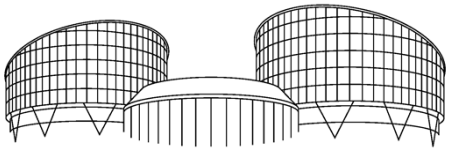

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF GUÐMUNDUR ANDRI ÁSTRÁÐSSON v. ICELAND

(*Application no. 26374/18*)

JUDGMENT

Art 6 § 1 (criminal) • Tribunal established by law • Participation of judge whose appointment was vitiated by undue executive discretion without effective domestic court review and redress • Grave breach tainting legitimacy of appointment procedure and raising objectively justified concerns as to political motives behind relevant decisions • Supreme Court's failure to draw necessary conclusions from its own findings acknowledging breach and to respond to applicant's arguments • Selection of judges on basis of merit through rigorous process inherent in concept of "tribunal" • Domestic law regulating judicial appointment process an inherent element of concept of "establishment" of court or tribunal "by law" • "Tribunal established by law" also meaning "tribunal established in accordance with the law" • Examination in light of common purpose shared with guarantees of "independence" and "impartiality": that of upholding fundamental principles of rule of law and separation of powers • Application of three-step test in determining whether irregularities in a judicial appointment process violate the *essence* of the right to a tribunal established by law • Whether there was (1) a *manifest* breach (2) of a *fundamental* rule of the appointment procedure and (3) whether allegations were effectively reviewed and redressed by domestic courts in a Convention-compliant manner • Domestic review to strike balance between competing interests at stake, including those relating to principles of legal certainty and irremovability of judges
Art 46 • General measures • No obligation on respondent State to reopen all similar cases that have since become *res judicata*

STRASBOURG

1 December 2020

This judgment is final but it may be subject to editorial revision.

In the case of Guðmundur Andri Ástráðsson v. Iceland,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Jon Fridrik Kjølbro, *President*,
Robert Spano,
Linos-Alexandre Sicilianos,
Síofra O'Leary,
Georgios A. Serghides,
Paulo Pinto de Albuquerque,
Aleš Pejchal,
Faris Vehabović,
Egidijus Kūris,
Branko Lubarda,
Mārtiņš Mits,
Georges Ravarani,
Gabriele Kucsko-Stadlmayer,
Pere Pastor Vilanova,
Jovan Ilievski,
Péter Paczolay,
María Elósegui, *judges*,
and Marialena Tsirli, *Registrar*,

Having deliberated in private on 5 February 2020 and on 16 September 2020,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 26374/18) against the Republic of Iceland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Icelandic national, Mr Guðmundur Andri Ástráðsson ("the applicant"), on 31 May 2018.

2. The applicant was represented by Mr V.H. Vilhjálmsson, a lawyer practising in Reykjavik. The Icelandic Government ("the Government") were represented by their Acting Agent, Ms F.R. Þorsteinsdóttir, the Acting State Attorney General.

3. The applicant complained that his criminal conviction had been upheld by a "tribunal" which was not "established by law" and which was not independent and impartial, in violation of Article 6 § 1 of the Convention.

4. On 19 June 2018 the Government were given notice of the application.

5. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). On 12 March 2019 a Chamber of that Section, composed of Judges Paul Lemmens, *President*, Robert Spano, Işıl Karakaş, Valeriu Griţco, Ivana Jelić, Arnfinn Bårdsen and Darian Pavli, and also of Hasan Bakırcı, Deputy Section Registrar, delivered a judgment in which it unanimously declared the application admissible and held, by five votes to two, that there had been a violation of Article 6 § 1 of the Convention as regards the right to a tribunal established by law. The joint dissenting opinion of Judges Lemmens and Griţco was annexed to the judgment.

6. On 14 May 2019 the Government requested the referral of the case to the Grand Chamber in accordance with Article 43 of the Convention. On 9 September 2019 the panel of the Grand Chamber granted that request.

7. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

8. The applicant and the Government each filed written observations on the merits of the case (Rule 59 § 1). In addition, third-party comments were received from the Government of Poland, the Commissioner for Human Rights of the Republic of Poland, the Public Defender (Ombudsman) of Georgia and the Helsinki Foundation for Human Rights, all of whom had been given leave by the President of the Grand Chamber to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3). The parties replied to these comments in the course of their oral submissions at the hearing (Rule 44 § 6).

9. The hearing took place in public in the Human Rights Building, Strasbourg, on 5 February 2020.

There appeared before the Court:

(a) *for the Government*

Ms F. R. ÞORSTEINSDÓTTIR,	*Acting Government Agent, Acting Attorney General,*
Mr T. OTTY QC,	*Counsel,*
Ms G. S. ARNARDÓTTIR,	*Deputy Agent,*
Ms M. THEJLL,	*Deputy Agent,*
Mr G. MOLYNEAUX	*Adviser;*

(b) *for the applicant*

Mr V. H. VILHJÁLMSSON,	*Counsel*.

The Court heard addresses, and replies to the questions from the judges, by Mr Vilhjálmsson, Ms Þorsteinsdóttir and Mr Otty.

10. On 14 and 20 February 2020, respectively, the applicant and the Government submitted further written replies to some of the questions put by the judges at the hearing.

THE FACTS

I. THE BACKGROUND TO THE CASE

A. Legislative history of the judicial appointment procedure in Iceland

1. Act no. 92/1989 on the Separation of the Executive and the Judiciary at the District Level

11. As part of the efforts to restructure the judiciary in Iceland, on 19 May 1989 the Icelandic Parliament (*Althingi*) adopted Act no. 92/1989 on the Separation of the Executive and the Judiciary at the District Level. Amongst the provisions introduced by the Act was the establishment of an Evaluation Committee to evaluate the competencies and qualifications of candidates for the post of District Court judge. Originally proposed in 1976, the introduction of such a committee was – according to the preparatory material in respect of the relevant Act – meant to ensure judicial independence and to increase public confidence in an independent judiciary. The Committee, an independent administrative body, was advisory *vis-à-vis* the Minister of Justice and was to be composed of three members appointed by the Supreme Court, the District Courts and the Icelandic Bar Association, respectively.

12. As regards the appointment of Supreme Court justices, the Supreme Court had been designated to act as an advisory body for that purpose at an earlier stage under Act no. 75/1973 on the Supreme Court (*Lög um Hæstarétt Íslands*).

2. Judiciary Act no. 15/1998

13. The Judiciary Act no. 15/1998 ("the former Judiciary Act"), which entered into force on 1 July 1998, originally maintained, as far as is relevant, the Evaluation Committee's mandate, composition and advisory role. In a judgment delivered on 14 April 2011 in relation to a dispute on the appointment of a District Court judge, the Supreme Court stressed that despite the advisory role of the Evaluation Committee at the material time, the Minister of Justice, when making a proposal for a judicial appointment contrary to the Committee's recommendation, was nevertheless bound by the principle of appointing the most qualified candidate to a public post and by the duty of "sufficient investigation" under section 10 of the Administrative Procedures Act (see paragraph 115 below for further information on this judgment).

14. The role of the Evaluation Committee in the judicial appointment process was further reinforced in 2010 through amendments made to section 4a of the former Judiciary Act by Act no. 45/2010 (see

paragraph 103 below). Amongst other important changes concerning the composition and the mandate of the Evaluation Committee, including an increase in the number of members to five and the extension of its mandate to cover the appointment of Supreme Court justices, the amendments introduced the rule that when making judicial appointments the Minister of Justice could only appoint candidates who were considered by the Committee to be the most qualified for a given post. In order to appoint a candidate who had not been considered the most qualified by the Committee, the Minister of Justice needed to obtain the approval of Parliament. This was, according to the Act's preparatory material, intended to further ensure the independence of the judiciary. That material referred to international legal instruments and recommendations on the appointment of judges, and underlined the importance of proper procedure in judicial appointments, in the light of the judiciary's significant role in securing fair trial rights and maintaining the checks and balances inherent in the separation of powers. It furthermore referred to an unwritten fundamental principle of Icelandic administrative law, whereby appointments to public posts had to be based on objective considerations and the most qualified candidate had to be appointed to any public post (see paragraph 114 for further information on the aforementioned unwritten administrative law principle).

15. In view of the increased role conferred upon the Evaluation Committee in the judicial appointment process through these amendments, the Minister of Justice established a set of rules in 2010 (Rules no. 620/2010) to govern the Committee's work (see paragraph 107 below for further information on the relevant Rules).

B. Establishment of the new Court of Appeal and appointment of its judges

1. General legal framework

16. On 26 May 2016 the Icelandic Parliament enacted Judiciary Act no. 50/2016 ("the new Judiciary Act"). The new Judiciary Act came into force on 1 January 2018, whereas a number of its temporary provisions, including temporary provision IV concerning the appointment of judges to the Court of Appeal, had entered into force earlier on 14 June 2016.

17. The new Judiciary Act introduced a new court of second instance in the Icelandic judicial system, namely the Court of Appeal (*Landsréttur*), thereby replacing the former two-tier system – consisting of District Courts and the Supreme Court – with a three-tier system.

18. Under section 21 of the new Judiciary Act, the Court of Appeal would be composed of fifteen judges. The initial procedure for the selection and appointment of the judges to the new Court of Appeal was regulated under temporary provision IV of the new Judiciary Act. The first paragraph

of temporary provision IV provided that the appointment process would be completed by 1 July 2017 and the appointed judges would take up their duties as of 1 January 2018, from which date the Court of Appeal would start operating. Referring to section 4a of the former Judiciary Act (see paragraph 14 above), the first paragraph of temporary provision IV further indicated that an Evaluation Committee would assess the qualifications of the individual candidates for the position of judge at the Court of Appeal and would provide the Minister of Justice with an evaluation report as to which candidates were considered to be best qualified to serve in that position. Pursuant to the relevant paragraph of the temporary provision, which largely reiterated section 4a of the former Judiciary Act (see paragraph 103 below), the Minister of Justice could not appoint a candidate whom the Evaluation Committee had not considered to be amongst the most qualified for the post. It also provided, however, that the Minister of Justice could depart from the assessment of the Evaluation Committee and propose a different candidate (or candidates) who had not been shortlisted by the Committee, on the condition that the proposed candidate(s) had nevertheless been found by the Evaluation Committee to fulfil all the minimum requirements set by section 21 of the new Judiciary Act (see paragraph 105 below) for appointment to the office of Court of Appeal judge, and that the proposal was accepted by *Althingi*.

19. The second paragraph of temporary provision IV then provided that for the first-round of appointments to the new Court of Appeal, the Minister of Justice would submit his or her proposals on each proposed candidate to *Althingi*. If *Althingi* accepted the Minister's proposals, they would then be sent to the President of Iceland, who would formally appoint the relevant judges. If *Althingi* did not accept any one of the Minister's proposals, the Minister would then have to submit new proposals to *Althingi* to replace the refused candidates.

2. Call for applications

20. On 10 February 2017 a call for applications was issued for the posts of fifteen judges at the Court of Appeal. The application deadline was set at 28 February 2017. According to the information obtained from the official website of the Icelandic Government, the prospective candidates were requested to provide information on the following matters as part of their applications:

> "(1) Current occupation.
>
> (2) Education and further education.
>
> (3) Experience of judicial work.
>
> (4) Experience of legal practice.
>
> (5) Experience of administrative work.

(6) Experience of academic work, e.g. teaching and other academic work and information concerning published, peer-reviewed articles and books, academic lectures, etc.

(7) Experience of management.

(8) Experience of additional work which might be useful for judicial post candidates, e.g. preparation of legislation, etc.

(9) Information on general and special competencies.

(10) Information concerning character and independence at work.

(11) Information concerning two former or current colleagues or superiors who can give the committee both orally and in writing information about the work and co-working skills of the candidate.

(12) Other information which can show the candidate's professional qualities and skills which are important for Court of Appeal judges."

The prospective candidates were moreover informed that applications should be accompanied, as applicable, by:

"(1) Copies of degree certificates.

(2) Copies of judgments which the candidate has drafted in the last 12 months, in orally argued court cases.

(3) Copies of written submissions which the candidate has drafted and orally argued in the last 12 months in court cases.

(4) Copies of administrative decisions which the candidate has drafted in the last 12 months.

(5) Published academic books and copies of articles by the candidate. It is requested that peer-reviewed articles be labelled as such.

(6) Other documents which can demonstrate the candidate's professional competence to work as a judge at the Court of Appeal."

21. Thirty-seven applications were initially received, including one from a certain A.E. However, only thirty-three of those applications were ultimately assessed by the Evaluation Committee, because three candidates withdrew their applications and one candidate did not fulfil the legal requirements for the post.

3. Assessment procedure before the Evaluation Committee

22. At a meeting held on 2 March 2017, the Minister of Justice (who, at the material time, served in that capacity under the title of Minister of the Interior) submitted the applications to the Chairman of the Evaluation Committee[1]. During the meeting, the Minister suggested to the Chairman

[1] The Evaluation Committee that undertook the assessment was composed as follows at the material time: one retired Supreme Court Justice (the chairman, nominated by the Supreme Court), one legal advisor from a law firm (nominated by the Supreme Court), one chief judge from a District Court (nominated by the Judicial Council), one lawyer (nominated by

that the Evaluation Committee provide her with a list of some twenty qualified candidates to choose from.

23. Following the meeting with the Minister of Justice, the Evaluation Committee set in motion the assessment process. According to the testimony provided by the Chairman of the Evaluation Committee in judicial proceedings brought in the aftermath of the appointment process by two of the shortlisted candidates, namely J.R.J. and Á.H., the Committee conducted its assessment on the basis of an evaluation table devised by it (see paragraphs 60-75 below for further information on these judicial proceedings). It appears from the Chairman's testimony that each candidate was individually evaluated and given points on the basis of twelve specific assessment criteria[2] noted on the evaluation table, which included education, judicial experience, and experience of legal practice or of public administration. The total number of points received by the candidates then determined their ranking.

24. The Evaluation Committee interviewed the candidates between 24 and 26 April 2017 and on 2 May 2017, and also sent questionnaires to the persons indicated by the candidates as referees.

25. On 11 May 2017 the Chairman of the Evaluation Committee submitted the Committee's draft assessment report to the Minister of Justice. The report included a list of fifteen candidates who were considered by the Committee to be the most qualified for appointment to the Court of Appeal as judges. According to information obtained from the judicial proceedings mentioned in the previous paragraph, the Minister asked once again during this meeting whether the Committee could provide her with a list that contained more than fifteen qualified candidates, upon which the Chairman showed the Minister the evaluation table that they had worked on and from which the list of the fifteen most qualified candidates had been generated.

26. On the same day, the Committee sent the draft assessment report to the candidates for their comments.

27. Seventeen candidates sent in comments, which were discussed at the Committee's meetings on 18 and 19 May 2017.

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the Bar Association), and one former Minister (nominated by Parliament) All members were appointed by the Minister of Justice for a renewable term of five years.

[2] The complete list of the twelve assessment criteria are as follows: education (5%), judicial experience (20%), experience of legal practice (20%), experience of public administration (20%), teaching experience (5%), academic experience (10%), management experience (5%), other relevant professional experience such as drafting of legislation (5%), general professional competence (5%) and special professional competence including competence in judicial procedure (5%), competence in drafting judgments (2.5%) and competence in conducting hearings (2.5%). As confirmed by the Evaluation Committee in its assessment report, the sum of the respective percentages amounts to 105%.

4. Final assessment report prepared by the Evaluation Committee

28. On 19 May 2017 the Evaluation Committee submitted its assessment report to the Minister of Justice, which had been finalised after the review of the comments received from the candidates in response to the draft report. According to the information provided in the report, while the comments received from the candidates had given rise to some changes in the Committee's assessment, they had not affected its recommendations regarding the fifteen most qualified candidates.

29. According to the testimony provided by the Minister of Justice before the District Court in a different set of judicial proceedings brought in the aftermath of the appointment process by two other candidates, namely E.J. and J.H., the Committee also submitted to the Minister on 19 May 2017, along with the assessment report, the evaluation table noted in paragraph 23 above, which showed the number of points allocated to each of the thirty-three candidates under each evaluation category and their rankings (see paragraphs 91-96 below for further information on these judicial proceedings). The Government argued in their observations that the assessment table had been submitted to the Minister of Justice at a later date – that is on 28 May 2017, together with the Evaluation Committee Chairman's letter to the Minister of Justice (see paragraph 40 below) – but they did not present any evidence in support of their argument.

30. The 117-page assessment report was divided into six chapters. The first chapter stated the names of the candidates, the second chapter set out the assessment criteria, the third chapter explained the procedure adopted by the Committee in conducting its assessment, the fourth chapter provided general information about the candidates, and the fifth chapter contained the evaluation of the candidates. The last chapter was divided into twelve sections – corresponding to the twelve different assessment criteria noted in paragraph 23 above – where the candidates were evaluated at the end of each section according to their qualifications. In the conclusion part of the report, the Evaluation Committee provided the following explanations on its assessment process:

> "... The Evaluation Committee's conclusion is based on a comprehensive assessment of the applicants' merits, in which the most important aspect is that the applicants have a broad, general legal education, knowledge and ability. In assessing the extent to which applicants' professional experience is utilised in the work of judges of the Court of Appeal, it is most important that they have solid experience of judicial work, legal practice, and administrative work related to the resolution of disputes. It also matters whether the applicants' experiences have been varied, such as whether they have experience in applying legal rules in different areas of law. In addition, the experience of the first few years of each job is given relatively the greatest weight in this regard, so there is less reason to differentiate between applicants with lengthy work experience because one of them has held a job longer than the other.

> ... In assessing general competence, and the ability to prepare and draft judgments and to preside in court, the Committee has given consideration to comments of referees, application documents, other relevant documents and the interviews held with the applicants."

31. The Committee found in its report that all thirty-three candidates that it reviewed were legally qualified to serve as Court of Appeal judges. However, in the conclusion of the report, it proposed a list of fifteen candidates whom it deemed to be the most qualified for the post of judge at the Court of Appeal. The assessment report, as opposed to the evaluation table on which the assessment was based, did not provide any ranking of those fifteen candidates; yet it stated explicitly that they were all more qualified for the post of judge at the Court of Appeal than the remaining eighteen candidates. A.E. was not among the fifteen candidates that the Committee considered to be the most qualified. It appears from the evaluation table attached to the assessment report that A.E. was ranked 18th among the thirty-three candidates[3].

32. According to information that emerged during the first set of judicial proceedings brought by the candidates J.R.J. and Á.H. mentioned above (see paragraph 23), on 19 May 2017 the Evaluation Committee also submitted a memorandum to the Minister of Justice on the procedure by which it had evaluated the comments made by the candidates in response to the draft assessment report (see paragraphs 27 and 28 above).

5. Procedure before the Minister of Justice

(a) Preliminary exchange with Parliament regarding the appointment procedure

33. By email of 12 May 2017, the Secretary-General of Parliament sent a memorandum to the Minister of Justice and the Speaker of Parliament on the procedure to be followed for the judicial appointments to the Court of Appeal and the role of Parliament in the process. The memorandum noted at the outset that the procedure before Parliament was without precedent and not entirely clear, but that it would be conducted in accordance with section 45(5) of the Parliamentary Procedures Act no. 55/1991 (see paragraph 109 below) and then provided further details in relation to the proposed procedure. Accordingly, the Minister of Justice would submit to Parliament one proposal for appointment to each of the fifteen posts. The Minister was expected to provide grounds for her proposals, stating in particular if she intended to deviate from the assessment of the Evaluation Committee. The Minister's proposals would then be sent to the Constitutional and Supervisory Committee of Parliament (hereinafter

[3] A.E. was ranked 18th with 5.275 points It should be noted, by comparison, that the candidate ranked first had received a total of 7.35 points, and the candidate ranked last had been given 3.525 points.

"the CSC"), which would give its opinion on those proposals in a manner that enabled Parliament to decide on each proposed candidate. The memorandum stated that no changes could be made to the Minister's proposals by Parliament; if any one of the proposals was not accepted by Parliament, then the procedure would have to be repeated.

34. By email of 16 May 2017, the *ad hoc* Permanent Secretary of the Ministry of Justice informed legal advisors from the Prime Minister's office, the Ministry of Justice and the Ministry of Finance that the Minister had approved the proposed procedure set out in the memorandum of the Secretary-General of Parliament.

(b) Proposal of the Minister of Justice concerning the appointments to the Court of Appeal

35. In an email dated 26 May 2017, the Minister of Justice sent to two in-house legal advisors the draft of the letter that she was planning to submit to Parliament concerning the appointments to the Court of Appeal and asked them to provide feedback. While the draft letter was not included in the case file for examination by the Court, it appears from further correspondence between one of the legal advisors and the *ad hoc* Permanent Secretary of the Ministry of Justice (see paragraph 37 below) that the Minister intended to depart from the list prepared by the Evaluation Committee.

36. In their response on the same day, the legal advisors informed the Minister that they had inserted some comments and suggestions in the draft letter. According to this email, their main comment was that if the Minister intended to change the Committee's list of proposed candidates, such change had to be specifically reasoned on the basis of the qualifications of the relevant candidates. They further suggested informing the candidates of the changes, at the latest before the list was submitted to Parliament or before it was processed by it.

37. On 28 May 2017 one of the legal advisors that the Minister had consulted sent an email to the *ad hoc* Permanent Secretary of the Ministry of Justice, reiterating the views noted above. He stated mainly that if the Minister of Justice considered that the Evaluation Committee's assessment procedure or the outcome of its assessment had been flawed, then she (the Minister) had two options. The first option would be to refer the matter back to the Committee for reassessment. As a second option, the Minister could choose to remedy the flaws herself, which would require her to evaluate all the candidates in the light of the "Minister's objectives" (the expression used in the email) and the relevant legal criteria. In such circumstances, a substantive assessment would have to be made of the qualifications of each applicant based on new grounds. In the legal advisor's opinion, the standard procedure in these circumstances would be to request the Committee to conduct a new evaluation. He further noted that the Minister's decision in respect of judicial appointments was an administrative act and therefore had

to comply with the Administrative Procedures Act no. 37/1993 (see paragraph 108 below). He lastly proposed that it might be wise to inform the candidates about any change in the emphasis placed on one of the assessment criteria and to give them an opportunity to present new information that could be relevant for the fresh evaluation.

38. It appears from the text of the judgments delivered by the District Court on 25 October 2018 in respect of the candidates E.J. and J.H. (see paragraphs 91-96 below) that on 28 May 2017, the *ad hoc* Permanent Secretary of the Ministry of Justice sent an email to the Minister of Justice concerning the latter's proposals for appointments to the Court of Appeal. According to the Permanent Secretary, who had reviewed the draft of the Minister of Justice's proposal, the Minister had three options before her:

> "1. It is possible that the Minister may declare tomorrow [to Parliament] that she is unhappy with the criteria on which the Evaluation Committee based its conclusions, and propose that the entry into force of the [new Judiciary Act] be postponed until 1 October [2017]... and that the Evaluation Committee reassess the issue based on criteria which the Minister emphasises with proper reasoning ...
>
> 2. That the Minister may send a letter to *Althingi* tomorrow with proposals that envisage amendments [to the Evaluation Committee's list] based on reasoning concerning the increased weight of judicial experience. The Minister [would thus be] repairing the faults with an independent assessment, which means that the same evaluation has to be carried out in respect of all the candidates based on the reasonable and legitimate criteria upon which the Minister proceeds. This means that a substantive evaluation has to be made of the competencies of each candidate based on the new criteria. It would be best to give increased weight to the judicial experience and refer to that in respect of the whole group ... We could also say that with this amendment, the gender balance is changed, without referring to those [particular] considerations in the [Minister's] proposal.
>
> 3. The Minister may send [her] unamended list to *Althingi* (which requires work from the Minister to choose the new names, with legitimate reasoning) – not an attractive option –."

39. In the meantime, on 27 May 2017 the Minister of Justice asked the Evaluation Committee to provide further information and documents on its evaluation of the thirty-three candidates, and inquired in particular as to whether the Committee had discussed the grounds on which the weight of each assessment criterion had been decided, and whether any documentation relating to that decision existed. She also requested information on whether the Committee had discussed its decision to find only fifteen candidates to be the most qualified for the fifteen posts, in the light of, *inter alia*, Act no. 10/2008 on Equality.

40. By a letter of 28 May 2017, the Chairman of the Evaluation Committee provided the Minister of Justice with details as to its evaluation procedure. He informed the Minister about the manner in which the Committee had given weight to each of the twelve pre-determined assessment criteria – which had been the same since the amendments

introduced by Act no. 45/2010 (see paragraph 14 above) – and explained that the same method and approach had been used in all judicial appointments during his four years as Chairman of the Committee. He stated that, following the same approach, all candidates had been evaluated separately under each criterion, and the points they received were noted in the assessment table; these points then determined the candidates' overall ranking. He stressed that the Committee had chosen to apply the same weight to each individual criterion as that applied in previous appointment procedures, noting in particular the importance of maintaining consistency in such matters. According to the Chairman, changing the weightings after the submission of candidatures, for the benefit of particular candidates and to the disadvantage of others, had to be avoided.

41. As regards the Minister's second question as to why only fifteen names had been proposed in the Committee' report, the Chairman explained that the Committee had not found that there had been several candidates of equal merit, nor had it encountered any difficulties in determining whether one candidate was more qualified than another. In this instance, fifteen positions had been advertised and the Committee had found that fifteen of the candidates under its review had been more qualified than the remaining ones for those positions. It had, therefore, not been necessary to propose a list of more than fifteen candidates in its report. The Committee's evaluation table had clearly shown the ranking of the individual candidates. The Chairman continued that the Minister had asked to be able to choose from among, for example, twenty candidates for the fifteen vacant posts. If this approach were to be followed, the candidate ranked 20th in the Committee's evaluation table could be chosen over candidates ranked 5th, 10th and so forth. According to the Chairman, this approach would contradict the purpose of Act no. 45/2010 as it had been described in the preparatory material (see paragraph 14 above). The intention behind the legislative framework requiring a separate expert committee to assess candidates for judicial posts, as opposed to leaving that assessment to the Minister of Justice alone, had been to safeguard judicial independence in the light of developments in other European countries.

42. Lastly, with regard to the reference made by the Minister to Act no. 10/2008 on Equality, the Chairman stated that the Committee did not evaluate qualifications according to the gender of the candidate. Moreover, Act no. 10/2008, which was of relevance to the Committee's work under Rules no. 620/2010, did not allow discrimination based on gender, whether direct or indirect. Such gender-based considerations could be entertained by the Minister only if two or more candidates had been considered as equally qualified for the post by the Evaluation Committee, which was not the case in the present circumstances.

6. Procedure before Parliament

(a) Submission of the Minister of Justice's list of candidates to Parliament

43. In a letter dated 29 May 2017, the Minister of Justice presented to the Speaker of Parliament her proposal of fifteen candidates for appointment as Court of Appeal judges. The proposal contained only eleven of the fifteen candidates whom the Evaluation Committee had found to be the most qualified for the post of judge at the Court of Appeal. The candidates ranked 7th, 11th, 12th and 14th[4] in the Committee's evaluation table had been removed from the list, and replaced with four other candidates ranked 17th, 18th, 23rd and 30th[5]. The Minister's proposal therefore included A.E., who had been ranked 18th by the Evaluation Committee (see paragraph 31 above).

44. In a separate letter sent on the same day, the Minister presented arguments for her proposals and the changes she had made in the Evaluation Committee's list. The Minister stated at the outset that, in its comprehensive report, the Evaluation Committee had relied on the assessment factors set out in Rules no. 620/2010 (governing the work of the Committee), and the weight ascribed to each assessment factor by the Committee had had a decisive effect on the ranking of each applicant. The Minister was, however, of the opinion that the Evaluation Committee had not given "judicial experience" the weight that the post of judge at an appellate court required. The Minister further argued that the assessment of candidates for judicial posts was not an exact science; it would not be possible to separate a qualified candidate from an unqualified one by a difference of 0.025 points on a scale of 1 to 10, and nothing in Rules no. 620/2010 had called for such working practices. After reviewing the assessment report, the candidates' comments on that report and the working documents presented to her, the Minister had concluded that a number of other candidates with many years of judicial experience should also have been included on the Evaluation Committee's list. She thus stated that she considered a total of twenty-four candidates to be eligible for the judicial posts, including those proposed by the Committee, and that she had drawn up her list of fifteen candidates on the basis of the principles described above. The Minister did not provide any further explanation as to why she had decided specifically to replace the candidates ranked 7th, 11th, 12th and 14th with those ranked 17th, 18th, 23rd and 30th. Nor is there any information before the Court as to the names of the twenty-four candidates considered eligible by the Minister of Justice.

[4] These candidates had received 6.2, 5.75, 5.675 and 5.525 points, respectively.
[5] These candidates had received 5.4, 5.275, 4.625 and 4.325 points, respectively.

(b) Procedure before the Parliamentary Constitutional and Supervisory Committee

45. Upon receipt of the Minister's proposals, the CSC held a meeting on 29 May 2017. It invited the Minister of Justice to the meeting, as well as the *ad hoc* Permanent Secretary of the Ministry of Justice, a number of experts, representatives from the Icelandic Bar Association and the Icelandic Judges' Association, the Parliamentary Ombudsman and the Chairman of the Evaluation Committee. Although the Court is not in possession of the minutes of this meeting, it transpired from the judicial proceedings brought subsequently by J.R.J. and Á.H. that the Minister of Justice had met with some criticism during this meeting for having failed to provide justification for each of the candidates that she had proposed to Parliament.

46. On 30 May 2017 the CSC held three meetings on the proposal of the Minister of Justice for the appointment of judges to the Court of Appeal. At the first meeting, B.N., who was the Chairman of the CSC at the material time, declared that he was the husband of one of the proposed candidates, namely A.E., and therefore stood down.

47. At one of the meetings held on 30 May 2017, the Minister of Justice presented a memorandum to the CSC to further substantiate her proposals. In the memorandum, the Minister reiterated her view that more weight should be accorded to judicial experience in the assessment of the candidates for an appellate court, including successful courtroom experience, and stated that she had also taken into account the Equality Act (no. 10/2008) in her proposal[6]. She continued to briefly outline the careers and qualifications of the four candidates whom she had added to the proposal[7]. She concluded with the following remarks:

> "As described above, it is the substantial judicial experience of these [four] candidates which motivated the Minister's proposal, in addition to the consideration which must be given to the Equality Act.
>
> The Minister is bound to propose those who are most qualified for the post of judge at the Court of Appeal. In this instance, the Minister considers that the aforementioned

[6] The points received by the candidates under "judicial experience", as well as the sex of each candidate, are as follows (listed from the candidate with the highest overall ranking to the lowest): 1st candidate: 8 (M); 2nd candidate: 6.5 (M); 3rd candidate: 6 (F); 4th candidate: 4.5 (M); 5th candidate: 0 (M); 6th candidate: 10 (F); 7th candidate: 3.5 (M); 8th candidate: 0 (F); 9th candidate: 0.5 (M); 10th candidate: 9.5 (M); 11th candidate: 5.5 (M); 12th candidate: 0.5 (M); 13th candidate: 1.5 (F); 14th candidate: 1(M); 15th candidate: 9.5 (F); 16th candidate: 0.5 (M); 17th candidate: 6 (M) ; 18th candidate: 8.5 (F); 19th candidate: 0 (F); 20th candidate: 7 (M); 21 candidate: 0 (F); 22nd candidate: 6.5 (F); 23rd candidate: 7 (F); 24th candidate: 0.5 (M); 25th candidate: 2.5 (F); 26th candidate: 0 (M); 27th candidate: 9.5 (M); 28th candidate: 0 (F); 29th candidate: 4 (M); 30th candidate: 9.5 (M); 31st candidate: 5.5 (F); 32nd candidate: 2 (M); and 33th candidate: 0 (F).

[7] All four candidates removed from the Evaluation Committee's original list were male; in their place, the Minister of Justice proposed two male and two female candidates.

four candidates are also the most qualified for the post of judge at the Court of Appeal. The Minister's assessment is based on a thorough examination of the documents of the case, including the applications, the Evaluation Committee's report, the candidates' comments, and the working documents of the Committee, and is made in light of the legitimate objectives discussed above.

The Minister has not raised any objections regarding the Evaluation Committee's preparation of this matter. She believes that the Evaluation Committee has shed sufficient light on the matter and that a satisfactory investigation has been performed for the assessment of the factors that constitute the grounds for the conclusion. The Minister considers it appropriate that more weight be given to judicial experience than that given by the Evaluation Committee. The Committee has already evaluated the candidates on the basis of this criterion and all the information about the judicial experience of the candidates is contained in the file. No new information or data has served as a basis for the Minister's proposal."

48. On 30 May 2017 the CSC also met with the Chairman of the Evaluation Committee, as well as representatives from the Icelandic Bar Association and the Icelandic Judges' Association and two academics, who answered questions put by the members of the CSC. At the close of the meeting, one of the members of the CSC – who was a member of parliament (MP) from an opposition party – requested the following statement to be entered in the official records: "In view of the limited time allowed to the Committee [the CSC], it is clear that the matter will not be dealt with in a sufficiently professional manner, and this will affect public confidence in the courts."

49. On 31 May 2017 the majority of the CSC, divided along party lines, proposed a parliamentary resolution, recommending that Parliament approve the Minister's proposal. The CSC held at the outset that under the Constitution, the role of the judiciary was to supervise the other holders of State powers, and that evaluation committees, such as that which had been set up in Iceland, served the purpose of limiting the power of the executive branch in the appointment of judges, by providing professional opinion on the qualification of candidates. If the Minister of Justice wished to depart from the list of candidates proposed by the Evaluation Committee, she had to present arguments for her proposal. Moreover, the choice had to be objective and the most qualified person had to be selected for the position. The CSC noted that the Evaluation Committee had considered that all thirty-three candidates fulfilled the legal requirements to be eligible for the relevant office. On this basis, and upon a discussion of the grounds underlying the Minister's proposal for appointment of judges to the Court of Appeal, including the deviations from the Committee's proposal, the CSC stated that it accepted the list proposed by the Minister. It stressed that Parliament's role in this process should be limited to reviewing whether the proper procedure had been applied by the Minister, whether an appropriate comparison of the candidates had been undertaken and whether the Minister's evaluations had been objective.

50. The minority, on the other hand, recommended that the proposal be dismissed, as they considered the reasons given by the Minister to be insufficient, in particular as to why she had chosen to depart from the Committee's proposal. They argued, *inter alia*, that the Minister had not made it clear how the four candidates removed from the original list and the four added ones had been evaluated and compared. Moreover, the minority expressed serious reservations regarding the Minister's compliance with principles of administrative law, including the requirement of sufficient investigation, the right of the candidates to comment and the general principle of domestic law that only the most qualified candidates should be selected for office, referring to the Supreme Court's judgment of 14 April 2011 in case no. 412/2010 (see paragraph 13 above and 115 below). They furthermore claimed that the CSC had been unable to obtain sufficient expert opinion on the matter and had had insufficient time to review the proposal.

(c) Vote in Parliament

51. The resolution proposed by the majority of the CSC was scheduled to be discussed at the parliamentary session of 1 June 2017. It appears from the letter that the Secretary-General of Parliament sent to the President of Iceland on 7 June 2017 (see paragraph 57 below) that, prior to the start of the session, the Speaker of Parliament consulted with the chairpersons of the different parliamentary groups and some individual MPs regarding the voting procedure, and that the consultations revealed that all MPs would vote in the same manner on every single proposal.

52. After opening the session, the Speaker formally informed the MPs that the candidates proposed by the Minister of Justice for appointment as Court of Appeal judges could be voted on individually or, if there were no objections, the proposals in respect of all fifteen candidates could be put to a single vote. Since there were no objections from any MPs, it was decided to proceed to a single vote.

53. Accordingly, on 1 June 2017 Parliament first voted on and rejected the CSC minority's proposal to dismiss the list prepared by the Minister of Justice by 31 votes to 30, strictly along party-political lines. This was followed by a vote on the majority's proposal, which was adopted – also along party-political lines –, with 31 MPs in favour, all of whom were members of the political parties composing the majority in the coalition government, and 22 MPs against, all members of opposition parties. A total of 8 MPs abstained, none of whom were members of the governing parties.

54. In a letter of 2 June 2017, the Minister of Justice was informed that at its session on 1 June 2017 Parliament had approved the list of fifteen candidates that she had proposed to be appointed as Court of Appeal judges. The letter was signed by the Speaker and the Secretary-General of Parliament.

55. On the same day, the Minister of Justice sent a letter to the Permanent Secretary of the Prime Minister's Office, who was acting at that time in her capacity as Secretary to the State Council, and requested that presidential letters of appointment be issued in respect of the candidates who had been selected as Court of Appeal judges.

7. Appointment of the Court of Appeal judges by the President of Iceland

56. On 6 June 2017 the Secretary to the President of Iceland requested information from Parliament on the procedure adopted by it for the selection of judges to be appointed to the Court of Appeal, the events leading up to the voting and the discussions held in Parliament, in the light of the relevant requirements of temporary provision IV to the new Judiciary Act and the Parliamentary Procedures Act.

57. By a letter of 7 June 2017 the Secretary-General of Parliament gave the President an account of the procedure before Parliament, and indicated that the voting had been lawful and in conformity with Parliament's statutory and customary procedures. The letter also stated the following:

> "... It should be emphasised that the provision [temporary provision IV] does not contain further instructions on how the matter should be handled in *Althingi*. The matter is therefore governed by parliamentary procedure and its customary implementation. However, it is clear from the temporary provision, ..., that *Althingi* will, or may, take a stand on each proposed candidate [separately] for the position of judge if it so wishes.
>
> It is a customary practice and an old tradition for a number of issues to be taken together during a vote if it is clear that everyone will vote in the same manner or when there is no proposal for amendments on individual matters, ... This is referred to as the sections being 'taken together' and the voting, or its conclusion, applies to each section. Generally, the right of MPs to request a 'separate vote' for a specific article, articles, sections or even individual words is respected, ...
>
> ...
>
> Particularly thorough preparation was made for the vote on Thursday, 1 June, ... The *Althingi* Secretariat prepared the vote, and before the parliamentary meeting commenced, the Speaker of Parliament sought the opinions of the leaders of the parliamentary groups and other MPs concerning the voting arrangements. The parliamentary document from the Constitutional and Supervisory Committee sets out a numbered proposal for each individual, so that the vote could be held for each person if this was desired. It was disclosed in conversations between the Speaker and leaders of parliamentary groups that MPs would all vote in the same way for each individual in the proposal and this view was confirmed by comments from various MPs when voting at the *Althingi* meeting. The Speaker of *Althingi*, furthermore, repeated formally at the meeting, at the time the voting commenced, that it [the vote] could be held for each candidate separately. There were, however, no objections to having the proposals presented as a whole, and no request for the Committee's proposals to be voted on separately. For instance, it could have been expected that a separate vote would be requested for those four candidates who had been included in the [Minister's proposal], ..., but that had not been the case.

> ...
>
> The conclusion of the Secretariat is therefore that the voting is fully legitimate and in accordance with the statutory and customary procedures of *Althingi*, to reply specifically to the query from the Office of the President of Iceland. The principal intention and requirement of the aforementioned temporary provision ... is to enable *Althingi* to take a position on each prospective judge, reject individual proposals by the Minister, and not to be faced with the obligation of having to approve or reject all proposals. When dealing with this matter in *Althingi*, this intention was respected; ..."

58. On 8 June 2017 the President of Iceland signed the letters of appointment in respect of the fifteen judges of the Court of Appeal, as proposed by the Minister of Justice and accepted by Parliament. The letter of appointment sent to A.E. read as follows:

> "The President of Iceland makes known: that in accordance with the Judiciary Act, I hereby appoint [A.E.] to the position of judge of the Court of Appeal, effective as of 1 January 2018. She shall respect the State's constitutional law and Icelandic laws in general, all in accordance with a solemn declaration by her.
>
> ..."

59. On the same day, the President of Iceland issued a statement referring to the correspondence between Parliament and his Office (see paragraphs 56 and 57 above). The President stated that no errors had been committed in the preparation and arrangement of the voting on 1 June 2017 and that the voting procedure had been in conformity with the law, parliamentary conventions and procedures.

C. Proceedings before national courts to challenge the lawfulness of the appointment procedure

60. In June 2017 J.R.J. and Á.H. – who were among the fifteen candidates that the Evaluation Committee had considered as the most qualified to be appointed to the bench of the Court of Appeal, but had been removed from the final list proposed to Parliament by the Minister of Justice – brought separate judicial proceedings in the District Court of Reykjavik against the Icelandic State. J.R.J. and Á.H. both requested in the first place the annulment of the Minister's decision of 29 May 2017 not to include them in the list of fifteen candidates proposed to Parliament for appointment to the Court of Appeal. They further requested the annulment of the decision not to include them on the list of fifteen candidates proposed to the President of Iceland for appointment after the vote in Parliament. In addition, they demanded compensation for pecuniary damage and 1,000,000 Icelandic krónur (ISK, approximately 9,000 euros (EUR) at the material time) for personal injury (non-pecuniary damage). They submitted that the Minister's decision not to propose them as Court of Appeal judges had been unlawful, because she had failed to give sufficient grounds for her departure from the Evaluation Committee's proposal and to demonstrate her

proposal's compliance with the requirement to appoint the most qualified candidate; they also claimed that she had not sufficiently investigated the matter. In their view, these violations could not be rectified by Parliament's approval of the Minister's proposal.

61. In both cases, the Icelandic State requested the District Court of Reykjavik to dismiss the claims of J.R.J. and Á.H. as inadmissible for being unsubstantiated, or in the alternative, to reject those claims on the merits. It reasoned that the administrative decision not to propose them as Court of Appeal judges was not of such a nature as to be subject to annulment, that the appointing power lay not with the Minister of Justice but with Parliament and the President, and that the plaintiffs' claims for damages were insufficiently substantiated.

62. On 7 July 2017 the District Court dismissed the plaintiffs' claims for annulment and pecuniary damage as inadmissible by way of a preliminary decision. The District Court held that the claim for annulment of the decision not to propose the plaintiffs as Court of Appeal judges was not one which could be adjudicated, as it was unclear what effects it would have if upheld, given that a finding for the plaintiffs in this respect would not annul the appointment of the fifteen judges proposed to Parliament. The District Court furthermore agreed with the State that the plaintiffs' claims for pecuniary damage were insufficiently substantiated.

63. On 10 July 2017 both J.R.J. and Á.H. appealed against the decisions of the District Court before the Supreme Court. It appears that in their appeal requests, J.R.J. and Á.H. had explained that they did not as such demand any change to the situation of those fifteen judges already appointed to the posts, but only the invalidation of the Minister's decision to sideline them. They stated that it was not for them to decide what such invalidation might lead to, in terms of its effects on the fifteen appointed judges.

64. On 31 July 2017 the Supreme Court upheld the District Court's judgments in both cases, in so far as they concerned the plaintiffs' requests for the annulment of the relevant decisions in which their names were not included among the list of fifteen candidates proposed to Parliament and the President, respectively, for appointment to the Court of Appeal. The Supreme Court held, in particular:

> "... it is not in the power of the courts to decide who should be appointed to the office of judge of the Court of Appeal. Bearing this in mind, and having received the [appellants'] ... explanation as to [the nature of their] claim, which will serve as a basis here, the [appellants] have not demonstrated that [they] have a lawful interest in obtaining a court ruling on the invalidity of decisions by the Minister of Justice."

The Supreme Court, however, annulled the District Court's decisions to dismiss the claims of J.R.J. and Á.H. for pecuniary damage. The cases were therefore remitted to the District Court for a fresh examination of that matter.

65. On 15 September 2017 the District Court found in favour of the Icelandic State and rejected the claims of J.R.J. and Á.H. for pecuniary and non-pecuniary damage. According to the District Court, the plaintiffs had sufficiently proven that the procedure employed by the Minister had not been in accordance with the law. That said, the plaintiffs had failed to prove that they would necessarily have been appointed as Court of Appeal judges had the proper procedure been applied and that they had, therefore, sustained damage. The District Court also found that the voting procedure in Parliament had not breached the law.

66. On 19 September 2017 J.R.J. and Á.H. appealed to the Supreme Court against the judgments of the District Court.

67. On 19 December 2017 the Supreme Court upheld the District Court's conclusions regarding the claims for pecuniary damage. However, it granted the applicants ISK 700,000 each (approximately EUR 5,700 at the material time) in compensation for non-pecuniary damage.

68. In its judgments the Supreme Court addressed at the outset the Icelandic State's argument that the plaintiffs had been misguided in challenging the decisions of the Minister of Justice in respect of the judicial appointments at issue, as it was the Icelandic Parliament, and not the Minister, which had the final say in deciding which candidates would be presented to the President of Iceland for appointment. In this connection, the Supreme Court reiterated that although the President of Iceland was formally the highest State official under the Constitution, in practice the Ministers were the supreme holders of executive power according to a well-rooted constitutional tradition. The arrangements made under the former Judiciary Act and the new Judiciary Act entailing the involvement of the Evaluation Committee and Parliament in the process of the appointment of judges did not change this constitutional tradition. Accordingly, it was the Minister of Justice, and not Parliament, which held the power to determine who would be proposed to the President of Iceland for appointment as judge to the Court of Appeal. The Icelandic State's argument to the contrary was therefore rejected.

69. The Supreme Court further reiterated in both judgments the general principle of Icelandic administrative law that when making appointments to public posts, the executive was bound by the rule that only the most qualified candidates had to be selected. It referred in this connection to two of its earlier judgments, delivered on 14 April 2011 and 5 November 1998, respectively. According to the first of those judgments, which concerned a dispute over the lawfulness of an appointment of a District Court judge, section 10 of the Administrative Procedures Act on the rule of investigation required the authorities to ensure that decisions concerning appointments to public posts were not made until all the relevant and necessary information had been obtained. In the second judgment, the Supreme Court had held that the power of a Minister in respect of appointments to public posts was

limited by the applicable laws and general principles of administrative law concerning such appointments and the evaluation of the competencies of the candidates. The Supreme Court stated that in the context of judicial appointments, the rule of investigation under section 10 of the Administrative Procedures Act had been transferred from the Minister to the Evaluation Committee following the establishment of such committee by Act no. 92/1982.

70. Turning to the specific facts before it, the Supreme Court observed at the outset that in the proposal that she had made to Parliament, the Minister of Justice had decided to retain eleven of the fifteen candidates which the Evaluation Committee had deemed to be the most qualified to be appointed as Court of Appeal judge. The Supreme Court noted that the qualifications of those eleven candidates had been assessed by the Evaluation Committee, which clearly possessed the expertise to assess such matters, and had conducted its assessment in accordance with the relevant domestic laws. In these circumstances, the procedure followed in respect of those eleven candidates, including the single vote held before Parliament, did not present any irregularities, provided that an opportunity had been made available to vote separately on each candidate upon request.

71. The Supreme Court went on to find, however, that to the extent that the Minister of Justice had decided to propose to Parliament to depart from the Evaluation Committee's assessment in respect of four candidates, as the law had permitted, her proposal had to be based on an independent investigation of all the elements necessary to substantiate it in accordance with section 10 of the Administrative Procedures Act (see paragraph 108 below). Accordingly, the Minister had to ensure that her own investigation and assessment were based on expert knowledge, on a par with that of the Evaluation Committee, and that the instructions concerning the evaluation procedure as set out under Rules no. 620/2010 on the work of the Evaluation Committee – rules that had been put in place by the Ministry of Justice to guide the work of the Committee (see paragraph 107 below) – were taken into account in her assessment. According to the Supreme Court, this was all the more important given that under the relevant law, the assessment report prepared by the Evaluation Committee limited the powers of the Minister of Justice and prohibited her from proposing a candidate who was not considered by the Committee to be the most qualified to the post of judge, unless the Minister obtained the consent of Parliament. The Supreme Court stressed that when making appointments to judicial posts, the decision taken by the Minister did not involve a post accountable to the Minister, but rather concerned members of a different branch of the State's government which had a monitoring role *vis-à-vis* the other branches and whose independence was guaranteed by Article 61 of the Constitution and section 24 of the former Judiciary Act.

72. On the basis of these considerations, the Supreme Court held that, having regard to her duty of investigation under section 10 of the Administrative Procedures Act, the Minister of Justice should, at the very least, have compared the competencies of the four candidates that she had added to the list with the four that she had removed. Depending on the outcome of such comparison, the Minister should then have given due reasons for her decision to seek Parliament's approval for her proposal to depart from the Committee's conclusions. Only in this manner could Parliament have sufficiently served its role in the process and taken a position on the Minister's assessment. Accordingly, and in keeping with the requirements of temporary provision IV of the Judiciary Act no. 50/2016, the Minister of Justice had been bound to present an independent proposal for each of the four candidates who had not been among the fifteen listed by the Evaluation Committee. In the Supreme Court's opinion, this view was also supported by the second paragraph of temporary provision IV, under which the non-acceptance by Parliament of any of the candidates proposed by the Minister of Justice would require the Minister to submit new proposals for Parliament's acceptance.

73. Having regard to the information and documents presented before it, the Supreme Court found that the Minister of Justice had not conducted an independent investigation and assessment comparable to that of the Evaluation Committee when departing from that Committee's opinion. The inadequate character of the investigation conducted by the Minister of Justice prevented her from reaching a different decision on the competencies of the candidates from that previously reached by the Evaluation Committee on the basis of the same data. Furthermore, she could not rely on considerations of gender under the Equality Act no. 10/2008 as those were only applicable in cases where two candidates of different genders had been considered equally qualified. The Supreme Court noted that neither in its initial letter addressed to Parliament on 29 May 2017, nor in the memorandum sent to the CSC the next day, had the Minister substantiated her proposals in a manner that had satisfied the minimum requirements noted above. The Minister of Justice had therefore breached the requirements of section 10 of the Administrative Procedures Act in the context of the procedure for appointment of Court of Appeal judges.

74. The Supreme Court added that the deficiencies in the procedure before the Minister of Justice had in turn resulted in a flawed procedure before Parliament, as those deficiencies were not rectified when the matter came to a vote in Parliament.

75. As to the plaintiffs' claims for non-pecuniary damage under section 26 of the Tort Act no. 50/1993 (see paragraph 113 below), the Supreme Court stated that although nothing suggested that the Minister had acted with the intention of causing injury to their reputation and personal honour, she should nevertheless have been aware that her actions could be

to the detriment of the plaintiffs' reputation and thus cause them personal injury. The Minister had, however, acted "in complete disregard of this obvious danger" ("*Þrátt fyrir þetta gekk ráðherrann fram án þess að skeyta nokkuð um þessa augljósu hættu*").

II. THE CIRCUMSTANCES OF THE CASE

A. The criminal proceedings against the applicant

76. The applicant was born in 1985 and lives in Kópavogur.

77. On 31 January 2017 the applicant was indicted for a violation of the Traffic Act no. 50/1987, on the charges of driving without a valid driving licence and driving under the influence of drugs.

78. On 23 March 2017 the District Court of Reykjanes convicted the applicant on the charges against him. The case was processed summarily as the applicant accepted the charges and pleaded guilty. The applicant was sentenced to seventeen months' imprisonment and his driving licence was revoked for life.

79. On 6 April 2017 the applicant appealed against the judgment to the Supreme Court. He did not as such challenge his conviction, but requested his sentence to be reduced. The public prosecutor requested that the judgment of the District Court be upheld. Since the case was not examined by the Supreme Court before the end of 2017, it was transferred to the newly established Court of Appeal in accordance with section 78(1) of Act no. 49/2016 on Amendments to the Criminal Procedure Act and Civil Procedure Act.

80. On 29 January 2018 the Court of Appeal notified the applicant and the prosecution of the date of the trial (6 February 2018), as well as the composition of the court that would be hearing the case. According to this letter, the Court of Appeal would be composed of three judges, including A.E., who was one of the four judges who had been proposed by the Minister of Justice for appointment to that court (see paragraph 43 above).

81. On 2 February 2018 the applicant's defence counsel requested that A.E. withdraw from the case, on account of the irregularities in the procedure by which she, and the other three candidates in question, had been appointed as judges to the Court of Appeal.

82. On 6 February 2018, at a preliminary hearing before the Court of Appeal, the applicant formally lodged a procedural motion requesting that A.E. stand down from the case as required by section 6 (g) of the Criminal Procedure Act no. 88/2008 (see paragraph 110 below). Referring to his right to have his case adjudicated by a qualified, impartial, independent and lawfully constituted court, and to the relevant requirements in this respect under Articles 59 and 70 § 1 of the Icelandic Constitution and

Article 6 § 1 of the Convention, the applicant claimed that he would not be given a fair trial before an impartial and independent tribunal established by law if A.E. were to participate in the proceedings, owing to the irregularities in the procedure leading to her appointment as judge of the Court of Appeal. In support of his claim, the applicant referred to the decision of the Court of Justice of the European Free Trade Association States (EFTA Court) of 14 February 2017 in case E-21/16 and the judgment of the General Court of the European Union (EU) of 23 January 2018 in case no. T-639/16 P (see paragraphs 142 and 132 below, respectively). He argued that according to those rulings, a judge whose appointment had not been in conformity with the law could not be considered to have been fully vested with judicial powers and his or her judgments would therefore have no validity. Having regard to the Supreme Court's findings of 31 July and 19 December 2017 on the irregularities in the procedure for the appointment of Court of Appeal judge (see paragraphs 64-75 above), any judgment delivered by the Court of Appeal in his case with the participation of A.E. would therefore lack validity.

83. On 22 February 2018 the Court of Appeal, with the participation of A.E., rejected the applicant's motion for A.E. to withdraw from the case. The court reasoned that A.E. had fulfilled the general eligibility criteria for appointment, had been appointed for an indefinite term and had enjoyed independence in that post as guaranteed by the Constitution and the new Judiciary Act. The Court of Appeal did not, therefore, agree that there were any events or circumstances, as indicated in section 6 (g) of the Criminal Procedure Act, that would give rise to a justifiable doubt as to the eligibility of A.E. to properly handle the case. The applicant appealed against that decision on 24 February 2018.

84. On 8 March 2018 the Supreme Court dismissed the appeal on the ground that the conditions for appeal had not been fulfilled for procedural reasons. It held that, whereas the applicant's main request was that A.E. should withdraw because of her unlawful appointment, he had incorrectly presented that claim as a "recusal request".

85. Following the Supreme Court's dismissal of the applicant's request for the withdrawal of A.E., the proceedings before the Court of Appeal continued with the participation of A.E.

86. In a letter of 13 March 2018, the applicant changed his pleadings before the Court of Appeal. His primary claim was that he be acquitted, on the grounds that the appointment of Court of Appeal judges had been in violation of Articles 59 and 70 of the Constitution and Article 6 § 1 of the Convention. In the alternative, he requested that his sentence be reduced.

87. On 23 March 2018 the Court of Appeal upheld the District Court's judgment on the merits.

88. On 17 April 2018 the Supreme Court granted leave to appeal and on 20 April 2018 the applicant appealed against the judgment to the Supreme Court, by way of an appeal lodged by the prosecutor at his request.

89. The applicant's main submission before the Supreme Court was to seek the quashing of the Court of Appeal's judgment and the remittal of his case for retrial. Alternatively, he requested to be acquitted or to be given a reduced sentence. His submissions were based on the following arguments:

> "Independent and impartial tribunals are a fundamental pillar of the rule of law. A prerequisite for the precluding of doubt regarding the independence and impartiality of tribunals is the strict observance of the laws and rules that apply to the appointment of judges.
>
> ...
>
> It is of particular importance to ensure the independence of the courts of law from the executive branch of government. The fact that politicians, political parties, a certain majority of parliament, the current government or a certain minister might be owed a favour by certain judges undermines their independence and can justifiably weaken public trust in the judiciary.
>
> It is therefore of key importance for it to be ensured beyond reasonable doubt that the appointment of judges is determined on the basis of the professional competence of candidates and not the political views and political connections of the candidate or the arbitrary decision of the Minister of Justice ...
>
> Pursuant to Article 59 of the Constitution, the organisation of the judiciary can only be established by law. According to the second sentence of Article 6 § 1 of the European Convention on Human Rights, a tribunal must be established by law. This entails not only a mandatory condition that general rules on appointments to the judiciary must be clearly enshrined in statute law, but also, and no less importantly, a mandatory condition that the appointment of judges in each instance must be in compliance with the law.
>
> In fact, it can be maintained that the former condition, [that is] the condition on the general rules of statute law, would be worth little if the above conditions did not entail a requirement of compliance with all applicable laws and rules in each instance."

Relying on these arguments, as well as on the decisions of the EFTA Court and the General Court of the EU as noted above (see paragraph 82 above), and on the previous findings of the Supreme Court regarding the irregularities in the procedure leading to the appointment of A.E. as a Court of Appeal judge (see the relevant judgments noted in paragraphs 67-75 above), the applicant claimed that he had been denied the right to a fair hearing before an independent and impartial tribunal established by law, as provided under Article 70 § 1 of the Constitution and Article 6 § 1 of the Convention. He stressed in this connection that the appointment of A.E. to her post had not been in accordance with the law, as required by Article 59 of the Constitution and Article 6 § 1 of the Convention. He further contended that during the parliamentary elections held in October 2017, A.E.'s husband B.N. – a member of parliament belonging to the same political party as the Minister of Justice, namely the Independence Party

(*Sjálfstæðisflokkurinn*) (also mentioned in paragraph 46 above) – had given up the first place on the party's constituency list in Reykjavik in favour of the Minister, after the latter's decision to include his wife in her proposal to Parliament. By that action, B.N. had effectively foregone the possibility of serving as a Minister in the new coalition government formed after the elections. In the applicant's opinion, the deal between the Minister and B.N. had undermined, from an objective perspective, the Court of Appeal's appearance of independence.

90. On 24 May 2018 the Supreme Court rejected the applicant's claims and upheld the judgment of the Court of Appeal. After setting out the facts and the procedure leading to the appointment of A.E. to the Court of Appeal, and recalling its conclusions in the judgments of 19 December 2017 in related proceedings brought by J.R.J. and Á.H., the Supreme Court made the following findings, as relevant:

> "[The applicant's] arguments for his primary and secondary claims before the Supreme Court are *inter alia* that under Article 59 of the Constitution and Article 6 of [the Convention], an appointment of a judge has in all respects to be in accordance with the law. Where that is not the case and the appointment is thus unlawful 'the judge in question is not a lawful holder of judicial power and a court's judicial rulings in which he has participated constitute a dead letter', as is argued in [the applicant's] observations before the Supreme Court. The conclusion drawn from the cited words cannot be sustained unless it is considered that a person's appointment as a judge under these circumstances would be vitiated by nullity [*markleysa*], thus not only that flaws in the appointment process would result in its annulment. It must be taken into account that in the aforementioned assessment report of the Evaluation Committee of 19 May 2017, it was concluded that all the 33 candidates fulfilled all the requirements provided for by law to hold the office of judge in the Court of Appeal, a fact that has not been challenged. The appointment of the judges was conducted in accordance with the formal procedural rules of Chapter III of Act no. 50/2016, as well as temporary provision IV of the same Act, albeit with the exception that, during the parliamentary procedure on the Minister of Justice's proposals on the appointment of the judges, the requirements of the second paragraph of the temporary provision were not followed in that Parliament should have voted on each and every judge separately, but not all the judges at the same time, as was in fact done. This issue, however, has already been addressed in the aforementioned judgment of the Supreme Court [of 19 December 2017], where it was concluded that this was a defect of no significance. Taking this into account, as well as the fact that all the fifteen judges were appointed to office by letters signed by the President of Iceland on 8 June 2017, co-signed by the Minister of Justice, it cannot be concluded that the appointment of [A.E.] was vitiated by nullity, nor is it accepted that judicial rulings of the Court of Appeal, which she has delivered along with others, are for that reason a 'dead letter'.
>
> When it is assessed whether the accused, due to [A.E.'s] participation, did not enjoy the right to a fair trial before an independent and impartial tribunal in accordance with the first paragraph of Article 70 of the Constitution (cf. Article 6 of the European Convention on Human Rights), it must be recalled that in the aforementioned judgments of the Supreme Court [of 19 December 2017] it was concluded that such flaws were in the procedure at the level of the Minister of Justice preceding the appointment of the fifteen Court of Appeal judges and that the State was liable for damages. In this case, this finding has in no way been challenged and these judgments

have, therefore, evidential value in this respect in accordance with section 116(4) of the Civil Procedure Act. In this regard, it must also, in particular, be emphasised that it cannot be accepted, as was argued in the aforementioned memorandum of the Minister of Justice of 30 May 2017, that by only increasing the weight ascribed to judicial experience from that which such experience was ascribed by the Evaluation Committee in its internal table, relied upon in its assessment report of the 19th of the same month, but relying in other respects on the 'sufficient investigation' of the Committee as to each assessment factor, the finding could be made that four named candidates for the post of judge in the Court of Appeal, but not others, would be removed from the group of the fifteen most qualified, and four specific named candidates would be moved up into that group rather than others [*sic*]. When assessing the consequences of the said flaws in the Minister of Justice's procedure, account must be taken of the fact that the appointment of all the fifteen judges of the Court of Appeal for an indefinite term, which has in no way been annulled by a court, became a reality upon the signing of their letters of appointment, dated 8 June 2017. As stated above, they all fulfilled the requirements of section 21(2) of Act no. 50/2016 for appointment to the office of judge, including the requirement of item 8 of the said paragraph, that is, being considered to be qualified to hold such office in the light of their professional experience and legal knowledge. From that time, the judges have held positions (cf. Article 61 of the Constitution) which preclude them from being discharged from office except by a judicial decision. From the time the appointment of these judges took effect, they have, according to the same provision of the Constitution (see section 43 (1) of Act no. 50/2016) been under the main obligation in the performance of their official duty to follow only the law. They have also been afforded, in accordance with the last mentioned provision of law, independence in their judicial work but also the duty to perform it under their own responsibility and never to follow instructions from others in their work. With reference to all of the above, there is no sufficient reason to justifiably doubt that [the applicant] enjoyed a fair trial before independent and impartial judges, in spite of the flaws in the procedure at the level of the Minister of Justice."

The Supreme Court did not specifically address the applicant's arguments regarding the lack of independence of the Court of Appeal on account of the allegedly political motives behind the Minister of Justice's proposals.

B. Further developments

1. Further judicial proceedings to challenge the lawfulness of the procedure for appointment of Court of Appeal judges

91. In February and March 2017 E.J. and J.H. – the two other candidates who were among the fifteen candidates that the Evaluation Committee had considered to be the most qualified, but had been removed from the final list proposed to Parliament by the Minister of Justice – brought judicial proceedings in the District Court of Reykjavik against the Icelandic State. E.J. requested a declaratory judgment to the effect that the State was obliged to compensate him for pecuniary damage in view of his non-appointment to the post of Court of Appeal judge on account of an unlawful decision on the part of the Minister of Justice. J.H. demanded awards in respect of

pecuniary damage and non-pecuniary damage on the same grounds. He requested, in particular, an explanation as to what aspect of the assessment of qualifications had been reduced at the expense of increased weighting of judicial work and how the assessment of individual applicants was altered as a result of those changes. He also questioned why some candidates, who had less judicial experience than him or no judicial experience at all, had been added to the list or kept on the list by the Minister.

92. In two separate judgments of 25 October 2018, the District Court of Reykjavik found for the plaintiffs. In the first judgment the District Court acknowledged E.J.'s right to compensation for pecuniary damage on the grounds that he had put forth. The District Court concluded, *inter alia*, that the candidate had sufficiently established that, had the procedure been conducted in a lawful manner with a reasonable assessment being made of his application and a comparison performed of his merits in relation to other candidates, it would have resulted in his appointment as judge of the Court of Appeal. In the other judgment, the District Court referred to the related Supreme Court judgments of 19 December 2017 (see paragraphs 67-75 above) and awarded the plaintiff, J.H., ISK 1,100,000 (approximately EUR 7,300 at the material time) in compensation for personal injury (non-pecuniary damage). As to pecuniary damage, the District Court awarded him ISK 4,000,000 (approximately EUR 29,200 at the material time) on the basis of the same argument as that made in respect of E.J.

93. In both cases, the District Court referred to the Supreme Court's finding in the 19 December 2017 judgments that when deviating from the Evaluation Committee's list, the Minister should at least have made a comparison between the qualifications of the four candidates that she removed from the list and the four that she added. According to the District Court, this finding could not be understood to mean that the Minister was limited in her comparison to those particular candidates directly concerned by her decision; if the Minister considered it appropriate to grant increased weight to judicial experience, then she should have duly assessed *all* candidates on the basis of that consideration. Otherwise, she would be prevented from claiming that she had selected the fifteen most qualified candidates on the basis of their experience of judicial work. The court held that neither the evidence in the case file, nor the Minister's submissions before it, offered a clear picture as to the nature of the comparison made by the Minister between the candidates in terms of their judicial experience.

94. Following the appeals lodged by the Icelandic State, on 27 March 2020 the Court of Appeal overturned both District Court judgments – partly in J.H.'s case and entirely in E.J.'s – by a two-to-one majority.

95. The Court of Appeal quashed the District Court's judgments to the extent that they concerned the claims for pecuniary damage. It held that the plaintiffs could not have taken it for granted that they would be appointed as

judges to the Court of Appeal. The procedure set out under temporary provision IV had clearly provided the Minister with the possibility of deviating from the Committee's proposal and appointing other candidates, provided that they fulfilled the basic qualifications. In these circumstances, and despite the proposal by the Evaluation Committee for their appointment, J.H. and E.J. could not be considered to have had a legal right to be appointed as judges to the Court of Appeal. The Court of Appeal upheld, however, the District Court's findings in respect of J.H.'s claims for non-pecuniary damage. It stressed that while J.H. had been removed from the list on the grounds of the need to attach more weight to judicial experience, he actually had more judicial experience than at least four of the candidates whom the Minister had retained from the Evaluation Committee's list.

96. By two decisions dated 8 May 2020, a three-judge panel of the Supreme Court granted E.J. and J.H. leave to appeal against the Court of Appeal's judgments, having regard to the precedential value of the cases. According to the latest information available to the Court, the cases are currently pending before the Supreme Court.

2. Other relevant developments

97. On 5 March 2018 a motion of no confidence was tabled in Parliament against the Minister of Justice by several members of two opposition parties, on the grounds of the breaches committed by her in the process of the appointment of Court of Appeal judges.

98. On 6 March 2018 Parliament rejected the motion by a vote of thirty-three MPs voting against the motion and twenty-nine in favour, with one MP abstaining. The thirty-three MPs rejecting the motion were all members of parties composing the majority in the coalition government. However, two other members of those parties voted in favour of the motion.

99. On 13 March 2019, following the judgment delivered by the Chamber in the instant case (see *Guðmundur Andri Ástráðsson v. Iceland*, no. 26374/18, 12 March 2019), the Minister of Justice resigned from office and the operation of the Court of Appeal was completely suspended for one week. Subsequently, the Court of Appeal resumed operation with only eleven of the fifteen appointed judges – since the four judges whose appointments had been called into question decided not to sit. It appears from publicly available information that provisional arrangements were made to temporarily appoint four judges to the Court of Appeal to serve until 30 June 2020.

100. On 17 April 2020 a new call for applications was made for a post of judge at the Court of Appeal, in response to which A.E. applied. It appears that following her recommendation for the post by the Evaluation Committee, A.E. made a request to the new Minister of Justice to be discharged from her existing (inactive) post at the Court of Appeal. On

16 June 2020 the new Minister of Justice announced that she would follow the Evaluation Committee's opinion and would propose to the President of Iceland that A.E. be appointed to the advertised post at the Court of Appeal, with effect from 1 July 2020. It appears from publicly available information that A.E. was appointed by the President of Iceland as proposed. It further appears that following vacancies advertised on 19 June 2020, two more judges have been appointed to the Court of Appeal.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

A. Domestic law

1. Icelandic Constitution

101. The relevant provisions of the Icelandic Constitution (*Stjórnarskrá lýðveldisins Íslands*) read as follows:

Article 2

"*Althingi* and the President of Iceland jointly exercise legislative power. The President and other governmental authorities referred to in this Constitution and elsewhere in the law exercise executive power. Judges exercise judicial power."

Article 59

"The organisation of the judiciary can only be established by law."

Article 60

"Judges settle all disputes regarding the competence of the authorities. No one seeking a ruling thereon can, however, temporarily evade obeying an order from the authorities by submitting the matter for judicial decision."

Article 61

"In the performance of their official duties, judges shall be guided solely by the law. Those judges who do not also have administrative functions cannot be discharged from office except by a judicial decision, nor may they be transferred to another office against their will, except in the event of reorganisation of the judiciary ..."

Article 70

"Everyone shall, for the determination of his rights and obligations or in the event of criminal charge against him, be entitled, following a fair trial and within a reasonable time, to the determination of an independent and impartial court of law. A hearing by a court of law shall take place in public, unless the judge decides otherwise as provided for by law in the interest of morals, public order, the security of the State or the interests of the parties.

Everyone charged with criminal conduct shall be presumed innocent until proven guilty."

2. The Judiciary Acts

(a) Act no. 92/1989 on the Separation of the Executive and the Judiciary at the District Level

102. Section 5 of Act no. 92/1989 on the Separation of the Executive and the Judiciary at the District Level (*Lög um framkvæmdarvald ríkisins í héraði*), which concerned the appointment of a committee to evaluate the competencies of candidates for posts of judge at District Courts, provided as follows:

"...

The Minister of Justice shall appoint a committee every four years, to evaluate the competencies of candidates for the post of District Court judge. The committee shall be composed of three members, one of whom shall be nominated by the Supreme Court and shall serve as chair of the committee. The Association of Judges shall nominate another member of the committee from amongst District Court judges and the Bar Association shall nominate the third from amongst practising lawyers. The same parties shall nominate reserve members of the committee. The committee shall give written and reasoned evaluations of the candidates to the Minister of Justice.

The Minister of Justice shall set out more detailed rules on the work of the committee."

(b) Judiciary Act no. 15/1998

103. The relevant provisions of the former Judiciary Act (*Lög um dómstóla*), as amended by Act no. 45/2010, read as follows:

Section 4a

"The Minister shall appoint an Evaluation Committee of five members to examine the qualifications of candidates for the office of Supreme Court judge or District Court judge. Two members shall be nominated by the Supreme Court, of whom one shall serve as chair; at least one of the two shall not be in active service as a judge. The third member shall be appointed by the Judicial Council and the fourth by the Icelandic Bar Association. The fifth member shall be elected by *Althingi*. ...

The Evaluation Committee shall provide the Minister with a written and reasoned report concerning candidates for the office of Supreme Court judge. The report of the Evaluation Committee shall state the board's view as to which candidate is best qualified for the post; the board may rank two or more candidates equally. In other respects, the Minister shall establish further rules on the functions of the board.

No candidate may be appointed to the office of judge whom the Evaluation Committee has not designated as the most qualified of the candidates, whether alone or equally ranked with others. However, derogation from this condition is permitted if *Althingi* adopts a motion of the Minister to appoint another named candidate who, in the opinion of the Evaluation Committee, meets all the requirements laid down in the second and third paragraphs of section 4. The Minister shall in such circumstances place the motion before *Althingi* within two weeks from the time of submission of the

Evaluation Committee's opinion or within two weeks from the time when *Althingi* is next convened following submission of the opinion; the motion must be approved within one month from the time when it is placed before *Althingi*, otherwise the Minister will be bound by the opinion of the Evaluation Committee."

Section 12

"3. The provisions of section 4a shall apply, *mutatis mutandis*, to appointments to District Court judge posts."

104. As already noted in paragraph 14 above, the preparatory material in respect of Act no. 45/2010 indicates that the amendments to the judicial appointment system in Iceland had aimed to further ensure the independence of the judiciary, having regard to the significant role played by the judiciary in securing fair trial rights and maintaining the checks and balances inherent in the separation of powers. The preparatory material also provides the following information on the assessment of the work experience of candidates for judicial posts, in so far as relevant:

"... When evaluating the competencies of candidates, several factors have to be taken into account, including experience of legal work, be it judicial work, litigation, other legal practice, academic work or work in the administration, but in general a candidate should possess a broad, general legal education and expertise. Other work undertaken by the candidates on the side should also be taken into account, such as membership of administrative committees or other related experience which will come into good use for a candidate. In general, it should be considered an asset for a candidate to have varied work experience, although that has to be assessed in each case. The committee should also look to and specifically seek out testimonials of a candidate's work and whether he or she is efficient and hard-working, whether he or she has the ability to identify key issues and to present his or her opinion in an understandable way, both in writing and verbally. In this regard, it is possible to look to academic writing, a candidate's experience with litigation or any judgments which a candidate may have written ..."

(c) Judiciary Act no. 50/2016

105. The relevant provisions of the new Judiciary Act (*Lög um dómstóla*) read as follows:

Section 11
Evaluation Committee on the Qualifications of Candidates for Posts as Judges

"The Minister shall appoint five principal members and as many reserve members to an evaluation committee to examine the qualifications of applicants for the office of Supreme Court judge, Court of Appeal judge or District Court judge. One member shall be nominated by the Supreme Court and shall serve as chair of the committee. One member shall be nominated by the Court of Appeal. The third member, who shall not be a serving judge, shall be nominated by the Judicial Administration and the fourth member shall be nominated by the Icelandic Bar Association. The fifth member shall be elected by *Althingi*. Each nominating party shall nominate a man and a woman, both as member and as reserve member, but this may be deviated from if objective reasons prevent the nomination of both a man and a woman. The nominating party shall then substantiate such impossibility. The Minister shall, when appointing

members to the committee, ensure compliance with the Equality Act's provisions on appointment to councils and committees. The term of appointment to the evaluation committee is five years, with the proviso that the term of one member shall expire each year. The same member cannot be appointed as a principal member of the board for more than two consecutive terms.

The evaluation committee shall be based on the premises of the Judicial Administration."

Section 12
The Evaluation Committee's Opinion and the Appointment of Judges

"The evaluation committee shall provide the Minister with a written and reasoned opinion concerning applicants for the office of judge. The opinion of the evaluation committee shall state the board's position regarding which applicant is best qualified for the post; the board may rank two or more applicants equally. In other respects, the Minister shall establish further rules on the functions of the committee.

No applicant may be appointed to the office of judge which the evaluation committee has not designated as the most qualified of the applicants, whether alone or equally ranked with others. However, derogation from this condition is permitted if *Althingi* accepts a proposal by the Minister to appoint another identified applicant, provided that, in the opinion of the evaluation committee, they meet all the requirements for appointment to the post. The Minister shall in such circumstances put the motion before *Althingi* within two weeks from the time of submission of the evaluation committee's opinion or within two weeks from the time when *Althingi* is next convened following submission of the opinion; the motion must be approved within one month from the time when it is put before *Althingi*, otherwise the Minister will be bound by the opinion of the evaluation committee."

Section 21
General Qualification Requirements

"The Court of Appeal shall be composed of 15 judges, appointed for an indefinite period of time by the President of Iceland as proposed by the Minister.

Only a person who fulfils the following conditions may be appointed to the office of Court of Appeal judge; he or she must:

1. have attained the age of 35 years;

2. be an Icelandic national;

3. have the necessary mental and physical capacity;

4. be legally competent to manage his or her personal and financial affairs, and never have been deprived of the control of his or her finances.

5. have not committed any criminal act considered to be dishonourable in public opinion, or evinced any conduct detrimental to the trust that persons holding judicial office generally must enjoy;

6. have completed the can.jur. examination or B.A. examination in law together with a master's degree;

7. have for a term of no less than three years been a district court judge, attorney before the Supreme Court, full professor or associate professor of law, commissioner of police, district commissioner, public prosecutor, permanent secretary of a ministry,

director general of a department of the Minister or *Althingi*'s Ombudsman, or have for such period discharged a similar function providing similar legal experience;

8. be deemed capable of holding the office in the light of his or her career and knowledge of law.

A person who is, or has been, married to an Appeal Court judge already in office, or a person related to such judge by blood or marriage by ascent or descent, or to the level of second cousin, may not be appointed to the Court of Appeal."

Section 43
Independence of Judges

"Judges are independent in their judicial work and shall perform such work under their own responsibility. In their resolution of a case they shall be guided solely by the law and never act under instructions from others. A judicial act will not be reviewed by others except through an appeal to a higher court.

..."

Section IV (temporary provision)

"Nomination of judges of the Court of Appeal shall be completed no later than 1 July 2017 and the judges shall be appointed to office with effect from 1 January 2018. As provided for in section 4a of Act no. 15/1998 on the Judiciary, a committee shall be established to investigate for the first time the qualifications of candidates for the office of judge of the Court of Appeal. The committee shall provide the Minister with its opinion about the candidates in conformity with the second subsection of the same section and of the regulation that applies to the committee. The Minister is not authorised to appoint an individual to the office of judge whom the Evaluation Committee has not deemed to be the most qualified amongst the candidates, either separately or among others. This provision may be departed from, however, if *Althingi* accepts a proposal by the Minister on an authorisation to appoint to the office of judge another named candidate who, in the opinion of the Evaluation Committee, meets all the conditions of the second and third paragraphs of section 21 hereof.

When the Minister proposes appointments to the office of judge of the Court of Appeal for the first time, he/she shall submit her proposal regarding every appointment to *Althingi* for approval. If *Althingi* accepts the Minister's proposals, he/she shall send them to the President of Iceland, who formally appoints the judges (see section 21). If *Althingi* does not accept the Minister's proposal regarding a particular appointment, the Minister shall present a new proposal to *Althingi* for approval.

..."

106. The preparatory material regarding temporary provision IV provides the following, as relevant:

"...Secondly, it is proposed that before the Minister appoints judges to the Court of Appeal for the first time, he/she should make a proposal regarding each appointment to Parliament for approval. In the light of the fact that 15 judges will be appointed simultaneously, it is natural to ensure the participation of more than one of the public powers in that process."

3. Minister of Justice's Rules no. 620/2010 on the work of the Evaluation Committee

107. The relevant provisions of the Minister of Justice's Rules no. 620/2010 on the work of the Evaluation Committee, which assesses the competencies of applicants for judicial posts (*Reglur um störf dómnefndar sem fjallar um hæfni umsækjenda um dómaraembætti*), read as follows:

Section 3

"When the application deadline has expired the Minister examines whether the candidates fulfil all the general conditions of qualification for the judicial office which was published in accordance with the Judiciary Act no. 15/1998. Then the applications fulfilling the conditions are sent to the Evaluation Committee for assessment."

Section 4

"In its opinion the Committee shall decide who is/are the most qualified candidate/s to be appointed to the judicial office. The Committee shall make sure that in its evaluation equality is respected. The conclusion shall stem from an overall assessment based on objective considerations and on the candidates' merits, taking account of the candidates' education, experience, integrity, competence and professional efficiency, as described, *inter alia*, in more detail below:

1. Education, career, theoretical knowledge. When evaluating the candidate's education, career and theoretical knowledge, the Committee shall lay emphasis on the fact of the candidate having a varied background in the fields of law such as experience as a judge, litigation or other type of legal practice work, work in administration or academic work. The candidate should have general and comprehensive legal knowledge and education. It should also be considered whether the candidate has undergone further education.

2. Secondary activities and social activities. The Committee shall also take into account the candidate's secondary activities, such as activities in appeals committees or other activities which could be useful for a judge. The Committee can also take into account extensive participation in social activities.

3. General competence. The Committee shall take into account whether the candidate has shown independence, impartiality, initiative and efficiency in his or her work and whether the candidate can easily extrapolate upon the key issues. It is optimal for the candidate to have management experience. The candidate shall have good knowledge of the Icelandic language and ability to communicate easily both verbally and in writing.

4. Special competence. It is important for the candidate to have good knowledge of civil and criminal procedures and to follow the provisions of law when drafting judgments, which also requires good use of language. The candidate has to be able to conduct hearings firmly and fairly and process the cases he/she is assigned quickly and with confidence.

5. Mental capabilities. The candidate has to be able to communicate easily, both with colleagues and other people he/she encounters at work. The candidate must have a good reputation both from his or her previous work and from outside work and must be dependable."

Section 5

"The candidate's application for the judicial office advertised, along with the rules that apply to it, shall be the basis upon which the Committee makes its evaluation.

The Committee shall make sure that the matter is in all other aspects sufficiently investigated before giving its opinion on a candidate's qualifications.

In its evaluation, in accordance with section 4, the Committee can take into account all published works of the candidates, such as scholarly writing, judgments, decisions and the like, even where they have not been submitted with the application. The candidate does not need to be specifically notified in advance.

The Committee can invite the candidates for an interview and request necessary documents in addition to those submitted with their application and the Committee can base its evaluation, under section 4, on the documents.

The Committee can obtain knowledge of the candidate's career from his/her former employer or others who have been in professional contact with him/her. The candidate shall have seven days to comment on the information that is collected."

Section 6

"The Committee shall submit a written and reasoned report on the candidates including the following:

(a) reasoned opinion on each candidate's qualification;

(b) reasoned opinion as to which candidate/s the Committee considers the most qualified for the judicial office."

Section 7

"The Committee shall share its draft assessment report with the candidates and give them seven days to comment thereon. The candidates are bound by confidentiality as to the content of the draft report."

Section 8

"After the Committee has reviewed the candidates' comments and amended the report, as appropriate, it finalises the report, signs it and sends it to the Minister along with the case documents. Furthermore, the Committee sends its report to the candidates.

Three days after the Minister and the candidates have been sent a copy of the report it shall be published on the Ministry of Justice's website."

Section 9

"The Committee shall submit a report on the candidates within six weeks after receiving the applications. This deadline can be extended under special circumstances such as in the event of a high number of candidates, etc.

..."

4. Administrative Procedures Act

108. The relevant provision of the Administrative Procedures Act no. 37/1993 (*Stjórnsýslulög*) reads as follows:

Section 10
Rule of investigation

"An authority shall ensure that a case is sufficiently investigated before a decision thereon is reached."

5. Parliamentary Procedures Act

109. The relevant provisions of the Parliamentary Procedures Act no. 55/1991 (*Lög um þingsköp Alþingis*) read as follows:

Section 45

"Motions for parliamentary resolutions shall take the form of resolutions. They shall be printed and distributed to Members at a sitting of *Althingi*. As a rule, motions for resolutions shall be accompanied by an explanation of their substance. Deliberations may not take place until at least two nights after the distribution of the motion.

A resolution cannot pass until it has received two readings. However, motions of no confidence in the Government or a minister, motions on the appointment of committees under Article 39 of the Constitution and motions from committees submitted pursuant to section 26(2) shall be debated and brought to a conclusion in a single debate in accordance with the rules on second readings of parliamentary resolutions. The same applies to motions for adjournment of sittings of *Althingi* pursuant to the second sentence of Article 23 (1) of the Constitution.

At the end of the first reading the motion will pass to the second reading and the committee proposed by the Speaker. However, a vote shall be taken at the request of any Member, and also if another motion is made regarding the committee to which the matter should be submitted.

The second reading shall not take place until one night after the first reading or distribution of a committee report. At this reading, individual Articles of the proposal shall be debated along with amendments to such Articles. At the close of this reading a vote shall be taken on each Article of the proposal and any amendments thereto, and finally on the proposal in its entirety. However, if there are no motions to amend, the proposal may be put to the vote in its entirety.

If *Althingi* receives a submission relating to a matter on which *Althingi* is required to take a position under the Constitution or by law, but the submission does not constitute parliamentary business pursuant to Chapter III, the Speaker shall report the submission at a sitting. The matter is then submitted without debate to a committee on the recommendation of the Speaker. When the committee has completed its examination of the matter, the committee shall express its opinion in a report, which shall be distributed at a sitting, together with a motion for a resolution, which shall be debated and brought to a conclusion in a single sitting pursuant to the rules on second readings of parliamentary resolutions.

Parliamentary resolutions which are distributed after the end of November may not be placed on the agenda before the Christmas recess except with the consent of

Althingi, obtained in compliance with section 74. Furthermore, parliamentary resolutions which are distributed later than 1 April may not be placed on the agenda before the summer recess except with the consent of *Althingi*, obtained in compliance with section 27. However, this consent can only be sought when five days have passed from the distribution of the resolution; derogation from this requirement is permitted with the support of three fifths of the Members voting on the resolution.

Constitutional requirements pursuant to Article 103 of the Agreement on the European Economic Area shall be derogated from by a parliamentary resolution, whose presentation shall comply with rules established by the Speaker.

The Prime Minister shall in October of each year submit to *Althingi* a report on the implementation of resolutions passed by *Althingi* in the preceding year and requiring action by a Minister or the government, unless a different form of reporting to *Althingi* is provided for by law. The report shall furthermore address the process of matters referred by *Althingi* to the Government or a Minister. When the report has been submitted, it shall be referred to the Constitutional and Supervisory Committee for discussion. The committee may submit to *Althingi* its opinion regarding the Minister's report at its discretion and submit proposals to *Althingi* regarding individual matters in the report."

6. Criminal Procedure Act

110. The relevant provisions of the Criminal Procedure Act no. 88/2008 (*Lög um meðferð sakamála*) read as follows:

Section 6

"A judge, including a lay judge, shall be disqualified from sitting as judge in a case where:

(a) he is an accused, a victim or a representative thereof;

(b) he has represented the interests of an accused or the victim in the case;

(c) he has testified or been called as a witness in the case for legitimate reasons or has served as an assessor or examiner in the case [with regard to the charges in question];

(d) he is or has been the spouse of the accused or the victim, is related to them by blood or marriage in a direct line or to the level of second cousin, or related to them to the same degree by adoption;

(e) he is related or has been connected to the representative of the accused or the victim, or counsel, in the manner stipulated in point (d);

(f) he is connected or has been connected to a witness in the case, or to an assessor or examiner, in the manner stipulated in point (d); or

(g) there are other circumstances or conditions that may justifiably raise questions about his impartiality."

111. According to the Criminal Procedure Act, judicial proceedings can be reopened under certain conditions. Section 228 of the Act states that when a District Court judgment has not been appealed against or the time limit for appeal has passed, the Committee on Reopening of Judicial Proceedings (*Endurupptökunefnd*) can approve a request of a person, who

considers that he or she has been wrongly convicted or convicted of a more serious offence than he or she committed, to reopen the judicial proceedings before the District Court, if certain conditions are fulfilled. The conditions are, *inter alia*, that new evidence has come to light which could have had great significance for the outcome of the case if it had been available before the judgment was announced (point (a)), or that there were serious defects in the processing of the case which affected its outcome (point (d)). The State Prosecutor can also request reopening for the benefit of the convicted person if he considers that the conditions in section 228(1) of the Act are fulfilled. In accordance with section 229 of the Act, the request for reopening shall be made in writing and sent to the Committee on Reopening of Judicial Proceedings. It shall include detailed reasoning as to how the conditions for reopening are considered to be fulfilled. Pursuant to section 231 of the Act, the Committee on Reopening of Judicial Proceedings decides whether proceedings will be reopened. If a request for reopening is approved the first judgment remains in force until a new judgment is delivered in the case. Section 232 of the Act states that the Committee on Reopening of Judicial Proceedings can accept a request for the reopening of a case which has been finally decided in the Court of Appeal or the Supreme Court and a new judgment will be delivered if the conditions of section 228 are fulfilled. A case will not be reopened in the Court of Appeal unless the time-limit to request leave to appeal to the Supreme Court has expired or the Supreme Court has rejected leave to appeal.

112. In a recent judgment it delivered on 21 May 2019, the Supreme Court held that neither section 228(1) (d) of the Criminal Procedure Act, nor any other laws, created an automatic right to reopening to persons whose criminal convictions had resulted in findings of a violation by the European Court of Human Rights and that each case would have to be assessed on its facts. The defendants in the relevant case had been convicted of tax offences, which the Court had found to be in violation of Article 4 of Protocol No. 7 to the Convention (see *Jóhannesson and Others v. Iceland*, no. 22007/11, 18 May 2017). Noting that the defendants had been heard by an independent and impartial tribunal and that their case was incomparable to those where fundamental fair trial principles had been breached, the Supreme Court found that their request did not fulfil the requirements for reopening under Section 228(1) (d) of the Criminal Procedure Act.

7. Tort Act

113. Section 26(1) of the Tort Act no. 50/1993 (*Skaðabótalög*) reads:

"A person who

(a) deliberately or through gross negligence causes physical injury or

(b) is responsible for unlawful injury against the freedom, peace, honour or person of another party,

may be ordered to pay an amount in respect of non-pecuniary damage to the injured party."

B. Domestic practice

114. It is an unwritten general principle of Icelandic administrative law that, in the appointment of persons to public posts, the appointing party is under a duty to appoint the most qualified candidate. It is furthermore considered that such appointments must be based on objective considerations. This principle has been confirmed by the Supreme Court in many of its judgments, including the judgments dated 5 November 1998 and 14 April 2011 (see paragraph 69 above), and the judgments of 19 December 2017 concerning the candidates J.R.J. and Á.H. (see paragraphs 67-75 above).

115. As mentioned briefly in paragraph 13 above, the Supreme Court judgment of 14 April 2011 (no. 412/2010) concerned a dispute over the appointment of a District Court judge, where the Supreme Court had found the then *ad hoc* Minister of Justice and the Icelandic State liable for damages in relation to the appointment at issue. The appointment having been made prior to the introduction of Act no. 45/2010, at which time the Evaluation Committee's recommendations on judicial appointments were not yet binding on the Minister of Justice, the latter had disregarded the recommendation of the Evaluation Committee and had proposed a candidate who had only been considered "qualified", instead of one of the three who had been considered "very well qualified". When one of the three candidates who were not appointed brought proceedings to claim damages for injury to his reputation and personal honour, the Supreme Court upheld that candidate's claims on the basis of the following principles:

"Under section 10 of the Administrative Procedures Act no. 37/1993, an authority making an appointment to a position or office of the State is required to ensure that issues of significance are sufficiently elucidated before a decision is made on the appointment. The previously applicable third and fourth paragraphs of section 12 of Act no. 15/1998 relieved the Minister of Justice ... to a significant extent of this duty of investigation when making appointments to positions of District Court judge, instead placing it in the hands of the Evaluation Committee, which was appointed with a view to ensuring that specialised expertise would be available there to assess the qualifications of applicants for a position as District Court judge ... Although the Evaluation Committee's opinion was not binding on the Minister, ..., it must be kept particularly in mind that its investigation replaced by law an investigation which the Minister would otherwise have been obliged to carry out. As a result, if the Minister considered there to be a reason to deviate from the opinion of the Evaluation Committee when appointing a District Court judge, then his/her decision would have to be based on further investigation under section 10 of the Administrative Procedures Act, taking into account among other things his own instructions in Rules no. 693/1999 on matters relating to the assessment of the applicants'

qualifications, while at the same time ensuring that comparable expert knowledge was exercised as in the case of the Evaluation Committee's work. In this regard, it needed also to be taken into consideration that when making an appointment to the office of judge, the Minister was not deciding on a post under the Minister's own authority, but an office pertaining to another branch of government and subject to special rules on independence, as provided in the first sentence of Article 61 of the Constitution and section 24 of Act no. 15/1998."

116. In his annual report for 2016, the Icelandic Parliamentary Ombudsman made the following remarks on the evaluation procedures followed by the authorities in appointments to public posts, as pertinent:

3.1.2 Matters concerning public servants

"...

According to an unwritten principle of administrative law, it is a general obligation to recruit the most competent candidate for a public post. Thus, an evaluation of candidates must be carried out on the basis of their professional competencies in the light of the legitimate criteria applicable, consideration being given to the law and to the nature of the post. The principle also entails that, in general, it is impermissible to take into account unrelated criteria such as political views or amity/animosity. In cases where public servants are to be recruited or appointed, authorities – or the recruitment companies they employ – increasingly appear to use a method whereby the criteria through which candidates are to be evaluated are enumerated and each criterion given a certain weight. Candidates are then awarded points for each criterion and their total score is calculated. The candidate who achieves the highest score is generally considered the most competent by the appointing authority. Deciding on the applicable criteria and their weight before evaluating candidates is in general in compliance with the appointing authority's task to evaluate candidates based on their professional competencies.

However, I have noticed in recent years that the above-described method is employed too strictly and absolutely, without properly assessing substantively the candidates' knowledge and experience. Thus, the candidates' experience is assessed only in terms of years, how many courses they have finished or how many academic articles they have published, without that experience apparently being substantively assessed, including as to how well the candidate has performed and how the experience will assist the candidate in the performance of the post in question. In other instances, the criteria have been divided into categories, i.e. different categories of professional experience, where each category can only give a certain maximum number of points. The result is often that the candidate who has done the highest number of jobs, and thus obtains points from the most categories, achieves a higher score than a candidate who has mastered a certain professional experience, without any substantive assessment as to whether the long experience of the latter candidate constitutes better preparation for the post than the varied experience of the former.

While noting that it is not, in general, illegitimate to look for varied professional experience when recruiting candidates for a post, the above-described methods often seem automatically to lead to a lack of substantive comparison of the qualities of candidates and thus of their competencies. This results in genuine uncertainty about whether the most qualified candidate for a post obtained the highest score and thus is eliminated from consideration [*sic*]. In this regard, I emphasise that the evaluation procedures followed by the authorities should enable them to meaningfully and substantively evaluate candidates, in order to recruit the most qualified candidate for

each post. In general, I believe that in the light of the evaluative nature of the choice of candidate for a public post and the criteria on which such a choice can be based, care should be taken when making that choice on the basis of points, as described above."

II. INTERNATIONAL MATERIAL

A. United Nations

117. The United Nations (UN) Basic Principles on the Independence of the Judiciary, adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, provide in their relevant part as follows:

Qualifications, selection and training

"10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives."

118. In its General Comment no. 32 on Article 14 of the International Covenant on Civil and Political Rights (ICCPR) – which was ratified by Iceland on 22 August 1979 – concerning the right to equality before courts and tribunals and to a fair trial (CCPR/C/GC/32 published on 23 August 2007), the UN Human Rights Committee stated as follows:

"4. Article 14 contains guarantees that States parties must respect, regardless of their legal traditions and their domestic law. While they should report on how these guarantees are interpreted in relation to their respective legal systems, the Committee notes that it cannot be left to the sole discretion of domestic law to determine the essential content of Covenant guarantees.

...

19. The requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception. The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature. States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them. A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal. It is necessary to protect judges against conflicts of interest and intimidation. In order to safeguard their

independence, the status of judges, including their term of office, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

20. Judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law. The dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary. The same is true, for instance, for the dismissal by the executive of judges alleged to be corrupt, without following any of the procedures provided for by the law."

119. The relevant parts of the thematic report by the UN Special Rapporteur on the Independence of Judges and Lawyers, Mr Leandro Despouy, on "Guarantees of judicial independence / Major developments in international justice" (UN Human Rights Council, document A/HRC/11/41 of 24 March 2009), read as follows:

III. GUARANTEES OF JUDICIAL INDEPENDENCE

A. Institutional independence: elements having an impact on the independence of the judiciary

"17. In this chapter, the Special Rapporteur will analyse features having an impact on the independence of the judiciary as an institution.

...

3. Selection and appointment

23. The Basic Principles on the Independence of the Judiciary prescribe that judges be selected on the basis of integrity and ability and that any method of judicial selection should include safeguards against judicial appointments for improper motives [footnote: Principle 10]. This key principle is also established by a number of regional standards [Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe, principle I (2) (c); Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, A (4) (h); Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region, principles 11, 12 and 15]. Furthermore, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa highlight the importance of transparency and accountability in the selection and appointment procedures [footnote: Principles and Guidelines in Africa, A (4) (h)].

24. The Special Rapporteur takes note of the variety of existing systems for the selection and appointment of judges worldwide. One can broadly distinguish political appointments (selection by the legislative or executive branches of power), appointments by popular elections, corporative appointments (by bodies composed of judges only), selection by judicial councils with plural representation, or a variety of mixed systems where the nominating body is of one type (e.g. judicial council) and the one in charge of appointments is of a different nature (e.g. a political appointing body) ...

...

30. In addition to the composition of the selecting body, it is also important to determine the extent of powers given to this organ, as this element has a great impact on the degree of independence of judges, not only from political power, but also from the selecting body itself ... In order to secure the independence of judges and the selection of the most suitable candidates, the Special Rapporteur highlights the importance of the establishment and application of objective criteria in the selection of judges. The principle of objective criteria was also highlighted by the Human Rights Committee and by the Committee against Torture. These objective criteria should relate particularly to qualifications, integrity, ability and efficiency. The Special Rapporteur emphasizes that selection of judges must be based on merit alone, a key principle also enshrined in Recommendation No. R (94) 1228 and the Statute of the Ibero-American Judge ...

...

33. Where an organ of the executive or legislative branch is the one formally appointing judges [footnote omitted] following their selection by an independent body, recommendations from such a body should only be rejected in exceptional cases and on the basis of well-established criteria that have been made public in advance. For such cases, there should be a specific procedure by which the executive body is required to substantiate in a written manner for which reasons it has not followed the recommendation of the above-mentioned independent body for the appointment of a proposed candidate. Furthermore, such written substantiation should be made accessible to the public. Such a procedure would help enhance transparency and accountability of selection and appointment."

120. In accordance with its obligation under Article 40 of the ICCPR, the Government of Iceland submitted its fifth periodic report on the implementation of the ICCPR to the UN Human Rights Committee on 27 April 2010 (UN Doc. CCPR/C/ISL/5). The relevant parts of the report, concerning the procedure for the appointment of judges, read as follows:

"130. In the recent years there has been growing concern that the rules relating to the selection and appointment of judges, both in the district courts and the Supreme Court, do not sufficiently guarantee the independence of the judiciary. This debate has centred on the role of the ministers, who have sole responsibility for appointing judges, and have on occasions disregard[ed] the recommendations of a special evaluation committee concerning the appointment of district court judges and the opinion of the Supreme Court concerning the appointment of Supreme Court Judges. A response has now been made to this criticism, and the Minister of Justice has submitted a bill to the *Althingi* on amendments to the Judiciary Act, No. 15/1998. Under the amendments proposed, the aim is that the Minister of Justice would appoint a five-man selection committee to examine the qualifications and competence of applicants for the position of both Supreme Court and district court judges ... This selection committee would submit to the Minister of Justice written and reasoned comments on applicants for positions as Supreme Court judges. In its comments, the committee would adopt a position as to which applicant was the best qualified to be appointed to the position, but would be able to name two or more as being equally well qualified.

131. The most significant element in these proposals is that the minister would not be able to appoint as a judge a person that the evaluation committee did not consider to be the best qualified, either absolutely or tying with one or more others, among the applicants. Exemptions could be made from this rule, however, if the *Althingi*

approved an application by the Minister of Justice for permission to appoint to the position another applicant, whose name was specified, who in the opinion of the selection committee met all the [relevant] conditions ...”

B. Council of Europe

1. Committee of Ministers

121. The Recommendation adopted by the Committee of Ministers on 17 November 2010 (CM/Rec(2010)12) on “Judges: independence, efficiency and responsibilities” provides in its relevant parts as follows:

Chapter I – General aspects

Judicial independence and the level at which it should be safeguarded

“3. The purpose of independence, as laid down in Article 6 of the Convention, is to guarantee every person the fundamental right to have their case decided in a fair trial, on legal grounds only and without any improper influence.

4. The independence of individual judges is safeguarded by the independence of the judiciary as a whole. As such, it is a fundamental aspect of the rule of law.”

Chapter II − External independence

“11. The external independence of judges is not a prerogative or privilege granted in judges’ own interest but in the interest of the rule of law and of persons seeking and expecting impartial justice. The independence of judges should be regarded as a guarantee of freedom, respect for human rights and impartial application of the law.”

Chapter VI - Status of the judge

Selection and career

“44. Decisions concerning the selection and career of judges should be based on objective criteria pre-established by law or by the competent authorities. Such decisions should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity.

...

46. The authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers. With a view to guaranteeing its independence, at least half of the members of the authority should be judges chosen by their peers.

47. However, where the constitutional or other legal provisions prescribe that the head of state, the government or the legislative power take decisions concerning the selection and career of judges, an independent and competent authority drawn in substantial part from the judiciary (without prejudice to the rules applicable to councils for the judiciary contained in Chapter IV) should be authorised to make recommendations or express opinions which the relevant appointing authority follows in practice.

48. The membership of the independent authorities referred to in paragraphs 46 and 47 should ensure the widest possible representation. Their procedures should be transparent with reasons for decisions being made available to applicants on request. An unsuccessful candidate should have the right to challenge the decision, or at least the procedure under which the decision was made."

The Explanatory Memorandum to this recommendation further provides as follows:

"13. The separation of powers is a fundamental guarantee of the independence of the judiciary whatever the legal traditions of the member states."

2. Venice Commission

122. In its Report on Judicial Appointments (CDL-AD(2007)028), adopted at its 70th Plenary Session (16-17 March 2007), the European Commission for Democracy Through Law (Venice Commission) held as follows (footnotes omitted):

"3. International standards in this respect are more in favour of the extensive depolitisation of the [judicial appointment] process. However no single non-political "model" of appointment system exists, which could ideally comply with the principle of the separation of powers and secure full independence of the judiciary.

...

5. In some older democracies, systems exist in which the executive power has a strong influence on judicial appointments. Such systems may work well in practice and allow for an independent judiciary because the executive is restrained by legal culture and traditions, which have grown over a long time.

6. New democracies, however, did not yet have a chance to develop these traditions, which can prevent abuse. Therefore, at least in new democracies explicit constitutional provisions are needed as a safeguard to prevent political abuse by other state powers in the appointment of judges.

7. In Europe, methods of appointment vary greatly according to different countries and their legal systems; furthermore they can differ within the same legal system according to the type of judges to be appointed."

123. The relevant extracts from the Rule of Law Checklist (CDL-AD(2016)007), adopted by the Venice Commission at its 106th Plenary Session (11-12 March 2016)[8], read as follows:

"45. A basic requirement of the Rule of Law is that the powers of the public authorities are defined by law. In so far as legality addresses the actions of public officials, it also requires that they have authorisation to act and that they subsequently act within the limits of the powers that have been conferred upon them, and consequently respect both procedural and substantive law [footnote omitted].

...

[8] Endorsed by the Ministers' Deputies at the 1263th Meeting (6-7 September 2016) and by the Congress of Local and Regional Authorities of the Council of Europe at its 31st Session (19-21 October 2016).

53. Although full enforcement of the law is rarely possible, a fundamental requirement of the Rule of Law is that the law must be respected. This means in particular that State bodies must effectively implement laws. The very essence of the Rule of Law would be called in question if law appeared only in the books but were not duly applied and enforced [footnote omitted]. The duty to implement the law is threefold, since it implies obedience to the law by individuals, the duty reasonably to enforce the law by the State and the duty of public officials to act within the limits of their conferred powers.

...

66. Abuse of discretionary power should be controlled by judicial or other independent review. Available remedies should be clear and easily accessible.

...

68. The obligation to give reasons should also apply to administrative decisions [footnote omitted].

...

74. The judiciary should be independent. Independence means that the judiciary is free from external pressure, and is not subject to political influence or manipulation, in particular by the executive branch. This requirement is an integral part of the fundamental democratic principle of the separation of powers. Judges should not be subject to political influence or manipulation.

...

79. It is important that the appointment and promotion of judges is not based upon political or personal considerations, and the system should be constantly monitored to ensure that this is so."

3. Consultative Council of European Judges

124. In its Opinion no. 1 (2001) on "standards concerning the independence of the judiciary and the irremovability of judges" the Consultative Council of European Judges (CCJE) made the following observations, the relevant parts of which read as follows (footnotes omitted):

The rationales of judicial independence

"10. Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial ... Their [judges'] independence is not a prerogative or privilege in their own interests, but in the interests of the rule of law and of those seeking and expecting justice.

11. This independence must exist in relation to society generally and in relation to the particular parties to any dispute on which judges have to adjudicate. The judiciary is one of three basic and equal pillars in the modern democratic state. It has an important role and functions in relation to the other two pillars. It ensures that governments and the administration can be held to account for their actions, and, with regard to the legislature, it is involved in ensuring that duly enacted laws are enforced, and, to a greater or lesser extent, in ensuring that they comply with any relevant constitution or higher law ... To fulfil its role in these respects, the judiciary must be independent of these bodies, which involves freedom from inappropriate connections

with and influence by these bodies. Independence thus serves as the guarantee of impartiality. This has implications, necessarily, for almost every aspect of a judge's career: from training to appointment and promotion and to disciplining.

12. ... judicial independence is an elaboration of the fundamental principle that 'no man may be judge in his own cause'. This principle also has significance well beyond that affecting the particular parties to any dispute. Not merely the parties to any particular dispute, but society as a whole must be able to trust the judiciary. A judge must thus not merely be free in fact from any inappropriate connection, bias or influence, he or she must also appear to a reasonable observer be free therefrom. Otherwise, confidence in the independence of the judiciary may be undermined.

13. The rationale of judicial independence, as stated above, provides a key by which to assess its practical implications – that is, the features which are necessary to secure it, and the mean by which it may be secured, at a constitutional or lower legal level, as well as in day-to-day practice, in individual states."

Basis of appointment or promotion

"17. ... There is, therefore, general acceptance both that appointments should be made 'on the merits' based on 'objective criteria' and that political considerations should be inadmissible.

...

25. Any 'objective criteria', seeking to ensure that the selection and career of judges are 'based on merit, having regard to qualifications, integrity, ability and efficiency', are bound to be in general terms. Nonetheless, it is their actual content and effect in any particular state that is ultimately critical. **The CCJE recommended that the authorities responsible in member States for making and advising on appointments and promotions should now introduce, publish and give effect to objective criteria, with the aim of ensuring that the selection and career of judges are 'based on merit, having regard to qualifications, integrity, ability and efficiency'**. Once this is done, those bodies or authorities responsible for any appointment or promotion will be obliged to act accordingly, and it will then at least be possible to scrutinize the content of the criteria adopted and their practical effect.

...

45. Even in legal systems where good standards have been observed by force of tradition and informal self-discipline, customarily under the scrutiny of a free media, there has been increasing recognition in recent years of a need for more objective and formal safeguards [regarding appointments and promotions of judges]. In other states, ..., the need is pressing ..."

Tenure – irremovability and discipline

"57. It is a fundamental tenet of judicial independence that tenure is guaranteed until a mandatory retirement age or the expiry of a fixed term of office: ..."

125. The Magna Carta of Judges (Fundamental Principles) was adopted by the CCJE in November 2010. The relevant paragraphs read as follows:

"**Rule of law and justice**

1. The judiciary is one of the three powers of any democratic state. Its mission is to guarantee the very existence of the Rule of Law and, thus, to ensure the proper application of the law in an impartial, just, fair and efficient manner.

Judicial Independence

2. Judicial independence and impartiality are essential prerequisites for the operation of justice.

3. Judicial independence shall be statutory, functional and financial. It shall be guaranteed with regard to the other powers of the State, to those seeking justice, other judges and society in general, by means of national rules at the highest level. The State and each judge are responsible for promoting and protecting judicial independence.

4. Judicial independence shall be guaranteed in respect of judicial activities and in particular in respect of recruitment,

Guarantees of independence

5. Decisions on selection, nomination and career shall be based on objective criteria and taken by the body in charge of guaranteeing independence.

...

8. Initial and in-service training is a right and a duty for judges. It shall be organised under the supervision of the judiciary. Training is an important element to safeguard the independence of judges as well as the quality and efficiency of the judicial system."

126. In another opinion on the "Position of the judiciary and its relation with the other powers of state in a modern democracy" dated 16 October 2015 (Opinion no. 18/2015), the CCJE made findings, the relevant parts of which read as follows (footnotes omitted):

III. Independence of the judiciary and separation of the powers

"10. The judiciary must be independent to fulfil its role in relation to the other powers of the state, society in general, and the parties to litigations. The independence of judges is not a prerogative or privilege granted in their own interest, but in the interest of the rule of law and of all those who seek and expect justice. Judicial independence is the means by which judges' impartiality is ensured. It is therefore the pre-condition for the guarantee that all citizens (and the other powers of the state) will have equality before the courts. Judicial independence is an intrinsic element of its duty to decide cases impartially. Only an independent judiciary can implement effectively the rights of all members of society, especially those groups that are vulnerable or unpopular. Thus, independence is the fundamental requirement that enables the judiciary to safeguard democracy and human rights."

IV. The legitimacy of judicial power and its elements

...

B. Different elements of legitimacy of judicial power

...

(2) Constitutional or formal legitimacy of individual judges

"14. In order to perform the judicial functions legitimised by the constitution, each judge needs to be appointed and thus become part of the judiciary. Each individual judge who is appointed in accordance with the constitution and other applicable rules thereby obtains his or her constitutional authority and legitimacy. It is implicit in this appointment in accordance with constitutional and legal rules that individual judges are thereby given the authority and appropriate powers to apply the law as created by the legislature or as formulated by other judges. The legitimacy conferred on an individual judge by his appointment in accordance with the constitution and other legal rules of a particular state constitutes an individual judge's 'constitutional or formal legitimacy'.

15. The CCJE has noted the different methods of appointment of judges in the member states of the Council of Europe. These include, for example: appointment by a council for the judiciary or another independent body, election by parliament and appointment by the executive. As the CCJE has pointed out, each system has advantages and disadvantages. It can be argued that appointment by vote of Parliament and, to a lesser degree, by the executive can be seen to give additional democratic legitimacy, although those methods of appointment carry with them a risk of politicisation and a dependence on those other powers. To counter those risks, the CCJE has recommended that every decision relating to a judge's appointment or career should be based on objective criteria and be either taken by an independent authority or subject to guarantees to ensure that it is not taken other than on the basis of such criteria. The CCJE has also recommended the participation of an independent authority with substantial representation chosen democratically by other judges in decisions concerning the appointment or promotion of judges ..."

127. On 7 February 2018 the CCJE published a report on "Judicial independence and impartiality in the Council of Europe member States in 2017". The relevant parts of this report read as follows (footnotes omitted):

II. Overview of relevant European standards

A. Functional independence: appointment and security of tenure of judges

"13. The above-mentioned European and international documents underline that candidates for judicial office should be selected according to objective criteria based on merit, and that the selection should be undertaken by an independent body. If a person or body outside the judiciary, such as the head of state, has the authority to appoint judges, the proposal of the independent body should generally be followed by the appointing authority.

14. The independence of judges requires the absence of interference by other state powers, in particular the executive power, in the judicial sphere ...

15. The ECtHR and the CCJE have recognised the importance of institutions and procedures guaranteeing the independent appointment of judges. The CCJE has recommended that every decision relating to a judge's appointment, career and disciplinary action should be regulated by law, based on objective criteria and be either taken by an independent authority or subject to guarantees, for example judicial review, to ensure that it is not taken other than on the basis of such criteria. Political considerations should be inadmissible irrespective of whether they are made within Councils for the Judiciary, the executive, or the legislature.

16. There are different appointment procedures of judges in the member States. These include, for example: appointment by a Council for the Judiciary or

another independent body, election by parliament and appointment by the executive. Formal rules and Councils for the Judiciary have been introduced in the member States to safeguard the independence of judges and prosecutors. However, as welcome as such developments may be, formal rules alone do not guarantee that appointment decisions are taken impartially, according to objective criteria, and free from political influence. The influence of the executive and legislative powers on the appointment decisions should be limited in order to prevent appointments for political reasons ..."

4. GRECO

128. At its 59th plenary meeting held from 18 to 22 March 2013 in Strasbourg, the Council of Europe Group of States Against Corruption (GRECO) adopted its Fourth Evaluation Report on Iceland, concerning corruption prevention in respect of members of parliament, judges and prosecutors (Greco Eval IV Rep (2012)8E). The report published on 28 March 2013 made the following relevant remarks on the appointment of judges:

"75. Generally speaking, the GET [GRECO evaluation team] found the judiciary in Iceland to be of a high standard. Steps have been taken to address public criticism as regards appointment and recruitment to the judiciary, an area where misgivings have been expressed in the past as to appointments to office being politically motivated rather than based on merit ... The GET wishes to highlight that judges must not only be independent, but also seen to be independent. This is of particular relevance in Iceland where opinion polls in recent years have shown that only about 30% of the public expresses confidence in the judicial system as a whole [footnote: Sustainable Governance Indicators (SGI) (2011) Iceland Report by Bertelsmann Stiftung] – a striking figure, all the more so since the professionalism and competence of judges do not appear to be questioned by the population. Further consideration could be paid by the judiciary to the additional measures which could be developed to tackle this negative public perception and thereby strengthen public trust and confidence in this sector ...

76. The rules for the appointment of judges were changed in May 2010, pursuant to Act No. 45/2010 amending Act No. 15/1998 ...

77. Appointment criteria are examined for each applicant by an evaluation committee consisting of five members ... The most suitable candidate is then appointed as a judge by the Minister of the Interior ... No applicant may be appointed to the office of judge without the endorsement of the evaluation committee. However, the provisions allow an exception to this rule: the Minister of the Interior can appoint a candidate from the list of suitable candidates, who meets all the requirements but has not been ranked as the most suitable candidate by the evaluation committee, if the *Althingi* adopts, by simple majority, such a motion by the Minister.

78. However, the exception described above, which requires an appropriate justification by the Minister, has not applied since the new rules on judicial appointments came into force in 2010. The GET heard that, before the new system applied, the Minister was not bound to follow the advice of the relevant judicial bodies when appointing a person to judicial office and indeed it happened in the past that appointments were made arbitrarily raising criticism as to political influence having filtered in the process ... The GET was also told that the exception provided by law is meant to work more as a safety measure to ensure some sort of review

mechanism for the decisions made by the evaluation committee (in the event, for example, of criticisms of corporatism).

...

82. The GET welcomes the measures taken in recent years to further regulate and strengthen the appointment and recruitment procedures in the judiciary (see paragraphs 77 and 78) to respond to concerns that had been raised previously in Iceland... The interlocutors met on-site agreed that the reforms undertaken in this field have provided greater safeguards against improper political influence and have decisively improved the general transparency of the system ..."

5. The European Charter on the Statute for Judges

129. The relevant extract from the European Charter on the Statute for Judges of 8-10 July 1998[9] reads as follows:

2. SELECTION, RECRUITMENT, INITIAL TRAINING

"2.1. The rules of the statute relating to the selection and recruitment of judges by an independent body or panel, base the choice of candidates on their ability to assess freely and impartially the legal matters which will be referred to them, (...).

2.2. The statute makes provision for the conditions which guarantee, by requirements linked to educational qualifications or previous experience, the ability specifically to discharge judicial duties."

The European Charter on the Statute for Judges provides as follows in its Explanatory Memorandum:

"1.1 The Charter endeavours to define the content of the statute for judges on the basis of the objectives to be attained: ensuring the competence, independence and impartiality which all members of the public are entitled to expect of the courts and judges entrusted with protecting their rights. The Charter is therefore not an end in itself but rather a means of guaranteeing that the individuals whose rights are to be protected by the courts and judges have the requisite safeguards on the effectiveness of such protection.

These safeguards on individuals' rights are ensured by judicial competence, in the sense of ability, independence and impartiality ..."

C. European Union

1. The European Commission

130. The European Commission's 2011 Progress Report on Iceland published on 12 October 2011 (SEC(2011) 1202 final) made the following observations regarding the independence of the judiciary in Iceland:

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[9] Adopted by participants from European countries and two judges' international associations, meeting in Strasbourg on 8-10 July 1998 (meeting organised under the auspices of the Council of Europe), endorsed by the meeting of the Presidents of the Supreme Courts of Central and Eastern European countries in Kyiv on 12-14 October 1998, and again by judges and representatives from Ministries of Justice from 25 European countries, meeting in Lisbon on 8-10 April 1999.

"The *independence* of the judiciary was strengthened. In May 2011, the process of appointing three judges in the Supreme Court took place according to the rules of the amended Judiciary Act. However, the implementation of the new rules on appointing judges and prosecutors still requires further monitoring."

2. Case-law of the European Union courts

(a) Judgment of the General Court (Appeal Chamber) in the case of *FV v Council* dated 23 January 2018 (T-639/16 P, EU:T:2018:22)

131. The case concerned an appeal brought by F.V., an official of the Council of the European Union at the material time, against a judgment delivered on 28 June 2016 by the Civil Service Tribunal of the European Union. F.V. claimed, *inter alia*, that the judgment under appeal had been delivered by a Chamber which had been improperly constituted, having regard to the flaws in the procedure for the appointment of one of the judges on the bench. He complained, in particular, that the judge in question had been appointed to the Civil Service Tribunal through an appointment procedure that had been initiated to fill two other positions in that tribunal.

132. By a decision dated 23 January 2018, the General Court found that the Chamber of the Civil Service Tribunal which delivered the judgment in question had been improperly constituted. It held, in particular, that the Council had failed to comply with the legal framework laid down by the relevant public call for applications, because it had used the list of candidates drawn up following that call – which had been made for the appointment of two judges only – to fill a third post. As the constitution of the relevant Chamber of the Civil Service Tribunal was considered improper on this ground alone, the judgment under appeal was set aside in its entirety. The relevant parts of the General Court's judgment read as follows:

"65. ..., it is therefore necessary to examine whether the flaws in the procedure for the appointment of the judge at issue are such as to affect the proper composition of the Second Chamber of the Civil Service Tribunal which delivered the judgment under appeal.

66. In that context, it must be borne in mind that, according to the case-law of the Court, when the proper constitution of the court which delivered the judgment at first instance is contested and the challenge is not manifestly devoid of merit, the appeal court is required to verify that the court was properly constituted. A ground alleging the irregular constitution of the panel of judges is a ground involving a question of public policy, which must be examined by the appeal court of its own motion, even if this irregularity was not invoked at first instance (see, to that effect, judgments of 1 July 2008, *Chronopost and La Poste* v *UFEX and Others*, C-341/06 P and C-342/06 P, EU:C:2008:375, paragraphs 44 to 50).

67. As is apparent from the first sentence of the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, one of the requirements concerning the composition of the Chamber is that courts must be independent, impartial and previously established by law.

68. The principle of the lawful judge, the objective of which is to guarantee the independence of judicial power with respect to the executive, stems from that

requirement, which must be interpreted as meaning that the composition of the court and its jurisdiction must be regulated beforehand by legal provisions (see, to that effect, judgment of 13 December 2012, *Strack* v *Commission*, T-199/11 P, EU:T:2012:691, paragraph 22).

...

72. According to the case-law of the European Court of Human Rights ('the ECtHR'), the principle of the lawful judge enshrined in the first sentence of Article 6(1) of the ECHR reflects the principle of the rule of law, from which it follows that a judicial body must be set up in accordance with the intention of the legislature (see, to that effect, ECtHR, 27 October 2009, *Pandjikidzé and Others v. Georgia*, ..., paragraph 103, and 20 October 2009, *Gorguiladzé v. Georgia*, ..., Paragraph 67).

73. According to the ECtHR, a court must thus be established in accordance with the legal provisions on the establishment and competence of judicial bodies and with any other provision of national law that would render, if it is not complied with, the involvement of one or more judges in the examination of the case improper. This includes in particular provisions relating to the mandates, incompatibilities and disqualification of judges (see, to that effect, ECtHR, 27 October 2009, *Pandjikidzé and Others v. Georgia*, ..., paragraph 104, and 20 October 2009, *Gorguiladzé v. Georgia*, ..., paragraph 68).

74. As it is apparent from the case-law of the ECtHR, the principle of the lawful judge requires compliance with the provisions governing the procedure for the appointment of judges (see, to that effect, ECtHR, 9 July 2009, *Ilatovskiy v. Russia*, ..., paragraphs 40 and 41).

75. Indeed, it is not only essential that judges are independent and impartial, but also that the procedure for their appointment appears to be so. It is for that reason that the rules for the appointment of a judge must be strictly adhered to. Otherwise, the confidence of litigants and the public in the independence and impartiality of the courts might be eroded (see, to that effect, decision of the EFTA Court of 14 February 2017, *Pascal Nobile* v *DAS Rechtsschutz-Versicherungs*, E-21/16, paragraph 16).

76. The question whether the flaws in the procedure for the appointment of the judge at issue are such as to affect the proper composition of the Second Chamber of the Civil Service Tribunal which delivered the judgment under appeal must be considered in the light of those principles.

77. In that regard, it must be stated that it is apparent [...], that the Council was fully aware that the list of candidates at issue had not been established with a view to appointing a judge to the post held by Ms [R.P.]. It nevertheless decided to use the list for that purpose. It therefore follows from the appointment itself that the Council deliberately disregarded the legal framework laid down by the public call for applications of 3 December 2013 and the rules governing the appointment of judges to the Civil Service Tribunal.

78. Accordingly, having regard to the importance of compliance with the rules governing the appointment of a judge for the confidence of litigants and the public in the independence and impartiality of the courts, the judge at issue cannot be regarded as a lawful judge within the meaning of the first sentence of the second paragraph of Article 47 of the Charter of Fundamental Rights."

133. The proposal for the review of this judgment made by the First Advocate General was dismissed by the Court of Justice (Reviewing

Chamber) on 19 March 2018 (C-141/18 RX), as the formal conditions under the Statute of the Court of Justice of the European Union on whether a judgment should be reviewed were not met in this case.

(b) Judgments of the General Court (Appeal Chamber) and the Court of Justice of the European Union (Grand Chamber) in the cases of *Simpson v Council* and *HG v Commission*

(i) Judgment of the General Court (Appeal Chamber) dated 19 July 2018 (cases T-646/16 P and T-693/16 P)

134. The cases of *Simpson v Council* and *HG v Commission* concerned appeals lodged with the General Court in September 2016 against judgments delivered by the Civil Service Tribunal in respect of Mr Simpson and Mr H.G., staff members at the Council of the European Union and the European Commission, respectively, at the material time. Both judgments of the Civil Service Tribunal had been delivered by the same panel of judges whose composition had been considered to be irregular by the General Court in the judgment in *FV*.

135. Relying on its findings in the case of *FV*, on 19 July 2018 the General Court held that the judgments of the Civil Service Tribunal under review had to be set aside in their entirety on the grounds of infringement of the principle of the right to a judge assigned by law.

136. Upon a request from the First Advocate General, in a decision of 17 September 2018 (EU:C:2018:763) the Reviewing Chamber of the Court of Justice of the European Union (CJEU) decided that the General Court's judgments in the cases of *Simpson* and *HG* should be reviewed, in order to determine whether, having regard, in particular, to the general principle of legal certainty, they affected the unity or consistency of European Union law. The Reviewing Chamber held as follows:

> "The review shall involve, in particular, the question whether, ..., the appointment of a judge may form the subject matter of a review of indirect legality or whether such a review of indirect legality is – by principle or after the passage of a certain period of time – excluded or limited to certain types of irregularity in order to ensure legal certainty and the force of res judicata."

(ii) Judgment of the Court of Justice of the European Union (Grand Chamber) dated 26 March 2020 (Joined Cases C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232)

137. On 26 March 2020 the Grand Chamber of the CJEU delivered its judgment in the cases of *Simpson* and *HG*. While the CJEU upheld the General Court's finding regarding the irregularity in the judicial appointment procedure at issue, it disagreed with that court's conclusion as to the effect of that irregularity on the parties' right to a "tribunal established by law". The relevant extracts from the judgment read as follows:

"50 As regards the answer to the question to be reviewed in this case, it is necessary to begin by examining whether, having regard, in particular, to the general principle of legal certainty, the General Court erred in law by setting aside the contested decisions on the ground that the composition of the panel of judges of the Civil Service Tribunal which had delivered those decisions had been irregular because of an irregularity affecting the procedure for the appointment of one of the members of that panel of judges, leading to a breach of the principle of the lawful judge, laid down in the first sentence of the second paragraph of Article 47 of the Charter.

51 In the context of that examination, it is necessary to determine, first, in what circumstances the appointment of a judge may, like acts covered by Article 277 TFEU, form the subject matter of an incidental review of legality. Secondly, the Court must verify whether, in so far as the irregularity concerning the appointment procedure is established, as determined by the General Court, that irregularity did indeed lead to an infringement of the first sentence of the second paragraph of Article 47 of the Charter, justifying the setting aside of those decisions.

...

72 Since the first sentence of the second paragraph of Article 47 of the Charter corresponds to the first sentence of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('ECHR'), its meaning and scope are, in accordance with Article 52(3) of the Charter, the same as those laid down by that convention. The Court must therefore ensure that the interpretation which it gives to the second paragraph of Article 47 of the Charter safeguards a level of protection which does not fall below the level of protection established in Article 6 ECHR, as interpreted by the European Court of Human Rights (judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 118 and the case-law cited).

73 According to the settled case-law of the European Court of Human Rights, the reason for the introduction of the term 'established by law' in the first sentence of Article 6(1) ECHR is to ensure that the organisation of the judicial system does not depend on the discretion of the executive, but that it is regulated by law emanating from the legislature in compliance with the rules governing its jurisdiction. That phrase reflects, in particular, the principle of the rule of law and covers not only the legal basis for the very existence of a tribunal, but also the composition of the bench in each case and any other provision of domestic law which, if breached, would render the participation of one or more judges in the examination of a case irregular, including, in particular, provisions concerning the independence and impartiality of the members of the court concerned (see, to that effect, ECtHR, 8 July 2014, *Biagioli v. San Marino*, CE:ECHR:2014:0708DEC000816213, §§ 72 to 74, and ECtHR, 2 May 2019, *Pasquini v. San Marino*, CE:ECHR:2019:0502JUD005095616, §§ 100 and 101 and the case-law cited).

74 Likewise, the European Court of Human Rights has already had an opportunity to observe that the right to be judged by a tribunal 'established by law' within the meaning of Article 6(1) ECHR encompasses, by its very nature, the process of appointing judges (ECtHR, 12 March 2019, *Ástráðsson v. Iceland*, CE:ECHR:2019:0312JUD002637418, interim judgment, § 98).

75 It follows from the case-law cited in paragraphs 71 and 73 of the present judgment that an irregularity committed during the appointment of judges within the judicial system concerned entails an infringement of the first sentence of the second paragraph of Article 47 of the Charter, particularly when that irregularity is of such a

kind and of such gravity as to create a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process and thus give rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge or judges concerned, which is the case when what is at issue are fundamental rules forming an integral part of the establishment and functioning of that judicial system.

76 It is in the light of those principles that the Court must examine whether the irregularity committed in the appointment procedure at issue resulted in this instance in an infringement of the parties' right to a hearing by a tribunal previously established by law, as guaranteed by the first sentence of the second paragraph of Article 47 of the Charter.

...

79 In that context, the mere fact that the Council used the list drawn up following the public call for applications of 3 December 2013 to fill the third post is not sufficient to establish an infringement of a fundamental rule of the procedure for appointing judges to the Civil Service Tribunal that is of such a kind and of such gravity as to create a real risk that the Council made unjustified use of its powers, undermining the integrity of the outcome of the appointment process and thus giving rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge appointed to the third post, or of the Chamber to which that judge was assigned.

80 In that respect, the irregularity in the appointment procedure at issue is distinguishable from that at issue in the decision of the EFTA Court of 14 February 2017, *Pascal Nobile v DAS Rechtsschutz-Versicherungs* (E-21/16), mentioned in paragraph 75 of the judgment of 23 January 2018, *FV v Council* (T-639/16 P, EU:T:2018:22). The latter irregularity consisted in the appointment of a judge to the EFTA Court for, exceptionally, a three-year term of office instead of a six-year term, and thus concerned, unlike the irregularity examined in the present cases, the infringement of a fundamental rule in relation to the duration of judges' mandates at that court which was intended to protect their independence.

81 It follows from the foregoing that the Council's disregard for the public call for applications of 3 December 2013 does not constitute an infringement of the fundamental rules of EU law applicable to the appointment of judges to the Civil Service Tribunal that entailed an infringement of the applicants' right to a tribunal established by law, as guaranteed by the first sentence of the second paragraph of Article 47 of the Charter.

82 Consequently, and since the judgments under review do not contain anything else that might cast doubt on compliance with the first sentence of the second paragraph of Article 47 of the Charter, it must be held that the General Court made an error of law in ruling, in those judgments, that that provision had been infringed. The irregularity referred to in the preceding paragraph could not, therefore, by itself justify the setting aside of a judicial decision adopted by the panel of judges to which the judge appointed to the third post was assigned."

(c) Judgment of the Court of Justice of the European Union (Grand Chamber) dated 19 November 2019 (Joined Cases C-585/18, C-624/18, C-625/18, EU:C:2019:982)

138. On 19 November 2019 the Grand Chamber of the Court of Justice of the European Union delivered a preliminary ruling in response to

requests from the Labour and Social Insurance Chamber of the Supreme Court of Poland. The requests mainly concerned the question whether the newly established Disciplinary Chamber of the Supreme Court of Poland satisfied, in the light of the circumstances in which it was formed and its members appointed, the requirements of independence and impartiality required under Article 47 of the Charter of Fundamental Rights of the European Union. Recalling that the interpretation of Article 47 of the Charter was borne out by the case-law of the European Court of Human Rights on Article 6 § 1 of the Convention, the Court of Justice underlined the following principles, as relevant:

> "120 [The] requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, ...
>
> ...
>
> 123 Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it ...
>
> 124 Moreover, in accordance with the principle of the separation of powers which characterises the operation of the rule of law, the independence of the judiciary must be ensured in relation to the legislature and the executive ...
>
> 125 In that regard, it is necessary that judges are protected from external intervention or pressure liable to jeopardise their independence. The rules set out in paragraph 123 above must, in particular, be such as to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned ...
>
> ...
>
> 127 According to settled case-law of [the European Court of Human Rights], in order to establish whether a tribunal is 'independent' within the meaning of Article 6(1) of the ECHR, regard must be had, *inter alia*, to the mode of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body at issue presents an appearance of independence (ECtHR, 6 November 2018, *Ramos Nunes de Carvalho e Sá v. Portugal*, CE:ECHR:2018:1106JUD005539113, § 144 and the case-law cited), it being added, in that connection, that what is at stake is the confidence which such tribunals must inspire in the public in a democratic society (see, to that effect, ECtHR, 21 June 2011, *Fruni v. Slovakia*, CE:ECHR:2011:0621JUD000801407, § 141).
>
> 128 As regards the condition of 'impartiality', within the meaning of Article 6(1) of the ECHR, impartiality can, according to equally settled case-law of the European Court of Human Rights, be tested in various ways, namely, according to a subjective test where regard must be had to the personal convictions and behaviour of a particular judge, that is, by examining whether the judge gave any indication of 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. 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. In this connection, even appearances may be of a certain importance. Once again, what is at stake is the confidence which the courts in a democratic society must inspire in the public, and first and foremost in the parties to the proceedings (see, inter alia, ECtHR, 6 May 2003, *Kleyn and Others v. Netherlands*, CE:ECHR:2003:0506JUD003934398, § 191 and the case-law cited, and 6 November 2018, *Ramos Nunes de Carvalho e Sá v. Portugal*, CE:ECHR:2018:1106JUD005539113, §§ 145, 147 and 149 and the case-law cited).

...

133 In that regard, as far as concerns the circumstances in which the members of the Disciplinary Chamber were appointed, the Court points out, as a preliminary remark, that the mere fact that those judges were appointed by the President of the Republic does not give rise to a relationship of subordination of the former to the latter or to doubts as to the former's impartiality, if, once appointed, they are free from influence or pressure when carrying out their role (see, to that effect, judgment of 31 January 2013, *D. and A.*, C-175/11, EU:C:2013:45, paragraph 99, and ECtHR, 28 June 1984, *Campbell and Fell v. United Kingdom*, CE:ECHR:1984:0628JUD000781977, § 79; 2 June 2005, *Zolotas v. Greece*, CE:ECHR:2005:0602JUD003824002 §§ 24 and 25; 9 November 2006, *Sacilor Lormines v. France*, CE:ECHR:2006:1109JUD006541101, § 67; and 18 October 2018, *Thiam v. France*, CE:ECHR:2018:1018JUD008001812, § 80 and the case-law cited).

134 However, it is still necessary to ensure that the substantive conditions and detailed procedural rules governing the adoption of appointment decisions are such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them, once appointed as judges (see, by analogy, judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 111).

135 In that perspective, it is important, *inter alia*, that those conditions and detailed procedural rules are drafted in a way which meets the requirements set out in paragraph 125 above."

(d) Judgment of the Court of Justice of the European Union (Grand Chamber) in the case of *Commission v. Poland* dated 24 June 2019 (Case C-619/18, EU:C:2019:531)

139. On 24 June 2019 the Grand Chamber of the CJEU delivered its judgment in the case of *Commission v. Poland*, which mainly concerned the lowering of the retirement age for Supreme Court judges to 65 and which applied to judges of the court appointed before the date on which the relevant law had entered into force. Under the law in question, it would be possible for Supreme Court judges to continue in active judicial service beyond the age of 65 subject to certain conditions, including an authorisation by the President of the Republic of Poland, who would not be bound by any criterion and whose decision would not be subject to any form of judicial review. After emphasising the cardinal importance of maintaining the independence of national courts in order to ensure effective

judicial protection, the Court of Justice made the following remarks regarding the role played by the principle of irremovability of judges in guaranteeing the independence of the judiciary:

> "75 In particular, that freedom of the judges from all external intervention or pressure, which is essential, requires, as the Court has held on several occasions, certain guarantees appropriate for protecting the individuals who have the task of adjudicating in a dispute, such as guarantees against removal from office (see, to that effect, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 64 and the case-law cited).
>
> 76 The principle of irremovability requires, in particular, that judges may remain in post provided that they have not reached the obligatory retirement age or until the expiry of their mandate, where that mandate is for a fixed term. While it is not wholly absolute, there can be no exceptions to that principle unless they are warranted by legitimate and compelling grounds, subject to the principle of proportionality ...
>
> 78 In the present case, it must be held that the reform being challenged, which provides that the measure lowering the retirement age of judges of the Sąd Najwyższy (Supreme Court) is to apply to judges already serving on that court, results in those judges prematurely ceasing to carry out their judicial office and is therefore such as to raise reasonable concerns as regards compliance with the principle of the irremovability of judges.
>
> 79 In those circumstances, and having regard to the cardinal importance of that principle, recalled in paragraphs 75 to 77 above, such an application is acceptable only if it is justified by a legitimate objective, it is proportionate in the light of that objective and inasmuch as it is not such as to raise reasonable doubt in the minds of individuals as to the imperviousness of the court concerned to external factors and its neutrality with respect to the interests before it."

Following an examination of the facts at issue on the basis of the foregoing principles, the Court of Justice found that the application of the measure lowering the retirement age of the Supreme Court judges to the judges currently serving in that court had undermined the principle of irremovability of judges, which was essential to their independence.

D. Court of Justice of the European Free Trade Association States (EFTA Court)

140. The Court of Appeal of the Principality of Liechtenstein requested an advisory opinion from the EFTA Court in respect of the Agreement on the European Economic Area (EEA Agreement) and the Solvency II Directive 2009/138/EC, and referred three questions to the EFTA Court in that regard. The third question, which was conditional on the entertainment of the first two questions by the EFTA Court after 16 January 2017, concerned the principle of loyalty laid down in Article 3 of the EEA Agreement and the possibility for the EFTA States to question the validity of the decisions of the EFTA Court. In essence the question raised the issue as to whether, from 17 January 2017, the EFTA Court would be lawfully

composed in a manner that ensured its independence and impartiality. The reason for the question was that by an ESA/Court Committee Decision of 1 December 2016, the regular judge of the EFTA Court in respect of Norway had been reappointed for a three-year term of office as of 17 January 2017. However, Article 30 § 1 of the Agreement between the EFTA States, on the Establishment of a Surveillance Authority and Court of Justice (SCA), provided that the judges of the EFTA Court would be appointed for a term of six years.

141. On 13 January 2017 the ESA/Court Committee delivered a new decision, whereby it reappointed the judge in respect of Norway for a term of six years and repealed its first decision.

142. On 14 February 2017, in case no. E-21/16, the EFTA Court replied to the Court of Appeal's third question, the relevant part of which reads as follows:

> "16. Any assessment of the lawfulness of the Court's composition, particularly concerning its independence and impartiality, requires that due account is taken of several important factors. First, the principle of judicial independence is one of the fundamental values of the administration of justice. ... Second, it is vital not only that judges are independent and fair, they must also appear to be so. Third, maintaining judicial independence requires that the relevant rules for judicial appointment, as set out in Article 30 SCA, must be strictly observed. Any other approach could lead to the erosion of public confidence in the Court and thereby undermine its appearance of independence and impartiality."

143. The EFTA Court concluded that it had to take into account the new decision repealing the previous decision and re-appointing the judge in respect of Norway for a term of six years. The new decision was unambiguous and provided for a term that was in accordance with Article 30 of the SCA. Therefore, there could be no doubt as to the lawfulness of the court's composition as from 17 January 2017.

E. The Inter-American Court of Human Rights

144. In the case of the *Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, judgment of 23 August 2013, concerning the removal of twenty-seven judges of the Supreme Court of Justice of Ecuador through a parliamentary resolution, the Inter-American Court of Human Rights made the following remarks on the independence of the judiciary:

> "144. In its case law, the Court has indicated that the scope of judicial guarantees and effective judicial protection for judges must be examined in relation to the standards on judicial independence. In the case of *Reverón Trujillo v. Venezuela*, the Court emphasized that judges, unlike other public officials, enjoy specific guarantees due to the independence required of the judiciary, which the Court has understood as 'essential for the exercise of the judiciary.' The Court has reiterated that one of the main objectives of the separation of public powers is to guarantee the independence of judges. The purpose of protection is to ensure that the judicial system in general, and its members in particular, are not subject to possible undue restrictions in the exercise

their duties by bodies outside the Judiciary, or even by judges who exercise functions of review or appeal. In line with the case law of this Court and of the European Court of Human Rights, and in accordance with the United Nations Basic Principles on the Independence of the Judiciary (hereinafter 'Basic Principles'), the following guarantees are derived from judicial independence: an appropriate process of appointment, guaranteed tenure and guarantees against external pressures.

...

154. Finally, the Court has emphasized that the State must guarantee the independent exercise of the judiciary, both in its institutional aspect, that is, in terms of the judicial branch as a system, and in its individual aspect, that is, in relation to a particular individual judge. The Court deems it pertinent to point out that the objective dimension is related to essential aspects for the Rule of Law, such as the principle of separation of powers, and the important role played by the judiciary in a democracy. Consequently, this objective dimension transcends the figure of the judge and collectively affects society as a whole ..."

F. Other international texts

145. The Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence, adopted on 19 June 1998 at a meeting of the representatives of the Commonwealth Parliamentary Association, the Commonwealth Magistrates and Judges Association, the Commonwealth Lawyers' Association and the Commonwealth Legal Education Association, provided as follows:

II. Preserving Judicial Independence

1. Judicial appointments

"Jurisdictions should have an appropriate independent process in place for judicial appointments. Where no independent system already exists, appointments should be made by a judicial services commission ... or by an appropriate officer of state acting on the recommendation of such a commission.

The appointment process, whether or not involving an appropriately constituted and representative judicial services commission, should be designed to guarantee the quality and independence of mind of those selected for appointment at all levels of the judiciary.

Judicial appointments to all levels of the judiciary should be made on merit ..."

146. The Universal Charter of the Judge was approved by the International Association of Judges on 17 November 1999. Its Article 9 on appointments reads as follows:

"The selection and each appointment of a judge must be carried out according to objective and transparent criteria based on proper professional qualification. Where this is not ensured in other ways, that are rooted in established and proven tradition, selection should be carried out by an independent body, that include substantial judicial representation."

147. In May 2012 the General Assembly of the European Network of Councils for the Judiciary adopted a declaration (the Dublin Declaration),

setting minimum standards regarding the recruitment, selection, appointment and promotion of members of the judiciary. The relevant extracts of the declaration read as follows:

> "1. Judicial appointments should only be based on merit and capability.
>
> There requires to be a clearly-defined and published set of selection competencies against which candidates for judicial appointment should be assessed at all stages of the appointment process.
>
> 2. Selection competencies should include intellectual and personal skills of a high quality, as well as a proper work ethic and the ability of the candidates to express themselves.
>
> ...
>
> 8. Diversity in the range of persons available for selection for appointment should be encouraged, avoiding all kinds of discrimination, although that does not necessarily imply the setting of quotas *per se*, adding that any attempt to achieve diversity in the selection and appointment of judges should not be made at the expense of the basic criterion of merit.
>
> 9. The entire appointment and selection process must be open to public scrutiny, since the public has a right to know how its judges are selected.
>
> 10. An unsuccessful candidate is entitled to know why he or she failed to secure an appointment; and there is a need for an independent complaints or challenge process to which any unsuccessful applicant may turn if he or she believes that he/she was unfairly treated in the appointment process.
>
> 11. If the Government or the Head of State plays a role in the ultimate appointment of members of the judiciary, the involvement of a Minister or the Head of State does not in itself contend against the principles of independence, fairness, openness and transparency if their role in the appointment is clearly defined and their decision-making processes clearly documented, and the involvement of the Government or the Head of State does not impact upon those principles if they give recognition to decisions taken in the context of an independent selection process. Besides, it was also defined as a Standard in this field that where whoever is responsible for making the ultimate appointment (the Government or Head of State) has the right to refuse to implement the appointment or recommendation made in the context of an independent selection process and is not prepared to implement the appointment or recommendation it should make known such a decision and state clearly the reason for the decision."

III. COMPARATIVE-LAW MATERIAL

148. The Court has considered it appropriate to conduct a comparative survey with regard to the domestic law and practice in forty States Parties to the Convention (namely Albania, Andorra, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Montenegro, North Macedonia, Norway, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine and the

United Kingdom) on the Convention requirement of a "tribunal established by law".

149. According to the information available to the Court, the concept of a "tribunal established by law" is recognised in the legal systems of all States surveyed, although the terminology used to designate it and the methods of its recognition differ. For instance, while in some States the concept is explicitly recognised in basically identical terms, some other States use the concept of a "lawful" or a "natural" judge or court.

150. The scope of the requirement of a "tribunal established by law" differs amongst the member States surveyed: in almost all the States concerned, the "established by law" requirement clearly involves the question of the composition of a court or tribunal; in thirty-seven member States that requirement relates to the jurisdiction and competence of a court or tribunal to rule in a particular case (in Belgium, Luxembourg and Malta the "established by law" requirement does not seem to cover this matter specifically); and in twenty-nine member States, it specifically relates to the consideration as to whether there is a legal basis for the existence of a court or tribunal.

151. The Court notes, as particularly relevant to the present case, that in nineteen (out of forty) of the States surveyed (namely Andorra, Austria, Azerbaijan, Belgium, Bulgaria, Croatia, France, Georgia, Hungary, Ireland, Italy, Lithuania, Luxembourg, Malta, Montenegro, Norway, Russia, Sweden and the United Kingdom), it is sufficiently established in domestic law and/or practice that the requirement of a "tribunal established by law" also covers the consideration as to whether the legal procedure for the appointment – to the post of judge – of its judges was complied with. As for the remaining twenty-one member States, it appears that it is not sufficiently clear under their domestic law and practice whether the "established by law" requirement also extends to the process of the appointment of judges.

152. The Court further notes that in those nineteen States where the requirement of a "tribunal established by law" clearly extends to the rules relating to the appointment of judges, the legal consequences regarding a judgment given by (or with the participation of) a judge who was appointed in breach of the relevant rules vary. In most of those States, it is possible in certain circumstances to request the annulment or quashing of the judgments adopted by such a judge: nevertheless, in a number of States, such as Austria, Belgium, Georgia, Norway, and Sweden, it is clear from the case-law of the domestic courts that the breach of the domestic law at issue has to be of a particular gravity – the degree of which differs from State to State – for the relevant judgments to be annulled or quashed. Similarly, in certain States, such as Croatia, France, Italy and the United Kingdom, it appears from the domestic law and/or practice that if judicial appointments are quashed or annulled due to the irregularities in the appointment procedure, it

would not necessarily mean that all acts or judgments adopted by the judge in question would be annulled or quashed.

153. Lastly, in almost all member States where the requirement of a "tribunal established by law" extends to the procedure for the appointment of judges (that is, nineteen out of forty States as mentioned in paragraph 151 above), the reopening of proceedings is a possibility, and in some instances an obligation, where a judgment has been annulled or quashed due to an irregularity in the appointment of a judge who participated in its delivery (see paragraph 152 above).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION AS REGARDS THE RIGHT TO A TRIBUNAL ESTABLISHED BY LAW

154. The applicant complained under Article 6 § 1 of the Convention that one of the three judges on the bench of the newly constituted Court of Appeal which had upheld his criminal conviction, namely A.E., had not been appointed in accordance with the relevant domestic law and that, therefore, the criminal charges against him had not been determined by a "tribunal established by law", within the meaning of that provision.

The first sentence of Article 6 § 1 of the Convention 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 and public hearing within a reasonable time by an independent and impartial tribunal established by law."

A. The Chamber judgment

155. After reiterating the general principles under the Court's case-law concerning the right to a "tribunal established by law", the Chamber proceeded with its analysis on the premise that the concept of "establishment" in the first sentence of Article 6 § 1 of the Convention encompassed, by its very nature, the process of appointing judges within the domestic judicial system. According to the Chamber, the principle of the rule of law required that the judicial appointment process be conducted in compliance with the applicable rules of national law in force at the material time.

156. The Chamber further noted that the test of a "flagrant breach of domestic law", which was ordinarily applied when examining whether national courts had correctly interpreted and applied the provisions of domestic law, should also apply where the alleged breach of domestic law was attributed to another branch of government and the breach had been acknowledged by the domestic courts. The Chamber held in this connection

that only those breaches of applicable national rules in the establishment of a "tribunal" that were of a fundamental nature, and that formed an integral part of the establishment and functioning of the judicial system, could be considered to constitute a "flagrant breach of domestic law" in this context.

157. Having thus laid down the main principles that would guide its examination, the Chamber had to determine whether the breaches of the relevant national rules in the procedure for the appointment of certain judges – including A.E. – to the Court of Appeal, as already recognised by the Supreme Court of Iceland, had been "flagrant" and, therefore, had had the result of denying the applicant the right to a hearing before a "tribunal established by law", having regard to the presence of Judge A.E. on the bench which upheld his conviction.

158. The Chamber noted in the first place that the Supreme Court, which had found that the applicant had enjoyed a fair trial before an independent and impartial "tribunal", in spite of the irregularities in the appointment of one of the judges on the bench of the Court of Appeal, had not examined as such whether the appointment at issue had constituted a "flagrant" breach of the relevant domestic rules in the light of the Court's case-law under Article 6 § 1. It noted secondly that, contrary to the argument of the respondent Government, a violation of the principle that a "tribunal" be established by law, as of the closely related principles under the same provision that a "tribunal" be independent and impartial, did not require a separate examination as to whether the breach of that principle had had the effect of rendering a trial unfair. The Chamber considered, thirdly, that having regard to their nature and gravity, the breaches of the national law in the instant case by the Minister of Justice had been of a fundamental nature, as they lay at the core of the appointment process. The Chamber moreover noted – in the light of the factual findings of the Supreme Court – that in addition to constituting a fundamental defect in objective terms, the breaches in question had also demonstrated the Minister's manifest disregard for the applicable rules in force at the material time. The Chamber lastly noted that the failure of Parliament – as confirmed by the Supreme Court – to adhere to the rule of separate voting on each candidate had also amounted to a serious defect in the appointment procedure, given that the relevant rule had been introduced to minimise the risk of party-political interests unduly influencing the process of appointments to the newly established Court of Appeal.

159. In the light of the foregoing findings, and having particular regard to the importance of securing compliance with applicable rules of national law in a democratic society governed by the rule of law, the Chamber found that the infringements of the domestic law, on account of the executive's exercise of undue discretion in the judicial appointment process, had amounted to a flagrant breach of the relevant rules applicable at the material time. It therefore concluded, by five votes to two, that there had been a

violation of Article 6 § 1 of the Convention in respect of the applicant's right to a "tribunal established by law" by reason of the unlawful presence of A.E. on the bench of the Court of Appeal which had upheld his criminal conviction (see paragraphs 97-123 of the Chamber judgment). Having regard to the conclusions reached in relation to the applicant's right to a tribunal established by law, the Chamber further considered that it was not necessary to examine his complaint in relation to the absence of independence and impartiality of the Court of Appeal panel which heard his appeal (see paragraph 126 of the Chamber judgment).

B. Submissions before the Grand Chamber

1. The parties

(a) The applicant

160. The applicant invited the Grand Chamber to follow the approach of the majority in the Chamber and find a violation of Article 6 § 1 on the grounds that the criminal charges against him had not been determined by a "tribunal established by law" on account of A.E.'s presence on the bench of the Court of Appeal which had heard his case, in spite of the irregularities in the process of that judge's appointment, as established by the domestic courts.

161. The applicant, at the outset, provided an overview of the history of the legislative developments in Iceland concerning the judicial appointment procedure, along the same lines as the information noted in paragraphs 11-19 above, all of which, he argued, had sought to reinforce the independence of the courts of law *vis-à-vis* the executive and to combat political corruption and abuse of power in judicial appointments – examples of which had been seen in Iceland in the past – so as to enhance public confidence in the judiciary. He also submitted, however, that legislation designed to ensure an independent and impartial judiciary would be useless if that legislation was circumvented in the process of appointment of judges, which was precisely the issue in the instant case when the Minister of Justice had decided to disregard the conclusions of the Evaluation Committee. The applicant argued in this regard that despite the number of legislative reforms to counter political corruption in judicial appointments, the Minister of Justice had acted out of political considerations in the proposals that she had made regarding the appointments to the new Court of Appeal.

162. The applicant claimed that the Supreme Court judgment delivered on 24 May 2018, in response to his challenges against the composition of the Court of Appeal in his case, had been defective. This was because it not only contradicted the judgments adopted earlier by the Supreme Court on 19 December 2017, but also wrongly referred to the December 2017

judgments as stating that the deficiency in the voting procedure in Parliament had not been "significant", whereas no such claim had been made by the Supreme Court in the judgments at issue. The judgment of 24 May 2018 had, moreover, failed to comprise any scrutiny as to whether the criteria established in the Court's case-law in respect of the "tribunal established by law" requirement had been fulfilled in the present case, or even to examine independently whether the breaches at issue had been serious or not. The Supreme Court's approach to the case suggested that there would be nothing to obstruct the Minister's proposals, even if she wished to depart *completely* from the list prepared by the Evaluation Committee and to propose the fifteen least qualified candidates according to the Committee's rankings.

163. The applicant attributed the Supreme Court's unwillingness to duly assess the legal effects of A.E.'s presence on the bench of the Court of Appeal to the small size of the legal community in Iceland. He stated that all four judges who had been appointed to the Court of Appeal upon the proposal of the Minister of Justice, including A.E., had served as alternate judges at the Supreme Court during the period from 5 March to 25 May 2018, when the applicant's case was pending before the Supreme Court, a situation which, he claimed, constituted a conflict of interest. The applicant added that the annulment of a judicial appointment by a court of law, by reason of irregularities in the appointment process, was unprecedented in Iceland.

164. In the applicant's opinion, the breaches of the law in the appointment of judges to the Court of Appeal, as identified by the Supreme Court on numerous occasions, had been very serious in nature. He argued in this connection that despite the advice provided by her own legal staff and the clear precedent set by the Supreme Court judgment of 14 April 2011 (see paragraphs 36 and 115 above), the Minister of Justice, who was a lawyer herself, had ignored the legal obligations that had been incumbent on her in the process of judicial appointments to the Court of Appeal. The Supreme Court had similarly found in its judgments of 19 December 2017 that the Minister had acted "in complete disregard" of the obvious danger to the reputational interests of the plaintiffs – namely the two non-appointed candidates – in that case. The applicant contended, on the basis of the aforementioned elements, that the Minister had breached the relevant laws with intent or with such gross negligence, that it bordered on intent. Referring, once again, to his arguments regarding the close political relations between the Minister of Justice and A.E.'s husband B.N. (see paragraph 89 above), the applicant argued that the Minister's decision had been motivated by political considerations and had amounted to abuse of power. He also argued in this connection that two of the candidates removed from the list by the Minister had been associated with left-wing parties in

different capacities, and that candidate number 30 proposed by the Minister had been the husband of a friend and former colleague of hers.

165. The applicant further argued that the explanations provided by the Minister in support of her decision to depart from the Evaluation Committee's list – which had allegedly been motivated by considerations of gender equality and judicial experience – were unconvincing. He claimed firstly that one of the rejected candidates was a District Court judge who had been ranked higher than all of the four District Court judges whom the Minister had chosen to appoint instead. Secondly, she had appointed a male District Court judge who had been ranked 30th on the Evaluation Committee's list, but had chosen to ignore a female District Court judge ranked 22nd. In the applicant's submission, these examples demonstrated that the Minister had not been justified in her decision and suggested an abuse of power.

166. As regards the breaches of the law committed by Parliament, the applicant stated that no plausible explanation had been given as to why Parliament had decided to contravene the clear and unequivocal letter of the law and to submit a single motion on all the candidates for acceptance or rejection. According to the applicant, this was a conscious decision on the part of Parliament, aimed at ensuring the approval of all four candidates who had not been on the Evaluation Committee's list, and as such it had constituted a breach of a very serious nature. To illustrate his point, the applicant explained that if the proposals had not been put to a single vote, Parliament would then have had to take separate a vote to reject, for instance, the candidate ranked in 7th place in favour of a candidate ranked 30th, who was among the four proposed by the Minister. It was therefore evident that Parliament had failed to act as a check on executive power and had thus neglected a legal duty vested in it for these exact circumstances. The applicant further argued that the explanations given by Parliament to justify the single vote were not satisfactory, as parliamentary custom could not take precedence over statute law. Like any other institution, Parliament had to abide by the law, particularly when the law in question was specifically designed to ensure due process in the appointment of judges and to curb the powers of the executive in that regard by assigning a supervisory function to Parliament.

167. The President of Iceland had, moreover, "given his blessing" to the breach committed by Parliament by signing A.E.'s letter of appointment and declaring, without having procured any independent investigation or legal advice, that no error had been committed in the conduct of the relevant vote in Parliament. All the principal pillars of government had, therefore, failed during the process of the appointment of the Court of Appeal judges.

168. The applicant argued that the breaches in question could not be considered minor for the purposes of the "tribunal established by law" principle under Article 6 § 1. He stressed in this connection the nature of the

laws breached, which were intended to ensure the independence of the judiciary through an objective appointment process, and the consequences of those breaches, which, as noted by the District Court in its judgments of 25 October 2018 (see paragraph 92 above), had resulted in a composition of the Court of Appeal including judges other than those who would have been appointed had the appointment process been conducted lawfully. To hold otherwise would render that principle ineffective for failure to afford any meaningful protection.

169. The applicant stressed that the central issue at stake in the present case was the continued meaningful protection of the right to a "tribunal established by law", which he considered to be a requirement independent from the other rights protected under Article 6 § 1 and "probably the most important" amongst them. He contended that without any real protection of that principle, the rest of the rights under Article 6 § 1 would be "terminally undermined". He added that the "established by law" principle must be understood not only to mean that a court is to be established by law in a strictly formal and narrow sense, but also – and possibly more importantly – to require that any acts undertaken in the course of establishing a court be lawful in the fullest relevant substantive sense.

170. He further argued that the principle of "legal certainty" would not apply when there had been a "flagrant breach" of the domestic law such as in the present case. He referred in this connection to the relevant paragraphs of the opinion delivered by Advocate General Sharpston in the cases of *Simpson* and *HG* (C-542/18 and C-543/18, see Opinion delivered by the Advocate General on 12 September 2019, EU:C:2019:977; see also paragraphs 134-137 above for further details on the cases of *Simpson* and *HG*). He also emphasised that the judgments of the Supreme Court dated 19 December 2017, which had established the irregularities in the appointment procedure, had been delivered some ten days prior to the date on which the appointments to the Court of Appeal had come into effect (see paragraphs 67-75 above). In other words, the Icelandic State had proceeded with the appointments notwithstanding the findings of the Supreme Court, which therefore prevented the Government from relying, in good faith, on legal certainty in the present case.

171. In response to an allegation by the Government that the Evaluation Committee had recently changed its assessment practice in a manner consistent with the Minister's original request to that Committee (see paragraph 190 below), the applicant argued that that allegation had no basis. While the Evaluation Committee had effectively proposed three candidates for one advertised post at the Supreme Court, as argued by the Government, it had done so only because those three candidates had been found to be equally qualified, and not because it had changed its assessment practice. In any event, even if the Evaluation Committee were to be criticised for its

assessment method, that would not justify the serious violations of the domestic law by the Minister and Parliament in the present case.

172. As to the Government's argument that his allegations of a political deal between the Minister and A.E.'s husband B.N. did not make sense chronologically (see paragraph 191 below), the applicant stated that the chronological order did not matter and that the facts spoke for themselves; it was apparent in his view that the Minister had done B.N. a favour, which the latter had repaid four months later.

(b) The Government

173. The Government of Iceland invited the Grand Chamber to reject the applicant's complaints and the Chamber majority's conclusion in relation to those complaints, and to follow the reasoning adopted in the dissenting opinion, according to which the breaches of some of the rules relating to the appointment of judges to the Court of Appeal were not such as to result in that court's lacking the required legal basis to subsequently hear cases with the participation of one or more of the four judges proposed by the Minister of Justice. In the Government's view, the majority judgment suffered from a number of fundamental errors, as indicated below.

174. They noted firstly that in the judgment the majority had disregarded one of the core principles of the Convention system, that is, the principle of subsidiarity, by setting aside the assessment of the highest domestic court of Iceland as to the scope of the relevant rules of domestic law on the lawfulness of a "tribunal". The Government claimed, by reference to the Court's relevant case-law, that the majority had failed to acknowledge that the consequences of a violation of domestic law was to be assessed by domestic courts and that it was open to the Court to take a different view only where it found that the domestic courts' assessment of the law had been "manifestly unreasonable or arbitrary or blatantly inconsistent with fundamental principles of the Convention" (they referred to the example of *Pla and Puncernau v. Andorra*, no. 69498/01, § 46, ECHR 2004-VIII).

175. The Government argued, secondly, that the majority in the Chamber had disregarded the fact that the right to a "tribunal established by law" was a right to a *competent* "tribunal" established previously by law. It had instead treated the term "established by law" in Article 6 § 1 as having the same meaning as "in accordance with" any and all rules, as long as those rules only "related to" the establishment and competence of judicial organs, and regardless of whether the flaw was only procedural in nature with no legal effect on the competence of the "tribunal". In the Government's opinion, the difference between the two terms was significant: a defect in the procedure by which a judge had been appointed could mean that the appointment procedure had not been "in accordance with the law". That did not, however, mean that the purported establishment of the tribunal itself was void; domestic law could still regard it as validly constituted

notwithstanding the procedural non-compliance with the appointment procedure.

176. Thirdly, the test of a "flagrant violation of domestic law" established by the majority as a test to be applied by the domestic courts was contrary to the Court's case-law. The correct approach would have been to ask whether, as a matter of domestic law, the deficiencies in the selection process were such as to render the subsequent appointment of the individual judge invalid. If they were not, the "tribunal" would then be comprised of appointed judges, bound by their legal obligations as holders of judicial office, and would therefore be "established by law". Under the Court's previous case-law, the "flagrant violation" test would only allow it to override a domestic court's finding that a "tribunal" was "established by law" when it was plain and obvious that it was not so established according to domestic law; whereas in the present case, the majority had held that the word "flagrant" related to the "nature and gravity of the alleged breach", and not to the flagrance of any error in the domestic court's analysis of domestic law. This approach was inconsistent with the Court's settled case-law, and with the principle of subsidiarity, and the test proposed was too broad and vague. Moreover, the only cases cited by the majority in support of their approach had been cases of the EFTA Court and of the General Court of the European Union, which concerned very different procedural flaws in very different legal contexts, and raised no issues of subsidiarity.

177. The proposed "flagrant violation" test was also unworkable, in the Government's opinion. Any violation, no matter what it involved or when it had taken place, would be subject to the test. Accordingly, the judgments delivered by a judge appointed even thirty years ago following a flawed procedure could be contested, if the flaws were considered serious enough by the Court. The Government argued on the basis of this example that the consequences of the proposed test would be worse than, and entirely disproportionate to, the deficiencies it purported to address.

178. Fourthly, while the majority had acknowledged that a test of "flagrant violation of domestic law" could only be met where the breach of law at issue was of a "fundamental nature ... [forming] an integral part of the establishment and functioning of the judicial system" (paragraph 102 of the Chamber judgment), they had failed to have regard to various factors which made it impossible to hold that a "flagrant" violation had taken place in the present circumstances. These factors included the fact that the Court of Appeal, as an institution, had been established by law; that A.E. had been found by the Evaluation Committee, the statutory body designated to make such assessments, to be fully qualified and eligible for appointment as a Court of Appeal judge; that in proposing candidates to *Althingi* for approval, the Minister of Justice was not required by law to follow the Evaluation Committee's recommendations in all circumstances; that in taking the course she did, the Minister had acted in good faith at all times

and had been driven by entirely legitimate considerations relating to judicial experience and gender balance; that the appointment of A.E., alongside the fourteen other judges, had been approved by Parliament, which had had occasion to scrutinise the Minister's proposals before the CSC and subsequently in full session and which had not sought to hold individual votes on each candidate despite having the power to do so; that the President of Iceland had formally appointed A.E. as a judge; that from the time when A.E. had taken up office as a judge, she had also undertaken all legal obligations arising from her post pursuant to Article 61 of the Constitution and had enjoyed the Constitutional protection of irremovability from office – which effectively meant that the defects in the appointment process had no effect on the judicial powers or status of A.E. when she participated in the applicant's case –; that there was no evidence that A.E. had ever acted in any way other than in an exemplary manner as a judge, in the applicant's case or otherwise; and that the Supreme Court had expressly found that, as a matter of domestic law, such technical flaws as it had identified in the process leading up to A.E.'s presentation for parliamentary approval and subsequent appointment were insignificant and were not such as to invalidate her appointment.

179. At the hearing before the Grand Chamber, the Government advanced some further reasons as to why the breaches at issue could not be considered to be "flagrant". They argued in particular that, having regard to the unprecedented nature of the appointment process, any errors subsequently identified were not likely to be easily characterised as "flagrant", unless bad faith could be shown – which had not been the case; that in the proceedings brought by J.R.J. and Á.H., the District Court had not initially found a breach of the law, which showed that any error was less than flagrant; and that the domestic courts had made no finding of bad faith against the Minister. The Government emphasised in this regard that the Supreme Court's finding in its judgments of 19 December 2017 regarding the danger to the reputation of J.R.J. and Á.H. had been taken out of its context in the Chamber judgment. Those findings were relevant to whether damages should be awarded by reference to conventional questions of foreseeability and remoteness of loss, and they did not concern any deliberate breach of the law. On the contrary, the Supreme Court had stated explicitly in its judgments that it was not finding that the Minister had deliberately set out to harm anyone's reputation.

180. Fifthly, and lastly, the majority had failed to have regard to the far-reaching implications of their approach. In this connection, the majority had found that *any* procedural deficiency at any stage of a judicial selection process, however technical or ancient, would be sufficient to render void any subsequent appointment, and any decision delivered by a judge so appointed, even where, as here, there had been express parliamentary approval for the appointment and the appointment had been formally made

by the President, and even where everyone involved in the process had acted in good faith and the judge was manifestly qualified. Such an approach would have extremely adverse consequences for the rule of law, judicial independence and legal certainty, and was irreconcilable with the need for security of judicial tenure, which had not been taken into account in the Chamber judgment. Upholding the majority's reasoning could have the consequence of invalidating not only every Court of Appeal decision involving A.E., but all Court of Appeal decisions, having regard to the critique of the single vote held in Parliament for all fifteen nominees.

181. The implications of such reasoning would, moreover, not be confined to Iceland; any technical deficiency in a judicial selection process would render court decisions susceptible to challenge across the Council of Europe States, regardless of any other safeguards accompanying the appointment process or the remoteness of the defect from the substantive decision under challenge, regardless of domestic court decisions declaring the validity of the appointment, and also regardless of the quality of the candidates appointed and the general safeguards in place for judicial competence and independence. In the Government's opinion, a procedural deficiency in a judicial selection process should be taken to raise an issue under the "established by law" requirement only if the deficiency in question led to the appointment of an unqualified or ineligible person as a judge, which was not the case on the present facts.

182. In addition to these arguments, the Government contended that the appointment procedure had, overall, been open and transparent. They considered it important to stress that the initial proposal submitted by the Evaluation Committee had met with criticism in Parliament, both from the opposition and from the coalition parties. The criticism had been two-fold: first, it was considered that the Evaluation Committee's proposal had disregarded gender equality, since of the fifteen candidates proposed, only five were women; second, it was considered that the Evaluation Committee had not given adequate weight to judicial experience. The list proposed by the Evaluation Committee would, therefore, have needed to be changed in any event and in her proposal to Parliament, the Minister of Justice had taken the relevant concerns into account. The Government further stressed that section 4 of the Minister of Justice's Rules no. 620/2010 listed the objective factors on which the Committee was expected to base its assessment, but it did not say anything about the *weight* to be accorded to each assessment factor. The Committee had taken it upon itself to give judicial experience the same weight as litigation and administrative experience. The four candidates removed from the Evaluation Committee's list by the Minister of Justice had received 0.5, 1.0, 3.5 and 5.5 for judicial experience according to the Committee's assessment table, whereas the four candidates added to the list had received 9.5, 8.5, 7.0 and 6.0. A.E., who was among the female candidates proposed by the Minister, had a thirty-two

year judicial career and had more judicial experience that any of the four candidates excluded from the list. That said, the proposal made by the Minister had not been based on objective numerical values; when she had proposed that more weight be given to judicial experience, this did not involve merely comparing the years of experience of the candidates, but also a subjective evaluation of their quality and capabilities. As to the gender equality considerations, the Government did not contest that such considerations only came into play under the Equality Act where candidates of different genders were "equally qualified", but argued that, contrary to the findings of the Evaluation Committee, the Minister had considered more than fifteen candidates to be equally qualified for the post.

183. Having regard to the foregoing, the Government contended that the Minister's approach had been entirely rational, even if it suffered from the technical flaws identified, and it had been subject to the safeguards provided by the requirements of parliamentary approval and Presidential appointment. While the requirements of the "sufficient investigation" rule under section 10 of the Administrative Procedures Act, which sought to ensure the factual accuracy of administrative decisions, applied strictly in the field of judicial appointments – given the importance of considerations such as the separation of powers and independence of judges – the Government argued that it was not absolutely certain what that requirement entailed in this specific field. In the present case, the Minister had provided reasoning for her proposals in good faith, yet that reasoning had been deemed insufficient by the Supreme Court.

184. A proper understanding of the Supreme Court judgment dated 24 May 2018 was essential in determining the correct approach to the present proceedings. It had been established in that judgment that A.E. was fully vested with legal office, that she had participated in the applicant's case "in accordance with domestic law" and the Court of Appeal was, in determining that case, "established by law". There was nothing arbitrary or manifestly unreasonable in the Supreme Court's ruling that, even if there were shortcomings in the procedure preceding A.E.'s appointment, this did not entail that the Court of Appeal lacked competence to decide on the applicant's case. It was therefore important not to confuse the legal effects of the procedural flaw in question regarding the other candidates (that is, the candidates who were removed from the list by the Minister of Justice) with the legal effects of the same flaw on the status of A.E. or on the applicant's case. That procedural flaw was remote from the proceedings in that case. The Supreme Court had found that, as a matter of domestic law, A.E.'s status had been unaffected by the procedural flaws identified and that, therefore, the Court of Appeal did not lack competence to act as a "tribunal" as a result of A.E.'s presence. According to the Government, its competence in this sense was solely decided by the interpretation of domestic law. The Government argued that while the Chamber had accepted the Supreme

Court's conclusion as to the existence of flaws in the appointment procedure, it had disregarded the same court's conclusion regarding the lack of any significant legal consequence of the flaw. The approach adopted by the majority implied that the legal effects of breaches of domestic law should not be assessed according to domestic law itself, but immediately and directly according to independent criteria laid down by the Chamber, and this would have the effect of detaching the violation of national law from its legal effects under national law. Referring in particular to the Supreme Court judgments concerning the candidates J.R.J. and Á.H., the Government stressed at the hearing before the Grand Chamber that A.E.'s appointment had been considered valid and effective as a matter of law. If the procedural defects identified had no implications or significance for A.E., then the logical conclusion was that they could not have any effect for the applicant either.

185. Contrary to the circumstances which had in the past led the Court to find a violation of the requirement of a "tribunal established by law", the procedural rules that had been breached in the present case neither directly regulated the participation of Judge A.E. in the applicant's case, nor had immediate effects for her presence on the bench. Therefore, A.E.'s participation in the examination of the applicant's case had not been "irregular" according to the meaning given to that term in the Court's case-law. The Government also underlined that the Supreme Court judgments of December 2017, on which the majority had relied so heavily, had not been delivered as part of the criminal proceedings against the applicant and had not concerned the question whether the Court of Appeal had been a "tribunal established by law".

186. The Government further argued that, contrary to the majority's finding, in its judgment of 24 May 2018 concerning the applicant the Supreme Court had not limited its examination to determining whether Judge A.E.'s appointment had been a "nullity" and whether the applicant's trial had been fair despite the flaws in the procedure for the appointment of A.E., but had addressed all relevant matters, such as whether Judge A.E.'s appointment had been invalid and whether the applicant's case had been heard by a "tribunal established by law". Although the Supreme Court's conclusion had been based on the Article 6 requirements of independence and impartiality, it no doubt also covered the "established by law" requirement under that provision.

187. The Government also explained, however, that while in theory it was possible for an Icelandic court to evaluate the lawfulness of a judicial appointment and to set aside a ruling in which an unlawfully appointed judge had participated, in practice the procedural flaws of the nature found in the present case would result in an award of damages to the candidates who had not been appointed as a result of the relevant flaws. There had not

been a case in the past half-century which suggested that the flaws in question would or could lead to the invalidation of a judicial appointment.

188. In the Government's view, the right to a "tribunal established by law" was distinct from the "right to an independent tribunal", as it was a right specifically and directly related to domestic law. In contrast to the case-law relied upon by the majority in the Chamber, the present case was not about the assigning of a particular case to a particular judge – which could raise objective concerns of independence and impartiality – but concerned the general process of the appointment of a judge, with no link to any particular case. Unlike the other cases that the majority had cited, the procedural irregularities established by the Supreme Court here had happened long before the judge in question had taken part in the applicant's case, they bore no connection with that case, and they carried no implications for the independence or the impartiality of the judge concerned. According to the case-law of the Court, a central issue in cases concerning the right to a "tribunal established by law" was whether the legal defect in any given case was relevant to any of the substantive protections of fairness, independence or impartiality in *that* case.

189. The Government argued moreover that, given the intervening role of Parliament, the relevant judicial organisation could not be said to have been dependent on the discretion of the executive. They explained in this connection that the special voting procedure before Parliament, as provided for under temporary provision IV, had sought to secure the credentials of the judges to be appointed and to seek consensus as to their appointment, in order to strengthen the legitimacy of those appointments and of the Court of Appeal as such. The legislative developments in the field of judicial appointments over recent decades had all sought to limit ministerial discretion in appointments, which had previously been a point of criticism in Iceland. While the Supreme Court had found that Parliament had failed to observe the voting procedure indicated in temporary provision IV, the Government contended that this was a matter of interpretation and that the flaw in question had not had any effect on the integrity of the process or on the results of the voting. The Government explained that the single vote held in Parliament had in any event been in accordance with the customary practice, and that no member of parliament had requested separate voting. There was, furthermore, no evidence to support the applicant's allegation that the vote *en bloc* had been part of a conspiracy to force through the appointment of A.E., nor was there evidence to suggest that the result would have been any different had the proposals been voted on separately.

190. At the hearing before the Grand Chamber the Government put forward some additional arguments. They underlined that, as the Court of Appeal was a new court, there had been no established precedent at the material time as to the procedure to be followed when submitting proposals to Parliament for appointments to that court, or as to how Parliament would

vote on such proposals. The Government further argued that recent developments in Iceland had shown that the Evaluation Committee had changed its assessment procedure since 2017 and had now adopted the practice of proposing more candidates than the number of advertised posts, which is what the Minister of Justice had requested from the Committee in the present case (see paragraphs 22 and 25 above). They referred in this connection to an assessment report delivered by the Evaluation Committee on 9 December 2019 in the context of an appointment to the office of Supreme Court judge, where the Committee had proposed three candidates as being the most qualified for one advertised post.

191. The Government also submitted affidavits from B.N. and the Minister to rebut the applicant's allegations that the Minister's decision had been driven by ulterior political motives. They argued, in particular, that the applicant's unfounded allegations concerning the Minister and B.N. made no sense chronologically because at the time when the process for judicial appointments to the Court of Appeal was underway in May 2017, the next parliamentary elections were scheduled to be held in October 2020. It was only as a result of unforeseen developments that general elections were called on 15 September 2017, and that the elections were held prematurely in October 2017 – that is, some three years prior to the initially scheduled date. In these circumstances, it could not be argued that the Minister had proposed B.N.'s wife A.E. to the post of a Court of Appeal judge as part of a political deal to secure her Ministerial post in the new government. The Government added that not only was there a complete absence of material to support the applicant's extraordinary allegations of bad faith against a wide range of persons and institutions, but also that none of those allegations had been made at the domestic level, which meant that the principle of exhaustion of domestic remedies prevented him from raising them before the Court now.

192. In response to a question put by the Court at the hearing as to the relationship of the right to a "tribunal established by law" with other requirements of a fair hearing, in particular with those of independence and impartiality, the Government submitted (as part of its written responses sent on 20 February 2020 – see paragraph 10 above) that there was a degree of relationship between all elements of a fair trial under Article 6 § 1. Accordingly, the "tribunal established by law" requirement was a facet of the overarching object of Article 6. In the Government's view, the "established by law" requirement could be construed in one of two ways. Under the first approach, the function of the term "established by law" would be to emphasise that Article 6 required access to a body which had jurisdiction to take legally binding decisions, in that (i) the "tribunal" itself had a proper foundation in domestic law, and (ii) the bench trying a particular case was validly constituted as a matter of domestic law. Under the second approach, the term "established by law" would be construed as

importing an additional requirement that there be no legal defect relating to a judge's appointment that would "destroy the essence of the right to a fair hearing before an independent and impartial tribunal". The Government argued that the first of these approaches was more consistent with the "ordinary meaning" interpretation rule under Article 31 of the Vienna Convention of 1969 on the Law of Treaties. The second approach, on the other hand, was not necessary in order to achieve the aims of Article 6: importing considerations of fairness, independence and impartiality into the "established by law" requirement would arguably duplicate protections provided elsewhere in Article 6, and obscure the specific function of that requirement. According to the Government, that function – reflected in the first approach identified above – was to ensure that the body hearing a case was legally competent to issue a binding determination in that particular case.

193. The Government lastly stated, in response to the comments received from third parties (see paragraphs 194-204 below), that the present case was wholly different from the kinds of situations mentioned in those interventions. In contrast to the alleged situation in Poland or Georgia, the approach of the Icelandic authorities in the present case had posed no conceivable threat to judicial independence.

2. The third-party interveners

(a) The Government of Poland

194. The Government of Poland stated at the outset that the case at issue concerned a matter of fundamental constitutional importance relating to the competence of State bodies in the context of judicial appointments. They argued that the practice of appointment of judges by the executive was widely accepted in Europe, and that such practice did not *per se* pose a problem under the case-law of the Court or that of the Court of Justice of the European Union.

195. The Government of Poland stressed the significance of the principle of subsidiarity in the Convention mechanism, and argued that the Chamber judgment had disregarded that principle and the margin of appreciation enjoyed by the respondent State's authorities in implementing their relevant Convention obligations. They argued that the Court should not replace national authorities in determining the correct interpretation of national legislation, which is what the Chamber had done in the instant case by dismissing the findings of the Supreme Court of Iceland in respect of the applicant. The Chamber had, moreover, acted without due consideration for the enormous implications of its decision on the Icelandic judicial system, and on the judicial systems of other member States. They argued in this regard that in cases involving the right to a "tribunal established by law", the Court's practice had so far been limited to finding violations only where

the breach of the domestic rules on judicial appointments had more serious consequences, such as where the bench had included a person who did not have the status of judge or who could not have been appointed to such office.

(b) The Commissioner for Human Rights of the Republic of Poland

196. The Commissioner for Human Rights of the Republic of Poland ("the Polish Commissioner"), Mr Adam Bodnar, submitted that the expression "established by law" in Article 6 § 1 of the Convention should inevitably incorporate the process of judicial appointments. The Commissioner contended that not only should the legal basis, the jurisdiction and the composition of a tribunal be regulated in advance by law, but the law in question should also determine the criteria and the procedure for the appointment of judges, and the appointments should in turn be conducted in compliance with those provisions. Strict observance of such provisions was essential to prevent unlawful interference with the appointment procedure by other branches of government, in particular the executive, and thus to ensure the independence and impartiality of judges. Such strict compliance would also serve to build public trust in the administration of justice and thereby to enhance the democratic legitimacy of the judiciary. The Polish Commissioner considered that it was essential not only that judges be independent and impartial, but also that the procedure for their appointment appeared to be so.

197. The Polish Commissioner indicated his agreement with the Chamber that a flagrant breach of the domestic rules on the appointment of judges constituted a clear violation of Article 6 § 1 of the Convention. A finding of such flagrant breach would render redundant any further examination of the fair trial requirements under Article 6 § 1, since there could be no fair trial before an authority that lacked the attributes of a court of law. The Commissioner further supported the notion that instances of flagrant violation had to be fundamental in nature and form an integral part of the appointment process. Accordingly, only those breaches that had a substantial impact on the conduct and/or outcome of the process would pass the "flagrant breach" threshold. The intentional nature of the breach was also an important factor to be taken into consideration in this regard, as the European Union courts had also acknowledged.

198. The Polish Commissioner stressed that it fell to the Court in the present case to clarify the implications, from the perspective of legal certainty, of a finding that a domestic court had not been "established by law". In the Commissioner's view, the deliberate interference by the executive – or by the legislature, as the case may be – with the status of a judge in a manner incompatible with the Convention should override any arguments relating to the principle of legal certainty or irremovability of judges. This was particularly so if there was no mechanism available to

review the lawfulness of a judicial appointment prior to the act of appointment. The Commissioner stated that acts aimed at intentionally circumventing or breaching applicable laws must not be rewarded by the acceptance of the situation thus created (*ex iniuria ius non oritur*).

199. As for the discussions concerning the principle of subsidiarity and the States' margin of appreciation, the Polish Commissioner stated that the right to be tried by an independent and impartial tribunal established by law was an essential element of the right to a fair trial, and that the Convention standard in this regard was autonomous, in the sense of being independent from the relevant national standards established in respective member States. The Court therefore had the authority to assess whether that standard had been applied in a Convention compliant manner by the national authorities and courts, and such assessment did not *per se* contravene the principle of subsidiarity or the margin of appreciation doctrine. Denying the Court the authority to carry out its own review in this respect would render the very guarantee of Article 6 illusory.

200. The Polish Commissioner lastly submitted that the ruling of the Grand Chamber in the present case would be highly relevant for assessing the compliance of the current practice of judicial appointments in Poland with the Convention standards. The Commissioner drew the Court's attention to the cases before the Court of Justice of the European Union in this regard, in particular to the judgment delivered by that Court on 19 November 2019 in the case of C-624/18 (noted in paragraph 138 above). The Commissioner informed the Court that relying on the findings in that judgment, the Polish Supreme Court (Chamber of Labour and Social Security) had found on 5 December 2019 that the National Council of the Judiciary – which had been tasked with making proposals to the President of the Republic for appointments to the Disciplinary Chamber of the Supreme Court – was not an independent and impartial body and that the Disciplinary Chamber could not be considered to be a "court". In the Commissioner's opinion, the judgment of the Court of Justice of the European Union had made it clear that the subsequent act of appointment by the President of Republic could not by itself repair a pre-existing deficiency in the appointment process, especially in the case of an *ultra vires* or improper exercise of authority, error of law, or manifest error of assessment.

(c) The Public Defender (Ombudsman) of Georgia

201. The Public Defender of Georgia ("the Public Defender"), Ms Nino Lomjaria, provided an overview of the recent process for the selection and appointment of judges to the Supreme Court of Georgia, which had been subject to criticism both by her office and by various international bodies. The criticisms mainly centred around the lack of transparency of the appointment procedure and the absence of objective selection criteria, which seriously undermined the possibility of merit-based appointments. The

Public Defender indicated that she had recently challenged the constitutionality of this process before the Constitutional Court of Georgia. While the Constitutional Court was yet to examine the merits of that claim, it had already confirmed that the right to a fair trial enshrined in the Constitution implied the right of a person to apply to a court composed in accordance with constitutional standards.

202. Referring to a number of international sources, and to the relevant case-law of the Court, the Public Defender stated that the method of selection and appointment of judges played a fundamental role in ascertaining the independence of a "tribunal". She submitted that there could be no public trust in the judiciary when the judicial selection process was flawed, especially where such flaws called into question the independence of the judiciary. The Public Defender added that the requirement of a "tribunal established by law" would not be satisfied where the breach of the applicable domestic rules raised doubts as to whether a court would have been composed differently but for the breach at issue. The endorsement of these principles by the Grand Chamber was of crucial importance not only for the parties to the present case but for the Council of Europe member States as a whole.

(d) Helsinki Foundation for Human Rights

203. The Helsinki Foundation for Human Rights ("the Helsinki Foundation"), a non-governmental organisation based in Poland, similarly submitted that the Grand Chamber's ruling in the present case would have a considerable impact not only in Iceland, but also on other member States, including Poland. They referred in this connection to what they regarded as the "judiciary crisis" in Poland, which had arisen from the judicial reform procedure undertaken by the Polish Parliament between 2015 and 2018 and which had generated significant criticism at home and abroad, including before the Court of Justice of the European Union.

204. The Helsinki Foundation submitted that according to the Court's case-law, as followed by the Court of Justice of the European Union, the manner in which judges were appointed was a factor which guided the assessment of judicial independence. Any violations of the rules of appointment, consisting in the increased involvement of political bodies in the judicial appointment process, could put the independence of the judiciary at risk. Such violations could, moreover, undermine the judiciary's legitimacy, given that in a democratic State, the legitimacy of judges heavily depended on public confidence in their neutrality, objectivity and lack of political affiliation. Accordingly, violations of the rules on judicial appointments by the legislature and the executive seeking to achieve their political objectives could cause serious disruption to a national judicial system, as manifested by the recent developments in Poland. The Helsinki Foundation underlined that only strict adherence to the rules governing the

judicial appointment process, in particular to those rules that sought to safeguard against improper political interference by other branches of the State, could ensure respect for the right to an independent and impartial "tribunal". Tolerance for breaches of the rules on judicial appointment – such as on the ground that any flaws in the earlier stages of the appointment process could be cured subsequently by the official act of appointment – would risk paving the way for abuse of the process for political reasons and would be incompatible with the principle of the rule of law.

C. The Court's assessment

1. Scope of the applicant's complaint as regards the right to a "tribunal established by law"

205. The Grand Chamber considers that it must first determine the scope of the applicant's complaint concerning the right to a "tribunal established by law".

206. At the outset it should be pointed out that the present case does not raise an issue as to the lawful existence of the newly established Court of Appeal. It is indeed not disputed between the parties that the Court of Appeal was established by a law emanating from Parliament, namely the new Judiciary Act, the quality of which – in terms of its accessibility and foreseeability – has not been contested by the applicant.

207. The Grand Chamber is similarly not called upon to review the judicial appointment system that is in place in Iceland. As pointed out by the Venice Commission and the CCJE (see paragraphs 122 and 126 above), there are a variety of different systems in Europe for the selection and appointment of judges, rather than a single model that would apply to all countries. The Court reiterates in this connection that although the notion of the separation of powers between the political organs of government and the judiciary has assumed growing importance in its case-law, appointment of judges by the executive or the legislature is permissible under the Convention, provided that appointees are free from influence or pressure when carrying out their adjudicatory role (see *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, § 49, ECHR 2013). The question is always whether, in a given case, the requirements of the Convention are met (see *Kleyn and Others v. the Netherlands* [GC], nos. 39343/98 and 3 others, § 193, ECHR 2003-VI, and *Henryk Urban and Ryszard Urban v. Poland*, no. 23614/08, § 46, 30 November 2010).

208. Nor is there any need for the Grand Chamber to determine whether the relevant domestic law on judicial appointments had been contravened during the process of Judge A.E.'s appointment to the newly constituted Court of Appeal. It notes in this connection that, in two separate judgments delivered on 19 December 2017 (see paragraphs 67-75 above), the Supreme Court of Iceland has already established that the relevant law had not been

complied with in so far as the appointment of the four judges proposed by the Minister, including A.E., was concerned. Firstly, by replacing four of the candidates – whom the Evaluation Committee had considered to be among the fifteen best qualified for appointment to the Court of Appeal – with four others – who had not made it to the top fifteen according to the Evaluation Committee's assessment – without carrying out an independent evaluation of the facts or providing adequate reasons for her decision, the Minister of Justice had breached section 10 of the Administrative Procedures Act. In this connection, she had also disregarded the well-established general principle of Icelandic administrative law that only the most qualified candidates should be selected to public posts. Secondly, the Icelandic Parliament had not held a separate vote on each individual candidate proposed by the Minister of Justice, as required under temporary provision IV of the new Judiciary Act. These findings were, moreover, repeated in the judgment delivered subsequently by the Supreme Court in the applicant's case (see paragraph 90 above).

209. Reiterating that it is primarily for the national authorities, in particular the courts, to interpret and assess compliance with domestic law (see, for instance, *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 186, 6 November 2018), the Court considers that there is no need to call into question the Supreme Court's above-mentioned findings. The Grand Chamber should accordingly proceed on the basis that the process by which A.E. was appointed to the Court of Appeal breached some of the relevant rules of domestic law on judicial appointments. It otherwise notes that the legality of the appointments of the remaining eleven judges – who were considered the most qualified on the list submitted by the Evaluation Committee and were subsequently also included on the list of the Minister of Justice submitted before Parliament – is not at issue in the present case.

210. The task of the Grand Chamber in relation to the present complaint is, therefore, limited to determining the *consequences* of the above-mentioned breaches of domestic law for the purposes of Article 6 § 1, in other words to ascertaining whether Judge A.E.'s presence, in spite of the established irregularities in her appointment, on the bench of the Court of Appeal which heard the applicant's appeal, deprived the applicant of the right to be tried by a "tribunal established by law".

2. Scope of the requirement of a "tribunal established by law"

(a) General principles and overview of the Court's existing case-law

(i) The notion of a "tribunal established by law"

211. The Court reiterates that under Article 6 § 1 of the Convention, a court or tribunal must always be "established by law". This expression reflects the principle of the rule of law which is inherent in the system of

protection established by the Convention and the Protocols thereto, and which is expressly mentioned in the Preamble to the Convention (see, for example, *Jorgic v. Germany*, no. 74613/01, § 64, ECHR 2007-III). As the Court has previously held, a tribunal that is not established in conformity with the intentions of the legislature will necessarily lack the legitimacy required in a democratic society to resolve legal disputes (see *Lavents v. Latvia*, no. 58442/00, § 114, 28 November 2002).

212. The Court further reiterates that "law", within the meaning of Article 6 § 1 of the Convention, comprises not only legislation providing for the establishment and competence of judicial organs, but also any other provision of domestic law which, if breached, would render the participation of one or more judges in the examination of a case irregular (see *Gorguiladzé v. Georgia*, no. 4313/04, § 68, 20 October 2009; *Pandjikidzé and Others v. Georgia*, no. 30323/02, § 104, 27 October 2009; and *Kontalexis v. Greece*, no. 59000/08, § 38, 31 May 2011). This includes, in particular, provisions concerning the independence of the members of a court, the length of their term of office and their impartiality (see, for example, *Gurov v. Moldova*, no. 36455/02, § 36, 11 July 2006; *DMD GROUP, a.s., v. Slovakia*, no. 19334/03, § 59, 5 October 2010; and *Miracle Europe Kft v. Hungary*, no. 57774/13, § 48, 12 January 2016).

213. In other words, the phrase "established by law" covers not only the legal basis for the very existence of a "tribunal" but also the compliance by that tribunal with the particular rules that govern it (see *Sokurenko and Strygun v. Ukraine*, nos. 29458/04 and 29465/04, § 24, 20 July 2006) and the composition of the bench in each case (see *Richert v. Poland*, no. 54809/07, § 43, 25 October 2011, and *Ezgeta v. Croatia*, no. 40562/12, § 38, 7 September 2017).

(ii) The purpose of the requirement that a "tribunal" be "established by law"

214. The Court observes that under its case-law, the object of the term "established by law" in Article 6 § 1 of the Convention is to ensure that the judicial organisation in a democratic society does not depend on the discretion of the executive, but that it is regulated by law emanating from Parliament (see *Zand v. Austria*, no. 7360/76, Commission's report of 12 October 1978, *Decisions and Reports* 15, p. 70, § 69, and *Miracle Europe Kft*, cited above, § 51).

215. At the same time, although the Court has emphasised the growing importance attached to the notion of separation of powers and the importance of safeguarding the independence of the judiciary (see *Baka v. Hungary* [GC], no. 20261/12, § 165, 23 June 2016), it has also noted that neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interaction (see, for instance, *Ramos Nunes de Carvalho e Sá*, cited above, § 144). In the Court's opinion, a

certain interaction between the three branches of government is not only inevitable, but also necessary, to the extent that the respective powers do not unduly encroach upon one another's functions and competences. The question is, once again, whether in a given case the requirements of the Convention are met (see *Kleyn and Others*, and *Henryk Urban and Ryszard Urban*, both cited above).

(iii) Review of the Court's case-law

216. The Court has held that, in principle, a violation by a "tribunal" of domestic legal provisions relating to the establishment and competence of judicial organs gives rise to a violation of Article 6 § 1 and that, therefore, it has jurisdiction to examine whether the domestic law has been complied with in this connection. However, having regard to the general principle that it is, in the first place, for the national courts themselves to interpret the provisions of domestic law, the Court has also found that it may not question their interpretation unless there has been a flagrant violation of domestic law (see, *mutatis mutandis*, *Lavents*, § 114, and *Kontalexis*, § 39, both cited above).

217. A review of the Court's existing case-law reveals that compliance with the requirement of a "tribunal established by law" has so far been examined in a variety of contexts – under both the criminal and civil limbs of Article 6 § 1 – including, but not limited to, the following:

(i) a court acting outside its jurisdiction (see *Coëme and Others v. Belgium*, nos. 32492/96 and 4 others, §§ 107-09, ECHR 2000-VII, and *Sokurenko and Strygun*, cited above, §§ 26-28);

(ii) the assignment or reassignment of a case to a particular judge or court (see *DMD GROUP, a.s.,*, cited above, §§ 62-72; *Richert*, cited above, §§ 41-57; *Miracle Europe Kft*, cited above, §§ 59-67; *Chim and Przywieczerski v. Poland*, nos. 36661/07 and 38433/07, §§ 138-42, 12 April 2018; and *Pasquini v. San Marino*, no. 50956/16, §§ 103 and 107, 2 May 2019);

(iii) the replacement of a judge without providing an adequate reason as required under the domestic law (see *Kontalexis*, cited above, §§ 42-44);

(iv) the tacit renewal of judges' terms of office for an indefinite period after their statutory term of office had expired and pending their reappointment (see *Gurov*, cited above, § 37, and *Oleksandr Volkov v. Ukraine*, no. 21722/11, §§ 152-56, ECHR 2013);

(v) trial by a court where some members of the bench were disqualified by law from sitting in the case (see *Lavents*, cited above, § 115, and *Zeynalov v. Azerbaijan*, no. 31848/07, § 31, 30 May 2013);

(vi) trial by a bench the majority of which was composed of lay judges despite the absence of a legal basis in domestic law for the exercise of judicial functions as a lay judge (see *Gorguiladzé*, § 74, and *Pandjikidzé and Others*, § 110, both cited above);

(vii) the participation of lay judges in hearings in contravention of the relevant domestic legislation on lay judges (see *Posokhov v. Russia*, no. 63486/00, §§ 39-44, ECHR 2003-IV);

(viii) trial by lay judges who had not been appointed in compliance with the procedure established by the domestic law (see *Ilatovskiy v. Russia*, no. 6945/04, §§ 38-42, 9 July 2009);

(ix) delivery of a judgment by a panel which had been composed of a smaller number of members than that provided for by law (see *Momčilović v. Serbia*, no. 23103/07, § 32, 2 April 2013, and *Jeniţa Mocanu v. Romania*, no. 11770/08, § 41, 17 December 2013);

(x) conduct of court proceedings by a court administrator who was not authorised under the relevant domestic law to conduct such proceedings (see *Ezgeta*, cited above, § 44).

(b) Refining the case-law principles

218. The instant case provides the Grand Chamber with an opportunity to refine and clarify the meaning to be given to the concept of a "tribunal established by law", and to analyse its relationship with the other "institutional requirements" under Article 6 § 1 of the Convention, namely, those of independence and impartiality. The Court will therefore first analyse the individual components of that concept and discuss how the terms "tribunal", "established" and "by law" should be interpreted so as to best reflect its purpose and, ultimately, to ensure that the protection it offers is truly effective. It will then examine the interaction between the requirement of a tribunal established by law and the conditions of independence and impartiality.

(i) "Tribunal"

219. According to the Court's settled case-law, a "tribunal" is characterised in the substantive sense of the term by its judicial function, that is to say, determining matters within its competence on the basis of legal rules and after proceedings conducted in a prescribed manner. It must also satisfy a series of further requirements, such as "independence, in particular of the executive; impartiality; duration of its members' terms of office; ..." (see, for example, *Belilos v. Switzerland*, 29 April 1988, § 64, Series A no. 132).

220. In the Court's view, in addition to the above, it is inherent in the very notion of a "tribunal" that it be composed of judges selected on the basis of merit – that is, judges who fulfil the requirements of technical competence and moral integrity to perform the judicial functions required of it in a State governed by the rule of law.

221. The Court notes, in this regard, the emphasis that is placed on these qualities of technical competence and moral integrity of judges in various

prominent international texts as an aspect of the right to a fair trial before an independent and impartial "tribunal" established by law. It would refer in this connection to paragraph 25 of Opinion no. 1 (2001) of the CCJE, which recommends that "the authorities responsible in member States for making and advising on appointments and promotions should now introduce, publish and give effect to objective criteria, with the aim of ensuring that the selection and career of judges are 'based on merit, having regard to qualifications, integrity, ability and efficiency'" (see paragraph 124 above). It further takes into account the international material cited in paragraphs 117, 129, and 145-147 above.

222. The Court is mindful that neither the characterisation of the Court of Appeal as a "tribunal", nor the merits of the judges appointed to that court, are as such contested in the present case. It nevertheless emphasises the paramount importance of a rigorous process for the appointment of ordinary judges to ensure that the most qualified candidates – in terms of both technical competence and moral integrity – are appointed to judicial posts. It goes without saying that the higher a tribunal is placed in the judicial hierarchy, the more demanding the applicable selection criteria should be. It is further evident that non-professional judges could be subject to different selection criteria, particularly when it comes to the requisite technical competencies. In the Court's view, such merit-based selection not only ensures the technical capacity of a judicial body to deliver justice as a "tribunal", but it is also crucial in terms of ensuring public confidence in the judiciary and serves as a supplementary guarantee of the personal independence of judges[10].

(ii) "Established"

223. The Court reiterates that according to its settled case-law, the phrase "established by law" covers not only the legal basis for the very existence of a "tribunal" but also the compliance by the court or tribunal with the particular rules that govern it and the composition of the bench in each case (see the cases cited in paragraph 213 above). The scope of

[10] See, in support of this argument, Principle 10 of the UN Basic Principles on the Independence of the Judiciary; paragraph 19 of the UN Human Rights Committee General Comment no. 32; paragraph 44 of Recommendation CM/Rec 2010(12) of the Committee of Ministers of the Council of Europe; paragraph 25 of Opinion no. 1 (2001) of the CCJE; and the Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence, which are cited in paragraphs 117, 118, 121, 124, 125 and 145 above respectively; see also the CJEU judgment in Joined Cases C-585/18, C-624/18 and C-625/18 dated 19 November 2019 (noted in paragraph 138 above), where the CJEU affirmed the necessity to ensure that "the substantive conditions and detailed procedural rules governing the adoption of [judicial] appointment decisions are such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them, once appointed as judges".

application of the requirement of a "tribunal established by law" may, therefore, not be confined to instances where a judicial body lacked the competence to act as a court or tribunal under domestic law, as argued by the Government in paragraph 175 above.

224. The Court further observes, as the Government have also indicated (see paragraphs 185 and 188 above), that its case-law on the requirement of a "tribunal established by law" has so far predominantly concerned breaches of domestic rules directly regulating the competence of a tribunal to rule on a particular case, or of those rules which had immediate effects on the composition of a tribunal hearing an applicant's case. The question that needs to be answered for the purposes of the present case is whether breaches of domestic law that have occurred at the stage of the initial appointment of a judge to serve at a particular court may also be liable to violate the right to a "tribunal established by law".

225. The Court notes in this connection that there is some precedent in its case-law pointing in that direction, such as the case of *Ilatovskiy* (cited above, §§ 39-42). That case concerned the conviction of an applicant (in 2002) by a district court composed of one professional judge and two lay judges, who had been appointed as lay judges in 1991 and 1999, respectively. Having established that the appointment of the lay judges in question had not been in compliance with the relevant domestic procedure in force at the material time, the Court concluded that the district court which had given the judgment against the applicant with those lay judges' participation could not be regarded as a "tribunal established by law". The judgment in *Ilatovskiy*, despite its differences from the present case, provides a clear example of a situation where irregularities in the appointment procedure may compromise the legitimacy of a court or tribunal, in which the appointed judges later participate, as one "established by law".

226. This correlation between the procedure for the appointment of a judge and the "lawfulness" of the bench on which such a judge subsequently sits also finds support in the purpose of the "established by law" requirement, as explained in paragraph 214 above. That requirement reflects the principle of the rule of law and seeks to protect the judiciary against unlawful external influence, from the executive in particular (see paragraph 211 above), although it cannot be excluded that such unlawful interference may also emanate from the legislature or from within the judiciary itself. It moreover encompasses any provision of domestic law – including, in particular, provisions concerning the independence of the members of a court – which, if breached, would render the participation of one or more judges in the examination of a case "irregular" (see paragraph 212 above). The Court is aware that the process of appointment of judges may be open to such undue interference, and finds that it therefore calls for strict scrutiny; moreover, it is evident that breaches of the law

regulating the judicial appointment process may render the participation of the relevant judge in the examination of a case "irregular".

227. As the CCJE observed in an opinion issued in 2015, "[e]ach individual judge who is appointed in accordance with the constitution and other applicable rules thereby obtains his or her constitutional authority and legitimacy" (see paragraph 126 above), therefore suggesting that a judge appointed in contravention of the relevant rules may lack the legitimacy to serve as a judge. Having regard to its fundamental implications for the proper functioning and the legitimacy of the judiciary in a democratic State governed by the rule of law, the Court considers that the process of appointing judges necessarily constitutes an inherent element of the concept of "establishment" of a court or tribunal "by law", and an interpretation to the contrary would defy the purpose of the relevant requirement. The Court reiterates in this connection that the Convention "is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective" (see, for instance, *Coëme and Others*, § 98, cited above).

228. The Court also emphasises in this connection that, according to the results of the comparative survey that it has carried out, nearly half of the States surveyed (that is, nineteen out of forty) interpret the requirement of a "tribunal established by law" as clearly encompassing the process of the initial appointment of a judge to office. There is, therefore, already a considerable consensus among the States surveyed in this regard and this cannot be overlooked by the Court. The results further show that in many other States this matter remains undetermined; it cannot, therefore, be excluded that if a similar question were to arise in those States as well, the domestic courts *could*, in principle, interpret the requirement of a "tribunal established by law" as covering the process of judicial appointment. The Court lastly refers in this connection to the judgment delivered on 26 March 2020 by the CJEU in the cases of *Simpson* and *HG*, where it was acknowledged (by reference to the Chamber judgment in the present case) that the right to a "tribunal established by law" encompassed the process of appointing judges (see paragraphs 74 and 75 of the CJEU judgment noted in paragraph 137 above).

(iii) "By law"

229. The nature and scope of the cases that have so far come before the Court in respect of the "tribunal established by law" requirement have mostly called for a determination as to whether a court overseeing a case had any legal basis in domestic law and whether the requirements arising from the relevant domestic law had been complied with in the constitution and functioning of that court. The Court wishes to clarify in this connection that, contrary to the Government's arguments (see paragraph 175 above), it has interpreted the requirement of a "tribunal established by law" also to mean a "tribunal established in accordance with the law" (see, *mutatis*

mutandis, *Ilatovskiy*, § 39; *Momčilović*, § 29; and *Jeniţa Mocanu*, § 37, all cited above). It considers this interpretation to be consonant with the general object and purpose of the relevant requirement and sees no reason to depart from it.

230. The Court would also like to emphasise at this juncture that the requirement that a tribunal be established "by law" in no way seeks to impose uniformity in the judicial appointment practices of the member States. As indicated above (see paragraph 207), the Court is well aware that there are varying judicial appointment systems across Europe, and the mere fact that the executive, in particular, has decisive influence on appointments – as is the case in many States Parties, where the restraints on executive powers by legal culture and other accountability mechanisms, coupled with a long-standing practice of selecting highly qualified candidates with an independent state of mind, serve to preserve the independence and legitimacy of the judiciary – may not as such be considered to detract from the characterisation of a court or tribunal as one established "by law". The concern here relates solely to ensuring that the relevant domestic law on judicial appointments is couched in unequivocal terms, to the extent possible, so as not to allow arbitrary interferences in the appointment process, including by the executive.

(iv) Interrelationship between the requirements of "independence", "impartiality" and "tribunal established by law"

231. Although the right to a "tribunal established by law" is a stand-alone right under Article 6 § 1 of the Convention, a very close interrelationship has been formulated in the Court's case-law between that specific right and the guarantees of "independence" and "impartiality".

232. In this connection, and as stated above (see paragraph 219), the Court has held that a judicial body which does not satisfy the requirements of independence – in particular from the executive – and of impartiality may not even be characterised as a "tribunal" for the purposes of Article 6 § 1. Similarly, when determining whether a "tribunal" is "established by law", the reference to "law" comprises any provision of domestic law – including, in particular, provisions concerning the independence of the members of a court – which, if breached, would render the participation of one or more judges in the examination of a case "irregular" (see paragraph 212 above). The Court moreover notes that in order to establish whether a court can be considered to be "independent" within the meaning of Article 6 § 1, regard must be had, *inter alia*, to the manner of appointment of its members (see, for instance, *Ramos Nunes de Carvalho e Sá*, cited above, § 144), which, as discussed above (see paragraphs 224-228), pertains to the domain of the establishment of a "tribunal".

233. Accordingly, while they each serve specific purposes as distinct fair-trial guarantees, the Court discerns a common thread running through

the institutional requirements of Article 6 § 1, in that they are guided by the aim of upholding the fundamental principles of the rule of law and the separation of powers. The Court notes that the need to maintain public confidence in the judiciary and to safeguard its independence *vis-à-vis* the other powers underlies each of those requirements (see in this regard the object of the right to a "tribunal established by law", as noted in paragraphs 214 and 215 above). In the Court's view, the recognition of this close connection and common purpose does not, as the Government have argued (see paragraph 192 above), lead to the obscuring of their specific functions or to their duplication, but serves only to reinforce their respective objects and effects.

234. The Court takes the view, against this background, that the examination under the "tribunal established by law" requirement must not lose sight of this common purpose and must systematically enquire whether the alleged irregularity in a given case was of such gravity as to undermine the above-mentioned fundamental principles and to compromise the independence of the court in question. "Independence" refers, in this connection, to the necessary personal and institutional independence that is required for impartial decision-making, and it is thus a prerequisite for impartiality. It characterises both (i) a state of mind, which denotes a judge's imperviousness to external pressure as a matter of moral integrity and (ii) a set of institutional and operational arrangements – involving both a procedure by which judges can be appointed in a manner that ensures their independence and selection criteria based on merit – which must provide safeguards against undue influence and/or unfettered discretion of the other State powers, both at the initial stage of the appointment of a judge and during the exercise of his or her duties (see, *mutatis mutandis*, *Khrykin v. Russia*, no. 33186/08, §§ 28-30, 19 April 2011).

3. Whether the irregularities in the present case amounted to a violation of the right to a "tribunal established by law": the threshold test

235. Having confirmed the scope of the right to a tribunal established by law, the requirements that follow from that right and its relationship to the principles of independence and impartiality, it now falls on the Court to determine whether the irregularities encountered in the judicial appointment procedure at issue had the effect of depriving the applicant of his right to a "tribunal established by law". Examination of that matter in turn raises the basic question whether any form of irregularity in a judicial appointment process, however minor or technical that irregularity may be, and regardless of when the breach may have taken place, could automatically contravene that right.

(a) Is there a need to set a threshold test?

236. The Court considers at the outset that, having regard to the potential implications of finding a violation, and to the important countervailing interests at stake, the right to a "tribunal established by law" should not be construed in an overly expansive manner, whereby any and all irregularities in a judicial appointment procedure would be liable to compromise that right. A degree of restraint should instead be exercised when dealing with this matter.

237. The Court reiterates in this regard that the right to a fair trial under Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which, in its relevant part, declares the rule of law to be part of the common heritage of the Contracting States. As noted in paragraph 211 above, the right to "a tribunal established by law" is a reflection of this very principle of the rule of law and, as such, it plays an important role in upholding the separation of powers and the independence and legitimacy of the judiciary as required in a democratic society. That said, the principle of the rule of law also encompasses a number of other equally important principles, which, although interrelated and often complementary, may in some circumstances come into competition.

238. The Court firstly refers in this connection to the principle of legal certainty, which is implicit in all the Articles of the Convention (see *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], no. 13279/05, § 56, 20 October 2011; see also the Rule of Law Checklist prepared by the Venice Commission, paragraph 123 above, where legal certainty is identified as one of the benchmarks of the rule of law). Under Convention law, the principle of legal certainty manifests itself in different forms and contexts, such as requiring the law to be clearly defined and foreseeable in its application (see, for instance, *Medvedyev and Others v. France* [GC], no. 3394/03, § 80, ECHR 2010, in the context of Article 5 of the Convention), or requiring that where the courts have finally determined an issue, their ruling should not be called into question (see, for instance, *Brumărescu v. Romania* [GC], no. 28342/95, § 61, ECHR 1999-VII). This latter aspect of legal certainty presupposes, in general, respect for the principle of *res judicata*, which, by safeguarding the finality of judgments and the rights of the parties to the domestic proceedings – including any persons involved as victims – serves to ensure the stability of the judicial system and contributes to public confidence in the courts. According to the Court's settled case-law, while the requirements of the principle of legal certainty, and the force of *res judicata*, are not absolute (see, for an example in the criminal-law sphere, *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, § 62, 11 July 2017), a departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character, such as the correction of fundamental defects or a miscarriage of justice (see, for instance, *Ryabykh v. Russia*, no. 52854/99, § 52, ECHR 2003-IX, and

OOO Link Oil SPB v. Russia (dec.), no. 42600/05, 25 June 2009). These notions do not, however, lend themselves to precise definition; the Court has to decide, in each case, to what extent the departure from the principle of legal certainty is justified (see, for instance, *Sutyazhnik v. Russia*, no. 8269/02, § 35, 23 July 2009).

239. The Court secondly notes as relevant the principle of the irremovability of judges during their term of office. This principle is in general considered as a corollary of judges' independence – which is a prerequisite to the rule of law – and thus included in the guarantees of Article 6 § 1 (see the principles on the irremovability of judges emerging from the Court's case-law under Article 6 § 1 in *Maktouf and Damjanović*, cited above, § 49; *Fruni v. Slovakia*, no. 8014/07, § 145, 21 June 2011; and *Henryk Urban and Ryszard Urban*, cited above, § 53; see also paragraph 20 of General Comment no. 32 of the UN Human Rights Committee cited in paragraph 118 above; paragraph 57 of Opinion no. 1 (2001) of the CCJE, cited in paragraph 124 above; and *Baka*, cited above, §§ 72-87, for other relevant international material). However, as recently confirmed by the Grand Chamber of the CJEU in the case of *Commission v. Poland* (C-619/18), the principle of the irremovability of judges is similarly not absolute, although an exception to that principle would only be acceptable "if it is justified by a legitimate objective, it is proportionate in the light of that objective and inasmuch as it is not such as to raise reasonable doubt in the minds of individuals as to the imperviousness of the court concerned to external factors and its neutrality with respect to the interests before it" (see paragraph 139 above).

240. A finding that a court is not a "tribunal established by law" may, evidently, have considerable ramifications for the principles of legal certainty and irremovability of judges, principles which must be carefully observed having regard to the important purposes they serve. That said, upholding those principles at all costs, and at the expense of the requirements of "a tribunal established by law", may in certain circumstances inflict even further harm on the rule of law and on public confidence in the judiciary. As in all cases where the fundamental principles of the Convention come into conflict, a balance must therefore be struck in such instances to determine whether there is a pressing need – of a substantial and compelling character – justifying a departure from the principle of legal certainty and the force of *res judicata* (see, for instance, *Sutyazhnik*, cited above, § 38) and from the principle of irremovability of judges, as relevant, in the particular circumstances of a case.

241. The Grand Chamber notes that, while it did not spell it out as such, the Chamber indeed attempted to strike such a balance by introducing a "flagrant breach" test, whereby only the gravest breaches of the judicial appointment rules would amount to a violation of the right to a tribunal established by law, thereby raising a high threshold before an infringement

of such rules could give rise to a violation of Article 6 § 1 of the Convention (see paragraphs 101 et seq. of the Chamber judgment and paragraphs 156-159 above).

242. While the Grand Chamber endorses the logic and the general substance of the test introduced by the Chamber, which it will further develop below (see paragraphs 243-252 above), it should state at the outset that it will not apply the same "flagrant breach" concept here. It observes in this connection that the concept of a "flagrant breach" has so far been used by the Court in a variety of different contexts, including, as pertinent, to determine whether the Court may depart from a domestic court's interpretation as to whether there had been a breach of the domestic law in the first place, as part of its assessment under the "tribunal established by law" requirement (see, for instance, *Posokhov*, §§ 39-44, and *Kontalexis*, § 44, both cited above). Transposing that concept to a context such as the present one – where the breach of the domestic law has already been established by domestic courts in an unequivocal manner – for the purpose of determining the consequences of that breach for the applicant's right to a "tribunal established by law" may give rise to some ambiguity, as has been noted both in the dissenting opinion annexed to the Chamber judgment and in the Government's submissions (see paragraph 176 above).

(b) The threshold test developed by the Grand Chamber

243. The Court is mindful of the difficulties involved in devising a comprehensive balancing test to cater to the possible irregularities that may arise in the judicial appointment processes in different jurisdictions across Europe – all with their own rules and practices – and notes that many States have introduced various mechanisms or standards to deal with this complex matter domestically (see the findings of the comparative-law survey noted in paragraph 152-153 above). The Court further considers that the Contracting States should be afforded a certain margin of appreciation in this connection, since the national authorities are in principle better placed than the Court to assess how the interests of justice and the rule of law – with all its conflicting components – would be best served in a particular situation. It nevertheless considers that the following criteria, taken cumulatively, provide a solid basis to guide the Court – and ultimately the national courts – in an assessment of whether the irregularities in a given judicial appointment procedure were of such gravity as to entail a violation of the right to a tribunal established by law and of whether the balance between the competing principles has been struck fairly and proportionately by the relevant State authorities in the particular circumstances of a given case.

(i) The first step of the test

244. The Court considers in the first place that there must, in principle, be a *manifest* breach of the domestic law, in the sense that the breach must be objectively and genuinely identifiable as such. The Court notes, as mentioned in paragraphs 209 and 216 above, that it will in general cede to the national courts' interpretation as to whether there has been a breach of the domestic law, unless the breach is "flagrant" (see *Lavents*, cited above, § 114) – that is, unless the national courts' findings can be regarded as arbitrary or manifestly unreasonable (see, *mutatis mutandis*, *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 149, 20 March 2018, and *S., V. and A. v. Denmark* [GC], nos. 35553/12 and 2 others, § 148, 22 October 2018).

245. The Court emphasises, however, that the absence of a manifest breach of the domestic rules on judicial appointments does not as such rule out the possibility of a violation of the right to a tribunal established by law. There may indeed be circumstances where a judicial appointment procedure that is seemingly in compliance with the relevant domestic rules nevertheless produces results that are incompatible with the object and purpose of that Convention right (see, *mutatis mutandis*, *DMD GROUP, a.s.,*, cited above, §§ 62-72). In such circumstances, the Court must pursue its examination under the second and third limbs of the test set out below, as applicable, in order to determine whether the results of the application of the relevant domestic rules were compatible with the specific requirements of the right to a "tribunal established by law" within the meaning of the Convention.

(ii) The second step of the test

246. Secondly, the breach in question must be assessed in the light of the object and purpose of the requirement of a "tribunal established by law", namely to ensure the ability of the judiciary to perform its duties free of undue interference and thereby to preserve the rule of law and the separation of powers. Accordingly, breaches of a purely technical nature that have no bearing on the legitimacy of the appointment process must be considered to fall below the relevant threshold. To the contrary, breaches that wholly disregard the most fundamental rules in the appointment procedure – such as, for instance, the appointment of a person as judge who did not fulfil the relevant eligibility criteria – or breaches that may otherwise undermine the purpose and effect of the "established by law" requirement, as interpreted by the Court, must be considered to contravene that requirement.

247. The Court accordingly takes the view that only those breaches that relate to the fundamental rules of the procedure for appointing judges – that is, breaches that affect the essence of the right to a "tribunal established by law" – are likely to result in a violation of that right (see paragraph 102 of

the Chamber judgment). In particular, as the Chamber rightly pointed out, the Court "must look behind appearances and ascertain whether a breach of the applicable national rules on the appointment of judges created a real risk that the other organs of Government, in particular the executive, [could exercise] undue discretion undermining the integrity of the appointment process to an extent not envisaged by the national rules in force at the material time" (see paragraph 103 of the Chamber judgment).

(iii) The third step of the test

248. Thirdly, the Court considers that the review conducted by national courts, if any, as to the legal consequences – in terms of an individual's Convention rights – of a breach of a domestic rule on judicial appointments plays a significant role in determining whether such breach amounted to a violation of the right to a "tribunal established by law", and thus forms part of the test itself.

249. The Court finds it noteworthy to emphasise that if, as argued by the Government (see paragraphs 176 and 184 above), the national courts' findings were considered to be fully dispositive of the assessment under the "tribunal established by law" requirement, regardless of the nature, scope and quality of the review conducted by those courts – that is, if the Court was not entitled to assess for itself whether the consequences of the breach of the domestic judicial appointment rules were such as to violate Article 6 – then this autonomous Convention right would be devoid of any real protection in the present context.

250. In this connection, the Court is mindful of its fundamentally subsidiary role in the supervisory mechanism established by the Convention, whereby the Contracting Parties have the primary responsibility to secure the rights and freedoms defined in the Convention and the Protocols thereto (see, for instance, *Garib v. the Netherlands* [GC], no. 43494/09, § 137, 6 November 2017). It also notes, however, that the principle of subsidiarity imposes a shared responsibility between the States Parties and the Court, and that national authorities and courts must interpret and apply the domestic law in a manner that gives full effect to the Convention (see, in particular, the references to the İzmir and Brighton conferences and declarations in *Burmych and Others v. Ukraine* (striking out) [GC], nos. 46852/13 et al., §§ 120-22, 12 October 2017). It therefore follows that while it is primarily for the national authorities, notably the courts, to interpret and apply domestic law, it falls ultimately on the Court to determine whether the way in which that law is interpreted and applied produces consequences that are consistent with the principles of the Convention (see, for instance, *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 191, ECHR 2006-V, and *Carbonara and Ventura v. Italy*, no. 24638/94, § 68, ECHR 2000-VI).

251. Evidently, as mentioned in paragraph 244 above, when examining whether there has been a breach of the relevant domestic rules in a given case, the Court will in principle defer to the national courts' interpretation and application of domestic law – unless their findings are arbitrary or manifestly unreasonable. However, once a breach of the relevant domestic rules has been established, the assessment by the national courts of the legal effects of such breach must be carried out on the basis of the relevant Convention case-law and the principles derived therefrom. Where the national courts have duly assessed the facts and the complaints in the light of the Convention standards, have adequately weighed in the balance the competing interests at stake and have drawn the necessary conclusions, the Court would need strong reasons to substitute its assessment for that of the national courts (see, *mutatis mutandis*, *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 107, ECHR 2012, and *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, § 164, 27 June 2017). Accordingly, while the national courts have discretion in determining how to strike the relevant balance, as mentioned in paragraph 243 above, they are nevertheless required to comply with their obligations deriving from the Convention when they are carrying out that balancing exercise.

252. The Court lastly points out that while it is not within its competence to set a specific time-limit before which an irregularity in the appointment procedure could be challenged by an individual relying on the "tribunal established by law" right, it does not agree with the Government that the absence of such time-limit would in practice have the effect of rendering the appointments open to challenge indefinitely (see the Government's argument in paragraph 180 above). This is because, with the passage of time, the preservation of legal certainty will carry increasing weight in relation to the individual litigant's right to a "tribunal established by law" in the balancing exercise that must be carried out. Needless to say, account must also be taken of the evidential difficulties that would arise with the passage of time and of the relevant statutory time-limits that may be applicable in the domestic law of the Contracting Parties to challenges of such nature.

(c) Application of the test to the circumstances of the present case

253. It now falls on the Court to determine whether the facts of the present case gave rise to a violation of the right to a "tribunal established by law", in the light of the three-step test formulated above.

(i) Whether there was a manifest breach of the domestic law

254. The Court observes, as already noted in paragraph 208 above, that the Supreme Court of Iceland found in its judgments of 19 December 2017

and 24 May 2018 that the domestic law had not been complied with in two respects during the process of appointment of the Court of Appeal judges: firstly, by reason of the Minister of Justice's failure to carry out an independent evaluation of the facts or to provide adequate reasons for her departure from the Evaluation Committee's proposal, which had been contrary to section 10 of the Administrative Procedures Act; and secondly, because of the non-compliance of Parliament with the special voting procedure set out in temporary provision IV of the new Judiciary Act. The Court reiterates its position that there is no reason to call into question the Supreme Court's interpretation of the domestic law in this regard, which is also not disputed by the parties, and finds therefore that the first condition of the test is clearly satisfied.

(ii) Whether the breaches of the domestic law pertained to a fundamental rule of the procedure for appointing judges

255. As noted in paragraph 246 above, when determining whether a particular defect in the judicial appointment process was of such gravity as to amount to a violation of the right to a "tribunal established by law", regard must be had, *inter alia*, to the purpose of the law breached, that is, whether it sought to prevent any undue interference by the executive with the judiciary, and whether the breach in question undermined the very essence of the right to a "tribunal established by law". With this in mind, the Court will commence its examination under this head by exploring the relevant legal framework in Iceland governing the judicial appointment procedure, with the aim of identifying its object and purpose.

256. A review of the legislative developments concerning the judicial appointment process in Iceland demonstrates that, following a number of reform procedures, an elaborate judicial appointment system was put in place progressively, whereby an Evaluation Committee – an administrative committee acting independently of the executive and composed of five[11] members appointed by the Minister of Justice – tasked with assessing the qualifications of the candidates and determining those most qualified for the post, played a central role. Under the latest legislative changes, the Evaluation Committee, which initially had advisory status only, was subsequently granted the power to issue binding recommendations for judicial appointments to courts at all three levels. While the law did allow the Minister, exceptionally, to deviate from the Committee's assessment to

[11] When the Evaluation Committee was initially established on 19 May 1989 by Act no. 92/1989, it was composed of only three members (see paragraph 11 above). The former Judiciary Act, which had entered into force on 1 July 1998, originally maintained the composition of the Evaluation Committee. However, the number of members of the Committee was subsequently increased to five by Act no. 45/2010 which amended the former Judiciary Act in May 2010 (see paragraphs 13 and 14 above).

a certain extent, use of such discretion was always subject to the control of Parliament (see paragraphs 19 and 105 above).

257. It appears from the preparatory material in respect of Act no. 92/1989 and Act no. 45/2010 (see paragraphs 11 and 14 above), as well as from the submissions of the parties before this Court and information obtained *proprio motu* from international sources (see paragraphs 161, 189, 120 and 128 above respectively), that the main aim behind the establishment of such mechanism was to limit the influence of the executive in the appointment of judges and thereby to strengthen the independence of the judiciary in Iceland. In their 2010 report submitted to the United Nations Human Rights Committee on the implementation of the ICCPR, the government of Iceland expressly stated that the relevant legislative changes had come about as a response to the growing concerns in that State that the rules governing the selection and appointment of judges did not sufficiently guarantee the independence of the judiciary, on account of the role played by ministers in the appointment process (see paragraph 120 above). Similarly, in its evaluation report on Iceland published in 2013, GRECO pointed out that "before the new [appointment] system applied, the Minister was not bound to follow the advice of the relevant judicial bodies when appointing a person to judicial office and indeed it happened in the past that appointments were made arbitrarily raising criticism as to political influence having filtered in the process" (see paragraph 128 above).

258. The Court notes that, as a supplementary guarantee against arbitrariness, the Supreme Court had made it clear as early as 2011 – at which point in time the Evaluation Committee enjoyed only an advisory role – that when using the statutory right to depart from the Committee's assessment, the Minister of Justice had to base his or her decision on sufficient investigation and assessment, in accordance with the requirement under section 10 of the Administrative Procedures Act and the general principle of Icelandic administrative law calling for the appointment of the most qualified candidates to public posts (see paragraph 115 above).

259. In the light of the foregoing explanations, it now falls to the Grand Chamber to determine whether the breaches in the procedure for the appointment of the four judges proposed by the Minister, including A.E., were of such gravity as to impair the legitimacy of the appointment process and to undermine the very essence of the right to a "tribunal established by law".

(α) The breaches committed by the Minister

260. According to the explanations that she provided to Parliament (see paragraphs 44 and 47 above), the Minister's decision to depart from the Evaluation Committee's assessment was mainly motivated by the need to accord more weight to judicial experience in the assessment of the

candidates – including subjective elements such as successful courtroom experience – and to achieve gender balance among the appointees.

261. The Court notes, by way of a preliminary remark, that the Evaluation Committee's decision to accord the same weight to judicial experience as to litigation and administrative experience had been in line with the relevant legislation, which had highlighted the desirability of varied professional experience (see the relevant references in the preparatory material in respect of Act no. 45/2010 and section 21 of the new Judiciary Act in paragraphs 14 and 105 above), as well as with the continuous practice followed by the committee up to that date, for at least the past four years (see the remarks by the Chairman of the committee in paragraph 40 above). The Chairman had emphasised in this regard that changing the weightings after the submission of candidatures, for the benefit of particular candidates and to the disadvantage of others, had to be avoided (ibid.).

262. The Court further notes that the committee's assessment method had also been in compliance with the gender balance requirements of the Equality Act (no. 10/2008). It observes in this connection that the Supreme Court of Iceland clearly stated in its judgments of 19 December 2017 that the Minister of Justice could not rely on considerations of gender under the Equality Act, as those were only applicable in cases where two candidates of different genders had been considered equally qualified, and that the inadequate investigation by the Minister was not such as to allow her to reach such a decision (see paragraph 73 above).

263. However, even supposing that the Evaluation Committee's assessment had been flawed in these areas – or that the method used was too technical (see the Parliamentary Ombudsman's report of 2016 cited in paragraph 116 above, which cautioned against the use of overly technical assessment methods in appointments to public posts in general) – and that, therefore, the Minister of Justice departed from the Committee's opinion on legitimate grounds, the thrust of the Supreme Court's finding in its December 2017 judgments was that the Minister had simply failed to explain why she had picked one candidate over another, as she was required to do under section 10 of the Administrative Procedures Act. The Minister's disagreement with the Committee's assessment method did not, therefore, absolve her from the obligation to provide solid reasons for her decision to depart from that neutral assessment.

264. The Court notes that the Government placed much emphasis in their observations on the argument that, according to the Committee's assessment table, all four of the candidates introduced to the list by the Minister of Justice, including A.E., had scored more points in judicial experience than the four removed (see paragraph 182 above). While that is true, the Court agrees with the Supreme Court that this information alone does not suffice to explain why those four particular candidates were removed from the list, or why the other four particular candidates were

added. It notes in this regard that in the original list prepared by the Evaluation Committee, there were candidates who had scored lower in judicial experience than the four removed – including two candidates who had not scored any points at all – who the Minister nevertheless decided to keep on the list. Similarly, among the eighteen candidates who had not been recommended by the Committee, there were those – including a female candidate – who had scored higher in judicial experience than some of the four eventually chosen by the Minister[12]. The Government explained that the Minister's assessment had not been based on a purely mathematical exercise and that she had had regard to subjective factors such as the "success" of a candidate in his or her career. However, the absence of any further explanation as to how she had measured "success", or any comparison of all the candidates from that perspective, calls into question the objectivity of the selection process.

265. In the Court's opinion this uncertainty surrounding the Minister's motives raises serious doubts of irregular interference by the Minister in the judiciary and thus taints the legitimacy of the whole procedure. This is particularly so considering that the Minister was a member of one of the political parties composing the majority in the coalition government, by whose votes alone her proposal was adopted in Parliament (see paragraph 53 above). Moreover, the Court cannot ignore, in this connection, the applicant's allegations regarding the overall political context within which the Minister made her proposals (see paragraphs 46 and 89 above). While the Court would not affirm that the Minister acted out of political motives, as alleged by the applicant, it considers that the Minister's actions were of such a nature as to prompt objectively justified concerns to that effect, and this is sufficient also to detract from the transparency of the selection process.

266. The Minister's failure to comply with the relevant rules was all the more serious considering that she had been reminded of her legal obligations in this regard on a number of occasions, by her own legal advisers, the Chairman of the Evaluation Committee and the *ad hoc* Permanent Secretary of the Ministry of Justice (see paragraphs 36, 40-42 and 38 respectively above). The Court also refers in this connection to the Supreme Court's finding in its December 2017 judgments that the Minister had acted "in complete disregard of [the] obvious danger" to the reputational interests of the shortlisted candidates whose names had been removed (see paragraph 75 above). It is therefore fair to conclude that the Minister's actions seem to have been taken in full awareness of her obligations under the applicable domestic law.

267. Having regard to the breaches committed by the Minister of Justice, and to the circumstances in which they took place, the Court considers that

[12] See footnote 6 above.

they may not be downplayed as mere technical or procedural irregularities, as argued by the Government, but constitute grave irregularities that go to the essence of the right to a "tribunal established by law".

(β) The shortcomings in the procedure before Parliament

268. The Court observes that the former Judiciary Act, as amended by Act no. 45/2010, gave Parliament a key role in the procedure for the election of judges (see paragraphs 14 and 103 above). This role was further strengthened by the new Judiciary Act in the process of the first round of appointments of the new Court of Appeal judges, whereby Parliament was tasked with approving each of the fifteen candidates proposed by the Minister of Justice, regardless of whether the Minister had deviated from the Evaluation Committee's proposals or not (see paragraphs 19 and 105 above).

269. In the instant case the Court considers, as also noted by the Supreme Court in its December 2017 judgments, that Parliament could have taken an informed position on the Minister's proposal, and thus have performed a meaningful supervision of the appointment process, only if the Minister had given due reasons – based on adequate investigation and assessment – for her proposal to depart from the Evaluation Committee's opinion, which she failed to do. However, contrary to the spirit of its statutory duty to safeguard the legitimacy of the appointment process, Parliament chose to overlook this important shortcoming. Consequently, "the deficiencies in the procedure before the Minister of Justice had in turn resulted in a flawed procedure before Parliament, as those deficiencies were not rectified when the matter came to a vote in Parliament" (see paragraph 74 above), as held by the Supreme Court.

270. The Court further notes that not only did Parliament fail to demand that the Minister provide objective reasons for her proposals to enable it to perform its duty effectively, but also – as the Supreme Court has acknowledged – it did not comply with the special voting rules set out in temporary provision IV of the new Judiciary Act by putting the Minister's proposal to a vote *en bloc*, instead of voting on each candidate separately. Arguably, this failure on the part of Parliament would not, on its own, have amounted to a violation of the right to a "tribunal established by law", particularly bearing in mind that the members of parliament had been offered the opportunity to request separate voting (see paragraphs 51-52 above; see also the Supreme Court's finding noted in paragraph 70 above that the vote *en bloc* did not pose an irregularity in respect of the eleven candidates retained from the Committee's original list). That said, the voting procedure surely compounded the grave breach already committed by the Minister of Justice in respect of the four candidates she had proposed and undermined Parliament's role as a check against the exercise of undue executive discretion in judicial appointments.

Accordingly, the applicant's belief that Parliament's decision was driven primarily by party political considerations may not be considered to be unwarranted.

271. The Court therefore considers that while the special parliamentary voting procedure provided for under the new Judiciary Act had sought to strengthen the legitimacy of the appointments to the newly established Court of Appeal (see the Government's argument to this effect in paragraph 189 above), the intervention of Parliament did not produce the desired effect, on the instant facts – that is, Parliament did not fulfil its duty as the guarantor of the lawfulness of the appointments procedure as regards the four candidates in question.

(γ) Concluding remarks under the second step of the test

272. In the light of the foregoing, the Court considers that there has been a grave breach of a fundamental rule of the procedure for appointing judges to the Court of Appeal in the instant case. The Court will therefore turn to the third step of the test, namely that of the review conducted by the domestic courts.

(iii) Whether the allegations regarding the right to a "tribunal established by law" were effectively reviewed and remedied by the domestic courts

(α) The review conducted by the Supreme Court in the applicant's case

273. As noted in detail in paragraph 89 above, the applicant argued before the Supreme Court that he had been denied the right to a fair hearing before an independent and impartial "tribunal established by law" on account of the irregularities in the appointment of Judge A.E., who had sat on the bench of the Court of Appeal in his case. He maintained in this connection, *inter alia*, that the requirement both under the Icelandic Constitution and the Convention for a court to be established by law entailed "not only a mandatory condition that general rules on appointments to the judiciary must be clearly enshrined in statute law, but also, and no less importantly, a mandatory condition that the appointment of judges in each instance must be in compliance with the law". Contrary to the Government's allegations (noted in paragraph 191 above), the applicant also raised before the Supreme Court his concerns about the political motivations behind the Minister's proposals, and expressly mentioned his suspicions regarding her involvement with B.N. (see paragraph 89 above).

274. The Court notes that the Supreme Court dismissed the applicant's appeal following two main lines of argument (see paragraph 90 above). It first found that although the vote held in Parliament had not complied with the special voting procedure set out in temporary provision IV of the new Judiciary Act, this defect was not significant and the appointment process had otherwise been conducted in accordance with the formal procedures set

out in that Act and that temporary provision. Bearing this in mind, and noting in addition that all thirty-three candidates had fulfilled the legal requirements to hold the office of judge at the Court of Appeal, and that fifteen of those candidates had moreover been appointed to such office by letters signed by the President of Iceland and co-signed by the Minister of Justice, the Supreme Court held that it could not be concluded that the appointment of A.E. had constituted a "nullity" (*markleysa*) or that the judgments delivered with her participation had been a "dead letter".

275. Secondly, the Supreme Court acknowledged that the procedure followed by the Minister of Justice in the appointment process had not complied with certain national rules on judicial appointments, as already established in its judgments of 19 December 2017. It held, nevertheless, that the appointment of all fifteen judges to the Court of Appeal, for an indefinite term, had "become a reality" upon the signing of the letters of appointment by the President, and from that time onwards, they had been under an obligation to follow only the law in the performance of their duties and to perform those duties independently. In those circumstances, the Supreme Court found no sufficient reason to justifiably doubt that the applicant had enjoyed a fair trial before independent and impartial judges, in spite of the flaws in the procedure attributable to the Minister of Justice.

276. In his observations submitted to the Court, the applicant argued that the judgment in question had been defective because the Supreme Court (i) had contradicted its earlier findings in the judgments of December 2017 and (ii) had failed to carry out a proper review of the Court of Appeal's compliance with the "established by law" requirement in the light of the relevant principles established in the Court's case-law, or to examine independently whether the breaches at issue had been "serious" or not (see paragraph 162 above).

277. The Government, for their part, stated that the Supreme Court had examined and addressed all relevant matters concerning A.E.'s appointment and the applicant's right to be heard by a "tribunal established by law". Following such examination, the Supreme Court had found that, as a matter of domestic law, A.E.'s status as a lawfully appointed judge had been unaffected by the procedural flaws identified and that, therefore, the Court of Appeal did not lack competence to act as a "tribunal" by virtue of A.E.'s presence on its bench. It was essential in this regard not to confuse the legal effects of the procedural flaw in question regarding the other candidates with the legal effects of the same flaw on the status of A.E. as a judge or on the applicant's case. The Government contended that the principle of subsidiarity required the Court to follow the Supreme Court's findings in this connection (see paragraphs 174, 184 and 186 above).

(β) The Court's analysis of the review conducted by the Supreme Court

278. The Court notes that the Supreme Court had the power to address and remedy the effects of the above-mentioned irregularities on the applicant's fair-trial rights by declaring that he had not been tried by a "tribunal established by law" – on account of the participation of Judge A.E. in his case at the Court of Appeal level – and by quashing the relevant Court of Appeal judgment. It is uncontested that in its judgment of 24 May 2018 concerning the applicant, the Supreme Court endorsed its earlier findings regarding the breaches committed by the Minister and Parliament in the process of appointments to the Court of Appeal. The Court agrees with the applicant, however, that when subsequently examining the impact of those breaches on his right to a "tribunal established by law", the Supreme Court appears to have failed to draw the necessary conclusions from its own findings and to assess the matter in a Convention-compliant manner.

279. In this connection, while the Government contest that finding (see paragraph 186 above), a review of the Supreme Court's judgment strongly suggests that the Supreme Court limited its examination to finding (i) that the appointment of A.E. had not constituted a "nullity" under Icelandic law and (ii) that despite the flaws in the appointment procedure, the applicant had *nevertheless* enjoyed a fair trial before an independent and impartial "tribunal" (see paragraphs 113 and 114 of the Chamber judgment). In reaching these findings, the Supreme Court seems to have placed a great deal of emphasis on the mere fact that the appointments had become official upon signature by the President and that, from that point onwards, there was no reason to doubt that the fifteen Court of Appeal judges, all of whom had been found to be legally qualified for the post by the Evaluation Committee, would perform their tasks independently and in accordance with the law.

280. The Court has no reason to doubt that the appointments at issue did not, technically speaking, constitute a nullity (*markleysa*) under Icelandic law or that, once appointed, the individual judges would endeavour to observe the fair-trial requirements. However, none of those findings address as such the question whether the irregularities in the process leading to the appointment of A.E. had, by and of themselves, interfered with the applicant's right to a "tribunal established by law" as a distinct Article 6 safeguard, as interpreted by the Court.

281. The Court observes, as noted in paragraphs 89 and 273 above, that the applicant had raised some very specific and highly pertinent arguments as to why he considered the breaches at issue to violate, *inter alia*, the requirement that he be tried by an independent and impartial tribunal and one "established by law". The Supreme Court did not, however, respond to any of those allegations – including the allegations about political connections between the Minister of Justice and Judge A.E.'s husband, B.N. To the extent that the Government have argued that "the Supreme Court *had* examined all relevant matters concerning A.E.'s appointment and the

applicant's right to be heard by a tribunal established by law", the Court notes that such examination is not reflected in the judgment, and as such it remains unknown what that examination entailed and on what legal and factual grounds the Supreme Court reached the conclusion that it did. In other words, it is not clear from the Supreme Court's judgment why the procedural breaches it had identified in its earlier judgments (dated 19 December 2017) were not of such a nature as to compromise the lawfulness of the appointment of A.E. and, consequently, of her subsequent participation in the applicant's case.

282. In the Court's opinion, the way in which the Supreme Court's judgment was constructed, and the particular emphasis on the fact that the appointments of the fifteen judges, including A.E., had "bec[o]me a reality upon the signing of their letters of appointment" (see paragraph 90 above), suggests an acceptance, or even a resignation, on the part of that court that it had no real say over the matter once the appointments had become official. This understanding in fact finds support in the Government's submissions: it appears from their statement that, although, in theory, the Icelandic courts had the power to verify the lawfulness of judicial appointments and to quash judgments in which unlawfully appointed judges had participated, procedural breaches of the type encountered in the present case would, in practice, only result in an award of damages to the unsuccessful candidates. Thus there had "not been a case in the past half-century which suggested that the flaws in question would or could lead to the invalidation of a judicial appointment" (see paragraph 187 above).

283. The Court therefore notes that the restraint displayed by the Supreme Court in examining the applicant's case – and the failure to strike the right balance between preserving, in particular, the principle of legal certainty on the one hand, and upholding respect for the law on the other – was not specific to the facts of the instant case, but it was the Supreme Court's settled practice. The Court finds that this practice poses problems for two main reasons. It considers in the first place that it undermines the significant role played by the judiciary in maintaining the checks and balances inherent in the separation of powers. It notes secondly that, having regard to the significance and the implications of the breaches in question – as discussed above – and to the fundamentally important role played by the judiciary in a democratic State governed by the rule of law, the effects of such breaches may not justifiably be limited to the individual candidates who have been wronged by non-appointment, but necessarily concern the general public. The Court has on many occasions emphasised the special role in society of the judiciary, which, as the guarantor of justice, a fundamental value in a law-governed State, must enjoy public confidence if it is to be successful in carrying out its duties (see, for instance, *Morice v. France* [GC], no. 29369/10, § 128, ECHR 2015; *Baka*, cited above, § 164; and *Denisov v. Ukraine* [GC], no. 76639/11, § 63, 25 September

2018). The Court also refers in this connection to Opinion no. 1 (2001) of the CCJE, where it was stated that "[n]ot merely the parties to any particular dispute, but society as a whole must be able to trust the judiciary" (see paragraph 124 above).

284. As regards the balance that should have been struck by the Supreme Court between the competing interests at play, the Court deems it important to stress that while the passage of a certain period of time after an allegedly irregular judicial appointment process may in principle tip the balance in favour of "legal certainty" (as stated in paragraph 252 above), that was not the case on the present facts. It notes in this connection that as a result of the proceedings brought by two of the unsuccessful candidates in June 2017 (very shortly after the signing of the appointment letters by the President), the irregularities in the appointment procedure were established by the Supreme Court as early as 19 December 2017, barely two weeks prior to the date on which the fifteen selected candidates even took office. Moreover, the applicant in the present case requested the withdrawal of A.E. on 2 February 2018, that is only one month after she had begun serving, and the final judgment of the Supreme Court in his case was rendered on 24 May 2018, less than four months later. In other words, the appointment of A.E. and the other three candidates in question was contested at the national level immediately after the finalisation of the appointment procedure and the irregularities that vitiated their appointment had been established even before they took office. In these circumstances, the Court considers that the Government cannot reasonably rely on the principles of legal certainty or the security of judicial tenure to argue against a violation of the right to a "tribunal established by law" on the present facts.

285. On a related note, the Court also rejects the argument that the irregularities at issue were too "remote" from the applicant's case to have had any impact on his right to a tribunal established by law. The Government claimed in this regard that the irregularities had occurred long before Judge A.E. had sat in the applicant's case, bore no connection with his case and carried no implications for the independence or impartiality of A.E. (see paragraph 188 above). In the Court's opinion the requisite "proximity" between the irregularities at issue and the applicant's case was attained when, and only when, the irregularly appointed judge, A.E., sat on the bench of the Court of Appeal which heard his case. The Court notes that the applicant presumably had not had any legal interest, or standing, to contest A.E.'s appointment at an earlier stage. Moreover, the question whether the irregularities at issue had any actual implications for A.E.'s independence or impartiality, this being at the centre of the Supreme Court's examination of the applicant's case, did not as such have a direct bearing on the assessment of his separate complaint under the "tribunal established by law" requirement, as already noted in paragraph 280 above.

286. Having regard to the foregoing, the Court, as the ultimate authority on the application and interpretation of the Convention, cannot accept the review undertaken by the Supreme Court in the applicant's case, as it had no regard to the question whether the object of the safeguard enshrined in the "established by law" concept had been achieved (for other examples where the Court rejected the domestic courts' assessment regarding compliance with the "tribunal established by law" requirement, see, *inter alia*, *Miracle Europe Kft*, § 65, and *Chim and Przywieczerski*, §§ 138-42, both cited above).

(iv) Overall conclusion as to whether there has been a breach of Article 6 § 1 of the Convention as regards the right to a tribunal established by law

287. Over the past decades, the legal framework in Iceland governing judicial appointments has seen a number of important changes aimed at limiting ministerial discretion in the appointments process and thereby strengthening the independence of the judiciary. Controls on ministerial power were further intensified in connection with the process for the appointment of the judges to the newly established Court of Appeal, where Parliament was tasked with approving every candidate proposed by the Minister of Justice, whether that proposal followed the Evaluation Committee's assessment or not, in order to enhance the legitimacy of that new court.

288. However, as established by the Supreme Court of Iceland, that legal framework was breached during the process for the appointment of the new Court of Appeal judges, particularly by the Minister of Justice. While the Minister was authorised under the relevant law to depart from the Evaluation Committee's proposal – subject to certain conditions – she had, on the present facts, disregarded a fundamental procedural rule that obliged her to base her decision on sufficient investigation and assessment. This procedural rule was an important safeguard to prevent the Minister from acting out of political or other undue motives that would undermine the independence and the legitimacy of the Court of Appeal, and its breach in the present circumstances was tantamount to restoring the discretionary powers previously held by her office in the context of judicial appointments, thereby neutralising the important gains and guarantees brought by successive legislative reforms. The Court notes that there were further legal guarantees in place to remedy the breach committed by the Minister, such as the procedure before Parliament and the ultimate safeguard of judicial review of the procedure before domestic courts; however, as discussed above, all those safeguards proved ineffective, and the discretion used by the Minister to depart from the Evaluation Committee's assessment remained unfettered.

289. In the light of the foregoing and having regard to the three-step test set out above, the Court considers that the applicant has been denied his

right to a "tribunal established by law", on account of the participation in his trial of a judge whose appointment procedure was vitiated by grave irregularities that impaired the very essence of the right at issue.

290. The Court therefore concludes that there has been a violation of Article 6 § 1 of the Convention in this regard.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION AS REGARDS THE RIGHT TO AN INDEPENDENT AND IMPARTIAL TRIBUNAL

291. The applicant complained that he had been denied the right to an independent and impartial tribunal as provided for in Article 6 § 1 of the Convention, having regard to the presence of A.E. on the bench of the Court of Appeal which ruled on his case, in spite of the deficiencies in her appointment.

A. The Chamber judgment

292. The Chamber declared this complaint admissible in its judgment of 12 March 2019, but did not deem it necessary to examine it separately on the merits, in view of the conclusion it had reached in respect of the applicant's other complaint – concerning the right to a "tribunal established by law" – under the same provision (see paragraph 126 of the Chamber judgment).

B. The parties' submissions

293. The applicant mainly argued that, in assessing whether a tribunal satisfied the requirement of independence under Article 6 § 1, it was necessary to examine, *inter alia*, the manner of appointment of its members and to determine whether the tribunal presented an appearance of independence. Having regard to the irregularities in the procedure leading to the appointment of A.E., it could not be held that the Court of Appeal which ruled in his case had had the appearance of an independent and impartial tribunal. During the proceedings before the Grand Chamber, he supported this allegation with some supplementary arguments – such as the instrumental role allegedly played by the irregularly appointed judges in the election of the Court of Appeal's current president, who enjoyed full discretion in the allocation of the cases within that court – which, in his opinion, further demonstrated the lack of independence and impartiality of the Court of Appeal.

294. The Government argued, by reference to the criteria for an independent and impartial tribunal as set out under the Court's case-law, that neither the procedural flaw identified by the Supreme Court in the

appointment process, nor any other aspect of her appointment, could be taken to cast doubt on A.E.'s independence or impartiality as a judge. They noted in this regard that A.E. was a professional judge who had been recognised by the Evaluation Committee to be eligible for appointment. They further noted that according to the Court's settled case-law, the appointment of judges by the executive or the legislature was permissible, provided that appointees were free from influence or pressure when carrying out their adjudicatory role (see, for instance, *Maktouf and Damjanović*, cited above).

C. The Court's assessment

295. The Court notes that, in the present case, the complaints under the "tribunal established by law" and "independence and impartiality" requirements stem from the same underlying problem, that is, the irregularities in the appointment of A.E. as a judge of the Court of Appeal. As the Court has found above, the irregularities in question were of such gravity that they undermined the very essence of the right to be tried by a tribunal established in accordance with the law. Having made that finding, the Court concludes that the remaining question as to whether the same irregularities have also compromised the independence and impartiality of the same tribunal does not require further examination (see, *mutatis mutandis*, *Zeynalov*, § 28, and *Miracle Europe Kft*, §§ 57-67, both cited above).

III. APPLICATION OF ARTICLES 41 AND 46 OF THE CONVENTION

296. 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."

297. Article 46 of the Convention provides:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

A. Article 41 of the Convention

1. Damage

298. Before the Chamber the applicant claimed 5,000 euros (EUR) in respect of non-pecuniary damage. The Government objected to that claim as excessively high, and argued that the finding of a violation would in itself

constitute just satisfaction for any non-pecuniary damage sustained by the applicant.

299. The Chamber agreed with the Government that the finding of a violation of Article 6 § 1 of the Convention constituted in itself sufficient just satisfaction.

300. In the proceedings before the Grand Chamber the applicant did not alter his submissions under this head. The Government, for their part, did not comment on this point before the Grand Chamber.

301. The Grand Chamber considers that a finding of a violation can be regarded as sufficient just satisfaction in the present case, and thus rejects the applicant's claim under this head.

2. Costs and expenses

302. In the Chamber proceedings the applicant claimed EUR 26,795 for the costs and expenses incurred before the domestic courts, including the legal fees awarded by the Court of Appeal in the amount of approximately EUR 3,590. He also claimed EUR 20,150 for the costs and expenses incurred before the Court. The Government submitted in response that the legal fees awarded by the Court of Appeal had been paid by the Treasury in accordance with the Criminal Procedure Act and that the applicant had not submitted any invoice demonstrating that he had reimbursed the Treasury for that amount. The Government further asserted that the costs claimed before the domestic courts and the Court were excessively high.

303. The Chamber considered it reasonable to award the applicant the sum of EUR 15,000 covering costs under all heads.

304. Before the Grand Chamber the applicant repeated his claim for the costs and expenses incurred before the domestic courts (EUR 26,795). He also claimed EUR 95,472 for the costs and expenses incurred before the Court (that is, EUR 20,150 in respect of the Chamber proceedings and EUR 75,322 in respect of the Grand Chamber proceedings). The costs and expenses incurred before the Court included, in particular, lawyer's fees in the amount of approximately EUR 86,200, as well as translation costs of approximately EUR 6,760 and travel expenses of approximately EUR 1,250.

305. In support of his claims, the applicant submitted invoices issued by his representative, showing that the latter had carried out a total of 387 hours' work on the case (112 hours before the domestic instances and 275 hours on the application submitted to the Court, at an hourly rate of approximately EUR 255, plus 24% value-added tax), together with invoices documenting the translation and travel expenses. He did not, however, submit any proof to counter the Government's earlier allegation that he had not reimbursed the Treasury for the legal fees awarded by the Court of Appeal.

306. The Government did not comment on the applicant's claim for costs and expenses in the Grand Chamber proceedings.

307. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In accordance with Rule 60 § 2 of the Rules of Court, itemised particulars of all claims must be submitted, failing which the Court may reject the claim in whole or in part (see *A, B and C v. Ireland* [GC], no. 25579/05, § 281, ECHR 2010).

308. The Court notes at the outset that the applicant's costs and expenses before the domestic courts were incurred only partially to prevent or rectify a violation of a Convention right in the instant case; it further notes that the costs before the Court of Appeal were met in part by the Treasury and that the costs before the District Court bore no relation to the violation found. The Court further finds that the number of hours claimed and the total amount of legal costs requested – both domestically and in connection with the proceedings before the Court – appear excessive (see, for instance, *Karácsony and Others v. Hungary* [GC], nos. 42461/13 and 44357/13, § 190, 17 May 2016).

309. In the light of the above considerations, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicant EUR 20,000 covering costs and expenses under all heads.

3. Default interest

310. 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.

B. Article 46 of the Convention

311. The Court reiterates that under Article 46 of the Convention the Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers. It follows, *inter alia*, that a judgment in which the Court finds a breach of the Convention or the Protocols thereto imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and to redress as far as possible the effects (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII, and *Stanev v. Bulgaria* [GC], no. 36760/06, § 254, ECHR 2012).

312. The Court further notes that its judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order in order to discharge its obligation under Article 46 of the Convention (see, for instance, *Öcalan v. Turkey* [GC], no. 46221/99, § 210, ECHR 2005-IV), provided that such means are compatible with the conclusions and spirit of the Court's judgment (see, for instance, *Scozzari and Giunta*, cited above, § 249, and *Ilgar Mammadov v. Azerbaijan* (infringement proceedings) [GC], no. 15172/13, §§ 148-49, 29 May 2019). However, in certain special circumstances the Court has found it useful to indicate to a respondent State the type of measures that might be taken to put an end to the situation – often a systemic one – which has given rise to the finding of a violation (see, for instance, *Ilgar Mammadov*, cited above, § 153).

313. Turning to the facts before it, the Court notes that the applicant's representative was expressly asked at the hearing whether the applicant would seek the reopening of the criminal proceedings against him in the event of a finding of a violation of Article 6 in the instant case, and the representative responded in the negative. While the applicant's representative has subsequently requested – in his written response to the questions from judges at the hearing (see paragraph 10 above) – to retract that statement, the Court considers that this subsequent request may not be taken into account in the absence of sufficient justification to explain the change in the applicant's previous position.

314. The Court further considers that in accordance with its obligations under Article 46 of the Convention, it falls upon the respondent State to draw the necessary conclusions from the present judgment and to take any general measures as appropriate in order to solve the problems that have led to the Court's findings and to prevent similar violations from taking place in the future. That being said, the Court would emphasise that the finding of a violation in the present case may not as such be taken to impose on the respondent State an obligation under the Convention to reopen all similar cases that have since become *res judicata* in accordance with Icelandic law.

FOR THESE REASONS, THE COURT

1. *Holds*, unanimously, that there has been a violation of Article 6 § 1 of the Convention as regards the right to a tribunal established by law;

2. *Holds*, by twelve votes to five, that there is no need to examine the remaining complaints under Article 6 § 1 of the Convention;

3. *Holds*, by thirteen votes to four, that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

4. *Holds*, unanimously,
   (a) that the respondent State is to pay the applicant, within three months, EUR 20,000 (twenty thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses*, by thirteen votes to four, the remainder of the applicant's claim for just satisfaction.

Done in English and French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 1 December 2020.

Marialena Tsirli Registrar	Jon Fridrik Kjølbro President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) partly concurring, partly dissenting opinion of Judge Pinto de Albuquerque;
(b) joint partly concurring, partly dissenting opinion of Judges O'Leary, Ravarani, Kucsko-Stadlmayer and Ilievski;
(c) partly dissenting opinion of Judge Serghides.

J.F.K.
M.T.

PARTLY CONCURRING, PARTLY DISSENTING OPINION OF JUDGE PINTO DE ALBUQUERQUE

I. INTRODUCTION

1. I concur with the finding of a violation of Article 6 of the European Convention on Human Rights ("the Convention"), but I am not satisfied with the reasoning that led to this finding. The European Court on Human Rights ("the Court") admits that there is no issue of judicial independence in the present case, since it is "mindful that neither the characterisation of the Court of Appeal as a 'tribunal', nor the merits of the judges appointed to that court, are as such contested in the present case"[1]. The Court even assumes that "the appointments at issue did not, technically speaking, constitute a nullity (*markleysa*) under Icelandic law" and that "once appointed, the individual judges would endeavour to observe the fair-trial requirements"[2]. Yet it convolutes the case into a major discussion on judicial independence in Iceland, on the basis of undeniably "remote"[3] irregularities committed in the process of appointment of one of the judges involved in the applicant's trial before the Court of Appeal, namely Judge A.E.

2. The purpose of this opinion is to explain why I consider that, on the one hand, the Court correctly identifies the irregularities committed in the procedure adopted by the Minister of Justice and Parliament in the appointment of Judge A.E. and rightly criticises the Supreme Court for not drawing the requisite conclusions from these defects for the purposes of the applicant's case; but, on the other hand, it fails to provide a convincing legal analysis of the nature of the irregularities in the appointment process or of how they impacted on the applicant's case and, as result, has not determined the appropriate individual and general measures for the implementation of the present judgment under Article 46 of the Convention.

II. CRITIQUE OF THE GRAND CHAMBER'S APPROACH TO THE RIGHT TO A TRIBUNAL ESTABLISHED BY LAW

3. The Court explains the purpose of the "established by law" requirement in Article 6 § 1 of the Convention as reflecting the rule of law and as seeking to protect the judiciary from unlawful external influence, by the executive or the legislature, or even from within the judiciary itself [4]. In this general context, the process of appointing judges is said necessarily to constitute an "inherent element of the concept of 'establishment' of a court

[1] Paragraph 222 of the present judgment.
[2] Paragraph 280 of the present judgment.
[3] To use the word in paragraph 285 of the present judgment.
[4] Paragraphs 214 and 226 of the present judgment.

or tribunal 'by law', and an interpretation to the contrary would defy the purpose of the relevant requirement"[5]. This inherent element is confirmed by a considerable degree of consensus among the States surveyed[6]. Yet, in the eyes of the Court, Article 6 of the Convention "solely" imposes "that the relevant domestic law on judicial appointments is couched in unequivocal terms, to the extent possible, so as not to allow arbitrary interferences in the appointment process, including by the executive"[7]. This unquestionably vague statement is insufficient in view of the Council of Europe's principle that judicial appointments must result from a decision of a body composed by at least a majority of judges, a fundamental guarantee of judicial independence that has been set out by the Committee of Ministers[8] and reiterated by the Consultative Council of European Judges (CCJE)[9], the Venice Commission[10] and GRECO[11]. The omission of the Council of Europe's position is all the more curious in view of the reference to the GRECO report on Iceland[12] and to the relevant Committee of Ministers and CCJE documents[13]. As confirmed unanimously by these authorities, the rationale of this principle is that it lays the ground for an effective guarantee of judicial independence and separation of powers, by conferring on a majority of judges the ultimate power to take a merit-based decision on who enters the judiciary and how judges progress in their careers, while at the same time making it possible for lay persons as representatives of civil society to participate in this process and consequently avoiding the prevalence of a corporatist mentality. Without any justification, the Court refrains from confirming the above-mentioned Council of Europe principle and its rationale, which is absolutely pertinent in the present case, and even accepts systems as being Convention compatible where the executive has "decisive influence" on judicial appointments "as is the case in many States

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[5] Paragraph 227 of the present judgment.
[6] Paragraph 228 of the present judgment.
[7] Paragraph 230 of the present judgment.
[8] Recommendation CM/Rec(2010)12 of the Committee of Ministers to member States on judges: independence, efficiency and responsibilities (adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies), see §§ 27, 46.
[9] The Consultative Council of European Judges, at its 11th plenary meeting (17-19 November 2010), adopted a Magna Carta of Judges (Fundamental Principles), see § 13.
[10] Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia" (CDL-AD(2015(042)), adopted by the Venice Commission at its 105th plenary session (18-19 December 2015), see § 77.
[11] Fourth evaluation round report on Portugal, adopted on 4 December 2015, see recommendation (vi). See my opinion appended to *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, 6 November 2018.
[12] Paragraph 257 of the present judgment.
[13] Paragraphs 121 and 126 of the present judgment referring, respectively, to Recommendation CM/Rec(2010)12 and CCJE Opinion 18/2015.

Parties, where the restraints on executive powers by legal culture and other accountability mechanisms, coupled with a long-standing practice of selecting highly qualified candidates with an independent state of mind, serve to preserve the independence and legitimacy of the judiciary"[14]. One is left to wonder which legal culture and which accountability mechanisms the Court is thinking of. If these vague references were not dangerous enough, the Court places the guarantee of judicial independence totally in the hands of the executive when it correlates the maintenance of "the independence and legitimacy of the judiciary" with "a long-standing practice of selecting highly qualified candidates with an independent state of mind", whatever this may mean. The Grand Chamber's argument of legitimation by tradition is akin to an *ex post facto* sociological analysis, but is certainly not a valid legal line of argumentation.

4. When the time comes to concretise its position, the Court invokes its usual mantra[15]:

> "The Court further considers that the Contracting States should be afforded a certain margin of appreciation in this connection, since the national authorities are in principle better placed than the Court to assess how the interests of justice and the rule of law – with all its conflicting components – would be best served in a particular situation."

On paper, Strasbourg's oversight is limited to situations where the national courts' findings can be regarded as arbitrary or manifestly unreasonable[16], but in reality it extends much further, as will be shown.

5. In this regard, the core of the judgment is paragraph 247. Although it proposes an essentialist reading of the Convention ("only those breaches that relate to the fundamental rules of the procedure for appointing judges – that is, breaches that affect the essence of the right to a 'tribunal established by law' – are likely to result in a violation of that right"), it immediately abandons it in favour of a consequentialist approach, ultimately focusing on whether "a breach of the applicable national rules on the appointment of judges created a real risk that the other organs of Government, in particular the executive, [could exercise] undue discretion undermining the integrity of the appointment process to an extent not envisaged by the national rules in force at the material time"[17]. The message of the judgment reflects the circumstance that the Court looks at this case with the benefit of hindsight[18],

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[14] Paragraph 230 of the present judgment.

[15] Paragraph 243 of the present judgment. For a critique of this mantra, see my opinion appended to *Correia de Matos v. Portugal* [GC], no. 56402/12, 4 April 2018.

[16] Paragraph 244 of the present judgment.

[17] Paragraph 247 of the present judgment. The tone is already set in paragraph 210: "The task of the Grand Chamber in relation to the present complaint is, therefore, limited to determining the *consequences* of the above-mentioned breaches of domestic law in terms of Article 6 § 1 ..." (original emphasis).

[18] As the Government rightly argued in paragraph 97 of their submissions before the Grand Chamber.

from the perspective of the irregularities in the procedure whereby a certain judge (Judge A.E.) was appointed to office and their clearly negative consequences for the legitimacy of the Court of Appeal as an institution, regardless of their connection to or implication for the applicant's case. For the Court, the decisive vantage-point from which to approach this case is that of the "effects" on the "general public"[19] of the unlawful conduct of the Minister of Justice in the appointment of Judge A.E. and of the connivance of the majority of parliamentarians. Indeed, this judgment represents, as was its aim, a verdict on the integrity of the Icelandic judicial system as a whole, even including the Supreme Court, whose "settled practice" of "restraint" and "resignation" has not been spared from criticism[20].

6. The consequentialist, effects-oriented approach is aggravated by the consideration that the degree of "undue discretion" depends on the national rules in force at the material time, as if these national rules could not themselves be unduly discretionary. This consideration is hardly compatible with the acknowledgment that "[t]here may indeed be circumstances where a judicial appointment procedure that is seemingly in compliance with the relevant domestic rules nevertheless produces results that are incompatible with the object and purpose of that Convention right"[21]. Even more importantly, the Court takes for granted the compatibility of the Icelandic legal framework with the Convention. Thus the Court does not problematise[22], as it should have done, the role played by the Evaluation Committee, which is tasked with assessing the qualifications of the candidates and determining those most qualified for the post, being composed of five members appointed by the Minister of Justice, under sections 11 and 12 of the new Judiciary Act (*Lög um dómstóla*) no. 50/2016[23]. While the initial, merely advisory role, of the Committee was indeed problematic[24], the subsequent attribution of power to issue binding recommendations for judicial appointments to courts at all three levels is no less questionable, because the law does allow the Minister to deviate from the Committee's assessment, although the use of such discretion is subject to the control of Parliament. As a matter of fact, the Government themselves

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[19] Paragraph 283 of the present judgment.
[20] Paragraphs 282 and 283 of the present judgment.
[21] Paragraph 245 of the present judgment.
[22] Paragraph 256 of the present judgment.
[23] One member shall be nominated by the Supreme Court and shall serve as chair of the committee. One member shall be nominated by the Court of Appeal. The third member, who shall not be a serving judge, shall be nominated by the Judicial Administration and the fourth member shall be nominated by the Icelandic Bar Association. The fifth member shall be elected by *Althingi*. Thus there is the possibility that the majority of the Committee's members may not be serving judges, nominated by courts.
[24] As hinted by the Court itself in paragraph 288 of the present judgment when referring to the "discretionary powers previously held by her office in the context of judicial appointments".

acknowledge that "neither the law nor its Explanatory Notes contain instructions on how the Minister should prepare a proposal to Parliament when deviating from the opinion of the Evaluation Committee, leaving a wide margin of discretion for the Minister in this matter"[25]. In straightforward language, the Icelandic legal framework allows for a Minister of Justice backed by a political majority in Parliament to circumvent the merit-based decision of the Evaluation Committee. Against this legal background, a case like the present one was bound to arise sooner or later. Even assuming that the spirit of the law sought to limit the politisation of the judicial appointment process, as the Government argued[26], the very letter of the law invited politicians to undermine that spirit.

7. Confronted with the Government's *ad terrorem* argument that the Chamber's reasoning had the effect of rendering judicial appointments indefinitely open to challenge on the basis of every legal flaw during the appointment process, the Court's reply is twofold. Not every flaw matters, but only those breaches that "wholly disregard the most fundamental rules", such as, for instance, the appointment of a person as judge who did not fulfil the relevant eligibility criteria, or those breaches "that may otherwise undermine the purpose and effect of the 'established by law' requirement, as interpreted by the Court"[27]. Although it refuses to set a specific time-limit before which an irregularity in the appointment procedure could be challenged by an individual relying on the "tribunal established by law" right, it finds that "with the passage of time, the preservation of legal certainty will carry increasing weight in relation to the individual litigant's right to a 'tribunal established by law' in the balancing exercise that must be carried out"[28].

8. These arguments are unconvincing. First, the Court does not delimit with precision "the most fundamental rules" of an appointment procedure of which a breach may taint any future judicial activity of the appointed judge. Where linguistic clarity and legal certainty were most needed the Court fails to deliver. Second, the Court admits that there might be non-fundamental rules of which a breach "may otherwise undermine the purpose and effect of the 'established by law' requirement"[29]. The degree of vagueness of the language is puzzling and will leave States in the dark as to the contours of the guidance given by the Court. Third, and no less importantly, the Court admits that the passage of time may cure breaches of those "most fundamental rules" of the appointment procedure, in a "balancing

[25] Paragraph 93 of the Government's submissions before the Grand Chamber of 11 November 2019.
[26] Paragraph 91 of the Government's submissions.
[27] Paragraph 246 of the present judgment.
[28] Paragraph 252 of the present judgment.
[29] Paragraph 246 of the present judgment.

exercise"[30] between the preservation of legal certainty and the individual litigant's right to a "tribunal established by law"; and this in turn means that the Court dilutes the guarantee of the essence of the right (and of "the most fundamental rules") in the "balancing exercise" involving the interests at stake. This is unfortunately not the first time[31]. To put it in principled terms, a breach of the essence of a Convention right cannot be cured by a subsequent application of the proportionality test[32].

III. THE PROTECTION OF THE ESSENCE OF THE RIGHT TO A TRIBUNAL ESTABLISHED BY LAW

9. In my view, the core issue of this case is the following: the right to a court established by law is a self-standing Convention right and its own autonomous content is not to be confused with that of the principles of independence, impartiality or irremovability of judges. The appointment of a judge to a court in accordance with the relevant eligibility criteria is undoubtedly part of the essence of this right. This is also supported by the fact that a significant number of Contracting Parties consider that the requirement of a "tribunal established by law" covers the legal procedure for the appointment of judges and allows or even imposes the reopening of the proceedings in the event of a judgment being adopted by a judge who has been unlawfully appointed to office[33].

10. The manipulation of the appointment process by politicians who want to put their cronies into the courts will definitively taint the legitimacy of the appointed judge and his or her subsequent judicial activity. The violation of "the most fundamental rules", such as the rules on the appointment of a judge to a court in accordance with the eligibility criteria, is an absolute procedural defect in the light of the Convention, warranting that no time-limit be set for it to be invoked, otherwise the legal order would condone future miscarriages of justice by a "puppet court". Fundamental defects that call into question the essence of the right to a court established by law cannot but be invocable at any time, especially in criminal proceedings where convictions have enduring effects on the defendant's life and reputation. To recall an expression frequently used in another context, convictions delivered by an unlawfully constituted "puppet court" are the fruits of a poisonous tree which cannot be cured. Like the fruit of the poisonous tree doctrine, which is intended to deter police from using illegal

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[30] Paragraph 252 of the present judgment.
[31] See my separate opinion in *Muhammad and Muhammad v. Romania* [GC], no. 80982/12, 15 October 2020.
[32] Ibid., paragraph 26 of that separate opinion.
[33] Paragraphs 151 and 153 of the present judgment; see also Opinion delivered by the Advocate General Sharpston on 12 September 2019 (EU:C:2019:977) in the CJEU cases of *Simpson* and *HG* (C-542/18 and C-543/18).

means to obtain evidence, the far-reaching, long-term negative impact of the above-mentioned procedural irregularities of the appointment process on the judicial activity of the appointed judge should deter governments from usurping the separation of powers and manipulating the judiciary, by filling courts with their friends and allies in exchange for political and all other sorts of favours.

11. In other words, this judgment should have laid down the principle that the manipulation of the appointment of a judge to a court in violation of the relevant eligibility criteria is an absolute procedural defect that cannot be remedied, neither by the passing of time, nor by the acquiescence of the defendant. As stated elsewhere[34], there are some procedural rights that are so basic to a fair trial that their infringement can never be viewed as fair, and no harmless-error analysis is possible. The same applies in the present case. The following arguments will make this point even clearer by subsuming the facts of the present case to the above-mentioned principle.

IV. APPLICATION OF THE ESSENTIALIST APPROACH TO THE CASE AT HAND

12. With regard to the facts of the case, the judgment correctly underlines the gravity of the Minister's action, as was unequivocally manifested in the Supreme Court's imposition of an award to two plaintiffs for non-pecuniary damage under section 26 of the Tort Act. The Supreme Court explicitly stated that the Minister had acted in "complete disregard of the obvious danger" to the reputational interests of two of the four candidates and had "thus rather served the interests of some of the other four she favoured in the process"[35]. With these simple but significant words, the Supreme Court courageously denounced the backstage political horse-trading that had led to the Minister's decision. As a matter of fact, Judge A.E. was the wife of a parliamentarian belonging to the same political party as the Minister, namely B.N., who had given up the first place in the party's

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[34] See paragraphs 16-20 of the partly dissenting opinion of Judges Kalaydjieva, Pinto de Albuquerque and Turković in *Dvorski v. Croatia* [GC], no. 25703/11, §§ 16-20, 20 October 2015, on the impact of structural errors on the fairness of criminal proceedings, and again my opinion in *Muhammad and Muhammad*, cited above, § 28.

[35] Paragraph 75 of the present judgment and paragraph 118 of the Chamber judgment. The relevant phrase in the Supreme Court's judgment reads as follows: "... *höfðu ákvarðanir hennar eigi að síður þær afleiðingar að bættur var hlutur einhvers úr hópi fjögurra annarra umsækjenda sem dómnefnd hafði raðað lægra en áfrýjanda*". The Government submitted this translation: "... her decisions nevertheless had the consequence of compensating a share of someone in the group of four other applicants, which the Evaluation Committee had rated lower than the appellant". The translation is not very clear, but the gist of the sentence is really that the Minister of Justice's decision "rather served the interests of some of the other four she favoured in the process"; this was the Chamber's interpretation in paragraph 118 of its judgment.

constituency list in Reykjavik in favour of the Minister. As the applicant put it in his complaint to the Court, "[i]t does not take a great deal of imagination to consider that the appointment of A.[E.] in the position of Court of Appeal judge was political quid pro quo."

13. Yet the above-mentioned laudable statement of the Supreme Court was not followed by any consequences, since the Supreme Court proceeded on the basis that the appointments were a *fait accompli*, namely, that they had become a reality upon the signing of the letters of appointment[36] and that the formal independence of the judges under national law could not be called into question. In other words, the Supreme Court adopted a purely formalistic standard of review that cannot be considered to fulfil the requirements of Article 6 § 1 of the Convention. The Court is entirely correct when it reproaches the Supreme Court, because "it is not clear from the Supreme Court's judgment why the procedural breaches it had identified in its earlier judgments (dated 19 December 2017) were not of such a nature as to compromise the lawfulness of the appointment of A.E. and, consequently, of her subsequent participation in the applicant's case"[37]. The problem is that the Court does not provide that clear answer either.

14. Remarkably, there is not the slightest inkling in the present judgment of the overall fairness test on which the Court has recently insisted[38]. Like the Chamber, and contrary to the Government, the Grand Chamber is of the view that the violation of the right to a "tribunal established by law" does not require a separate examination as to whether the breach of that principle had had the effect of rendering the proceedings overall unfair. It is important to note that under existing case-law, the finding of a violation of the right to a "tribunal established by law"[39], the right to an independent judge[40], or the right to an impartial judge[41], has never required a separate analysis of the fairness of the proceedings as a whole. This line of case-law is fully respected by the present judgment, and rightly so. By ignoring the Government's repeated invitation to proceed to an assessment of the overall fairness of the applicant's trial, the Court implicitly acknowledges the absolute nature of the defects in the appointment of Judge A.E., who was a member of the court hearing the applicant's case. Yet the Court misses the opportunity to explicitly affirm that absolute procedural defects in the appointment of a judge, such as those which occurred in the present case, do not allow for any holistic, harmless-error analysis based on factors such as the passing of time or the defendant's procedural conduct.

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[36] Paragraph 90 of the present judgment.
[37] Paragraph 281 of the present judgment.
[38] See the discussion in *Murtazalyeva v. Russia* [GC], no. 36658/05, 18 December 2018.
[39] *DMD Group, a.s., v Slovakia*, no. 19334/03, § 61, 5 October 2010.
[40] *Henryk Urban and Ryszard Urban v Poland*, no. 23614/08, §§ 45-56, 30 November 2010.
[41] *Morice v. France* [GC], no. 29369/10, § 78, ECHR 2015.

15. Therefore, contrary to the Court's argument that the irregularities at issue were not too remote from the applicant's case, they were indeed remote, and it is absolutely irrelevant that the irregularities in the appointment procedure were established by the Supreme Court barely two weeks prior to the date on which the fifteen selected candidates even took office, or that the applicant in the present case requested the withdrawal of A.E. only one month after she had begun serving.

16. In view of the above, and especially of the direct affront to the essence of the right to a "tribunal established by law" in the present case, I consider that the Grand Chamber should have acknowledged the absolute nature of the procedural defects in the appointment of Judge A.E. and their far-reaching, long-term negative impact on her judicial activity, and consequently should have instructed the respondent State to reopen the applicant's case, in addition to awarding him just satisfaction[42]. The applicant's position regarding the reopening of his criminal proceedings during or subsequent to the oral hearing is therefore irrelevant, since a defendant's acquiescence to a violation of the essence of a Convention right is of no legal value. What matters is that the respondent State should draw all the necessary conclusions from the absolute nature of the procedural defects identified by the Court, and should do so in a three-step manner: firstly, by reopening the applicant's domestic trial; secondly, by preventing violations of the same nature in cases pending before domestic courts; and thirdly by rectifying all judgments raising similar problems which have become final[43]. Otherwise the present judgment will remain a toothless, paper tiger, which in fact it is[44].

17. The reproach as to the deliberate interference by the Minister of Justice, seconded by her political faction in Parliament, with the status of a Court of Appeal judge in a manner incompatible with the Convention should override any consideration of the principle of legal certainty, let alone of the stability of the Icelandic judicial system[45]. Only this solution is coherent with the fact acknowledged by the Court itself that "the effects of such breaches may not justifiably be limited to the individual candidates who have been wronged by non-appointment, but necessarily concern the

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[42] See, on the possible injunctions of the Court, my opinion in *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, 11 July 2017.

[43] This Court is evidently not constrained by the fact that the Supreme Court's judgment of 21 May 2019 seems to significantly narrow the terms under which a case can be reopened in Iceland after a violation has been found by the Court.

[44] In this regard, it is instructive to recall the words of Advocate General Sharpston, that "[where] there is a 'flagrant' breach of the right to a tribunal established by law that operates to the detriment of the confidence which justice in a democratic society should inspire in litigants, the judgments affected by that irregularity should evidently be set aside without more ado" (Opinion of 12 September 2019, cited above, § 109).

[45] This is the argument that the Government used against reopening (paragraphs 180 and 181 of the present judgment).

general public"[46]. To be crystal clear, political acts aimed at intentionally circumventing the law on judicial appointments must not be rewarded by the acceptance of the situation thus created, namely the acceptance of the judge who has been unlawfully appointed and of the judgments delivered by that judge. *Ex iniuria ius non oritur*.

18. Ultimately, the facts of this case reflect a systemic problem which warrants a reform of Icelandic law. In order to rectify the legal source of the systemic problem reflected in the facts of this case, the respondent State should revoke the possibility for the Minister to deviate from the Evaluation Committee's assessment with the assent of Parliament, as provided by section 12 of the new Judiciary Act (no. 50/2016), and should reconsider the composition of the Evaluation Committee in order to recalibrate the proportion of judicial and non-judicial members, as set out in section 11 of that Act.

V. CONCLUSION

19. In sum, the present judgment promises an essentialist approach to the right to a "tribunal established by law" but does not keep that promise. Neither the definition of the essence of the right, nor the determination of the absolute nature of the procedural defects in the appointment of Judge A.E. and their legal consequences in the applicant's case, are clear. The Court wants to have its cake and eat it, by finding on the one hand that the irregularities in question were of "such gravity that they undermined the very essence of the right to be tried by a tribunal established in accordance with the law"[47], therefore justifying the reproach against the Minister for her unlawful conduct in the appointment of Judge A.E., against the majority of the parliamentarians for their connivance with the Minister and against the Supreme Court for its inertia in the applicant's case, whilst on the other hand limiting the impact of this judgment in the domestic legal order as much as possible by not imposing reopening and thus not guaranteeing the possibility of a fair judgment, by a court established by law, to the applicant and to all defendants in similar cases. For that reason, the same criticism that the Court addresses to the Supreme Court, for not having assumed the consequences of its findings regarding the seriousness of the procedural flaw in the appointment of Judge A.E. to the Court of Appeal, can also be addressed to the Court itself.

[46] Paragraph 283 of the present judgment.
[47] Paragraph 295 of the present judgment.

JOINT PARTLY CONCURRING, PARTLY DISSENTING OPINION OF JUDGES O'LEARY, RAVARANI, KUCSKO-STADLMAYER AND ILIEVSKI

1. We agree, albeit to a qualified extent, with the finding of a violation of Article 6 § 1 of the Convention, in so far as the panel of the appellate court which heard the applicant's appeal was not a "tribunal established by law".

2. With regret, however, we cannot agree with the majority's refusal to examine the applicant's second complaint under Article 6 § 1 in relation to the same court's alleged lack of independence when hearing his appeal. We are of the opinion that the majority should have addressed both complaints, not least because this would have provided an explanation as to why no reopening of the applicant's trial at domestic level has been requested by the Grand Chamber.

3. Before explaining further why we support the finding of a violation of Article 6, while nevertheless partly dissenting, a brief deconstruction of the judgment in relation to this violation is called for. The Grand Chamber has sought to refine and clarify the meaning of the concept of "a tribunal established by law" and to analyse its relationship with the requirements of independence and impartiality under Article 6 § 1 in order to provide an interpretation of that concept which "best reflect[s] its purpose and ... ensure[s] that the protection it offers is truly effective" (see paragraph 218 of the judgment). The right to a tribunal established by law is elevated to a stand-alone right under Article 6 § 1 of the Convention (paragraph 231) and treated as "a distinct Article 6 safeguard" (paragraph 280), albeit that the basis of and need for this characterisation are not fully explained. Nor, in our view, have its consequences been sufficiently considered. In order to accommodate the principles of legal certainty, *res judicata* and the irremovability of judges, the Grand Chamber finds that only the gravest of breaches of the judicial appointment rules would amount to a violation of the right to a tribunal established by law (paragraphs 236-41)[1]. The majority's finding of a violation is based, firstly, on the nature of the now stand-alone right to a "tribunal established by law" and, secondly, on the participation in the applicant's appeal of a judge "whose appointment procedure was vitiated by grave irregularities that impaired the very essence of the right at issue" (paragraph 289).

4. We support the conclusion that the panel of judges which heard the applicant's appeal was not a "tribunal established by law" given certain irregularities in the appointment procedure. Thus the finding of a violation of Article 6 § 1 of the Convention is unanimous. However, our approach to

[1] On the clarity of the threshold test developed in the Grand Chamber's judgment, see further below.

the three inter-related requirements in Article 6 § 1 of the Convention – "established by law", "independence" and "impartiality" – differs from that of our colleagues, as does our reason for finding a violation. In our view, there was no need to transform the first requirement into a stand-alone right in order to find a violation in this case; nor was it necessary to "supercharge" the different defects in the appointment procedure in order to ensure that they met the threshold test of the Grand Chamber's own making. It was sufficient in this case for the Grand Chamber to find that a series of defects, of variable importance and gravity, which occurred when establishing a new appellate court for which the Icelandic legislature had provided a clear appointment procedure, and in the context of heightened awareness of the various forms which "rule of law" problems may take in different European States, violates the Article 6 § 1 "established by law" requirement. In addition, we consider that, having declared in paragraph 210 of the judgment that the Grand Chamber's task was to determine the *consequences* of breaches of domestic law on judicial appointments in terms of Article 6 § 1, it has failed to do just that. The judgment risks sowing confusion rather than clarity with the new test summarised above and, moreover, the Court's failure to examine whether the panel which heard the applicant's appeal was in fact, in his case, independent and impartial should give rise to considerable concern. In the individual case of the applicant, it is through this examination of his second complaint that the *consequences* of any appointment irregularities should have been assessed.

I. FACTS AND SCOPE OF THE CASE

A. Facts

5. ***The applicant's trial for a traffic offence at domestic level.*** The relevant facts can be summarised as follows. The applicant was tried for a road traffic offence (driving without a valid licence and under the influence of drugs) before a criminal court. He pleaded guilty and was given a hefty sentence. He appealed against the sentence imposed. As the appeal proceedings progressed, he altered his grounds of appeal and raised two distinct issues: first, the question of the regularity of the appointment of one of the judges, namely A.E., to the Court of Appeal and, secondly and separately, the fairness of the proceedings in view of that judge's alleged lack of independence and impartiality.

6. ***The institutional background to the applicant's case.*** The background to this complaint is the creation, in 2016, of an appellate court which transformed the Icelandic judicial system from a two-tier (district courts and Supreme Court) into a three-tier system with the new Court of Appeal, composed of fifteen judges, in between. According to the domestic

legal provisions governing the initial selection and appointment of the first fifteen appellate judges, an Evaluation Committee (EC) had to select the candidates who were considered to fulfil the conditions for serving as judges at that new court and propose to the Minister of Justice a list of fifteen candidates deemed to be the most suitable. In addition, the relevant legislation provided that the Minister had the possibility of departing from the EC's proposal and of submitting to the Icelandic Parliament different names of judges to be chosen from the list of candidates who fulfilled the legal conditions for appointment. The Icelandic Parliament, by means of a separate vote on each of these candidates, had to approve the Minister's amended proposal.

7. The Minister made use of her ability to depart from the EC's proposal in respect of four judges, among whom she proposed A.E. It transpired that the Minister wished to attach greater weight than the EC to judicial experience, a criterion which favoured A.E. given her long experience as a judge, and also wished to address questions of gender balance. Her amended list of candidates was endorsed by a global vote of Parliament, rather than by an individual vote for each candidate proposed, and the President of Iceland then signed the relevant letters of appointment.

8. In separate proceedings, entirely unrelated to those involving the applicant, four of the judges whose names had been on the list of the fifteen most qualified candidates established by the EC challenged the decision to appoint the judges who had not been on that short list, among whom was A.E. The Icelandic Supreme Court recognised in that context that there had been irregularities in the appointment procedure. Although it refrained from invalidating the Minister's decision, approved by Parliament, to replace the claimants in those proceedings, it granted two of them compensation for non-pecuniary damage[2].

9. ***The applicant's request for the withdrawal or recusal of A.E.*** In the criminal proceedings against the applicant, the Court of Appeal, with the participation of A.E., rejected the procedural motion requesting that she should withdraw, since there was nothing which gave rise to a justifiable doubt as to her eligibility to handle the case. An attempt by the applicant to have the Supreme Court resolve this issue *before* the Court of Appeal proceeded with the merits of his appeal was dismissed on purely procedural grounds[3]. The Court of Appeal then upheld the judgment under appeal on the substance.

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[2] As explained in paragraph 96 of the Grand Chamber judgment, the compensation proceedings involving the remaining two judges are still pending.

[3] The Supreme Court held that, whereas the applicant's main request was that A.E. should withdraw because of her unlawful appointment, he had incorrectly presented that claim as a "recusal request" (see paragraph 84 of the judgment). Under Icelandic law, the Supreme Court could not deal with a challenge to the lawfulness of the appointment of a judge on

10. ***The proceedings before the Supreme Court.*** The Supreme Court, seised of the applicant's request for the judgment of the Court of Appeal to be quashed and his case retried, based on his right to a fair trial and doubts as to the independence and impartiality of one if its members stemming from a flawed appointment procedure, upheld the judgment of the court below. It found that it could uphold the applicant's claim only if the judge was not a lawful holder of judicial power, thus if the flaws in the appointment process had entailed the nullity ("*markleysa"*) of that appointment. Referring to its previous judgment in relation to the short-listed candidates whose names had been removed, as mentioned above, it repeated that in spite of the flaws in the procedure at the level of the Minister of Justice, they did not entail such a nullity. It stressed in that context, *inter alia*, that all the judges so appointed were qualified to hold judicial office in the light of their professional experience and legal knowledge. This had not been contested by the applicant. Furthermore, the Supreme Court reiterated that recourse to a single vote in Parliament was a "defect of no significance". Taking also into account the fact that all the new judges had been appointed to office by letters signed by the President of Iceland, there were insufficient reasons to doubt that the applicant had enjoyed a fair trial before independent and impartial judges. All the judges had, pursuant to Icelandic law, been appointed for an indefinite term, were afforded independence in their judicial work and had a duty to perform their work under their own responsibility and never to follow instructions from others in the exercise of their duties.

B. Scope

11. ***Two complaints.*** According to the application, and as clearly stated in the Chamber judgment, the applicant raised two complaints:

(i) that the inclusion of an irregularly appointed judge on the appeal panel which heard his case had violated the requirement of a "tribunal established by law"; and

(ii) that the composition of that Court of Appeal panel had violated his right to be heard by an independent and impartial tribunal.

12. The essence of the applicant's case is thus not about the irregular appointment of A.E., but about the fairness of the proceedings in which his conviction for a traffic offence was upheld on appeal. Of course, the appointment procedure plays an incidental role, as it could have been at the origin of the unfairness that he alleged.

13. However, the present case is most certainly about the *possible consequences* of the alleged and indeed identified flaws in the appointment

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the appellate panel on the basis of an interlocutory appeal. Such a claim could only be examined by the Supreme Court on a direct appeal in the event of a conviction; in other words, *after* the challenged judge had already heard and disposed of the case.

procedure as submitted by the applicant – i.e. the lack of a lawful and independent tribunal – concerning the trial for a traffic offence in which he was convicted.

14. ***The majority's response to the two complaints.*** The majority acknowledge that the task of the Grand Chamber is "to determin[e] the *consequences* of the ... breaches of domestic law in terms of Article 6 § 1" (paragraph 210 of the judgment). However, they have chosen to address only one of the complaints about the proceedings which led to the applicant's conviction, i.e. the manner of A.E.'s appointment and whether this meant that the Court of Appeal panel was not a "tribunal established by law"[4].

15. As explained above, the majority have transformed the "established by law" requirement into a "stand-alone right" (paragraph 231 of the judgment). Thus, they do not consider it necessary to look into the other requirements of a fair trial pursuant to Article 6 § 1 of the Convention and, moreover, indirectly deny the interrelationship between the three requirements which has characterised the Court's case-law to date. When doing so, however, they stop halfway, failing to explain sufficiently why there should or should not have been a reopening of the proceedings[5]. Only an assessment of the fairness of the applicant's trial in its entirety, which necessarily implies an examination of the interrelationship between the three requirements for the fairness of a trial, can produce an answer to that question.

16. It is therefore necessary, in our view, to examine the relationship between the three requirements of Article 6 § 1 (II.) and its impact on the methodology of the assessment in a specific case (III.).

II. THE RELATIONSHIP BETWEEN THE THREE REQUIREMENTS OF ARTICLE 6 § 1

17. The question of the relationship between the three requirements (A.) is important, as it may have a bearing on the consequences of the finding that one of the requirements is not or is only partially met (B.).

[4] It should of course be noted that the regularity of the appointment of the other two members of that panel was never called in question.

[5] See paragraph 313 of the judgment, where reliance is placed on the applicant's indication at the oral hearing (later retracted in writing) that he did not seek reopening. The Court was not, in any event, bound, under Article 46 of the Convention, by the applicant's specific requests and was entitled to indicate any measure it deemed necessary to put an end to the violation found.

A. Three interrelated requirements for the fairness of proceedings under Article 6 § 1

18. ***The majority's unclear statements as to the interrelationship between the three requirements of Article 6 § 1.*** Are the three elements one finds in Article 6 § 1 – "... everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law ..." – self-standing requirements or are they interrelated or even interdependent? Are they rights or requirements?

19. In respect of either the self-standing or interrelated character of the "established by law" requirement under Article 6 § 1, the Grand Chamber judgment is unclear, if not inconsistent. It affirms that it "is a stand-alone right under Article 6 § 1 of the Convention" but later acknowledges that "a very close interrelationship has been formulated in the Court's case-law between that specific right and the guarantees of 'independence' and 'impartiality'" (paragraph 231 of the judgment). In some other paragraphs, the interrelationship between "established by law" and independence is also clearly stated. In particular, the judgment stresses (paragraph 234, emphasis added) that

> "the examination under the 'tribunal established by law' requirement *must not lose sight of this common purpose and must systematically enquire whether the alleged irregularity in a given case was* of such gravity as to undermine the ... fundamental principles [of the rule of law and separation of powers] and *to compromise the independence of the court in question*."

20. ***The choice made by the majority: "established by law" now has a stand-alone character.*** It appears that the majority do not really consider the three requirements to be interrelated but rather see them as a succession of requirements whereby shortcomings in relation to the first may irremediably compromise the others, thus making it unnecessary, perhaps even pointless, once the first requirement ("established by law") is not fulfilled, to enter into an assessment of the other two. Thus, in paragraph 295 of the judgment, the applicant's two separate complaints are characterised as stemming from the same underlying problem, and since the irregularities are considered to be of such gravity that they undermined the very essence of the new stand-alone right:

> "... the Court concludes that the remaining question as to whether the same irregularities have also compromised the independence and impartiality of the same tribunal does not require further examination ..."

21. The judgment thus finds that, since the panel of the Icelandic Court of Appeal which heard the applicant's appeal does not fulfil the "established by law" requirement, it cannot even be considered a tribunal within the meaning of Article 6 § 1. Accordingly, the requirement has not only been transformed into a self-standing right, it is also one with an absolute character, such that a judicial body which was not established by law, like

the panel in question, can in no way enjoy independence or conduct a trial which, overall, qualifies as fair.

22. To sum up, in the eyes of the majority, establishment by law is not merely one of the requirements of the fairness of a trial, together with independence and impartiality, but a prerequisite, a *conditio sine qua non* of the fairness of proceedings which, if not fulfilled, makes it unnecessary to examine the other conditions.

23. ***An important qualification in the form of the gravity test.*** It is true that the majority attempt to provide an important qualification so that not every shortcoming in a judicial appointment procedure irremediably leads to a violation of the "established by law" condition under Article 6 § 1.

24. They introduce a threshold or gravity test with three tiers[6] and acknowledge a dilemma to which the elevation of this requirement to a stand-alone right gives rise: an excessively strict application of the "established by law" requirement would impair other important principles, such as legal certainty, *res judicata* and the irremovability of judges (paragraphs 238-40 of the judgment). They consequently accept that there can be infringements of the "established by law" requirement that do not impair independence and impartiality, do not violate Article 6 § 1 and do not negate the characterisation of a judicial body as a "tribunal".

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[6] The threshold test developed by the Grand Chamber and the language used to explain and delimit that test may give rise to some uncertainty.
On the one hand, the Grand Chamber indicates that the "flagrant breach" test applied by the Chamber – itself an innovation if not a departure from previous case-law – was designed to accommodate the principles of legal certainty, *res judicata* and irremovability, and to distinguish what type of appointment irregularities would lead to a violation of the right to a tribunal established by law. However, while the Grand Chamber endorses the logic and general substance of the Chamber test, it declares that it will not apply the same flagrant breach concept; its threshold test being composed of other or additional elements and/or called something else.
On the other hand, as regards the language used to translate this new threshold test, the judgment refers to "the gravest breaches of the judicial appointment rules" (paragraph 241), an assessment of whether particular defects or irregularities in a given appointment procedure "were of such gravity as to entail a violation" (paragraphs 243 and 255), a manifest breach of domestic appointment rules (paragraph 244), "breaches that wholly disregard the most fundamental rules in the appointment procedure" (paragraph 246), grave irregularities or breaches that affect "the (very) essence of the right to a 'tribunal established by law'" (paragraphs 247, 255, 267 and 289), whether the breaches in a given appointment procedure "were of such gravity as to impair the legitimacy of the appointment process and to undermine the very essence of the right to a 'tribunal established by law'" (paragraph 259). This varying language contrasts with the clarity of that derived from long-established case-law as to when a departure from the principle of legal certainty may be justified – "only when made necessary by circumstances of a substantial and compelling character, such as the correction of fundamental defects or a miscarriage of justice" (see the case-law cited in paragraph 238 of the judgment).

25. ***The ultimate aim of the gravity test: ensuring independence and impartiality.*** However, on closer inspection, the entire three-tier test according to which the identified flaws must be significant is ultimately aimed at identifying those that impair independence and impartiality. Thus, in paragraph 246 of the judgment it is stated that an alleged breach must be assessed in the light of the object and purpose of the "established by law" requirement, namely to "ensure the ability of the judiciary to perform its duties free from undue interference". This object and purpose is the same as that pursued by the requirement of independence.

26. It can be concluded that, despite the fact that the judgment bestows a self-standing character on the "established by law" requirement, now a right in itself, the reasoning adopted nevertheless evolves in a logic dictated by the interrelationship between the three requirements under Article 6 § 1 of the Convention; an interrelationship which we consider essential and which the Grand Chamber should have preserved.

27. ***The inconclusive nature of the case-law relied on to support this stand-alone character.*** It is important, when referring to the Court's case-law, to note that it has, on occasion, recognised that "fundamental defects in the composition of the bench" which had tried an applicant undermined the fairness of the proceedings against him. However, it has done so in proceedings involving the appointment of lay and not professional judges[7]. Moreover, the Court has always underlined the close connection between the "established by law" requirement and the guarantees of independence and impartiality, both also being integral parts of the principle of the rule of law in a democratic society.

28. It is also true that in some cases, such as *DMD Group, a.s.*,, the Court has held that "in principle, a violation by a tribunal of domestic legal provisions relating to the establishment and competence of judicial organs gives rise to a violation of Article 6 § 1"[8]. However, there is no support in the case-law – until the present judgment – for the proposition that finding a violation of the "established by law" requirement precludes an additional assessment of whether an applicant's right to a fair trial was also violated due to a lack of independence or impartiality. In *Kontalexis*, for example, having found a violation of Article 6 § 1 on the basis of the absence of a "tribunal established by law", the Court examined separately the impartiality of the same tribunal in relation to the applicant's trial, finding no violation in this regard[9]. To find a violation of Article 6 § 1 in relation to

[7] See, in particular, *Ilatovskiy v. Russia* (no. 6945/04, §§ 43-45, 9 July 2009). The majority recognise in paragraph 225 of the judgment the differences between that case and the present one but do not derive from those crucial differences the relevant consequences.
[8] *DMD Group, a.s., v. Slovakia*, no. 19334/03, § 59, 5 October 2010.
[9] *Kontalexis v. Greece*, no. 59000/08, 31 May 2011.

the first, institutional requirement, and no violation in relation to the other two, is not necessarily contradictory.

29. ***Some important factors neglected.*** Despite the indirect acknowledgement by the majority of the aforementioned interrelationship, their approach to the case ignores a series of weighty factors, in particular the overall fairness of proceedings principle that is well established in the Court's case-law and, even more importantly, the distinction that has to be made between general institutional problems, as far as the "established by law" requirement is concerned, and the concrete consequences of such shortcomings for a given trial. In this context, they omit to examine the need for legal certainty with regard to judicial appointments and the appointed judges' own right not to be dismissed from office, except pursuant to a specific procedure provided for by law. Finally, as indicated previously, the reason why the judgment does not require the reopening of the applicant's proceedings at domestic level is not really explained[10].

30. ***Overall fairness of the proceedings.*** It is common ground – and yet important to remember – that this case, like all others brought under Article 6 § 1 of the Convention, is about the overall fairness of proceedings as guaranteed by that Article. According to its wording, everyone is entitled to a "fair" hearing "by an independent and impartial tribunal established by law". It clearly lists three requirements and not only this Court, but also domestic courts, have generally considered each requirement in the light of the others. This, by way of consequence, leads to the finding that if one of the requirements is not fulfilled, the proceedings in question are not automatically considered unfair.

31. We are of the firm belief that, in conformity with the long-standing case-law of the Court, when assessing whether proceedings are fair, one has to consider the overall fairness of those proceedings, in criminal as well as in civil matters[11].

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[10] See footnote 5 above.

[11] The Court does not, in general, apply the requirements of Article 6 § 1 mechanically and in isolation, but seeks to assess in practice the extent to which a failure to comply with one of the conditions affects the fairness of the trial as a whole. In a series of judgments, it has come to the conclusion that not every breach of the rules guaranteeing the fairness of the trial necessarily entails a violation of Article 6. Indeed, it examines the trial as a whole and relates the different elements of its conduct to each other. If it finds, in this overall examination, certain deficiencies which, taken in isolation, would not have led to the finding of an unfair trial, it may come to the opposite conclusion if the deficiencies taken as a whole render the trial unfair. This case-law highlights the relative nature of breaches of the various guarantees of a fair trial in general and of the independence of the judge in particular: a breach of the procedural rules surrounding the safeguarding of independence does not automatically and mechanically lead to a violation of Article 6. It must be of a certain seriousness or be combined with a number of other breaches which, taken as a whole, impair the fairness of the trial. See *Beuze v. Belgium* [GC], no. 71409/10, § 120,

32. ***Distinction between the general and individual violations on which the applicant relies.*** On reflection, it appears obvious that the "established by law" requirement is not an end in itself. It has an indirect character as it is ultimately aimed at securing the independence and impartiality of the judge. In our view, a fault line running through the approach of the majority is the failure to distinguish between a general institutional problem and its concrete consequences in a given individual's trial. We consider it of the utmost importance to examine, on the one hand, the general problem created by flaws in the appointment of a judge and, on the other, the concrete consequences which the irregularities, leading to an infringement of the "established by law" requirement, might have had on the fair trial of an individual who claims that the irregularly appointed judge lacked independence and impartiality. This will only be possible by going into the other elements as listed in Article 6 § 1.

33. Having found a violation of Article 6 § 1 in respect of the "established by law" requirement, but refusing to go further into the alleged unfairness of the applicant's own trial due to – in his submission – a lack of independence, the majority have ignored the distinction between a general and perhaps systemic problem and its concrete consequences, if any, in an individual case. This is not only what the applicant requested the Court to do, but it is also, looking at examples of cases at member State level and from the Court of Justice of the European Union (CJEU), what falls naturally to a court to do in this type of case.

B. The consequences of the interrelationship between the three requirements

34. ***The need to identify the consequences of a concrete infringement.*** As stated before, the fact that the "established by law" requirement has no self-standing, absolute character and has to be seen in the light of the other requirements of Article 6 § 1 is consistent with the well-established case-law of the Court to the effect that what is required in civil and criminal cases is the overall fairness of the trial.

35. What are the *consequences* of the concrete infringement of the "established by law" requirement on the fairness of the proceedings in the specific case? There can be instances of minor, absolutely irrelevant flaws which have no bearing at all and, conversely, some that indeed deprive the impugned person of any capacity or legitimacy to be a judge and entail the

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9 November 2018: "The fairness of a criminal trial must be guaranteed in all circumstances. However, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case ... The Court's primary concern, in examining a complaint under Article 6 § 1, is to evaluate the overall fairness of the criminal proceedings." The same principles apply in civil matters, see *Regner v. the Czech Republic* [GC], no. 35289/11, § 151, 19 September 2017.

nullity of his or her appointment. The majority acknowledge that the flaws must be significant in order to generate a violation of Article 6 § 1, hence the three-tier gravity test. However, they fail to differentiate between the effects of procedural irregularities for fellow judicial candidates and for parties to court proceedings and do not examine the consequences of the identified flaws for a specific trial[12]. This latter approach, however, finds support in some Council of Europe member States and in the case-law of the CJEU.

36. ***Comparative law elements.*** Examples from different Council of Europe member States (for example Austria, Norway, Sweden, the United Kingdom) demonstrate that the unlawful or irregular appointment of judges does not automatically lead to the annulment of the judgments in which they have taken part. Although such systems also consider the right to a lawfully established tribunal as an essential guarantee for a fair trial, they do not provide for unconditional protection against a decision by a judge who has been appointed following a flawed procedure. An irregularity in the appointment of a judge will only undermine the lawful establishment of a court in a narrow set of circumstances. A high threshold is set and it will not be met in cases of flaws of a purely technical nature which were incapable of having had any influence on the appointment decision itself. In some countries, regard will be had to whether the irregular appointment of a judge was material to the proceedings, and also to the damage that would be caused to each party if the hearing of the case were to be nullified. This protects the judge's constitutionally guaranteed irremovability against unwarranted attacks and the validity of the trial from immaterial flaws in the judicial appointment procedure. Unfortunately, the majority take no position on this approach.

37. ***CJEU case-law.*** We are perfectly aware of the extremely delicate "rule of law" problems facing different European States, against which background the present judgment is being handed down. Pending before this Court are numerous Article 6 cases in which questions arise relating to the existence or absence of the objective guarantees necessary to safeguard the independence and impartiality of judges[13]. In Brussels, questions relating to

[12] In their assessment, they moreover draw inappropriate parallels with cases that are – too – far away from the case at hand. In this respect, the reference to the *Iliatovsky* case dealing with lay persons who had not been appointed judges in accordance with the legal requirements (paragraph 225 of the judgment) is particularly inappropriate. It is obvious that they were simply not judges at all.

[13] See, for example, *Grzęda v. Poland* (no. 43572/18); *Xero Flor w Polsce sp. z o.o. v. Poland* (no. 4907/18); *Broda v. Poland* (no. 26691/18) and *Bojara v. Poland* (no. 27367/18); *Żurek v. Poland* (no. 39650/18); *Sobczyńska and Others v. Poland* (nos. 62765/14, 62769/14, 62772/14 and 11708/18); and *Reczkowicz and Others v. Poland* (nos. 43447/19, 49868/19 and 57511/19).

compliance by certain European Union (EU) member States with their EU law obligations under, *inter alia*, Articles 2 and 7 of the Treaty on European Union (TEU) are pending, and concrete manifestations of a member State's failure to so comply in the judicial sphere have been a running theme in cases before the CJEU for several years now. Some of those judgments, and other less prominent ones, which have raised the question of the right to a "*juge légal*" in the more mundane context of EU staff disputes, are quite rightly cited in detail in the present Grand Chamber judgment.

38. However, we do not consider that the CJEU judgments necessarily support the logic underpinning the majority's position – namely the existence of a stand-alone right to a "tribunal established by law" detached from a concrete assessment of independence and impartiality and the automatic consequences which flow from irregularities in a judicial appointment procedure as presented by the majority. Take, for example, the preliminary ruling of the CJEU in a 2019 case known as *A.K.*, where it examined whether the new Disciplinary Chamber of the Polish Supreme Court was independent (see the extract in paragraph 138 of the Grand Chamber judgment)[14]. The CJEU explained when a court could be considered to lack the independence and impartiality required by Article 47 of the EU Charter of Fundamental Rights. As regards the circumstances in which the members of a tribunal were appointed, executive involvement in the appointment procedure was clearly stated to be unproblematic, however, reflecting established Strasbourg case-law: "if, once appointed, they [would be] free from influence or pressure when carrying out their role"[15]. Furthermore, turning to the substantive conditions and detailed procedural rules governing the adoption of appointment decisions, the CJEU held that it was necessary to ensure that they could not give rise to reasonable doubt, in the minds of individuals, "as to the imperviousness of the judges concerned to external factors and *as to their neutrality with respect to the interests before them*"[16]. With all due respect, it is difficult to see much difference between the reasoning of the Icelandic Supreme Court, which led it to conclude *in concreto* that A.E. clearly did not lack the requisite independence to sit in the three-judge panel hearing the applicant's appeal, and that of the CJEU.

39. Turning to a staff case which features in the Grand Chamber judgment – *Simpson v. Council of the EU*[17] – this is a case which at first sight might be read as lending support to the majority's approach[18]. On

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[14] Joined Cases C-585/18, C-624/18 and C-625/18 *A.K.v. Krajowa Rada Sądownictwa*, and *CP and DO v. Sąd Najwyższy* (EU:C:2019:982).
[15] Ibid., § 133.
[16] Ibid., § 134 (emphasis added).
[17] Cases C-542/18 RX-II and C-543/18 RX-II of 26 March 2020, *Simpson v. Council of the European Union* and *H.G. v. European Commission* (EU:C:2020:232)

closer inspection, however, we consider that it does not. The background to the case was similar to that of the applicant in the present case. The Council, when constituting the members of the European Civil Service Tribunal (ECST), had used a list of candidates established to appoint two judges in order to appoint a third one. The participation of the latter in Mr Simpson's case was challenged. In relation to the *consequences* of this appointment irregularity – a question identical to that before the Grand Chamber – the General Court of the EU held that as the constitution of the ECST was improper, the judgment under appeal automatically had to be set aside in its entirety[19]. The judge at issue could not "be regarded as a lawful judge"[20]. In that case the Court of Justice held, however, that the General Court had erred in law. The impugned appointment irregularity was not of such a kind or of such gravity as to create a real risk that the Council had made unjustified use of its powers, undermining the integrity of the outcome of the appointment process and thus giving rise to a reasonable doubt in the minds of individuals as to the independence and impartiality of the judge whose appointment had been challenged. There had been no infringement of a fundamental rule in relation to judges which was intended to protect their independence[21]. The CJEU did not reject the logic of the Chamber's departure in *Ástráðsson*, but in our view clearly sought to work around it[22]. In particular, it relied on the principle of legal certainty, which it regarded as necessary to ensure the stability of the judicial system, in order to avoid any automaticity in terms of consequences (the setting aside of a judicial decision in which the impugned judge had participated) which the new departure in this Court's case-law risked – and now risks – entailing.

40. A third CJEU judgment, not mentioned in the Grand Chamber judgment, marks even more clearly the crucial distinction between a general and perhaps systemic problem in relation to the appointment of judges and its concrete consequences, if any, in an individual case. The judgment – known as *LM* or *Celmer* – originated in a preliminary reference from the Irish High Court, which asked whether it could execute a European Arrest

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[18] See, in particular, the extensive references to the Chamber judgment in the present case in the Opinion of Advocate General Sharpston of 12 September 2019 (EU:C:2019:977).
[19] Case T-646/16 P *Simpson v. Council of the European Union* (EU:T:2018:493).
[20] Ibid., § 43. See also the judgment of the General Court in case T-639/16 P *FV* (EU:T:2018:22), at § 78, reproduced in paragraph 132 of the Grand Chamber judgment.
[21] Cases C-542/18 RX-II and C-543/18 RX-II, cited above, §§ 79-80.
[22] We note that Advocate General Sharpston sought, in §§ 76-87 of her Opinion, to distinguish the *Simpson* and *Ástráðsson* cases, pointing to what she referred to in the present case as "manipulation of a list by the executive". However, what she had in mind in this regard becomes clearer in paragraph 107 of the Opinion where she explains that setting aside a judgment adopted by a judge whose appointment was regular would be justified: "where a procedure is manipulated by political leaders in order to secure the appointment as judge of a supporter of theirs who does not have the legal qualification required by the call for applications ...". This is, unquestionably, not the situation in the *Ástráðsson* case.

Warrant (EAW) issued by the Polish courts in relation to an individual accused of drug trafficking. The applicant, who was the subject of the EAW, had argued that since Poland, and its courts, had departed so completely from the common values of the rule of law, he ran a real risk in his individual case, if surrendered, of a breach of his right to an independent tribunal[23]. The CJEU enjoined the referring court, and courts confronted with the same problem in other EU member States, to carry out a two-stage process when deciding whether to execute an EAW in such circumstances: first assessing systemic or generalised deficiencies with regard to the independence of courts in the issuing member State and then ascertaining, specifically and precisely, whether there are substantial grounds for believing that the individual concerned will run such a risk if he is surrendered to that State[24]. The latter assessment *in concreto* of the alleged risk of a fair trial breach must have regard to the individual's personal situation, as well as to "the nature of the offence for which he is being prosecuted"[25]. We are aware that regarding an EU member State such as Poland, where questions in relation to the independence of its judiciary have arisen following a series of sustained legislative changes, it is now being asked whether there is a need for the second stage of the CJEU assessment just described. On this view, the deficiencies in an individual case could be regarded as established once systemic deficiencies reach a certain level[26]. However, given that the violation of Article 6 § 1 of the Convention in the present case derives from a series of shortcomings, of variable importance and gravity, albeit ones which were allowed to occur in a specially designed judicial appointment procedure, we consider that the present case is clearly far removed from the Polish context which is the subject of the bulk of the CJEU cases.

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[23] Case C-216/18 PPU, *Minister for Justice and Equality v LM* (EU:C:2018:586).
[24] Ibid., §§ 61 and 68.
[25] Ibid., § 75. For this distinction between the general assessment of systemic problems and the individual assessment of concrete consequences see also the Irish Supreme Court's follow-up judgment to the CJEU ruling: "It is of the essence of the test … that once there has been a claim of a generalised or systemic breach of independence, *there must nevertheless be an individual, specific and precise determination of whether that, in the particular case, on its own or in conjunction with other factors, amounts to a breach of the essence of a right to a fair trial*" (*Minister for Justice and Equality v. Celmer* (2018) IESC); and the Opinion of Advocate General Sharpston (cited above, § 109) in relation to appointment irregularities which were not flagrant in the majority sense, as we contend is the case here: "... if it transpires that the *substance* of the right to a fair trial was adversely affected, it will become imperative to give that right precedence over the principle of legal certainty and set aside the judgment at issue".
[26] See, for example, the pending Dutch preliminary reference in case C-354/20 PPU *L v. Openbaar Ministerie* (EU:C:2020:1033).

41. ***The method to be followed.*** In the light of the foregoing, two methodological points have to be highlighted: first, the various interrelated requirements of Article 6 § 1 of the Convention – "tribunal established by law", "independence" and "impartiality" – can and may have to be examined separately – in line with the applicant's complaints – and, second, the consequences of this examination, whatever its outcome, have to be considered.

III. "TRIBUNAL ESTABLISHED BY LAW" AND INDEPENDENCE IN THE APPLICANT'S SPECIFIC CASE

42. As indicated previously, the applicant raises two separate, albeit interrelated, complaints – violation of the "established by law" requirement (A.) and violation of his right to a fair trial due to the alleged lack of independence and impartiality of the Court of Appeal panel (B.).

43. ***An obligation to examine all the complaints brought forward.*** For the reasons outlined above, these two complaints should have been examined separately by the Grand Chamber. While they may have a common *origin* this does not mean that the *consequences* of establishing a breach of one or the other are the same. In addition, a violation with regard to one complaint does not automatically imply a violation of the other.

44. It is true that the Court has frequently refrained from examining peripheral or secondary complaints or complaints that are in one way or another absorbed by the main complaint to which it has provided an extensive answer[27]. This is a means by which the Court seeks to deal with as many applications as possible, to concentrate on the core legal issues, to avoid overburdening a given judgment and to ensure greater clarity by leaving aside peripheral or secondary claims. However, where claims are neither peripheral nor secondary, skipping an essential and even distinct element of an application could rightly be perceived as a partial "denial of justice"[28]. In the present case, the applicant's two complaints obviously stand on an equal footing and both have a bearing on the question of the consequences, pursuant to Article 6 § 1, of any violations established thereunder.

[27] See, for example, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014, or, previously, *Kamil Uzun v. Turkey*, no. 37410/97, § 64, 10 May 2007.

[28] See, for example, the separate opinion of Judge Sicilianos in *Myasnik Malkshyan v. Armenia*, no. 49020/08, 15 October 2020.

A. "Established by law"

45. ***Two flaws in the appointment procedure.*** Applying the three-tier test developed and explained under the general principles (see paragraphs 243 et seq. of the judgment), the judgment identifies two flaws in the appointment procedure:

(i) ministerial breaches in relation to the candidates shortlisted by the EC and the amended list proposed to Parliament by the Minister; and

(ii) non-compliance by Parliament, which had to endorse the choice of candidates proposed by the Minister, with the established voting rules.

46. ***Ministerial failure to comply with the legal procedure.*** We have no difficulty concurring with the majority in finding a series of flaws in the manner in which the Minister departed from the list proposed by the EC and proceeded to propose a different list to Parliament. Those flaws were identified by the Icelandic Supreme Court in its judgments of 19 December 2017, awarding damages to candidates whose names had been shortlisted but removed (see paragraphs 68-73 of the present judgment). According to that Supreme Court judgment, the Minister of Justice was entitled to propose her own candidates to Parliament, but her proposal had to be based on an independent investigation of all the elements necessary to substantiate it, in accordance with the well-established rules of administrative procedure. She consequently had to ensure that her own investigation and assessment were based on expert knowledge, on a par with that of the EC, and that the instructions concerning the evaluation procedure as set out under the applicable rules on the work of the EC – rules that had been put in place by the Ministry of Justice to guide that work – were taken into account in her assessment. The Minister should, at the very least, have compared the competencies of the four candidates that she had added to the list with the four that she had removed. Depending on the outcome of such a comparison, the Minister should then have given due reasons for her decision to seek Parliament's approval for her proposal to depart from the EC's selection. Only in this manner could Parliament have sufficiently played its role in the process and taken a sufficiently informed position on the Minister's assessment. The inadequate character of the investigation conducted by the Minister of Justice prevented her from reaching a different decision on the competencies of the candidates from that previously reached by the EC on the basis of the same data (paragraphs 72-73 of the judgment). The Minister's conduct was all the more regrettable as she must have been aware of the slippery slope on which she was embarking, having been warned by her in-house legal advisers (paragraphs 35 et seq. of the judgment).

47. According to an exchange of memoranda with the Parliament, the Minister had also been told at an earlier stage that she was expected to

provide grounds for her proposals, and in particular to state whether she intended to deviate from the assessment of the EC (paragraph 33 of the judgment). She was also advised to inform the candidates about any change envisaged in the evaluation criteria and to give them an opportunity to present new information that could be relevant for any fresh evaluation (paragraph 37 of the judgment).

48. As to the reasons provided by the Minister for her selection – greater judicial experience and gender balance – it should be noted that her choice of replacement candidates did not entirely correspond to the reasons provided. For example, she did not replace the four candidates who had been on the initial list – four men – with four women, but instead with two women and two men, despite the fact that there were more than two women on the list of suitable candidates who had not been shortlisted by the EC.

49. ***Absence of any valid reasons for the Ministerial choice?*** It is, however, incorrect in our view to state that the Minister did not provide *any* valid reasons for her choice (paragraph 263 of the judgment). On the contrary, she considered the criteria applied by the EC Committee inadequate in that, in particular, insufficient importance had been accorded to the judicial experience of candidates being proposed for the new appellate body (paragraphs 44 and 47 of the judgment). It should be added that criticism of the rigidity of the criteria chosen and applied by the EC, as well as of the insufficient importance accorded to judicial experience, was echoed by several domestic stakeholders and bodies at the time[29]. Furthermore, the appointment system has subsequently been changed so that evaluation committees propose more candidates than the number of judicial posts (as explained in the respondent Government's submissions at paragraph 190 of the judgment). This represents – it should be noted – the

[29] Thus, for example, it is clearly stated in the submissions of the respondent Government that the need for greater weight to be given to judicial experience had also been emphasised by the vice-chairman of the Icelandic Judges' Association. A representative of the latter association was invited to the meeting of the Parliamentary Constitutional and Supervisory Committee (CSC) on 29 May 2017 (paragraph 45 of the judgment) and was questioned by the CSC on 30 May 2017 (paragraph 48 of the judgment). Details of what answers were provided by the judges' association to the CSC is not, unfortunately, provided in the judgment. See also the 2016 report of the Icelandic Parliamentary Ombudsman on shortcomings in evaluation procedures which had developed in Iceland for appointment to public posts (reproduced in paragraph 116 of the judgment):
"... in recent years the *above-mentioned (evaluation) method is employed too strictly and absolutely*, without properly assessing substantively the candidates' knowledge and experience. Thus, the candidates' experience is assessed only in terms of years, how many courses they have finished or how many academic articles they have published, *without that experience apparently being substantively assessed, including as to how well the candidate has performed and how the experience will assist the candidate in the performance of the post in question. ... This results in genuine uncertainty about whether the most qualified candidate for a post obtained the highest score* ..." (emphasis added).

very margin which the Minister had requested in relation to the Court of Appeal appointments. Moreover, the difference between candidate 15 (the last to be retained) and A.E., no. 18, was 0.205 (5.48-5.275 out of 10 points = 2.05%). With such a narrow margin between them, it is almost impossible to speak of a difference in merit. Moreover, the greater reliance placed by the Minister on two criteria, even if she did not follow them entirely and consistently, does not seem totally unreasonable. Four men were replaced by two women and two men, and among the newly retained candidates, each had more – indeed much more – judicial experience. The judge whose impartiality and independence were impugned in the applicant's case, A.E., had a score of 8.5 in this respect, whereas the four removed candidates only obtained between 0.5 and 5.3 points. There appears to be nothing arbitrary or unreasonable about insisting on significant judicial experience for a State's first Court of Appeal.

50. ***Non-compliance by Parliament with the established voting rules.*** A single vote was taken by Parliament whereas it is uncontested that, according to the procedure specially put in place by the 2016 Judiciary Act, there should have been a separate vote for each of the candidates (see paragraphs 19 and 105, and also 70, 90 and 189, of the judgment). It may be somewhat excessive, however, to find that the failure to comply with those rules "surely *compounded* the grave breach already committed by the Minister of Justice ..." (paragraph 270 of the judgment, emphasis added). Informed by the Speaker of Parliament that the candidates proposed by the Minister could be voted on individually or, if there were no objections, put to a single vote, nobody from either the majority or the minority in Parliament objected or requested a separate vote (paragraph 52 of the judgment). The Supreme Court had examined this flaw and concluded that it was "a defect of no significance" (paragraph 90 of the judgment). It had convincingly explained that the single vote "did not present any irregularities, provided an opportunity had been made available to vote separately on each candidate upon request" (paragraph 70 of the judgment). It should be added that, had the single vote in Parliament itself been a significant or manifest flaw, the appointment of all the Court of Appeal judges, including the 11 shortlisted by the EC, would have been flawed too (ibid.).

51. ***A series of shortcomings that, considered together, lead to the finding of a violation of Article 6 § 1.*** As indicated in the introduction, we concur with our colleagues regarding the violation of the "established by law" requirement because we find a series of shortcomings, of variable importance and gravity, in the appointment procedure for judges of the Court of Appeal. The Minister did not comply with the duty to give reasons under Icelandic administrative law generally and in particular under the

provisions of the Judiciary Act, which allowed her, exceptionally, to deviate from the EC's proposal. Although she deviated on the basis of ostensibly legitimate criteria, she did not consistently follow those criteria when choosing the four replacement candidates. The shortcoming at Parliamentary level – which could be attributed to the Speaker or to Parliament as a whole – was not such that it could be said to give rise on its own to an irregular appointment procedure. However, considering the procedure as a whole – the selection and proposal by the EC, the Ministerial decision to deviate from that proposal and the manner in which this was done, the questions raised by members of the CSC, the impression that the decision-making process was rushed through, etc. – we can agree that the parliamentary procedure followed did not offset the preceding flaws. This cumulative series of shortcomings was all the more regrettable as a judicial appointment procedure had been specially and carefully designed for the establishment of a new appellate court, a factor that should have prompted special vigilance and strict compliance with the applicable rules by all those involved. We disagree with our colleagues, however, in the "supercharging" of the flaws identified, in order to meet the manifest breach test which the Grand Chamber has decided to develop, and the consequences that the majority have attributed to the passing of the threshold, namely a general violation of Article 6 § 1 which they regard as dispensing with the need to assess the applicant's individual case[30].

B. Independence and impartiality

52. ***The reasons given by the majority for dispensing with an assessment of independence and impartiality.*** As stated succinctly in paragraph 295 of the judgment and explained above, the majority decided that there was no need to examine the applicant's second complaint in relation to the alleged lack of independence of the Court of Appeal panel which heard his case. As the complaints stem from the same underlying problem – an irregular judicial appointment procedure – the finding of a violation in relation to one requirement ("established by law") dispensed with the need to examine the other complaint (an allegedly unfair trial due

[30] Compare the separate opinion of Judges Lemmens and Griţco at Chamber level, paragraph 8:
"... the 'flagrant denial of justice' test is a stringent test of unfairness. A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6. What is required is 'a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article' ... Transposed to the requirement that a tribunal must be 'established by law', this would mean that there could only be a violation of Article 6 § 1 of the Convention where the breach of the rules relating to the establishment or the jurisdiction of the tribunal is of such a fundamental nature as to amount to the destruction of the very essence of the guarantee of establishment by law ..."

to the lack of judicial independence). In other words, the consequence of the violation of Article 6 § 1 in relation to the first requirement was, automatically but implicitly, the unfairness of the applicant's trial. At its most extreme – as expressed explicitly or implicitly in the separate opinions of Judge Serghides and Judge Pinto de Albuquerque – the applicant was not tried by a properly constituted court and thus there was no "judgment" as such, in his regard.

53. ***Need to assess independence and impartiality.*** However, while we fully agree that flaws in a judicial appointment procedure can give rise to a strong presumption of a lack of independence and objective impartiality, there can and should be no automaticity in this respect. In each case, it is necessary to ascertain whether the violation of legal requirements in the appointment procedure has impaired the independence and objective impartiality of the judge in the impugned trial whose fairness has been challenged. Evidence of such an approach is scattered throughout the Grand Chamber judgment itself; take the position of the Polish Commissioner for Human Rights: "instances of flagrant violation had to be *fundamental in nature and form an integral part* of the appointment process" (paragraph 197 of the judgment, emphasis added). Then in paragraph 234 of the judgment, for example, the Grand Chamber stresses that it must "systematically enquire whether the alleged irregularity in a given case was of such gravity as to ... compromise the independence of the court in question". In addition, it is clearly stated that departure from the principle of legal certainty is justified only "when made necessary by circumstances of a substantial and compelling character, such as the correction of fundamental defects or a miscarriage of justice" (paragraph 238 of the judgment).

54. ***The applicant's arguments concerning A.E.'s alleged lack of independence.*** Turning to the applicant's trial – the individual trial which must be at the heart of the Court's Article 6 § 1 assessment – and to the question of A.E.'s independence, it will be remembered that the applicant was tried for driving without a valid licence and under the influence of drugs. He pleaded guilty and was heavily sentenced. He appealed against the sentence imposed. As the appeal proceedings progressed, he altered his grounds of appeal and raised the issues of the regularity of the appointment of A.E. to the Court of Appeal and, secondly and separately, the fairness of his trial given her alleged lack of independence and impartiality.

55. He based this latter complaint on the suggestion, little more, that A.E.'s appointment had formed part of a political deal, that her participation in the election of the Court of Appeal's president must have been politically biased and that this in turn had influenced the assignment of cases to appeal court judges. He claimed that he therefore had reason to fear that the Court

of Appeal panel, as it was composed in his case, lacked the necessary independence and impartiality to dispose fairly of his appeal.

56. ***Assessment of the applicant's arguments.*** These arguments are both general and of an unsubstantiated nature. They do not reveal any specific reason related to the applicant, his case, or the charges under appeal which would justify his alleged fear of a lack of independence or impartiality of the Court of Appeal when dealing with his case. A.E., who had served as a judge for a number of years, was recognised by the EC as possessing the professional qualifications and competence for the office of judge of the Court of Appeal. In other words, she fulfilled the requirements set by the new Judiciary Act. This was not contested by the applicant. She had scored lower in the EC's evaluation because she had no attorney, teaching or academic experience and because the EC had decided to downplay the importance of prior judicial experience. Once she was appointed as a Court of Appeal judge by the President of Iceland, all the constitutional and legal guarantees for, and obligations incumbent on, members of the judiciary applied to her. She held office for an indefinite term, was not bound to follow any instructions from the executive and could not be removed from office except by a judicial decision. Transfer to another post against her will was only possible in the event of a reorganisation of the judiciary. Moreover, the applicant had been convicted of a serious traffic offence. His case was processed summarily because he had fully confessed to the charges. The applicant did not contest the fact that his conviction was first and foremost based on his admission of guilt.

57. Besides, it is clear from the judgment that the majority do not actually impugn the independence of A.E. Her judgment in the applicant's case and, and beyond that, any judgment of an appellate panel on which she sat, simply fall foul of an absolutist approach to irregularities in a judicial appointment procedure which were entirely remote from any appeal in relation to a driving offence to which the appellant had pleaded guilty. As regards A.E., in paragraph 285 of the judgment the majority indicate that:

> "... the question *whether the irregularities at issue had any actual implications for A.E.'s independence or impartiality*, this being at the centre of the Supreme Court's examination of the applicant's case, did not as such have a direct bearing on the assessment of his separate complaint under the 'tribunal established by law' requirement ..." (emphasis added)

In paragraph 280 this point is made even more clearly:

> "The Court has no reason to doubt that ... once appointed, the individual judges would endeavour to observe the fair-trial requirements."[31]

[31] See also paragraphs 1 and 15 of the concurring opinion of Judge Pinto de Albuquerque, where he recognises that the appointment irregularities at issue were "undeniably remote" from the applicant's case.

58. The respondent Government had, quite rightly in our view, asked the Court not to confuse the legal effects of the irregularities in the appointment procedure for the shortlisted candidates whose names had been removed with the legal effects of the same irregularities on the status of A.E. or on the applicant's case. Whereas for the former, the legal effects were identifiable and real, hence the award of damages, the procedural irregularities complained of and acknowledged by the domestic courts were entirely remote from the applicant's appeal. The majority approach the question of "remoteness" in temporal terms (see paragraph 285 of the judgment) when in fact the central question, as the Grand Chamber stated at the outset, was whether any irregularities in the appointment of Court of Appeal judges, including A.E., had any consequences for the fair trial of the applicant and for the disposal of his appeal. This question of cause and effect is either not understood by the majority as being relevant or simply not addressed.

59. ***Conclusion: no lack of independence.*** The applicant did not sufficiently substantiate how the procedural irregularities at issue had the effect of undermining the independence and impartiality of the Court of Appeal in practice – that is, how his fears in this regard were objectively justified, as required under the Court's case-law[32].

IV. CONCLUSION

60. What conclusion should be drawn if it is found that the procedure leading to the appointment of a judge is irregular, such that the "established by law" requirement is not met but the flaws identified are not important enough to entail a lack of independence and/or impartiality?

61. ***The judgment's findings on individual redress and general measures.*** The judgment remains quite discreet as regards the consequences of the violation of Article 6 § 1. The applicant has not been awarded any compensation for non-pecuniary damage. Under the head of Article 46 of the Convention, the judgment reiterates the general principle that the respondent State has a legal obligation to choose, "subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and to redress as far as possible the effects" (paragraph 311 of the judgment). It acknowledges that, in certain special circumstances, the Court has found it useful to indicate to a respondent State the type of measures that might be taken to put an end to an – often

[32] See, *mutatis mutandis*, *Kleyn and Others v. the Netherlands* [GC], no. 39343/98 and 3 others, § 194, ECHR 2003-VI, and *Filippini v. San Marino* (dec.), no. 10526/02, 26 August 2003.

systemic – situation (paragraph 312). The judgment then relies entirely on the statement made at the Grand Chamber hearing by the applicant's representative, who, when asked whether his client sought the reopening of his case, responded in the negative. No heed is paid to the fact that he eventually retracted this statement, the reason being that there was insufficient justification to explain the change in the applicant's position (paragraph 313). The judgment lastly observes that it falls to the respondent State to take any general measures, as appropriate, in order to resolve the problems that have led to the Court's findings and to prevent similar violations from taking place in the future. It adds that this does not mean that the Icelandic State would be obliged, under the Convention, to reopen all similar cases that have since become *res judicata* (paragraph 314).

62. ***The missing reasons for not requiring reopening.*** Whilst we fully agree with the conclusions, we have difficulties with the underlying reasoning.

63. The majority judgment, in its conclusion, quite rightly makes a distinction between general and specific individual measures. We clearly subscribe to such a distinction, as the common thread of our separate opinion lies precisely in the need for a distinction between the general problem of the flawed appointment procedure for certain judges of the newly created Court of Appeal and the specific problem of the fairness of the applicant's trial for a traffic offence.

64. We subscribe to the conclusion that general measures should be taken by the Icelandic authorities to avoid repetition of the flaws which occurred in this appointment procedure. We are mindful of the very delicate context in which the present judgment intervenes, with challenges proliferating in relation to judicial independence and the rule of law more generally. Oddly enough, what is at stake at European level is less a failure to comply with the "tribunal established by law" requirement and more the issue of the independence of the judiciary. For the reasons outlined above, it is that question which we consider to be central[33]. There are striking examples in Europe today of legal systems where appointments are strictly in conformity with domestic law but where the law itself may be the problem, as it appears to be aimed, usually after a process of gradual or rapid amendment, at cementing executive control over the judiciary, thus fettering and undermining its independence. As a matter of fact, we note that on a general level the Icelandic authorities have already acknowledged and remedied the imperfections in the impugned judicial appointment procedure. After the Chamber judgment the Court of Appeal operated with only eleven of the fifteen appointed judges; four additional judges were

[33] For an overview of well-established case-law demonstrating the centrality of independence see the Court's new Factsheet on the *Independence of the justice system*, https://echr.coe.int/Documents/FS_Independence_justice_ENG.pdf.

temporarily appointed then a fresh call for judges was made and eventually new judges, including A.E., were appointed after a regular procedure (see paragraphs 99-100 of the judgment).

65. ***The underlying justification: distinction between general and individual consequences.*** There is, however, a very simple and straightforward reason for refusing the reopening of the applicant's case and, beyond that, in a general and indefinite manner, all proceedings in which A.E. participated. While the overall and systemic problem requires general measures, on the specific and individual level the reopening of a case is only necessary if a judge lacks independence or impartiality or if overall fairness is impaired.

66. As we have sought to explain above, in the present case no element was advanced that could have led to such a conclusion. There was, in short, no evidence, not even anecdotal, to suggest that the irregularities in the appointment procedure had affected the hearing or determination of the charges in the applicant's case and specifically upon his appeal.

67. It is, therefore, the extremely important distinction between general problems and their possible, but not automatic, consequences at the level of a specific case that explains why, in the present case, general measures of redress are necessary, whereas the reopening of the specific proceedings in which the applicant was tried is not. In terms of causation, in the specific case, the problem at the general level had no causal effect on the fairness of the applicant's appeal.

68. As we indicated at the outset, our vote in favour of finding a violation of Article 6 § 1 stems from our opinion that there was a series of flaws, of variable importance and gravity, in the appointment procedure for the newly-established Court of Appeal in Iceland, but that vote is, crucially, qualified by the fact that the fairness of the applicant's individual trial was not in any way impaired.

69. Our separate opinion should in no way be read as downplaying the fundamental importance of observing the rules that govern the appointment of judges with regard to the confidence of litigants and of the public in general in the independence and impartiality of the judiciary. These requirements constitute a major achievement of democracy and of the rule of law and form part of the essence of the right to effective judicial protection and the fundamental right to a fair trial. Every democratic system has to preserve these values. The transformation of the courts over time, from a "long arm" of political power to control and muzzle citizens, into bodies which protect individual liberties in an institutional environment characterised by the separation of powers, is a development whose importance cannot be overestimated. It is a development, moreover, which this Court seeks to safeguard and in relation to which it must remain constantly vigilant.

PARTLY DISSENTING OPINION OF JUDGE SERGHIDES

1. The main issue in the present case was whether the Court of Appeal, which upheld the applicant's conviction and sentence for a road traffic offence (seventeen months' imprisonment and the revocation of his driving licence for life), had been a "tribunal established by law" within the meaning of Article 6 § 1 of the Convention, in so far as one of the judges on the bench of the newly constituted Court of Appeal which ruled on his case had not been appointed in accordance with the domestic law.

2. I am in agreement with the judgment that there has been a violation of Article 6 § 1 of the Convention, as the tribunal was not one "established by law". However, I take objection to the Court's finding that it did not need to examine the remaining complaints under that provision, namely that the tribunal lacked independence and impartiality. More precisely, my only disagreement with the judgment concerns point 2 of its operative part which holds that "there is no need to examine the remaining complaints under Article 6 § 1 of the Convention", following point 1 of the operative part (adopted unanimously) by which it found "that there ha[d] been a violation of Article 6 § 1 of the Convention as regards the right to a tribunal established by law".

3. The explanation given by the Court as to why there is no need to examine the remaining complaints of independence and impartiality is given in paragraph 295 of the judgment:

> "The Court notes that in the present case, the complaints under the 'tribunal established by law' and 'independence and impartiality' requirements stem from the same underlying problem, that is, the irregularities in the appointment of A.E. as a judge of the Court of Appeal. As the Court has found above, the irregularities in question were of such gravity that they undermined the very essence of the right to be tried by a tribunal established in accordance with the law. Having made that finding, the Court concludes that the remaining question as to whether the same irregularities have also compromised the independence and impartiality of the same tribunal does not require further examination ..."

4. In my view, after the finding that there was no tribunal established by law, the alleged "remaining complaints" mentioned in point 2 of the operative part, namely those on the right to an independent and impartial tribunal, became immediately and automatically devoid of object and existence *ex tunc*; and therefore they should have been rejected as inadmissible *ratione materiae*, by virtue of Article 35 §§ 3(a) and 4 (under the latter provision, the Court may declare a complaint inadmissible "at any stage of the proceedings"). This consequence is not something that the Court, having held that there is no tribunal established by law, can overlook or consider unnecessary to examine. It should have decided the issue by stating the obvious and rejecting these complaints, in the manner that I propose.

5. It is self-evident that the rule of grammar and logic according to which there can be no adjective without a noun applies here. “Independent” and “impartial” are attributes of a noun, in the present case “a tribunal”, within the meaning of Article 6 § 1. When there is no “tribunal”, as in the present case because of the absence of a tribunal established by law, there is no noun and thus no object to which the adjectives “independent” and “impartial” can correspond, with the result that these adjectives become devoid of object and existence. It is crucial to note that all the requirements of the right to a fair trial specified by Article 6 § 1 are indispensable, and without them the said right cannot be secured. However, the only free-standing requirement of Article 6 § 1 is that there must be a lawful tribunal. This requirement is a central feature of a fair trial as it refers to the very essence of the relevant right. The other requirements of Article 6 § 1, such as the independence or impartiality of the tribunal, or that the hearing should take place within a reasonable time, all pre-suppose the fulfilment of the central demand, namely that the tribunal must have been established by law. In other words, the “independence” and “impartiality” requirements are intrinsic and inseparable qualities related to the very existence of “a tribunal established by law”. It is impossible to examine the qualities of a tribunal that does not exist, just as it is impossible to examine the qualities of a non-existent person or building. Therefore, any hope that a tribunal is independent and impartial will hinge on the fact that it is a tribunal established by law in the first place. The former qualities are dependent on the latter and cannot be left in a vacuum.

6. Regrettably, the Court, by finding that there was no need to examine the complaints of a lack of independence and impartiality, gave the impression that it was referring to the merits of those complaints, thus suggesting that they remained admissible. However, as submitted in this opinion, these complaints had become inadmissible and should have been rejected as such.

7. Finally, the proposed approach is in line with the principle of effectiveness, which underlies all Convention provisions, and according to which all human rights enshrined and guaranteed therein must be protected practically and effectively and not in a theoretical or illusory manner. I would point to some other aspects of this principle, namely that it assists the Court: (i) in seeking to ascertain and determine the core or very essence of an allegedly violated right which needs effective protection and to give it the weight and consideration that it deserves; (ii) in deciding whether there has been a violation of the core of the right; and (iii) if there has been such a violation, to draw, in its corresponding decision, all the necessary conclusions or repercussions from such finding.

8. These aspects of the principle of effectiveness are also corollaries of its capacity to secure rights in a practical and effective manner. In the present case the Court, even though it found a violation of the right in

question, on the ground that there had been no tribunal established by law, in holding that there was no need to examine the issues of independence and impartiality, it then failed, with all due respect, to attribute the requisite weight and consideration to the consequences of that violation. And what is more, it failed to do so even though it had rightly acknowledged that the very essence of the right in question had been undermined (see paragraph 295 of the judgment).