



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

FIRST SECTION

CASE OF ŠKRLJ v. CROATIA

(Application no. 32953/13)

JUDGMENT

STRASBOURG

11 July 2019

FINAL

11/10/2019

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

In the case of Škrlj v. Croatia,

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

Krzysztof Wojtyczek, *President*,

Ksenija Turković,

Armen Harutyunyan,

Pere Pastor Vilanova,

Pauliine Koskelo,

Jovan Ilievski,

Raffaele Sabato, *judges*,

and Renata Degener, *Deputy Section Registrar*,

Having deliberated in private on 11 June 2019,

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

PROCEDURE

1. The case originated in an application (no. 32953/13) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Croatian national, Mr Matko Škrlj (“the applicant”), on 6 May 2013.

2. The applicant was represented by Mr I. Milanović, a lawyer practising in Umag. The Croatian Government (“the Government”) were represented by their Agent, Mrs Š. Stažnik.

3. The applicant alleged that in minor-offence proceedings against him he had not been tried by an impartial tribunal as required by Article 6 § 1 of the Convention, because a judge involved in the case had agreed, in another set of proceedings, to be removed from the case because of his animosity towards the applicant’s mother.

4. On 8 September 2015 notice of the application was given to the Government.

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

5. The applicant was born in 1991 and lives in Rijeka.

A. First set of minor-offence proceedings against the applicant

6. On 29 February 2012 Buzet police station (*Policajska uprava istarska, Policijska postaja Buzet*) issued a penalty notice, having found the applicant guilty of two minor road traffic offences: not stopping his vehicle in order to let a pedestrian cross at a pedestrian crossing, and not wearing a seat belt, offences proscribed by sections 134(4) and 163(8) of the Road Traffic Safety Act (*Zakon o sigurnosti prometa na cestama*, Official Gazette nos. 67/2008 and 74/2011, see paragraph 20 below).

7. The applicant challenged that penalty notice before the Pazin Minor Offences Court (*Prekršajni sud u Pazinu, Stalna Služba u Buzetu*). The case was assigned to Judge B.L.V.

8. On 13 June 2012 Judge B.L.V. issued a decision setting aside the penalty notice and ordering that summary minor-offence proceedings be conducted.

9. On the same day Judge B.L.V. summoned the applicant to a hearing scheduled for 6 July 2012. The summons, which contained a warning that the hearing could be held in the defendant's absence in the event that his questioning was not necessary and relevant for lawfully and correctly deciding the case, was served on the applicant on 20 June 2012.

10. According to the applicant, on 28 June 2012 his lawyer, I.M., sent a fax to the Pazin Minor Offences Court, asking the president of that court to disqualify Judge B.L.V. from dealing with the case. The application stated that Judge B.L.V. had worked with the applicant's mother, who was also a judge, and in order to remove any doubt as to Judge B.L.V.'s impartiality, he should be removed from the case.

11. According to the Government, such a fax was never received by the Pazin Minor Offences Court. The domestic case file does not contain any application by the applicant to disqualify Judge B.L.V. from dealing with the case.

12. Although duly summoned, neither the applicant nor his lawyer appeared before the Pazin Minor Offences Court on 6 July 2012. The competent prosecutor in the case did not appear either. Judge B.L.V. decided to hold the hearing in the absence of the parties. He found that the applicant's questioning was not relevant for correctly establishing the facts of the case. He then examined a written report from the police officer who had directly observed the applicant committing the minor road traffic offences.

13. On the same day, concluding that there were no reasons to doubt the police officer's written report, Judge B.L.V. found the applicant guilty of the charges listed in the penalty notice of 29 February 2012. He fined him 1,000 Croatian kunas (HRK – approximately 130 euros (EUR)) and ordered a term of imprisonment in default of payment.

14. As there was no possibility for the applicant to appeal to a higher court in the summary minor-offence proceedings, he lodged a constitutional complaint with the Constitutional Court (*Ustavni sud Republike Hrvatske*). He submitted that Judge B.L.V. had decided his case even though he had asked for the judge to be disqualified. He further submitted that he had also asked for Judge B.L.V.'s removal in another set of minor-offence proceedings before the same court, and on that occasion the judge had accepted to recuse himself, citing animosity between himself and the applicant's mother (see paragraph 18 below). Pursuant to section 104(3) of the Minor Offences Act (*Prekršajni zakon*, Official Gazette no. 107/2007, see paragraph 21 below), Judge B.L.V. should therefore have immediately informed the president of the court that there were circumstances justifying his recusal. As Judge B.L.V. had failed to do so, the applicant had not been tried by an impartial court.

15. On 17 October 2012 the Constitutional Court declared the applicant's constitutional complaint inadmissible as manifestly ill-founded. That decision was served on the applicant on 9 November 2012.

16. Upon request of the Government Agent, on 22 October 2015 the Registry of the Constitutional Court confirmed that the Pazin Minor Offences Court's case file did not contain the applicant's application for Judge B.L.V. to be disqualified from dealing with the case.

B. Second set of minor-offence proceedings against the applicant

17. On 6 June 2012, in another set of minor-offence proceedings against the applicant before the Pazin Minor Offences Court, the applicant requested, through his lawyer, I.M., that Judge B.L.V. be disqualified from dealing with the case. In his application, he stated that Judge B.L.V. had worked with his mother, who was also a judge, and in order to remove any doubt as to Judge B.L.V.'s impartiality, he should be removed from the case.

18. After learning of the application for his disqualification, Judge B.L.V. discontinued all activity on the case and proposed that the application be accepted. In a statement to the President of the Pazin Minor Offences Court, he said that he had been in continuous conflict with the applicant's mother, who had been president of the court where he had worked, and that they did not communicate with each other.

19. On 14 June 2012 the President of the Pazin Minor Offences Court disqualified Judge B.L.V. from dealing with the case, finding that there were circumstances which called his impartiality into doubt. That decision was served on the applicant on 23 June 2012.

II. RELEVANT DOMESTIC LAW

A. The Road Traffic Safety Act

20. The relevant provisions of the Road Traffic Safety Act read:

Section 134

“(1) If traffic at a marked pedestrian crossing is not controlled by traffic lights or by an authorised person, a driver is obliged to approach the pedestrian crossing at a speed which does not jeopardise pedestrians, so that he or she may stop his or her vehicle and let pedestrians who have already stepped onto the pedestrian crossing pass.

...

(4) Drivers who do not comply with subsections 1 and 2 of this section shall be fined HRK 500 for a minor offence.

...”

Section 163

“(1) When travelling in a motor vehicle in seats installed with safety belts, drivers and passengers are obliged to use the seat belt[s] in the way designated by the seat belt manufacturer.

...

(8) Drivers and other persons who do not comply with the provisions in this section shall be fined HRK 500 for a minor offence.”

B. The Minor Offences Act

21. The relevant provisions of the Minor Offences Act, as in force at the time, provided:

DISQUALIFICATION Exclusion and recusal

Section 104

“(1) A judge shall be excluded from a case:

1. if he or she has been injured by the minor offence [in question];
2. if he or she is the spouse, a relative by blood – either lineal, descending or ascending in any degree, or collateral [sharing the same ancestor] to the fourth degree – or related by affinity to the second degree to the defendant, his or her counsel, the prosecutor, the injured person, their legal guardian or legal representative, or the representative of a legal person;
3. if he or she is a legal guardian, ward, adoptive parent or adopted child, foster parent or foster child to the defendant, his or her counsel, the defendant’s spouse, the prosecutor, the injured person or the representative of a legal person;

4. if he or she has conducted the first-instance proceedings in the same case or has taken part in the first-instance proceedings as a decision-maker, prosecutor, defence counsel, legal guardian or legal representative of the injured person or the prosecutor, or if he or she has testified as a witness or as an expert witness, or has taken part in the inspection or other operation on whose basis the minor offence proceedings were initiated.

(2) A judge may be removed from a particular case if it has been argued and proved that there are circumstances other than those listed in the previous subsection which call his or her impartiality into doubt.

(3) A judge, as soon as he or she discovers grounds for [his or her] exclusion as referred to in subsection 1, or circumstances that justify his or her removal (subsection 2), shall immediately inform the president of the court, who shall appoint a substitute judge. ...

(4) When a judge learns that an application for his or her removal has been lodged, he or she shall immediately discontinue all activity on the case, and in the event of a removal referred to in subsection 2, he or she may, before the ruling on the application, carry out only those procedural actions where there is a risk of delay.”

Parties’ application for disqualification Section 105

“(1) Parties may ask for the disqualification of a judge.

(2) Parties may lodge their application for disqualification up until the start of proceedings ..., and if they learn of a reason for the judge’s exclusion (section 104, subsection 1) at a later stage, they shall submit their application immediately after learning of that reason.

...”

Requirements for holding a hearing Section 167(3)

“A hearing can be held and a judgment can be rendered if parties and other persons participating in proceedings, although duly summoned, do not appear. The hearing can be held in the defendant’s absence if his or her questioning is not necessary and relevant for lawfully and correctly rendering the judgment.”

Section 180(1)

“By means of a judgment, a charge against a defendant is dismissed, or the defendant is acquitted or found guilty.”

22. The other relevant provisions of the Minor Offences Act are set out in the case of *Marčan v. Croatia* (no. 40820/12, §§ 21-22, 10 July 2014).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

23. The applicant complained that, owing to Judge B.L.V.'s involvement in the minor-offence proceedings against him, he had not been tried by an impartial tribunal. He relied on Article 6 § 1 of the Convention, the relevant part of which reads:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an ... impartial tribunal ...”

A. Admissibility

1. *The parties' arguments*

24. The Government argued that the applicant had failed to exhaust the available and effective domestic remedies, in that, in the proceedings complained of, although early on he had been made aware of the fact that his case had been assigned to Judge B.L.V., he had never sought that judge's disqualification. His application of 28 June 2012, by which he had allegedly sought the disqualification of that judge, had never been received by the Pazin Minor Offences Court. This had been confirmed by the Constitutional Court, whereas the applicant had never submitted any proof to the contrary.

25. The Government further submitted that had the applicant submitted an application for disqualification, Judge B.L.V. would have adjourned the hearing and immediately informed the president of the court, just as he had done in another case against the applicant. The Government lastly noted that in the instant case there had been no grounds as set out in section 104(1) of the Minor Offences Act for Judge B.L.V. to be automatically excluded from dealing with the case.

26. The applicant submitted that he had sought Judge B.L.V.'s disqualification in the proceedings complained of. On 28 June 2012 his lawyer had submitted the application to the Pazin Minor Offences Court by fax. He had received confirmation of delivery of the fax and had never been informed otherwise. Judge B.L.V. had not forwarded his application to the president of the court, but had instead decided to deal with his case.

27. The applicant further contended that at the same time, in another set of minor-offence proceedings against him before the same court, Judge B.L.V. had agreed to be removed from the case, admitting that there was animosity between himself and the applicant's mother. Therefore, the judge had been well aware of the circumstances justifying his recusal, and pursuant to section 104(3) of the Minor Offences Act, he ought to have informed the president of the court and asked to be removed from the case.

2. The Court's assessment

28. The Court considers that the question related to the exhaustion of domestic remedies is closely linked to the substance of the applicant's complaint that he was not tried by an impartial tribunal. The Court therefore finds that the Government's objection should be joined to the merits.

29. The Court notes that the applicant's complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' arguments

(a) The applicant

30. The applicant submitted that only several days before convicting him in the minor-offence proceedings, Judge B.L.V., in another set of proceedings against him before the same court, had agreed to be removed from the case, admitting that there was animosity between himself and the applicant's mother. The judge had therefore been aware of the circumstances justifying his recusal. Consequently, as soon as the judge had learned that another case against the applicant had been assigned to him, pursuant to section 104(3) of the Minor Offences Act, he should have informed the president of the court and asked to be removed from the case. The applicant had believed that Judge B.L.V. would do precisely that, which was why he had not appeared at the hearing of 6 July 2012.

31. The applicant contended that the fact that he had been tried by a judge who had himself admitted that there were circumstances justifying his recusal undermined the appearance of a fair trial. The Constitutional Court had not remedied the defect in question.

(b) The Government

32. The Government submitted that in the proceedings in question the applicant, who had been represented by a lawyer, had had the benefit of all the guarantees of Article 6 of the Convention. He had had sufficient time to prepare his defence and had been afforded the opportunity to effectively participate in the proceedings. The judgment against him had been based on lawfully obtained evidence and had not been arbitrary.

33. The Government contended that the applicant had been tried by an impartial tribunal. First of all, there had been no grounds for Judge B.L.V.'s automatic exclusion from the case (see paragraph 21 above, section 104(1) of the Minor Offences Act). Further to this, it could not be speculated as to whether the circumstances which had justified the judge's recusal in the

previous case against the applicant had still existed in the proceedings complained of. According to the Government, given that Judge B.L.V. had not asked to be removed from the case, those circumstances must have ceased to exist. Moreover, unlike in the previous case where the applicant had sought Judge B.L.V's disqualification, in the proceedings complained of he had not submitted such an application. This was obviously because, at the material time, the applicant himself had had no doubts regarding that judge's impartiality.

34. The Government lastly submitted that the applicant had been tried in a summary procedure, where the trial judge had only assessed whether, in the light of the defendant's objections, the police penalty notice could be upheld or not. In the present case, the applicant had not submitted any kind of arguments or evidence in his favour. In the objection by which he had challenged the penalty notice the applicant had merely cited the notice in question, had denied having committed the offences, and had asked the court to acquit him. He had not attended the hearing. Thus, Judge B.L.V. had not had a significant role in the proceedings and his alleged partiality had been of no relevance to the adjudication of the case. He had based his judgment on the written report of the police, the credibility of which had never been put to doubt. Lastly, the trial judge had had no opportunity to order that the applicant should receive a higher or lower fine, because the fine had been fixed by the Road Traffic Safety Act.

2. *The Court's assessment*

(a) **General principles**

35. The general principles relating to the requirements of an impartial tribunal were summarised as follows in the case of *Denisov v. Ukraine* ([GC], no. 76639/11, 25 September 2018):

“61. As a rule, impartiality denotes the absence of prejudice or bias. According to the Court's settled case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to (i) 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 (ii) an objective test, that is to say, by ascertaining whether, quite apart from the personal conduct of any of its members, the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (see, among other authorities, *Micallef v. Malta* [GC], no. 17056/06, § 93, ECHR 2009, with further references).

62. However, there is no watertight division between subjective and objective impartiality, as the conduct of a judge may not only prompt objectively held misgivings as to the tribunal's impartiality from the point of view of the external observer (the objective test) but may also go to the issue of the judges' personal conviction (the subjective test) (see *Kyprianou v. Cyprus* [GC], no. 73797/01, § 119, ECHR 2005-XIII). 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 (see *Pullar v. the United Kingdom*, 10 June 1996, § 32, Reports 1996-III).

63. In this respect, 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 (see *Morice v. France* [GC], no. 29369/10, § 78, ECHR 2015).”

(b) Application of these principles to the present case

36. The Court observes at the outset that the minor road traffic offences of which the applicant was convicted do not belong to the traditional categories of criminal law (see, amongst others, *Marčan*, cited above, § 37).

37. The Court reiterates that while entrusting the prosecution and punishment of minor offences to administrative authorities is not inconsistent with the Convention, the person concerned must have an opportunity to challenge any decision made against him or her before a tribunal that offers the guarantees of Article 6 (see, amongst many others, *Lauko v. Slovakia*, 2 September 1998, § 64, *Reports of Judgments and Decisions* 1998-VI).

38. The Court notes that Judge B.L.V., who conducted the minor-offence proceedings against the applicant in a single-judge formation, had only several days earlier agreed to be removed from another case against the applicant for the very same reason related to his impartiality (see paragraph 17-19 above).

39. In that other case, the applicant sought Judge B.L.V.’s disqualification on the grounds that he had worked with his mother, who was also a judge (see paragraph 17 above). In replying to the applicant’s application, Judge B.L.V. accepted that he had worked with the applicant’s mother and, in addition, admitted that there was animosity between himself and the applicant’s mother, although this was not mentioned by the applicant. Specifically, Judge B.L.V. said that he had been in continuous conflict with her and that they did not communicate with each other (see paragraph 18 above).

40. Contrary to the Government’s above argument (see paragraph 33), the Court considers it unlikely that Judge B.L.V.’s situation could have changed only several days after he had agreed to be removed from the applicant’s case. Thus, when he was assigned the minor-offence proceedings complained of, Judge B.L.V. must have been aware of the circumstances justifying his withdrawal (see paragraphs 8, 17 and 18 above).

41. In the Court’s view, this created a situation which was capable of raising legitimate doubts as to Judge B.L.V.’s impartiality, doubts which were not without objective justification, and was also of such a nature as to raise an issue under the subjective test, even disclosing personal bias motivated by the judge’s animosity towards the applicant’s mother

(compare *Filyutkin v. Russia* [Committee], no. 39234/08, §§ 37-38, 24 July 2018).

42. The present situation differs in particular from that examined by the Court in the case of *Dragojević v. Croatia* (application no. 68955/11, §§ 111-123, 15 January 2015), where a judge had refrained from sitting in a judicial formation as a “precautionary measure”, without there being any particular reason to doubt his personal impartiality (§§ 120-121 *in fine*).

43. The Court reiterates that any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see *Castillo Algar v. Spain*, 28 October 1998, § 45, Reports 1998-VIII; *Morice*, cited above, § 78; and *Ramljak v. Croatia*, no. 5856/13, § 31, 27 June 2017). Indeed, judges should maintain and enforce high standards of conduct and should personally observe those standards so as to maintain the integrity of the judiciary. Any breach of such standards diminishes public confidence which the courts in a democratic society must inspire in the public (see *Morice*, cited above, § 78).

44. The present case should be distinguished from cases in which the only issue at stake was the previous functional involvement of judges in the proceedings (see *Zahirović v. Croatia*, no. 58590/11, §§ 31-36, 25 April 2013; *Sgaibă v. Romania* (dec.), no. 6005/05, §§ 30-38, 27 January 2015; and *Smailagić v. Croatia* (dec.), no. 77707/13, §§ 31-36, 10 November 2015), where the Court held that functional involvement was not in itself sufficient to give rise to a conclusion as to the lack of impartiality of the judge or court concerned. In such cases, the Court deemed that it was for the applicants to raise their arguable concerns concerning the judges’ alleged lack of impartiality by asking for their removal from the case.

45. Turning to the particular circumstances of the present case, where the trial judge was aware of the circumstances justifying his withdrawal before the hearing leading to the applicant’s conviction, the Court does not find it necessary to rule on whether the applicant, as he claimed, had actually lodged an application for the judge’s disqualification or, as the Government seemed to suggest, no such application had apparently been made. What in this specific context the Court considers relevant is the fact that an obligation on the part of a judge sitting in a case to inform immediately the president of the court of the circumstances justifying his removal is expressly set out in the national law (see paragraph 21 above, section 104(3) of the Minor Offences Act). Consequently, it was primarily for Judge B.L.V., who was aware of the circumstances, to ask the President of the Pazin Minor Offences Court to be removed from the case.

46. Furthermore, the Court does not accept the Government’s argument that Judge B.L.V. did not have a significant role in the proceedings and therefore his partiality was of no relevance to the adjudication of the case (see paragraph 34 above). Indeed, regardless of the extent to which the applicant used his procedural rights to prove his defence, the Court is of the

view that the very fact that he was tried by a judge who had himself admitted that there were circumstances justifying his withdrawal undermined the appearance of a fair trial.

47. Lastly, the Court notes that the Constitutional Court did not remedy the defect in question. It is certainly possible that a higher or the highest court might, in some circumstances, make reparation for defects in the proceedings before lower courts (see *Ramljak*, cited above, § 40). In the present case, although the Constitutional Court had the power to quash the relevant decision on the grounds that it appeared that the trial judge had not been impartial, it declined to do so and upheld the impugned judgment. As a consequence, it did not cure the failing in question (see *Kyprianou v. Cyprus* [GC], no. 73797/01, § 134, ECHR 2005-XIII).

48. In view of the foregoing, the Court rejects the Government's objection of non-exhaustion of domestic remedies that it has previously joined to the merits (see paragraph 28 above) and finds that there has been a violation of Article 6 § 1 of the Convention as regards the requirement of an impartial tribunal.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

49. 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.”

50. The applicant did not submit a claim for just satisfaction. Accordingly, the Court considers that there is no call to award him any sum on that account.

FOR THESE REASONS, THE COURT

1. *Joins*, unanimously, to the merits the Government's objection of non-exhaustion of domestic remedies and *dismisses* it;
2. *Declares*, unanimously, the application admissible;
3. *Holds*, by six votes to one, that there has been a violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 11 July 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener
Deputy Registrar

Krzysztof Wojtyczek
Vice-President

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

K.W.O.
R.D.

DISSENTING OPINION OF JUDGE SABATO

1. In one set of proceedings (“the second set of proceedings” – see paragraphs 17 et seq. of the majority’s judgment) the applicant filed a request for the recusal (also referred to as disqualification or withdrawal) of a judge of the Pazin Minor Offences Court who was to rule on the challenge against a fine that the applicant had been given for traffic violations. The judge wrote a statement for the attention of the president of the court in which he acknowledged that he had been in conflict with the applicant’s mother, herself a member of the judiciary. On 14 June 2012 the president of the court endorsed the disqualification of the judge, who did not hear the case.

2. In a different set of proceedings (“the first set of proceedings” – see paragraphs 6 et seq. of the judgment) another penalty for traffic violations had been challenged before the Pazin Minor Offences Court. On 13 June 2012, in the framework of this challenge, the same judge – whose disqualification would be endorsed the next day by the president of the court in the second set of proceedings – summoned the person concerned for a hearing to be held on 6 July 2012. The person did not appear at this hearing. On the same day the penalty was upheld by the judge.

3. As I will state below, in my opinion it is uncertain whether the judge realised – at the time of issuing the summons, at the hearing, or later – that the person who challenged the fine in the first set of proceedings was the same person who had previously requested his withdrawal in the second set of proceedings, that is to say, the applicant before our Court, whose mother was not on good terms with the judge. It is a small world after all.

4. The majority found (see paragraph 45 of the judgment) that it was unnecessary to establish whether the applicant, as he claimed, had actually lodged a request for the judge’s disqualification in this different (first) set of proceedings or whether, as the respondent State expressly objected in their observations of 18 January 2016 and 31 March 2016, no such request had ever been submitted. I regret that I cannot agree. I consider – again, for the reasons I will state below – that it was indeed necessary to establish the facts and that, since the Government expressly objected that the applicant had not filed a request for recusal, the rule of the burden of proof should have led to a finding that no request for recusal existed (see paragraph 24 of the majority’s judgment). The Government noted that the applicant claimed to have sent a fax asking for the judge’s withdrawal, without then appearing at the hearing, but never filed a fax transmission report with our Court. The Government, for their part, produced excerpts of the log from the local court’s electronic filing system, containing no mention of the fax.

5. Having said this, I prefer not to deal with the objection – which the Government also clearly raised in their observations of 18 January 2016 and 31 March 2016 – that, because the applicant had omitted to lodge a request

for recusal, domestic remedies had not been exhausted. Dealing with this issue, in fact, would involve complex assessments in law and in fact, including with regard to the role of recusal of judges *vis-à-vis* self-disqualification in the domestic system, as well as the nature (in the light of its effectiveness) of the complaint which the applicant, instead of filing a request for recusal, brought before the Constitutional Court of Croatia seeking the setting-aside of the Pazin court's judgment of 6 July 2012 (see, *mutatis mutandis*, with reference to a different constitutional-law framework, *Horvat v. Croatia*, no. 51585/99, §§ 41-45, 26 July 2001). Such complex assessments are made unnecessary by the approach I will take as to the object of the applicant's complaint before our Court and the extent of our Court's assessment of judicial impartiality. I will nonetheless discuss a few general implications of the need for a request for the recusal of a judge – if such a remedy is available at the domestic level – to be brought in the domestic courts before an issue of judicial impartiality is raised before our Court.

6. My approach differs radically from the one adopted by the majority of the Chamber in determining the object of the applicant's complaint before our Court. I find that the applicant did not complain – at least, not directly – of a possible violation of Article 6 § 1 of the Convention deriving from the fact that the judge did not withdraw from the case (in the first set of proceedings), after he had agreed to withdraw in another case (in the second set of proceedings). On the contrary, the applicant stated clearly that, in his view, it was the decision of the Constitutional Court of the Republic of Croatia of 17 October 2012 which was in violation of Article 6 § 1 of the Convention, since that court had allegedly neglected to consider that the Pazin court's decision had been taken by a partial judge and thereby infringed the domestic Constitution (Article 29). Furthermore, the applicant assumed that the Constitutional Court “[had] not read” his complaint, as the allegedly “superficial” reasoning that it gave stated that no fundamental right was at stake (whereas, according to the applicant, the issue of judicial impartiality had been clearly argued by him). Consequently, the applicant sought the “overturning” of both the Constitutional Court's and the Pazin court's decisions, as well as the reopening of the proceedings.

7. In its decision of 17 October 2012, in my reading of it, the Constitutional Court ruled that no specific violations of human rights and fundamental freedoms were to be found in the judgment of the Pazin court. In my opinion (which, again, differs from that of the majority), this decision is in full conformity with Article 6 § 1 of the Convention as far as the principle of judicial impartiality is concerned. Such conformity may be affirmed on two grounds: firstly, because the decision was itself taken by a “tribunal” meeting the requirements of Article 6 § 1 (since no doubt at all has been cast on the fact that the Constitutional Court judges were impartial); and, secondly, because the issue of the impartiality of the Pazin

court, brought to the attention of a Constitutional Court with the power to quash the allegedly unlawful judgment (see, for instance, *mutatis mutandis*, *Süssmann v. Germany* [GC], no. 20024/92, § 41 et. seq., and in particular § 43, ECHR 1996-IV; *Kyprianou v. Cyprus* [GC], no. 73797/01, § 134, ECHR 2005-XIII; and *Micallef v. Malta* [GC], no. 17056/06, § 57, ECHR 2009), had been resolved within the domestic system by a decision rejecting the applicant's arguments.

8. The Constitutional Court's proceedings, in my view, are one example of the many national remedial mechanisms aiming at establishing whether the *judex suspectus* is or is not impartial. The most common remedy, however, is a request for recusal, the omission of which has been noted by the Government. Regardless of the differences between such remedies, the case-law of our Court states that the existence of national procedures for ensuring impartiality, namely rules governing the withdrawal of judges, is a relevant factor in assessing the impartiality of national tribunals. As our Court has found in the past, such rules manifest the national legislature's concern to remove all reasonable doubts as to the impartiality of the judge and constitute an attempt to ensure impartiality by eliminating the causes of such concerns. In addition to ensuring the absence of actual bias, they are directed at removing any appearance of partiality, and so serve to promote the confidence which the courts in a democratic society must inspire in the public. Our Court takes such rules into account when making its own assessment as to whether a tribunal was impartial and, in particular, whether the applicant's fears can be held to be objectively justified (see, for instance, *mutatis mutandis*, *Pescador Valero v. Spain*, no. 62435/00, §§ 24-29, ECHR 2003-VII; *Micallef*, cited above, § 99; and *Pasquini v. San Marino*, no. 50956/16, § 144, 2 May 2019).

9. The majority of the Chamber substantially disagreed with the assessment made by the domestic Constitutional Court. Making their own assessment as to whether the Pazin court was impartial, they considered insufficient the fact that there had been a domestic review of the issue and, in the circumstances of the case, held that Article 6 § 1 of the Convention required that the judge should have disqualified himself (as I mentioned, the majority considered it unnecessary to ascertain whether a recusal had been requested). I respectfully dissent for reasons of fact and law.

10. As to the facts, I would suggest that, since no request for recusal had been submitted to the judge (see above, regarding the total lack of evidence), and neither the applicant nor his counsel appeared at the hearing to challenge the court's impartiality, it may well be that the judge was totally unaware that the person whose case he was trying *in absentia* on 6 July 2012 was the same person whose mother he had admitted not being on friendly terms with. Aside from the possible difficulty of identifying persons by name only, one should also consider that the applicant has a surname different from his mother's and that in the previous set of

proceedings the judge had been able to recognise the applicant as his mother's son only after a recusal clarifying the issue had been filed with the court. In saying this, I regret that I further disagree with my distinguished colleagues of the majority, who found that the judge had been aware of the circumstances and should therefore have reported the situation to the president of the court (see paragraph 45 of the judgment). I do not need to recall, in this context, the reasons for which the personal impartiality of the judge is presumed. However, I do need to state that, in my opinion, the previous withdrawal from another case, in the particular setting of that case (which was conducted in a "small claims" court and *in absentia*), cannot constitute enough evidence to rebut this presumption.

11. This consideration, taken together with the finding that the reason for possible withdrawal was indicated as a mere alleged animosity deriving from a lack of communication in a professional environment, leads me to conclude that the facts by themselves show that a better decision would have been to abide by the domestic ruling: no violation of Article 6 § 1 should have been found.

12. But, as I mentioned, there are also issues at law to be considered, concerning the extent to which our Court, in my opinion, should review the national assessment of judges' impartiality by other judges (for example, judges hearing recusal cases, or judges before whom a decision is impugned for reasons relating to alleged bias of the court which gave a previous decision). In my opinion, failure to comply with the rules concerning self-disqualification should in principle constitute sufficient reason for the parties to request a recusal, so that, in the absence of such a request by the interested party, any impact of the aforementioned failure on the lawfulness of the proceedings and decision, as well as on their compliance with Article 6 § 1, should normally be excluded.

13. I should recall that, adopting this line of interpretation of Article 6 § 1 as regards judicial impartiality, our Court has held as follows (*Zahirović v. Croatia*, no. 58590/11, § 35-36, 25 April 2013):

"... when the domestic law offers a possibility of eliminating the causes for concerns regarding the impartiality of the court or a judge ... , it would be expected (and in terms of the national law required) of an applicant who truly believes that there are arguable concerns on that account to raise them at the first opportunity. This would above all allow the domestic authorities to examine the applicant's complaints at the relevant time and ensure that his rights are respected. ... In the present case, however, the applicant failed to use the opportunity to submit his complaints about the ... alleged lack of impartiality at the trial stage of the proceedings. Therefore, owing to that failure, the Court is not able to conclude that the alleged procedural defect complained of interfered with the applicant's right to a fair trial ..."

I subscribe to this principle and, in doing so, I respectfully disagree with the majority of the Chamber, who took the view that the case at hand was to be distinguished from *Zahirović* and other similar case-law. I would have applied the *Zahirović* standard to the case at hand.

14. The impartiality of judges is, however, too delicate a topic to be left to procedural law alone. Since the *Zahirović* standard is substantially a procedural one, I must admit that in some exceptional instances the procedural defect linked to the lack of impartiality could interfere with the right to a fair trial, and consequently could entail a violation of Article 6 § 1, even if the applicant had failed to raise his or her concerns by using an appropriate remedy in the domestic system. One example that comes to mind is that of a member of the judiciary deciding a case even if he or she has a direct and personal interest in it, placing him or her substantially in the position of a party to the proceedings. In such cases the violation would be blatant, in that the decision was given a non iudice, that is, by a tribunal so evidently lacking impartiality that the decision was *in rem propriam*.

15. A final remark concerns the link between the impartiality and independence of judges, the importance of which our Court has often underlined. In view of this link, I would not underestimate the risk to the independence of national judges which the majority's decision entails. Litigants who have not duly requested the recusal of a judge in their domestic system might raise issues of bias directly before our Court, even on the basis of minor suspicions different from the serious ones I just mentioned. In most systems, the delicate position of the judge is protected from suspicions of bias raised at a late stage by the provision of specific remedies subject to strict deadlines for challenging impartiality, which otherwise is to be presumed. A judge whose impartiality is subject to public scrutiny for too long is less independent, as he or she may fear that, at all stages of the procedure, justice administered by a judge may be transformed into justice trying the judge. It is true that, in the case at hand, the Croatian system offered a domestic remedy in the form of a complaint to the Constitutional Court (a complaint whose role, as I said, could be further clarified *vis-à-vis* the role of a request for recusal). But this is not true for all European systems, in many of which the only remedy is an application for recusal (and, if recusal is not requested, bias may no longer be a ground for appeal). The non-existence in many countries of domestic remedies other than an application for recusal, therefore, entails the danger – given that the majority substantially considered a previous application for recusal to be unnecessary – that national judges may be placed in the uncomfortable situation of seeing their impartiality directly challenged in Strasbourg.