December 2005 the applicant made a lengthy supplementary statement to the investigating judge, providing his comments on the statements collected by the judge and referring to various proceedings in which the witnesses had been involved. He also noted that he did not view

his comments as a supplementary statement as such, since it was only at that time that the complaint had become more precise, at least in part. Furthermore, he observed that the witness statements covered a period of six years, when he had sat in about three thousand cases. The statements could not therefore provide the full picture. He suggested that statements should be taken from a number of lay members of the court and provided the investigating judge with their names and telephone numbers.

15. On 21 December 2005, upon completion of the investigation, the investigating judge submitted a report to the Supreme Court summarising his investigation and the evidence collected. The report was accompanied by all the material he had collected, including the statements given by the witnesses and the applicant. The report made no recommendation.

16. By a letter dated 10 February 2006 the chief registrar of the Supreme Court informed the applicant that the court had decided that a disciplinary process was warranted. He provided the applicant with the charge sheet drawn up by the Supreme Court at a meeting it had held on 9 February 2006. This included two charges of misconduct, and details of the preparatory investigation by the investigating judge. The charges against the applicant were as follows:

“First Charge

Misconduct (Articles 153 § 7 (4) and 157 § 3 of the Constitution)

Particulars

While you exercised the duties of President of the Industrial Disputes Court you repeatedly displayed oppressive, disparaging, scornful and, more generally, insulting behaviour towards the lay members of the Court, both inside and outside the courtroom and, at the same time, in the course of proceedings you sometimes ignored them, sometimes did not allow them to put questions and sometimes did not allow them to ask for clarification on the matters at issue.

Second Charge

Misconduct (Articles 153 § 7 (4) and 157 § 3 of the Constitution)

Particulars

While you exercised the duties of President of the Industrial Disputes Court you repeatedly displayed oppressive, disparaging, scornful and, more generally, insulting and even humiliating behaviour towards lawyers and/or litigants and/or witnesses during the proceedings, including ironic comments at their expense and/or innuendos, with the result that, owing to the agitation and disruption caused to them, the entire proceedings were diverted from their proper course.”

17. A list of fifteen witnesses was attached to the charge sheet.

18. In his letter the chief registrar summoned the applicant to appear on 9 March 2006 before the SCJ (see paragraph 36 below) to answer the charges. He informed the applicant that the proceedings would not be held in public unless he so wished and that, pending the proceedings, he would have to refrain from carrying out his duties.

19. On 9 March 2006, before the applicant answered the charges against him, his lawyer raised several preliminary objections. In particular, he argued that the investigation had been incomplete as statements had not been taken from the people indicated by the applicant. Furthermore, he argued that the charge sheet was incomplete, defective and vague; it did not give sufficient information to the applicant about the offences in relation to the actual content of the two charges he was facing.

20. The SCJ ruled the same day that the charge sheet, taken together with the fifteen statements, provided sufficient information to the applicant about the facts on which the charges had been based. In that regard, it noted that the applicant had commented on all the details referred to in the statements in a lengthy statement. The SCJ also held that the investigation had been adequate and had provided grounds for bringing charges.

21. The applicant then pleaded not guilty to the charges.

22. A hearing was set for 29 March 2006. The applicant's lawyer agreed that the proceedings would not be held in public.

23. Hearings commenced on the scheduled date. The SCJ set out the procedure to be followed: every witness would read out the statement he or she had given to the investigating officer and would then be cross-examined by the applicant's lawyer. Following a request by the applicant's lawyer, the SCJ also held on the same day that in view of the defence's line of argument all the files of the proceedings in which the witnesses had sat as members of the IDC, from the applicant's appointment as president of the IDC onwards, should be brought before it. The hearing was scheduled to continue on 31 March 2006.

24. Following a request by the applicant's lawyer, leave was given by the SCJ on the latter date for the applicant to have full access to the IDC registry's archives in order to enable him to examine and collect any elements that could help his defence.

25. The hearings continued, with around seven more sessions being held. Files of the proceedings over which the applicant had presided and in which the witnesses had been involved were admitted as exhibits. They were filed in separate bundles by reference to the particular witness and were recorded in the list of exhibits.

26. During the proceedings it was clarified that the charge sheet was limited to the period subsequent to the applicant's appointment as President of the IDC. Further statements that related to pending proceedings and complaints that had previously been dealt with by the Supreme Court were removed from the charge sheet. Ten out of the fifteen witnesses listed on the charge sheet ultimately testified. They comprised six lay members, two lawyers and two people who had been witnesses in proceedings over which the applicant had presided. The witnesses read out and confirmed the contents of their statements. They were then cross-examined by the applicant's lawyer.

27. In addition, at the suggestion of the applicant's lawyer, the court also summoned the IDC's registrar.

28. After the conclusion of the witness statements and an address by the applicant's lawyer, the SCJ found on 29 May 2006 that a prima facie case had been established against the applicant. It therefore called the applicant to put forward his defence.

29. The applicant took until 23 June 2006 to set out his defence case, testifying himself and calling thirty-six witnesses. They consisted of twenty-six lay members of the IDC, nine lawyers and a representative from the redundancy fund. The proceedings concluded with the applicant's lawyer addressing the court. He raised the issue of the charge sheet again and also submitted that because the Supreme Court and the SCJ had the same composition, the same judges had examined the witness statements, had decided to refer the case to trial, formulated the charge sheet and overseen the proceedings. Those judges had also acted as prosecutors and had then tried the case. He argued that that was contrary to the rules of natural justice and the right to a fair trial. He stressed, however, that this had nothing to do with the judges as individuals.

30. In a decision of 19 September 2006 the SCJ found, by a majority of twelve to one (the President and eleven justices concurring), that on the basis of the evidence and all the material facts before it, the applicant's alleged misconduct had been proved. The SCJ assessed the evidence given by the eleven witnesses and made specific reference to events transcribed in the records of court proceedings over which the applicant had presided and in which the witnesses had been involved. It referred to ten specific cases. After hearing the applicant, in accordance with Rule 26 (see paragraph 41 below), the SCJ removed him from office.

31. The relevant parts of the decision read as follows:

“..."

Rule 13 secures for the judge against whom proceedings are brought all the rights provided for in Article 12 § 5 of the Constitution for persons who are charged with a criminal offence. That constitutional provision secures the well-known rights that an accused has in a criminal trial and are identical to those secured under Articles 6 §§ 2 and 3 of the European Convention on Human Rights, which was ratified by the House of Representatives by law in 1962 (Law 39/62). Furthermore, the provisions of Article 30 of our Constitution, which are the equivalent to those of Article 6 of the Convention, are also applicable.

...

At no stage did the Supreme Council of Judicature function as a public prosecutor against Mr Kamenos. The President and Members of the Supreme Council of Judicature did not put a single question to the witnesses who were listed on the charge sheet, or to those summoned on behalf of Mr Kamenos, which might have been construed as cross-examination for the purpose of contesting the witnesses' allegations. On the contrary, the President and Members of the Supreme Council of Judicature asked very few questions, and they were solely for the purpose of

clarification; special reference will be made to some of those questions at the appropriate stage. Not a single question was put to Mr Kamenos. The Supreme Council of Judicature was not seeking to pursue a procedure of prosecution against Mr Kamenos in the form of a confrontation between prosecution and defence. For that reason, and despite having such powers under Rule 16, the relevant provision of the Constitution on the judicial process and the procedure to be followed in investigating disciplinary cases, it did not assign the duties of prosecutor to the judge-investigator or to any other judicial official. In that way, which was the declared intention of the Supreme Council of Judicature, more rights were secured for Mr Kamenos than those which he had under the aforementioned Articles of the Constitution and the Rule. That was precisely the aim of the procedure followed by the Supreme Council of Judicature, which essentially remained an audience for the witnesses' statements.

It follows that this is the appropriate moment to refer to the suggestion made by Mr Kamenos's lawyer in his final address. Its subject relates directly and absolutely to what we have just said. The lawyer alleged that the Supreme Council of Judicature had functioned in a dual capacity, given that it had judged the case and simultaneously exercised the duties of prosecutor. Clarifying his position, he said that that is inferred from the fact that the President and Members of the Supreme Council of Judicature put questions to the witnesses. In our opinion, that suggestion is unfounded and unjustifiable. It is unfounded for the reasons which we explained above, and unjustifiable because it conflicts with what the lawyer said to us at the beginning of the proceedings, when he ... spoke in praise of the powers invested by the Constitution in the Supreme Council of Judicature, describing its work as difficult and important [in those instances] when it is called upon to decide whether a judge displayed misconduct and is obliged, again in accordance with the Constitution, to terminate the latter's services in the event of conviction. In brief, Mr Efstathiou not only accepted but also praised as correct the competence, arising from the Constitution, of the Supreme Council of Judicature, which is made up of the full bench of the Members of the Supreme Court, the highest judicial authority in the State.

...

[The applicant's lawyer] asked many witnesses to express an opinion on the extent to which they considered that Mr Kamenos's decisions were correct. Most of them, including the lawyers, gave the right reply, namely, that it was not for them to judge Mr Kamenos's decisions. In the same way, the Supreme Council of Judicature is not judging the correctness of Mr Kamenos's decisions. We do not have such competence. That belongs to the Supreme Court. The competence of the Supreme Council of Judicature is only to decide whether the charges of improper behaviour (misconduct) are proved, which [behaviour] in the case we are examining and according to the particulars of the charges, is continuous (*κατά σπρροή, διαρκής*) and directly refers to the function of Mr Kamenos as the President of the Industrial Disputes Court.

...

We previously stated that certain witnesses called by Mr Kamenos, evidently in an endeavour to tone down or explain what the witnesses listed on the charge sheet had testified to and who touched on Mr Kamenos's behaviour in the course of the hearing, in essence confirmed what those witnesses had said. Several examples follow ...

...

From the evidence that we have analysed above, we find that the charges have been proved.

...

We wish to clarify that the purpose of this procedure is not to punish Mr Kamenos but to protect the public by adopting of a strict standard of judicial behaviour in order to preserve public confidence in the integrity, prestige and independence of the judicial system. We borrow and adopt the above principle from the decision (Investigation concerning Judge Bruce Van Voorhis, No. 165) given in February 2003 by the Commission of Judicial Performance of the State of California, in the United States of America, which concerned a procedure against a specific judge whose services were also terminated for misconduct, with facts and particulars similar to the case before us. In essence, we translate the principle which that Commission adopted and recorded on page 31 of the decision. The principle is based, as stated in the decision, on what was said by the Supreme Court of the State, that the purpose of the procedure was not to punish judges who have erred but to protect the judicial system and those who are subject to the formidable power exercised by judges.

...

Evaluating the above with great care, caution and, we would say, anxiety, we are led to the conclusion that everything imputed to Mr Kamenos as stated in the two charges has been proved. In accordance with the relevant provisions of the Constitution, which are referred to in our decision, the proof of a charge of misconduct against a judge leads to the termination of his services.”

32. The dissenting judge found in his decision that the evidence was not sufficient to prove such a serious charge as misconduct. As regards the procedure, the judge noted, *inter alia*, that the Supreme Council of Judicature had asked the witnesses very few questions and that they had been for the purposes of clarification. Furthermore, with regard to the investigation and the object of the hearing, he observed:

“A judicial official with the duties of prosecutor was not appointed, a possibility which is referred to in Rule 16, and we adopted the following approach: every witness read his statement to the investigating officer out loud and, immediately after, was cross-examined by Mr Kamenos’s lawyer. During the cross-examination or subsequently members of the Supreme Council of Judicature asked the witnesses a few questions for clarification purposes. This is also exactly what happened in the case of Mr Kamenos and the 36 witnesses called by him.

...

Before referring to the evidence, it is useful if we outline the methodology which led to the taking of statements by the Investigating Officer. He did not himself take the initiative of collecting evidence in view of the accusation, as he explains in his report. The persons who signed the accusation did not have any personal knowledge of the circumstances and statements were taken from all those they ... named, and from others subsequently named by those who had been initially summoned. The investigation into the manner in which Mr Kamenos exercised his duties in general was therefore not systematic and that is also the reason for not taking statements from a number of other persons whom Mr Kamenos himself indicated. Besides, as we have seen, of the 28 statements which the Investigating Office took, only 15 were attached to the charge sheet, with a further reduction to 10 in the course of the hearing. They did not include statements which, as the Investigating Officer reported, not only expressed no complaints but stated that Mr Kamenos’s conduct had been irreproachable in all respects. Consequently, as is in any case self-evident, the object

of the hearing is [to determine] whether, on the basis of the evidence of those ten witnesses, the charge has been substantiated as formulated. That is to say, whether, from each individual's evidence and the correlation between them, to the extent possible, there arises conduct as cumulatively stated on the charge sheet, [and] in the case of the second charge "with the result that, owing to the agitation and disruption they were caused, the entire proceedings were diverted from their proper course". This (was the wording), without any specification on the charge sheet of a definite, specific incident at a specific time, ... in relation to a specific person in the context of a specific case. The witnesses who remained on the charge sheet (whose statements I shall of course return to), as lay members of the court, or as lawyers or witnesses, did not submit a complaint there and then about what they considered to be objectionable conduct. ... Nor did the litigants in any specific case which could be related to the charge sheet make a complaint at the time, or appeal or employ any other legal means so that any objectionable conduct would be examined also from the aspect of its effect on the final outcome. That was what occurred in the cases of *Athanasiou v. Reana Manuf. & Trade Co.Ltd and others* (2001) 1 C.L.R. 1635, and *Fanos N. Epiphaniou Ltd v. Melarta and others* (2002) 1 C.L.R.654, in which the Supreme Court annulled decisions issued by the Industrial Disputes Tribunal under the presidency of Mr Kamenos, using strong language about the degree of his intervention in the proceedings and the appearance of partiality to which it could give rise. Of course, the charge sheet does not extend to those cases and does not concern the issue of interventions as such ... The core of the charge is the conduct attributed to Mr Kamenos at the expense of lay members of the court, lawyers, litigants and witnesses, and it is in the light of such considerations that I shall go on to examine the evidence adduced."

33. The applicant continued to receive all the benefits that came with his post during the proceedings. It appears from a letter sent to him by the Treasury of the Republic of Cyprus that the applicant was considered as having retired from the date of his dismissal, 19 September 2006. He was paid a retirement lump sum and started receiving his pension.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Supreme Court and the SCJ

34. The 1960 Constitution, which came into force when the Republic of Cyprus was established, provided for the existence of a Supreme Constitutional Court and a High Court (Parts IX and X of the Constitution respectively). Both courts were composed of a Greek, Turkish and a neutral judge (Articles 133 and 153). The neutral judges, who were not subjects or citizens of Greece, Turkey or the United Kingdom (and the Colonies), presided over the courts (Articles 133 and 153). That Constitutional arrangement only lasted until the beginning of 1964: following the inter-communal problems of 1963, the neutral presidents vacated their posts without being replaced. The Administration of Justice (Miscellaneous Provisions) ("Law no. 33/1964") was enacted in order to address an emergency situation and to set up the necessary judicial machinery for the

continued administration of justice. By virtue of that law, the two highest courts were merged into one, the Supreme Court, to which the jurisdiction and powers of the two earlier courts were transferred. The establishment and operation of the new Supreme Court was held to be in conformity with the Constitution on the basis of the recognised principles of the law of necessity (*the Attorney-General of the Republic v. Mustafa Ibrahim and others* (1964) C.L.R. 195). The Turkish-Cypriot judges of the former courts participated in the composition of the Supreme Court for a few years following its establishment but subsequently withdrew.

35. The Supreme Court was originally composed of between five and seven judges, but their number was gradually increased by legislation to its current thirteen (Law no. 33/1964; in particular, Amending Laws no. 59/1981 and no. 158/1988). The judges of the Supreme Court are appointed by the President of the Republic (Article 153 § 2 of the Constitution).

36. District judges, senior district judges, presidents of district courts and judges of courts exercising specialised jurisdiction are appointed by the SCJ. The SCJ is composed of all thirteen judges of the Supreme Court (Articles 153 § 8 (1) and 157 § 1 of the Constitution and section 10 of Law no. 33/1964 as amended by Law no. 3/1987). Pursuant to Article 157 § 2 of the Constitution the appointment, promotion, transfer, termination of appointment, dismissal and disciplinary matters related to judges are exclusively within the competence of the SCJ. The same is provided by section 10(2) of Law no. 33/64 (as amended by Law no. 3/1987). Furthermore, with the exception of their appointment, the SCJ has exclusive competence under Article 153 § 8 to determine matters concerning the retirement, dismissal or termination of the appointment of Supreme Court judges and the court's president.

37. Articles 153 and 157, in so far as relevant, provide as follows:

Article 153 § 8

“(1) There shall be established a Council consisting of the President of the Supreme Constitutional Court as Chairman and the Greek and the Turkish judge of the Supreme Constitutional Court as members.

(2) This Council shall have exclusive competence to determine all matters relating to-

(a) the retirement, dismissal or otherwise the termination of the appointment of the President of the High Court in accordance with the conditions of service laid down in the instrument of his appointment;

(b) the retirement or dismissal of any Greek judge or the Turkish judge of the High Court on any of the grounds provided in subparagraphs (3) and (4) of paragraph 7 of this Article.

(3) The proceedings of the Council under subparagraph (2) of this paragraph shall be of a judicial nature and the judge concerned shall be entitled to be heard and to present his case before the Council.

(4) The decision of the Council taken by a majority shall be binding upon the President and the Vice-President of the Republic who shall jointly act accordingly.”

Article 157

“1. Save as otherwise provided in this Constitution with regard to the Supreme Constitutional Court, the High Court shall be the Supreme Council of Judicature, and its President shall have two votes.

2. The appointment, promotion, transfer, termination of appointment, dismissal and disciplinary matters of judicial officers are exclusively within the competence of the Supreme Council of Judicature.

...”

38. District judges, senior district judges, presidents of district courts and judges of the courts exercising specialised jurisdiction are appointed by the SCJ. They retire at the age of sixty-three (section 8(2) of the Courts of Justice Law, Law no. 14/1960, as amended in relation to district courts; and as provided for by the various domestic laws which concern courts of specialised jurisdiction). Supreme Court judges hold office until the age of 68 (Article 153 § 7 (1) of the Constitution).

39. Once appointed, judges can only be removed under very exceptional circumstances. In particular, Articles 153 § 7 and 157 § 3 of the Constitution, in so far as relevant, provide as follows:

Article 153 § 7

“...

“(3) Any Greek or the Turkish judge of the High Court shall be retired on account of such mental or physical incapacity or infirmity as would render him incapable of discharging the duties of his office either permanently or for such period of time as would render it impracticable for him to continue in office. A judge so retired shall be entitled to all benefits and emoluments provided by any law in force for the time being.

(4) A Greek or the Turkish judge of the High Court may be dismissed on the ground of misconduct.”

Article 157 § 3

“No judicial officer shall be retired or dismissed except on the like grounds and in the same manner as a judge of the High Court.”

40. Judicial independence is safeguarded by the Constitution and the traditions of the judiciary. The Constitution provides for a strict separation of the powers, jurisdictions and duties of the executive, legislature and judiciary.

B. Procedural Rules concerning the exercise of the SCJ's Disciplinary Authority

41. On 14 July 2000 the Supreme Court issued Rules on the basis of Article 163 § 2 (f) of the Constitution and section 17 of Law no. 33/64, setting out the practice and procedure to be followed by the SCJ in the exercise of its competence with regard to disciplinary matters relating to judicial officers (see paragraph 9 above). They set out in detail the disciplinary procedure to be followed in the event of a complaint that a judge may have become incapable, have displayed inappropriate behaviour (misconduct) or committed a disciplinary offence. In so far as relevant, they provide as follows:

“2. Definitions

...

‘Supreme Council of Judicature’ means the Supreme Court in the exercise of its competences on the basis of Article 157 of the Constitution.

...

3. Where it comes to the notice of the Supreme Court, in the exercise of its procedures, competences and powers or following a complaint, that a Judge may have

—

- (a) become incapable,
- (b) displayed inappropriate behaviour (misconduct),
- (c) committed a disciplinary offence,

it shall notify that Judge of the information it has in its possession or the complaints made and shall ask for his views within a specified time-limit.

4. Having received the views of the Judge, or on expiry of the above time-limit in the event that he refuses or omits to submit them, the Supreme Court shall examine whether there are grounds which justify holding an investigation into the possibility of the Judge having become incapable, having displayed inappropriate behaviour (misconduct) or having committed a disciplinary offence

5. If it is considered that an investigation is justified, this shall be carried out in the manner set out below.

...

(a) If an investigation is ordered, the Supreme Court shall appoint an investigating judge, to whom it shall assign the investigation of the matter.

...

In the conduct of the investigation, the investigating judge shall be assisted by a member or members of the registry of the courts.

Before beginning the investigation, all the information in the Supreme Court's possession shall be put before the investigating judge, including the views of the Judge who is the subject of the investigation. The investigating judge shall proceed with the investigation as quickly as possible and shall complete his task without delay.

6. The investigating judge shall take statements and collect information from every person who is in a position to provide facts and information with regard to the subject of the investigation.

...

7. The statements taken and the facts collected shall be put before the Judge who is under investigation, and he is given the opportunity to make, if he so wishes, a supplementary statement within a specified time-limit.

8. After completion of the investigation, the investigating judge shall submit, within fifteen days, a report summarising the evidence collected. The report shall be accompanied by the statements which have been taken, including any supplementary statement by the Judge under investigation.

9. The Supreme Court shall decide, in the light of the statements, facts and information before it, whether it is justified to refer the Judge under investigation to the Supreme Council of Judicature in order for it to be decided whether he has become incapable, has displayed inappropriate behaviour (misconduct) or has committed a disciplinary offence.

10.

...

(a) If a decision is taken to proceed against the Judge for misconduct or for committing a disciplinary offence, a charge sheet shall be drawn up, on which shall be set out the charge or charges, as the case may be, and a summary of the details which form the basis for them.

...

11. The charge sheet shall be served on the Judge against whom it is directed by the registrar of the court in which he serves, together with the investigating judge's report and all the data attached to it.

12. Pending the hearing the Judge against whom proceedings are being taken shall refrain from the exercise of his judicial duties.

13. During the hearing the Judge against whom proceedings are being taken shall enjoy all the rights guaranteed by Article 12 § 5 of the Constitution for a person charged with the commission of an offence.

14. Where the investigating judge is a member of the Supreme Court, he shall not be a member of the bench during the hearing.

15. At the first appearance before the Supreme Council of Judicature, the Judge against whom proceedings are being taken shall be called upon to answer the charge or charges. If the answer is a denial of the charges, a date shall be fixed for hearing the case. ...

16. During the hearing, the Supreme Council of Judicature shall summon, one by one, and shall hear the witnesses who have made statements and any other person who is in possession of facts or is in a position to shed light on the matters at issue. The witnesses shall take the oath required by law or make an affirmation that they will tell the Court the truth and nothing but the truth. Their evidence shall be introduced by questions which are put by the President of the Supreme Council of Judicature and supplementary questions by the Members:

... The Supreme Council of Judicature can assign the duties of prosecutor to the investigating judge or, if this is not feasible, to another Judge of the Supreme Court or to another Judge, in which case the presentation of witness evidence shall be made by him.

17. After the presentation of their evidence, witnesses shall be subject to cross-examination by the Judge against whom proceedings are being taken.

18. After the cross-examination, the President and Members of the Supreme Council of Judicature may put questions for clarification purposes, after which the Judge against whom proceedings are being taken shall have the right to put supplementary questions.

19. At the conclusion of the witness evidence on which the charge is based, the Supreme Council of Judicature shall decide if a prima facie case has been established against the Judge against whom proceedings are being taken.

20. If it is decided that a prima facie case has been established against the Judge against whom proceedings are being taken, he shall be given an opportunity to present his defence. The Judge against whom proceedings are being taken shall be entitled to give evidence on oath, to make an unsworn statement and to call witnesses. Both the Judge against whom proceedings are being taken and who has given evidence on oath, and any other witness for the defence, shall be subject to examination by the President and Members of the Supreme Court of Judicature, at the close of which the Judge against whom proceedings are being taken shall be given an opportunity to make, if it concerns himself, a supplementary, clarifying statement, or, if it concerns a witness whom he has summoned, of asking clarifying or supplementary questions.

21. On completion of the defence, the Judge against whom proceedings are being taken shall have the right to address the Court.

22. After the conclusion of the hearing, the Supreme Council of Judicature shall decide, in the case of a prosecution, if it has been proved that the Judge against whom proceedings are being taken is guilty –

- (a) of misconduct or
- (b) of a disciplinary offence,

as the case may be.

23. If the Supreme Council of Judicature decides that the charge or charges against the Judge against whom proceedings are being taken have not been proved, the court shall acquit and exonerate him.

...

26. A Judge who is found to be incapable or guilty of misconduct shall be heard before the Supreme Council of Judicature proceeds further.

27. A Judge guilty of misconduct shall be dismissed as the Constitution provides.

28. A judge guilty of a disciplinary offence shall be given-

- (a) a reprimand; or
- (b) a reprimand published in the Official Gazette of the Republic.”

C. Review of SCJ decisions

42. Article 146 of the Constitution provides for the revisional jurisdiction of the Supreme Court. Article 146 § 1 provides as follows:

“The Supreme Constitutional Court shall have exclusive jurisdiction to adjudicate finally on a recourse made to it on a complaint that a decision, an act or omission of any organ, authority or person, exercising any executive or administrative authority is contrary to any of the provisions of this Constitution or of any law or is made in excess or in abuse of powers vested in such organ or authority or person.”

43. In the case of *Antonios Kourris and the SCJ* ((1972) 3 C.L.R 390), the complainant, a district court judge, brought a “recourse” (judicial review proceedings) before the Supreme Court under Article 146 of the Constitution. He challenged a decision by the SCJ relating to the temporary appointment of five other district judges as presidents of district courts and complained about the SCJ allegedly refusing or omitting to deal with his written complaint in connection with those appointments. On 8 August 1972 the Supreme Court dismissed the recourse. It held, by a majority, that it lacked jurisdiction to deal with a recourse under Article 146 of the Constitution against any act, decision or omission of the SCJ because the latter’s functions were very closely connected with the exercise of judicial power.

44. In the case of *Savvas Karatsis v. 1. the Republic of Cyprus, through the Supreme Council of Judicature, 2. the SCJ* ((2001) 3 C.L.R. 220), the complainant, a family court judge, brought a recourse before the Supreme Court under Article 146 of the Constitution, challenging a decision by the SCJ concerning the conditions of his appointment to a temporary post as district court judge and the revocation of his appointment when he did not accept those conditions. The Supreme Court sat as a full bench (that is, all thirteen judges; see paragraph 35 above). The complainant requested that the Supreme Court re-examine and/or revise its judgment in *Kourris* (see paragraph 43 above) and that his case be heard by a different bench, arguing that the thirteen judges in question had themselves written the impugned decision, which they had taken in their capacity as members of the SCJ. On 15 March 2001 the Supreme Court dismissed the recourse for want of jurisdiction without addressing the issue of impartiality. It ruled that the Constitution entrusted the appointment of judicial officers exclusively to the SCJ (Article 157 § 2 of the Constitution). Judicial appointments were closely, even inextricably, interwoven with the exercise of the judicial function; more precisely, they constituted a precondition for the exercise of that function. Entrusting the appointment of judicial officers to the judicial function itself was an aspect of the independence of the judiciary and an expression of the autonomy of that function. Law no. 33/64 had been based on that premise and reflected the constitutional order. The complainant then filed a communication with the United Nations Human Rights Committee

(OP-ICCPR), which was declared inadmissible on 25 July 2005 (communication no. 1182/2003; decision on admissibility UN. Doc. CCPR/C/84D/1182/2003)).

D. The IDC

45. The IDC was established by the Annual Holidays with Pay Law of 1967 (Law no. 8/1967, as amended; section 12(2)(a)). It consists of the President or a judge, who are appointed by the SCJ, as well as two lay members who have a purely consultative role and are appointed by the president of the IDC upon the recommendation of the trade unions and the employers' federations respectively. The President and the judges of the IDC are permanent members of the judiciary but cannot be moved to any other position in the service (section 12 (3)(c) and (4)(b) of the above Law). The IDC's President has the same salary and terms of service as a senior district court judge while IDC judges are treated in the same way as district court judges (Law no. 14/1960, paragraph 38 above and section 12 (3)(b) and (4)(d) of Law no. 8/1967). Retirement is therefore at the age of sixty-three.

E. Relevant Constitutional human rights provisions

46. Article 12 § 5 of the Constitution guarantees the right to a fair trial in criminal cases. It reads as follows:

“5. Every person charged with an offence has the following minimum rights:

- (a) to be informed promptly and in a language which he understands and in detail of the nature and grounds of the charge preferred against him;
- (b) to have adequate time and facilities for the preparation of his defence;
- (c) to defend himself in person or through a lawyer of his own choosing or, if he has no sufficient means to pay for legal assistance, to be given free legal assistance when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”

47. Article 30 of the Constitution guarantees the right of access to court and the right to a fair trial in civil cases. It reads as follows:

“1. No person shall be denied access to the court assigned to him by or under this Constitution. The establishment of judicial committees or exceptional courts under any name whatsoever is prohibited.

2. In the determination of his civil rights and obligations or of any criminal charge against him, every person is entitled to a fair and public hearing within a reasonable

time by an independent, impartial and competent court established by law. Judgment shall be reasoned and pronounced in public session, but the press and the public may be excluded from all or any part of the trial upon a decision of the court where it is in the interest of the security of the Republic or the constitutional order or the public order or the public safety or the public morals or where the interests of juveniles or the protection of the private life of the parties so require or, in special circumstances where, in the opinion of the court, publicity would prejudice the interests of justice.

3. Every person has the right:

- (a) to be informed of the reasons why he is required to appear before the court;
- (b) to present his case before the court and to have sufficient time necessary for its preparation;
- (c) to adduce or cause to be adduced his evidence and to examine witnesses according to law;
- (d) to have a lawyer of his own choice and to have free legal assistance where the interests of justice so require and as provided by law;
- (e) to have free assistance of an interpreter if he cannot understand or speak the language used in court.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION AS REGARDS THE IMPARTIALITY OF THE SCJ

48. The applicant complained under Article 6 § 1 of the Convention that the same judges had charged, tried and convicted him, in breach of the principle of impartiality. The above provision reads as follows:

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

49. The Government contested that argument.

A. Admissibility

1. Applicability of Article 6 of the Convention: the criminal head

50. In order to establish whether a person has been criminally convicted within the autonomous meaning of the Convention the Court applies the so-called “Engel criteria” (*Engel and Others v. the Netherlands*, 8 June 1976, §§ 82 and 83, Series A no. 22; see also *Oleksandr Volkov v. Ukraine*, no. 21722/11, § 93, ECHR 2013).

51. Applying these criteria to the present case, the Court observes that the proceedings before the SCJ took place following a complaint of alleged

misconduct against the applicant. The relevant procedural rules concerning the SCJ's disciplinary authority set out the disciplinary procedure to be followed in the event of a complaint alleging inappropriate behaviour (misconduct) by a judge. The offence of misconduct is a disciplinary offence and is limited and linked to the exercise of judicial functions. It does not belong to the criminal sphere. Furthermore, the penalty for misconduct under the Rules is dismissal (Article 153 § 7 (4) of the Constitution and Rule 27; see paragraphs 39 and 41 above). Following the SCJ's finding on 19 September 2006 that misconduct had been proved, the applicant was removed as President of his court and, simultaneously, dismissed from his post as a judge. The proceedings were therefore of a purely disciplinary nature.

52. It is also relevant to note here that the applicant's dismissal from the judiciary did not prevent him from practising as a lawyer (see similarly *Oleksandr Volkov*, § 93, cited above).

53. Accordingly, the proceedings in the present case did not involve the determination of a criminal charge against the applicant and Article 6 is not applicable under its criminal head.

2. Applicability of Article 6 of the Convention: the civil head

54. The Court must next consider whether the civil head of Article 6 is applicable.

(a) The parties' submissions

(i) The Government

55. It was the Government's position that Article 6 under its civil head was not applicable. They submitted that the disciplinary proceedings against the applicant had not constituted a determination of his civil rights and obligations within the meaning of Article 6 § 1. First, no "right" had existed in the present case: there had been no right to remain as a judge or as President of the IDC and there had been no right not to be dismissed from his post. The applicant did not have arguable grounds on which to claim such a right. Secondly, even if such a right was deemed to exist, it was not "civil" in nature as the two conditions established in the case of *Vilho Eskelinen and Others v. Finland* ([GC], no. 63235/00, § 62, ECHR 2007-II) had been fulfilled. As to the first condition, the Government observed that the applicant had not had a right of access to a court in order to challenge his removal. Although neither the Constitution nor the applicable procedural rules concerning the exercise of the SCJ's disciplinary authority expressly excluded access to a court in order to challenge the removal of a judge from his post, the Supreme Court had expressly ruled in the cases of *Kourris* and *Karatsis* (cited above) that the acts, decisions or omissions of the SCJ could not be challenged by way of a recourse under Article 146 of the

Constitution (see paragraphs 43 and 44 above). The applicant had therefore not had access to a court in order to challenge his dismissal.

56. As to the second condition set out in *Vilho Eskelinen*, the Government pointed out that the Court had acknowledged that a judge had specific responsibilities in the field of the administration of justice, which was a sphere in which States exercised sovereign power. A judge participated directly in the exercise of powers conferred by public law and performed duties designed to safeguard the general interest of the State (relying on *Serdal Apay v. Turkey* (dec.), no. 3964/05, 11 December 2007; *Muammer Yilmazoğlu v. Turkey* (dec.), no. 36593/97, 12 June 2003 and *Pitkevich v. Russia* (dec.), no. 47936, 8 February 2001). The exclusion from access to court by domestic law was justified on objective grounds and in the State's interests. In the *Karatsis* case the Supreme Court had highlighted that judicial appointments were inextricably interwoven with the exercise of the judicial function and, more precisely, constituted a precondition for the exercise of that function. Entrusting the appointment of judicial officers to the judicial function itself constituted an aspect of the independence of the judiciary and was an expression of the autonomy of its function (see paragraph 44 above). In the present case, the applicant, as a judge at the IDC, and even more so as its president, had occupied a post of the highest rank in the field of the administration of justice. He had had powers conferred by public law and had assumed duties to safeguard the general interests of the State. The applicant's misconduct had eroded public confidence in the integrity and independence of the judicial function as a whole. As stated by the SCJ in its decision in the present case, the purpose of the procedure had not been to punish the applicant, but rather to protect the public by adopting a strict standard of judicial conduct so as to preserve the public's trust in the integrity, reputation and independence of the judicial system (see paragraph 31 above). Preventing the applicant from having access to a court had therefore been justified on objective grounds and the subject matter of the dispute had been related to the exercise of State power.

(ii) The applicant

57. The applicant submitted that the disciplinary proceedings against him had been a drastic step. By their very nature and consequences a "right" in the sense of Article 6 of the Convention had been created. Any public-law features of a disciplinary nature in the case did not exclude the proceedings from the scope of Article 6 since their outcome had been severe and far-reaching: the applicant had been dismissed from his post, affecting his career and professional activities. The fact that Articles 12 § 5 and 30 of the Constitution, which contained equivalent guarantees to Article 6 of the Convention, had been applicable to the disciplinary proceedings were indicative of the civil nature of the right at stake.

58. The applicant emphasised that he had not had access to court because he was not able to seek a review of the SCJ's decision and that there had been no objective justification for that exclusion. The Court's decisions in *Serdal Apay*, *Muammer Yilmazoglu* and *Pitkevich* (all cited above), on which the Government had relied in their submissions on this point (see paragraph 56 above) had nothing to do with his case as the State's interest in those cases had been strictly interpreted on the basis of their specific facts. It emerged clearly from the Court's judgment in *Vilho Eskelinen* (cited above) that only the special nature of the relationship between the particular civil servant and the State in question could justify not applying Article 6. Such a case would have to involve a particular portion of sovereignty being given to the civil servant, creating a special bond of trust. That had not been the case in the present application.

59. Lastly, the Government's reliance on the cases of *Kourris* and *Karatsis* did not provide a justification for denying him access to a court. It was clear from those cases that the existence of a "right" for the purposes of Article 6 did not depend on the classification or categorisation of the nature of the cases mentioned above by the Supreme Court when it was examining the complainants' recourses.

(b) The Court's assessment

(i) General principles established by the Court's case-law

60. The Court reiterates that for Article 6 § 1 in its "civil" limb to be applicable, there must be a dispute ("*contestation*" in the French text) over a "right" which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether that right is protected under the Convention. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play (see, among many authorities, *Regner v. the Czech Republic* [GC], no. 35289/11, § 99, 19 September 2017; *Károly Nagy v. Hungary* [GC], no. 56665/09, § 60, 14 September 2017; *Baka v. Hungary* [GC], no. 20261/12, § 100, ECHR 2016 and *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, § 42, ECHR 2015).

61. Article 6 § 1 does not guarantee any particular content for (civil) "rights and obligations" in the substantive law of the Contracting States: the Court may not create by way of interpretation of Article 6 § 1 a substantive right which has no legal basis in the State concerned (see *Regner* § 100, *Károly Nagy*, § 61 and *Baka*, § 101, all cited above, with further references).

62. In so far as the "civil" nature of the right is concerned, in cases concerning employment disputes concerning civil servants the Court,

applies a two-tier test which it established in its Grand Chamber judgment in *Vilho Eskelinen* (cited above - hereinafter referred to as the “*Eskelinen* test”). In order for the respondent State to be able to rely before the Court on the applicant’s status as a civil servant in excluding the protection embodied in Article 6, two conditions must be fulfilled. First, the State in its national law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the State’s interest. In order for the exclusion to be justified, it is not enough for the State to establish that the civil servant in question participates in the exercise of public power or that there exists, a “special bond of trust and loyalty” between the civil servant and the State, as employer. It is also for the State to show that the subject matter of the dispute in issue is related to the exercise of State power or that it has called into question the special bond (*ibid.*, §§ 102-103). Thus, there can in principle be no justification for the exclusion from the guarantees of Article 6 of ordinary labour disputes, such as those relating to salaries, allowances or similar entitlements, on the basis of the special nature of the relationship between the particular civil servant and the State in question (*ibid.*, § 103). There will, in effect, be a presumption that Article 6 applies. It will be for the respondent Government to demonstrate, firstly, that a civil-servant applicant does not have a right of access to a court under national law and, secondly, that the exclusion of the rights under Article 6 for the civil servant is justified (*ibid.*, § 103).

63. In its Grand Chamber judgment in the case of *Baka* (cited above), the Court confirmed the approach taken in a number of Chamber judgments that the *Eskelinen* test also applied to disputes concerning judges as the judiciary, albeit not being part of the ordinary civil service, is considered part of typical public service (*ibid.*, § 104). This covered all types of disputes, including those relating to recruitment/appointment, career/promotion, transfer and termination of service/dismissal (*ibid.*, § 105; see also *Regner*, § 108, cited above). Lastly, the Court emphasised in *Baka* that the *Eskelinen* criteria were pertinent to cases concerning all the guarantees embodied in Article 6 equally (see *Baka*, § 106, cited above).

(ii) *Application of the above principles to the present case*

(α) Existence of a right

64. The starting point for the assessment of the applicability of the civil aspect of Article 6 of the Convention is the existence of a genuine and serious dispute over a “right” which the applicant could claim on arguable grounds under domestic law (see, most recently, *De Tommaso v. Italy* [GC], no. 43395/09, § 144, 23 February 2017, with further references, as well as *Baka*, §§ 107-111, cited above).

65. The Court observes that the SCJ appointed the applicant as an IDC judge on 1 October 1997 and made him President of that court on 6 December 2001.

66. In Cyprus judges hold office until they resign or retire and can only be removed by the SCJ in exceptional circumstances. Those circumstances are set out exhaustively in the Constitution and the SCJ's Procedural Rules. First, a judge can be made to retire on account of such mental or physical incapacity or infirmity as would render him incapable of discharging the duties of his office either permanently or for such a period of time as would render it impracticable for him to continue in office (Article 153 § 7 (3) of the Constitution; see paragraph 39 above). In such a situation a judge is entitled to all the benefits and emoluments provided for by any law in force at the time. Second, a judge can be dismissed for misconduct (see Articles 153 § 7 (4) and 157 § 3 of the Constitution and Rule 27; see paragraphs 39 and 41 above).

67. It is therefore clear from the applicable domestic law that judges, in line with the principle of irremovability and except for exceptional circumstances, have the right to serve their term of office in full until retirement (see, *mutatis mutandis*, *Baka*, cited above, § 107).

68. The president and judges of the IDC are permanent members of the judiciary and their terms of service are the same as those of senior district court judges and district court judges respectively (see paragraph 45 above). They can thus hold office until retirement. In the Court's view therefore the applicant could arguably claim that he was entitled to serve as a judge and President of the IDC until the age of sixty-three (see *Baka*, cited above, § 107). Although SCJ decisions are not subject to review, judges are provided with the same procedural safeguards as in civil and criminal proceedings in order to defend themselves (see paragraphs 31 and 41 above).

69. The Supreme Court charged the applicant with misconduct under Articles 153 § 7 (4) and 157 § 3 of the Constitution and the question before the SCJ was whether he had indeed been guilty of such a violation.

70. It is clear from the above therefore that the outcome of the disciplinary proceedings in question was directly decisive for the manner of the exercise of the right in question.

71. In the light of the foregoing, the Court considers that in the present case there was a genuine and serious dispute over a "right" which the applicant could claim on arguable grounds under domestic law.

(β) "Civil" nature of the right: the *Eskelinen* test

72. The Court must now determine whether the "right" claimed by the applicant was "civil" within the autonomous meaning of Article 6 § 1, in the light of the criteria developed in the *Vilho Eskelinen* judgment.

The relevant case-law

73. Since its adoption, the Court has applied the *Eskelinen* test in a number of cases concerning disciplinary proceedings. In the majority of those cases the Court has found that the first condition, that is, whether national law “expressly excluded” access to a court for the post or category of staff in question was not fulfilled and that Article 6 was thus applicable to the proceedings in question.

74. A determinative factor in a number of those cases was whether an applicant was able to seek review of the decision or measure in question (see *Tato Marinho dos Santos Costa Alves dos Santos and Figueiredo v. Portugal*, nos. 9023/13 and 78077/13, § 41, 21 June 2016; *Bayer v. Germany*, no. 8453/04, § 38, 16 July 2009; and *Iordan Iordanov and Others v. Bulgaria*, no. 23530/02, § 44, 2 July 2009).

75. However, it emerges from many of those cases that the existence of the possibility of review is not *per se* a *sine qua non* in order for the first condition of the *Eskelinen* test to be fulfilled. So in *Saghatelyan v. Armenia* (no. 7984/06, §§ 32-35, 20 October 2015), in which the applicant had been dismissed as a judge on the basis of a presidential decree following a recommendation by the Council of Justice, the Court considered that the first condition of the test had not been satisfied. It observed in that regard, first, that the Government had not mentioned a particular provision of the law which expressly excluded judicial protection in connection with disciplinary proceedings against judges and, second, that although at the material time it had not been possible to challenge a presidential decree, as this applied to all individuals, national law did not rule out access to court for the applicant based on her status as a holder of public power. In *Harabin v. Slovakia* (no. 58688/11, 20 November 2012), disciplinary proceedings were brought against the applicant, who was the President of the Supreme Court, before the Constitutional Court. It found him guilty of a serious disciplinary offence and imposed a disciplinary sanction (§§ 36-37). The decision was final, there being no remedy against the Constitutional Court’s decisions (§ 54). In applying the *Eskelinen* test, the Court observed that the Constitutional Court was a tribunal with powers to determine the relevant issues. National law therefore did not exclude a judicial examination of the relevant points and the applicant had actually had access to a court (§ 123). The Court thus took the approach that even though the disciplinary proceedings brought against the applicant were only examined at one level of jurisdiction, that qualified as “access to court” for the purposes of the first condition of the *Eskelinen* test.

76. Further, in *Olujić v. Croatia* (no. 22330/05, § 36-37, 5 February 2009) and in *Oleksandr Volkov* (cited above, § 88), which both concerned the dismissal of judges, the Court did not confine its reasoning to the fact that it had been open to the applicants to seek review of the decision of the first-instance bodies. The Court highlighted that in the context of the first

condition, it was not prevented from categorising a particular domestic body, outside the domestic judiciary, as a “court” for the purposes of the *Eskelinen* test. In that connection, it reiterated that for the purposes of Article 6 § 1 of the Convention a tribunal need not be a court of law integrated with the standard judicial machinery since a tribunal, within the meaning of Article 6 § 1, was characterised in the substantive sense of the term by its judicial function, that is to say, the determining of matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner. Consequently, a non-judicial body, for example an administrative or parliamentary body, may qualify as a “court” in the substantive sense of the term if it performed judicial functions (see also *Savino and Others v. Italy*, nos. 17214/05 and 2 others, §§ 72-75, 28 April 2009).

77. Hence, in *Olujić* (cited above, §§ 36-42), although the applicant had filed a constitutional complaint with the Constitutional Court against the decisions of the first decision-making body, the National Judicial Council, the Court examined the powers of the National Judicial Council and the nature of the proceedings before it. It noted that the proceedings before the National Judicial Council followed the rules of criminal procedure, which included, *inter alia*, all the guarantees provided by Article 6 of the Convention and enabled the accused to submit a defence. When ruling in disciplinary proceedings against judges, the National Judicial Council was empowered to establish the facts of a given case, hold hearings, hear witnesses and assess other evidence and decide on all the questions of fact and law. It therefore concluded that in that case the National Judicial Council had exercised judicial powers in determining the applicant’s disciplinary responsibility and thus that the disciplinary proceedings against the applicant had been conducted before a tribunal for the purposes of Article 6 § 1 of the Convention.

78. Similarly, in *Oleksandr Volkov* (cited above, §§ 88-91), although the dismissal decision had been reviewed by the Higher Administrative Court, the Court, in determining whether the applicant had had access to a court in the context of the first condition of the *Eskelinen* test, noted that in determining the applicant’s case and taking a binding decision, it appeared that the High Council of Justice, the Parliamentary Committee on the Judiciary and the plenary meeting of Parliament had, in combination, performed a judicial function. In that regard, it observed that the High Council of Justice had determined all the questions of fact and law after holding a hearing and assessing the evidence, the Parliamentary Committee had been empowered to hold its own deliberations and conduct additional inquiries, if deemed necessary, which could end with a recommendation to dismiss or retain the judge and that the plenary of Parliament had subsequently approved dismissing the applicant based on the HCJ’s submissions and the Parliamentary Committee’s recommendation.

79. That approach was followed in a number of subsequent cases. For instance, most recently, in *Sturua v. Georgia* (no. 45729/05, § 27, 28 March 2017), a disciplinary charge against the applicant had been examined by the Disciplinary Council of Judges at first instance as a four-member panel and on appeal sitting as a plenary. The decisions were then reviewed by the Supreme Court of Georgia. The Court observed that the disciplinary bodies that had conducted the proceedings had clearly performed a judicial function and that the Disciplinary Council of Judges clearly represented “a tribunal” within the meaning of Article 6 § 1 of the Convention. In *Di Giovanni v. Italy* (no. 51160/06, § 37, 9 July 2013) the Court observed that the first-instance body – the disciplinary section of the Supreme Judicial Council – had full jurisdiction to examine all the questions raised in the case. The fact that the decision could be appealed against before the Court of Cassation (*Sezioni Unite*) was an additional factor. Similarly, in several recent judgments against the former Yugoslav Republic of Macedonia, the Court observed in the context of the first condition that the first-instance disciplinary body, the State Judicial Council, determined all questions of facts and law after holding hearings and assessing evidence (*Poposki and Duma v. the former Yugoslav Republic of Macedonia*, nos. 69916/10 and 36531/11, § 37, 7 January 2016; *Gerovska Popčevska v. the former Yugoslav Republic of Macedonia*, no. 48783/07, § 58, 7 January 2016; *Jakšovski and Trifunovski v. the former Yugoslav Republic of Macedonia*, nos. 56381/09 and 58738/09, § 32, 7 January 2016; and *Mitrinovski v. the former Yugoslav Republic of Macedonia*, no. 6899/12, § 29, 30 April 2015).

80. Nonetheless, in a minority of cases the Court has found that the first condition had not been fulfilled.

81. In *Suküt v. Turkey* ((dec.), no. 59773/00, 11 September 2007), which concerned the early retirement of an army officer on disciplinary grounds, the Court held that the applicant had not had access to court as under Turkish constitutional law the decisions of the Supreme Military Council were not subject to judicial review. The Court took the same approach in disciplinary cases concerning the decisions of the Turkish Supreme Council of Judges and Public Prosecutors which, pursuant to domestic law, were not subject to judicial review (see *Nazsiz v. Turkey* (dec.), no. 22412/05, 26 May 2009, concerning the disciplinary dismissal of a public prosecutor, and *Özpınar v. Turkey*, no. 20999/04, § 30, 19 October 2010, concerning the removal from office of a judge on disciplinary grounds).

The approach to be taken in the present case

82. In the present case, disciplinary proceedings were brought against the applicant before the SCJ, which has exclusive competence, *inter alia*, for the dismissal of judges and disciplinary matters (see paragraphs 36 and 37 above). As no review lies against any act, decision or omission of the

SCJ under domestic law (see paragraphs 43 and 44 above), the SCJ's decision to remove the applicant from office was final.

83. The arguments of both the Government and the applicant are based on the premise that the applicant had no access to a court because he was not able to seek a review of the SCJ's decision.

84. The Court, however, finds that the mere fact that a review of the SCJ's decision was not possible does not necessarily mean that the applicant did not have access to a court for the purposes of the *Eskelinen* test.

85. In line with the prevailing approach taken in its case-law set out above (see paragraphs 75-79 above) the Court, in deciding whether the first condition of the *Eskelinen* test has been met, should consider whether the disciplinary authority in question qualifies as a "court" for the purposes of the test. To that end the Court will look at whether the disciplinary authority performed a judicial function and at the nature of the proceedings before it.

86. The SCJ is composed of all thirteen judges of the Supreme Court. Pursuant to Article 153 § 8 of the Constitution the proceedings before the SCJ are of a judicial nature and the judge concerned is entitled to be heard and present his case to it. The practice and procedure to be followed in disciplinary proceedings against judges are set out in detail in the relevant Procedural Rules. Rule 13 secures for the judge against whom proceedings have been taken all the rights provided for under Articles 12 § 5 and 30 of the Constitution, which provide equivalent safeguards to Articles 6 §§ 1, 2 and 3 of the Convention (see paragraphs 46 and 47 above). The SCJ holds hearings, summons and hears witnesses, assesses evidence and decides the questions before it with reference to legal principles.

87. In those circumstances, the Court finds that the disciplinary proceedings were conducted before a court for the purposes of the *Eskelinen* test.

88. It follows that the first condition of the *Eskelinen* test has not been met. Therefore, as both limbs of the test have to be met for Article 6 not to apply to disciplinary proceedings, there is no need to consider the second limb of that test, and Article 6 § 1 of the Convention is applicable under its civil head to the disciplinary proceedings against the applicant.

3. *Otherwise as to admissibility*

89. The Court finds that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further finds that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

90. The applicant submitted that pursuant to Rule 16 of the Procedural Rules the SCJ had been obliged to appoint a prosecutor but had failed to do so. As a result, the judges who had acted as prosecutors had also tried the case, in breach of the principle of impartiality. They had chosen the witnesses to be summoned and had decided on the objection raised by the applicant concerning a charge sheet which they themselves had drawn up. In the applicant's view such circumstances amounted to a most flagrant violation of the rule of natural justice.

(b) The Government

91. The Government submitted that the Supreme Court, in accordance with the disciplinary procedure set out in the Procedural Rules, had decided, after the completion of the disciplinary investigation, that the matter should be dealt with by the SCJ. The Government pointed out that the Court had held in cases concerning criminal proceedings that the test to be applied was whether in a given case there was a legitimate reason to fear that a tribunal lacked impartiality and that the standpoint of the accused was important but not decisive. The Court looked at whether there were objective reasons for the applicant to fear that the tribunal in question would display bias or prejudice with regard to the decision that it was required to reach. Therefore a situation which might occasion misgivings on the part of the accused could not necessarily be treated as objectively justified (relying on *Hauschildt v. Denmark*, 24 May 1989, § 49, Series A no. 154). This depended on the circumstances of the particular case (*ibid.*). The mere fact that the same court had also made pre-trial decisions in a case was not in itself sufficient to justify fears as to its impartiality (relying on *Jasiński v. Poland*, no. 30865/96, §§ 55-58, 20 December 2005; *Tierce and Others v. San Marino*, nos. 24954/94, 24971/94 and 24972/94, §§ 79-83, ECHR 2000-IX; and *Saraiva de Carvalho v. Portugal*, 22 April 1994, §§ 35-40, Series A no. 286-B).

92. It was the Government's view that the applicant's fears had not been objectively justified in the circumstances of the present case. There had been no objective reasons for him to fear that the SCJ, which had appointed him as a judge and had also promoted him to the post of President of the IDC, would display bias or prejudice with regard to the decision that it was required to reach in the proceedings on account of the fact that it had previously decided in its capacity as the Supreme Court that the matter of the applicant's conduct should be further dealt with in disciplinary proceedings and had framed the "charges" against him. The Court has

reiterated that its task is not to review the relevant law and practice *in abstracto*.

93. The Government observed that the Procedural Rules referred to “prosecution”, to the framing and hearing of “charges” and used other terminology pertinent to criminal proceedings when misconduct or the commission of disciplinary offences by judges of lower courts were concerned. However, in reality the actual proceedings had been disciplinary and not criminal in nature and had not been aimed at punishing the applicant but maintaining the public’s trust in the integrity, prestige and independence of the judicial system through the adoption of strict standards of judicial conduct. In dealing with the investigation material submitted to it by the investigating judge, the Supreme Court’s role had been to examine whether, based on the statements that had been made, the conduct allegedly exhibited by the applicant had raised a disciplinary issue which needed to be determined in trial proceedings conducted with procedural safeguards. Under domestic law therefore, the Supreme Court’s function at that phase had not been to weigh the witness statements, including those of the applicant, to assess their veracity or to assess or determine in any way whether they had pointed to guilt or to any suspicion of guilt. It had also not had the function of assessing whether there was a *prima facie* case against the applicant as that could only be determined by the SCJ, which heard the case. It had therefore not dealt with the same issues that had been subsequently examined by the SCJ. The Supreme Court’s assessment that the investigation material had justified referring the applicant for trial had not been such as to convey a conviction that the applicant had been guilty of misconduct as alleged, and could not therefore be considered as amounting to a finding of guilt.

94. The core issue in the disciplinary proceedings, and the one on which the SCJ’s decision had been based, had been whether the witnesses had been honest as the applicant’s defence all along had been that they had not told the truth. The Supreme Court had not dealt with that issue and had not interviewed any of the persons who had been interviewed by the investigating judge. The witnesses had not given particulars in their statements of specific IDC proceedings in which the applicant’s misconduct had allegedly arisen, nor had the files or records of such proceedings been before the Supreme Court when it had taken its decision.

95. Lastly, the Government pointed out that although it had been possible under Rule 16 of the Procedural Rules to assign prosecution duties to the investigating judge or another judge for the purposes of the trial, that had not been done in the present case. Under domestic law the applicant had had the right to be heard, and to cross-examine and question witnesses before a decision was made as to whether there was a *prima facie* case against him and to bring witnesses in his defence. It was also evident from the SCJ’s judgment and the record of the disciplinary proceedings that the

SCJ had not assumed any role in the proceedings analogous to that of a prosecuting authority but had maintained its role of an adjudicating disciplinary body, refraining from any questioning analogous to that of the examination in chief of witnesses testifying against the applicant or to that of the cross-examination of witnesses testifying in his defence.

2. *The Court's assessment*

(a) **General principles established by the Court's case-law**

96. The Court reiterates that impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways. According to the Court's settled case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (see *Morice v. France* [GC], no. 29369/10, § 73, ECHR 2015, with further references).

97. As to the subjective test, the principle that a tribunal must be presumed to be free of personal prejudice or partiality is long-established in the case-law of the Court. The personal impartiality of a judge must be presumed until there is proof to the contrary. As regards the type of proof required, the Court has, for example, sought to ascertain whether a judge has displayed hostility or ill will for personal reasons (*ibid.*, § 74).

98. In the vast majority of cases raising impartiality issues the Court has focused on the objective test. However, there is no watertight division between subjective and objective impartiality since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of his or her personal conviction (subjective test). Thus, in some cases where it may be difficult to procure evidence with which to rebut the presumption of the judge's subjective impartiality, the requirement of objective impartiality provides a further important guarantee (*ibid.*, § 75).

99. As to the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his or her impartiality. This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge or a body sitting as a bench lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (*ibid.*, § 76).

100. The objective test mostly concerns hierarchical or other links between the judge and other protagonists in the proceedings or the exercise

of different functions within the judicial process by the same person (see *Kyprianou v. Cyprus* [GC], no. 73797/01, § 121, ECHR 2005-XIII).

101. In this connection, even appearances may be of a certain importance or, in other words, “justice must not only be done, it must also be seen to be done”. What is at stake is the confidence which the courts in a democratic society must inspire in the public.

(b) Application of the above principles to the present case

102. The applicant expressed his grievance as being that he had been charged, tried and convicted by the same judges, in breach of the principle of impartiality: the judges of the Supreme Court had charged him with the offence of misconduct and then, sitting as the SCJ, had tried him and found him guilty of misconduct. The same judges, albeit in a different capacity, had also decided on his objection concerning the charge sheet, which they themselves had drawn up.

103. The way the applicant has formulated his complaint therefore means that it is directed at a functional defect in the proceedings and not the conduct of the judges; the applicant did not contest their personal impartiality. The case must therefore be examined from the perspective of the objective impartiality test, and more specifically it must address the question of whether the applicant’s concerns, stemming from the specific situation, may be regarded as objectively justified in the circumstances.

104. In considering this question, the Court reiterates that, both in relation to Article 6 § 1 of the Convention and in the context of Article 5 § 3, it has found doubts as to whether impartiality can be objectively justified where there is some confusion between the functions of prosecutor and judge (see *Kyprianou*, cited above, § 126, with further references).

105. The Court observes that the SCJ is composed of all the judges of the Supreme Court. In accordance with the relevant Procedural Rules concerning the exercise of the disciplinary authority of the SCJ, when the complaint concerning the applicant’s conduct in the exercise of his judicial functions was submitted to the Supreme Court, the applicant was served with a written notice of the allegations and asked to submit, if he so wished, his position on the matter. Following this, the Supreme Court appointed an investigating judge (who was not a member of the Supreme Court) to look into the complaint. The investigating judge submitted a report to the Supreme Court, together with the statements he had collected from witnesses and the applicant. The Supreme Court then framed the charges of misconduct against the applicant and called him to appear before the SCJ. The disciplinary proceedings were carried out before the SCJ, which ultimately found that the charges had been proved and, after hearing the applicant, removed him from office.

106. The Court notes that it is clear from the proceedings and the SCJ's decision that the SCJ did its best to avoid a procedure that was prosecutory in nature in an attempt to prevent an atmosphere of hostility and confrontation in the proceedings. In its efforts to achieve such a goal, it decided not to assign the duties of a prosecutor to the investigating judge or to any other judicial official and did not put questions to the witnesses, other than a few for clarification purposes. As it observed in its decision, it essentially acted as an audience for the statements by the witnesses. It also put no questions to the applicant (see paragraph 31 above).

107. Nonetheless, the fact remains that the Supreme Court itself framed the charges against the applicant and then, sitting as the SCJ, conducted the disciplinary proceedings. In the context of those proceedings it decided on and dismissed the applicant's objection concerning the charge sheet (see paragraphs 19 and 20 above).

108. In such a situation, confusion between the functions of bringing charges and those of determining the issues in the case could prompt objectively justified fears as to the SCJ's impartiality.

109. The Court therefore finds that on the facts of the case and considering the functional defect which it has identified, the impartiality of the SCJ was capable of appearing open to doubt. The applicant's fears in that regard can thus be considered as objectively justified.

110. It follows that there has been a violation of Article 6 § 1 of the Convention on that account.

111. The Court emphasises in this respect that this finding does not concern the outcome of the disciplinary proceedings and therefore is not a finding as to whether or not the applicant should have been dismissed for misconduct.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION AS REGARDS THE INFORMATION GIVEN TO THE APPLICANT ABOUT THE RELEVANT IDC PROCEEDINGS

112. The applicant complained that he had not been given adequate information about the specific IDC proceedings to which the complaint against him related and on which the SCJ had relied. He relied on Article 6 § 2 of the Convention. The Court finds, however, that this complaint falls to be examined under Article 6 § 1.

113. The Government contested the applicant's argument.

A. The parties' submissions

1. The applicant

114. The applicant submitted that during the proceedings the SCJ had admitted evidence, specifically numerous records of IDC proceedings over which he had presided, which had not been part of the material put together by the investigating judge and which had not been brought to the applicant's attention before the trial. He had found about those records from the SCJ's decision. In that connection, he argued, in particular, that the case files in three of the IDC cases on which the SJC had relied had been admitted during the proceedings, without giving him any notice. He had thus been deprived of the possibility to put forward arguments concerning the claims made about him in those proceedings or challenge the witnesses who had testified against him and whose testimony had been relied on or could only be challenged by referring to the relevant case files. In his view, the SCJ had admitted those cases as evidence for the purposes of contradicting evidence which had been in the applicant's favour.

2. The Government

115. The Government observed that the statements that had been given to the investigating judge had not included particulars of specific judicial proceedings before the IDC concerning the applicant's alleged misconduct. The case files referred to in the SCJ's decision had not been part of the investigative material and had not been submitted to the Supreme Court when it had taken its decision to refer the applicant to the SCJ.

116. The applicant had been given full access to the records of the IDC's registry so he could gather any material required for his defence. All the relevant case files on which the SCJ had relied had been brought as evidence before it and filed as exhibits during the proceedings at the request of the applicant's lawyer. All the material produced and filed as exhibits during the hearing had been recorded in the list of exhibits in the case. The three cases the applicant had mentioned in his observations had been included in the exhibits that had been prepared by IDC's registrar, who had also given evidence to the SCJ. The case files had been put in separate bundles; each bundle had been filed as an exhibit with a reference to the witness who had sat in the cases, according to the case lists prepared by the registrar. The three cases had been included in the bundles concerning the relevant witness. The Government provided the Court with a copy of the lists with all the exhibits.

117. Consequently, the Government submitted that the applicant had known about the lists, had had every opportunity to inspect and use the contents of the case files, to question witnesses and adduce his own evidence to rebut them. There was thus no indication in the present case that

the SCJ's findings had been based on evidence about which the applicant had not had the opportunity to examine witnesses. The applicant's claim was therefore unfounded.

B. The Court's assessment

118. The Court notes that the SCJ examined the records of the IDC court proceedings over which the applicant had presided and which had involved the ten witnesses who had testified before it and had given statements to the investigating judge. In its final decision the SCJ relied on ten IDC cases. The applicant had already referred to some of those cases, including one of those he now complains about, in his supplementary statement of 16 December 2005 to the investigating judge. Furthermore, all the IDC cases relied on by the SCJ, including the three referred to by the applicant, and their files, were included in the exhibits admitted to the Court and to which the applicant had access.

119. Bearing the above circumstances in mind and having examined all the material before it, the Court finds that the applicant has not substantiated his complaint. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

120. The applicant made various complaints under Article 6 §§ 1 and 3 and Article 7 of the Convention with regard to the disciplinary proceedings.

121. The Court has already held that the disciplinary proceedings in the instant case did not give rise to a "criminal charge" against the applicant within the meaning of Article 6 § 1 of the Convention (see paragraphs 50-53 above). Article 6 § 3 and Article 7 of the Convention are not therefore applicable to the present case. It follows that these complaints are incompatible *ratione materiae* with the provisions of the Convention and must be rejected pursuant to Article 35 §§ 3 (a) and 4.

122. To the extent that the applicant's complaints concern or fall to be examined under Article 6 § 1 of the Convention, the Court finds, in the light of all the material in its possession and in so far as the matters complained of are within its competence, no appearance of a violation of the rights and freedoms set out in the Convention or its Protocols arising from this complaint. Accordingly, this part of the application must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

123. 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

1. The parties' submissions

(a) The applicant

124. In respect of pecuniary damage, the applicant argued that he should be granted the annual salary and retirement benefits (pension and retirement lump sum) he would have been entitled to if he had served as President of the IDC until retirement at the age of sixty-three on 15 June 2012. He submitted that the total pecuniary damage he had suffered could reach 959,000 euros (EUR). In support of his claim he submitted a report dated 26 May 2009 by a private consulting and outsourcing company, calculating the salary and pension benefits. The report gave two estimates based on whether or not the pension benefit paid at the time would continue to be paid in the future: in the first scenario the estimate was EUR 601,800 and in the second it was EUR 959,900.

125. The applicant claimed EUR 250,000 in respect of non-pecuniary damage. He submitted that he had been a well-known and respectful judge and the President of the IDC and had suffered damage to his honour and reputation. The Supreme Court had issued a press release concerning the disciplinary decision and thus his dismissal had been made public.

126. The applicant argued that there was a direct link between the violation complained of and the damages he claimed under both heads.

(b) The Government

127. The Government rejected the applicant's claims under both heads as grossly exaggerated. They did not provide further arguments but submitted that they reserved their right in the event of a finding of a violation to make observations on his claims, in particular concerning loss of earning and other benefits.

2. The Court's assessment

128. As regards the applicant's claim for pecuniary damage, the Court observes that it is based on the assumption that a finding of a violation by the Court under Article 6 § 1 would mean that he should not have been dismissed for misconduct. However, the Court observes that an award of

just satisfaction can only be based on the fact that the applicant did not have the benefit of all the guarantees of Article 6 § 1 of the Convention owing to a functional defect. The Court cannot speculate as to what the outcome of proceedings compatible with Article 6 § 1 of the Convention would have been (see paragraph 111 above). Consequently, the Court sees no causal link between the breach of Article 6 § 1 and the alleged pecuniary damage. There are therefore no grounds for an award under that head (see, *inter alia*, *Poposki and Duma*, § 60, and *Mitrinovski*, § 56, both cited above, with further references).

129. On the other hand, having regard to the violation found and ruling on an equitable basis, as required by Article 41 of the Convention, it awards the applicant EUR 7,800 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

130. The applicant claimed EUR 19,648 for his lawyer's fees for the proceedings before the SCJ. He submitted an invoice dated 25 September 2006. His claim was composed of EUR 15,377 in respect of meetings, the preparation of submissions for the case and the hearings and his lawyer's appearances before the SCJ; EUR 1,708.60 for his lawyer's closing address; and EUR 2,562.90 as VAT at 15%.

131. The applicant also claimed EUR 1,437.50 for the expert report he had submitted to the Court in relation to his claim for pecuniary damage. He attached a copy of the invoice.

132. The Government rejected the claims as excessive and reserved its right to make further submissions in the event of a finding of a violation.

133. The Court observes that only legal costs and expenses found to have been actually and necessarily incurred and which are reasonable as to quantum are recoverable under Article 41 of the Convention. This may include domestic legal costs actually and necessarily incurred to prevent or redress the breach of the Convention (see, example, *Associated Society of Locomotive Engineers and Firemen (ASLEF) v. the United Kingdom*, no. 11002/05, § 58, 27 February 2007, with further references).

134. In so far as the applicant's claim concerns costs and expenses incurred before the SCJ, regard being had to the documents in its possession and the above criteria, noting particularly that the invoice lacks sufficient itemisation, the Court considers it reasonable to award the applicant the sum of EUR 10,000 under this head.

135. As regards the claim for expenses incurred for the preparation of the expert report, the Court finds that it was not incurred necessarily given that it has dismissed the applicant's claim in respect of pecuniary damage.

C. Default interest

136. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT,

1. *Declares*, by a majority, the complaint under Article 6 § 1 of the Convention concerning the SCJ's impartiality admissible and the remainder of the application inadmissible;
2. *Holds*, by six votes to one, that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds*, by six votes to one,
 - (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
 - (i) EUR 7,800 (seven thousand eight hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 31 October 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Registrar

Helena Jäderblom
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Pamballis is annexed to this judgment.

H.J.
J.S.P.

DISSENTING OPINION OF JUDGE PAMBALLIS

The question of the applicability of Article 6 § 1 in its “civil limb” is raised in this case. I agree with the majority that in order for Article 6 § 1 to be applicable, there must be a dispute as to a right recognised under domestic law. Nonetheless, I have to dissent with regard to the applicability of Article 6 § 1 in the present case, and this inevitably leads me to consider the application inadmissible.

The applicability of Article 6 § 1 – that is, the right to a fair hearing – in civil proceedings was raised recently in the case of *Baka v. Hungary*¹, which concerned access to a court by a judge.

The applicant (Mr Baka), as President of the Hungarian Supreme Court, criticised proposed legislative reforms affecting the judiciary. The constitutional and legislative changes that followed resulted in the premature termination of his mandate as President. Those changes at the same time precluded the possibility of a judicial review of his dismissal. The Court held that there had been a violation of Article 6 because the applicant’s access to a court had been impeded by the transitional provisions of the new legislation.

At the same time, the Court in the *Baka* case confirmed that in cases raising a dispute concerning judges, the criteria already established in the case of *Vilho Eskelinen and Others v. Finland*² were applicable.

Those criteria are:

- (a) the State’s national law must have expressly excluded access to a court for a relevant post or category of staff; and
- (b) that exclusion must be justified on objective grounds in the State’s interest.

In my view, the particular circumstances of the case under consideration, as analysed in the judgment of the majority, falls outside the scope of Article 6. The conditions set out in the *Vilho Eskelinen* case are fulfilled and the protection enshrined in Article 6 § 1 is excluded.

The first condition, as mentioned above, is that the law must have expressly excluded access to a court.

The majority of the Court, in the present judgment, seek to establish that the fact that no review of the Supreme Council of Judicature (SCJ)’s decision was possible does not necessarily mean that the applicant did not have access to a court. The majority’s reasoning is that the disciplinary authority, the SCJ, qualified as a court for the purposes of the *Eskelinen* test and that access to a court was therefore not excluded.

I do not concur with this reasoning. The applicant had no access to a court, under national law, because the decisions of the SCJ are connected

¹ [GC], no. 20261/12, ECHR 2016.

² [GC], no. 63235/00, ECHR 2007.

with the exercise of its judicial power and they cannot be challenged. Disciplinary proceedings were instituted against the applicant by the SCJ and these proceedings were of a judicial nature. They led to the applicant's dismissal. The applicant did not have a right of access to a court to challenge that decision. Neither the national law nor the Constitution provide for a right of access to a court in cases concerning the dismissal of judges. On the contrary, constitutional provisions exclude judicial review in a general, abstract and foreseeable manner, by stating that the decision of the SCJ is final and binding. The case-law expressly states that the decisions of the SCJ cannot be challenged by means of a recourse under Article 146 of the Constitution³.

As mentioned in the *Vilho Eskelinen* case, the exclusionary legal provision must be of general application, whereas in the *Baka* case the provision was directed at a specific individual. That is why the Court, in the special circumstances of the particular case, found that the first of the *Eskelinen* criteria had not been satisfied.

It is my opinion that the first *Eskelinen* criterion was fulfilled in the present case.

The Court seeks to establish that a judge acting in his official capacity has a "right", and the deprivation of the judge's powers is considered an interference with the judge's individual rights. In my view, there is no such human right to preserve those powers. A judge is a State organ and the extension of such protection would inevitably lead to the creation of a special right for judges.

The second *Eskelinen* criterion is that the exclusion must be justified on objective grounds in the State's interest. The Court noted that in order for the exclusion to be justified, it was not enough for the State to establish that the applicant participated in the exercise of public powers, or that there was a special bond of trust and loyalty; the State had to show that that special bond had been called into question. Judges are entrusted with specific responsibilities in the administration of justice. The applicant held the office of President of the Industrial Disputes Court and exercised judicial powers. He participated directly in the exercise of powers conferred by public law and duties designed to safeguard the general interest of the State and other authorities. Public confidence in the judiciary is of paramount importance and should be preserved. The applicant's misconduct has diminished this trust and confidence. Therefore, his exclusion served a legitimate purpose and was justifiable.

³ *Kourris and the SCJ* ((1972) 3 C.L.R. 390) and *Karatsis v. 1. The Republic of Cyprus, through the Supreme Council of Judicature, 2. The SCJ* ((2001) 3 C.L.R. 220).