

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

SECOND SECTION

CASE OF BAKA v. HUNGARY

(Application no. 20261/12)

JUDGMENT
(*Merits*)

STRASBOURG

27 May 2014

THIS CASE WAS REFERRED TO THE GRAND CHAMBER
WHICH DELIVERED JUDGMENT IN THE CASE ON
23/06/2016

This judgment may be subject to editorial revision.



In the case of Baka v. Hungary,

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

Guido Raimondi, *President,*
Işıl Karakaş,
Nebojša Vučinić, *judges,*
Helena Jäderblom, ad hoc *judge,*
Egidijus Kūris,
Robert Spano,
Jon Fridrik Kjølbro, *judges,*
and Abel Campos, *Deputy Section Registrar,*

Having deliberated in private on 15 April 2014, delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 20261/12) against the Republic of Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Hungarian national, Mr András Baka ("the applicant"), on 14 March 2012.

2. The applicant was represented by Mr A. Cech, a lawyer practising in Budapest. The Government were represented by their Agent, Mr Z. Tallódi, of the Ministry of Public Administration and Justice.

3. The applicant alleged, in particular, that he had been denied access to a tribunal to contest the premature termination of his mandate as President of the Supreme Court. He also complained that he had been removed from office as a result of the views and positions that he had expressed publicly in his capacity as President of the Supreme Court.

4. On 29 November 2012 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. On 5 March 2013 the President of the Section granted the Hungarian Helsinki Committee, the Hungarian Civil Liberties Union, the Eötvös Károly Institute, and the Helsinki Foundation for Human Rights of Poland, leave, under Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court, to intervene as third parties in the proceedings.

6. Mr A. Sajó, the judge elected in respect of Hungary, was unable to sit in the case (Rule 28). The Government accordingly appointed Ms Helena Jäderblom, the judge elected in respect of Sweden, to sit in his place (Article 26 § 4 of the Convention and Rule 29 § 1 (a) of the Rules of Court as in force at the time).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1952 and lives in Budapest.

A. Election of the applicant as President of the Supreme Court and his functions

8. On 22 June 2009, after seventeen years of service (1991-2008) as a judge at the European Court of Human Rights and, subsequently, more than one year's service as a member of the Budapest Court of Appeal, the applicant was elected by the Parliament of Hungary, by decision no. 55/2009 (VI.24) OGY, as President of the Supreme Court for a six-year term, until 22 June 2015.

9. In that capacity, the applicant not only performed managerial tasks but also had a judicial role, presiding over deliberations on uniformity issues and guiding decisions. He was also President of the National Council of Justice. This second function was added to the tasks of the President of the Supreme Court in 1997 by the Organisation and Administration of the Courts Act (Act LXVI of 1997). As the head of the National Council of Justice, the applicant was under an explicit statutory obligation to express an opinion on parliamentary bills that affected the judiciary, after having gathered and summarised the opinions of different courts via the Office of the National Council of Justice.

10. On 13 October 2011 the General Assembly of the Network of the Presidents of the Supreme Judicial Courts of the European Union unanimously elected the applicant President of the Network for a two-year term (from 2011 to 2013).

B. Background to the case

11. In April 2010 the alliance of Fidesz–Magyar Polgári Szövetség (Fidesz–Hungarian Civic Union, hereinafter "Fidesz") and the Christian Democratic People's Party ("the KDNP") obtained a two-thirds parliamentary majority and undertook a programme of comprehensive constitutional reform. Thereafter, the applicant spoke up several times in order to express his views on the integrity and independence of the judiciary. In his professional capacity as President of the Supreme Court and the National Council of Justice, the applicant expressed his views on four issues: the Nullification Bill; the retirement age of judges; the amendments to the Code of Criminal Procedure; and the new Organisation and Administration of the Courts Bill.

12. Firstly, the Nullification Bill (subsequently Act XVI of 2011) sought to redress convictions relating to the crowd dispersion in autumn 2006. The applicant criticised the manner in which that goal would be achieved, namely by reopening final judgments and annulling through legislation certain judicial decisions. On 12 February 2011 the applicant's spokesman explained to the *Népszabadság* newspaper that, in the applicant's view:

> "the Bill ordering the annulment of some judicial decisions delivered in relation to the 2006 riots gives cause for concern, because it violates the right of judges to freely assess evidence. This is a serious constitutional problem. ... the judiciary is examining the Bill only from a professional point of view and distances itself from any kind of political debate. András Baka [the applicant], President of the National Council of Justice, hopes that Parliament will choose a legal technique that eliminates the problem of unconstitutionality".

On 8 March 2011, the day after the adoption of the Bill, István Balsai (Fidesz MP, Chairman of the Constitutional, Judicial and Standing Orders Committee of Parliament at the relevant time), responded to the critiques of the judiciary in a press conference, where he declared: "The adopted legal solution was said to be unfortunate. Now, I myself find it unfortunate if a member of the judiciary, in any position whatsoever, tries to exert influence over the legislative process in such a way".

13. Secondly, in relation to the proposal to reduce the mandatory retirement age of judges (from seventy to the general retirement age of sixty-two) in Article 26 (2) of the Fundamental Law of Hungary, on 7 April 2011 court presidents, including the applicant, addressed a letter to different actors in the constitutional process (the President of the Republic, the Prime Minister, the Speaker of Parliament) in which they pointed out the possible risks to the judiciary posed by that proposal. Their concern was that by abolishing the possibility for judges to remain in office until the age of seventy, the proposed rule would force one tenth of Hungarian judges (274 persons) to end their careers unexpectedly in 2012. In the morning of 11 April 2011 (the day of the vote on the proposals for amendment), the applicant addressed a letter to the Prime Minister in which he stressed that the proposal was humiliating and professionally unjustifiable; it infringed the fundamental principles of independence, status and irremovability of judges; and it was also discriminatory, since only the judiciary was concerned. He added as follows:

> "It is, however, unacceptable if a political party or the majority of Parliament makes political demands on the judiciary and evaluates judges by political standards."

The same day, Parliament adopted the above-mentioned proposal (see Relevant domestic law below).

14. On 14 April 2011 the plenary session of the Supreme Court, the applicant in his capacity as President of the National Council of Justice, as

well as the presidents of regional and county courts addressed a communiqué to the Hungarian and European Union public, pleading for the autonomy and independence of the judiciary and criticizing the new mandatory retirement age for judges. The relevant extracts from the communiqué read as follows:

> "According to the proposal, the mandatory retirement age of judges will be reduced by eight years as of 1 January 2012. As a result, the tenure of 228 judges (among them 121 judges responsible for court administration and professional supervising) will be terminated the same day, without any transition period, due to the fact that they will have turned 62. By the 31 December 2012 a further 46 judges will have to terminate their career. As a consequence of this decision the timeliness of judicial proceedings will significantly deteriorate (reassignment of nearly 40 000 cases will be necessary, which may even cause several years' delay in the judicial proceedings of tens of thousands of clients). The administration of courts will be seriously hindered since the replacement of dozens of retiring judges is extremely difficult.
>
> The multiple effect of the forced pensioning off, without any real justification, of highly qualified judges, who have several years of experience and practice, and most of whom are at the apex of the hierarchy, will fundamentally shatter the functioning of the court system – leaving aside other unforeseeable consequences. Moreover, the proposal is unfair and humiliating with respect to the persons concerned, who took an oath to serve the Republic of Hungary and to administer justice and who devoted their life to the judicial vocation.
>
> It is incomprehensible why the issue of the retirement age of judges is worth regulation in the Fundamental Law. There is only one answer: by including it in the Fundamental Law, there will be no chance to contest this legal rule, which violates the fundamental principles of a democratic state governed by the rule of law, before the Constitutional Court.
>
> Such an unjustified step insinuates a political motivation. "

15. Thirdly, on 14 June 2011, Bill T/3522 on the amendment of certain legislation concerning judicial procedure and the judicial system (including the Code of Criminal Procedure) was submitted to Parliament. At the applicant's request, the Criminal Law Division of the Supreme Court prepared an analysis of the Bill, which was communicated to Members of Parliament. As no substantive changes were made to the Bill (enacted on 4 July 2011 as Act LXXXIX of 2011), the applicant decided to challenge the Act before the Constitutional Court on grounds of unconstitutionality and violation of obligations enshrined in international treaties, making use of that prerogative for the first time in Hungarian history. The Constitutional Court, in its decision no. 166/2011.(XII.20.) AB of 19 December 2011, established the unconstitutionality of the impugned provisions and quashed them (notably, the provision concerning the Attorney General's right to establish court competence by derogation from default statutory rules).

16. Lastly, the applicant expressed his views in a parliamentary debate on two new Cardinal Bills: the Organisation and Administration of the Courts Bill (no. T/4743) and the Legal Status and Remuneration of Judges

Bill (no. T/4744). According to the explanatory memorandum to the Bills, it was proposed that the National Council of Justice be abolished and replaced by a National Judicial Office and a National Judicial Council. The purpose of those proposals was to separate judicial and managerial functions, which had been "unified" in the person of the President of the Supreme Court, who was at the same time president of the National Council of Justice. The proposed reform sought to concentrate the tasks of judicial management in the hands of the president of the new National Judicial Office, while leaving the responsibility for overseeing the uniform administration of justice with the president of the Supreme Court (renamed with the historical appellation "Kúria"). On 26 October 2011, the applicant addressed a detailed analysis of the Bills to Parliament, taking account of the comments received from judges throughout the country. He also decided to express his opinion directly before Parliament, in accordance with Article 45 § 1 of Parliamentary Decision 46/1994 (IX.30) OGY on the Rules of Parliament. In his speech, delivered on 3 November 2011, the applicant raised his concerns about the fact that the draft legislation did not address the structural problems of the judiciary, but left them to the discretion of the chief executive of an external administration (the president of the new National Judicial Office), to whom excessive and, in Europe, unprecedented powers were being conferred without adequate accountability.

C. Removal of the applicant as President of the Supreme Court

17. The Fundamental Law of 25 April 2011 established that the highest judicial body would be the Kúria (the historical Hungarian name for the Supreme Court).

18. On 19 October 2011, in an interview on ATV, the State Secretary of Justice, Róbert Répássy, MP, declared that under the Organisation and Administration of the Courts Bill (no. T/4743), the new Kúria would have the same function as the current Supreme Court and that only the Supreme Court's name would change. He said that the legislation "will certainly not provide any legal ground for a change in the person of the Chief Justice". Some months earlier, on 14 April 2011, during a debate on the Fundamental Law, another Fidesz politician, Gergely Gulyás, MP, had declared on Inforádió that the President of the Supreme Court would remain the same and that only the name of the institution would change.

19. On 19 November 2011, Gergely Gulyás submitted a Bill (no. T/4996) to Parliament proposing an amendment to the 1949 Constitution. The amendment sought to provide that Parliament would elect the president of the Kúria by 31 December 2011 at the latest.

20. On 20 November 2011, MPs János Lázár and Péter Harrach, Fidesz and KDNP party leaders respectively, submitted a Bill (no. T/5005) to Parliament on the transitional provisions of the Fundamental Law of

Hungary. Under section 11 the legal successor of the Supreme Court and the National Council of Justice would be the Kúria for the administration of justice, and the President of the National Judicial Office for the administration of the courts. Pursuant to section 11(2) of the Transitional Provisions of the Fundamental Law of Hungary Bill, the mandates of the President of the Supreme Court as well as of the President and members of the National Council of Justice would be terminated upon the entry into force of the Fundamental Law. The reasoning of the Bill stipulated that it provided comprehensive regulation of the succession of the Supreme Court, the National Council of Justice and their President. The successor (body or person) would be different according to the different nature of the separated functions. Having regard to the modifications of the court system, the Bill provided that the mandates of the President of the Supreme Court currently in office, as well as that of the President and members of the National Council of Justice, would be terminated upon the entry into force of the Fundamental Law.

21. In order to bring other legislation into line on this issue, on 23 November 2011 a Fidesz MP, Ferenc Papcsák, submitted an amendment to sections 185 and 187 of the Organisation and Administration of the Courts Bill. The amendment sought to terminate the mandates of the members and President of the National Council of Justice as well as those of the President and Vice-President of the Supreme Court upon the entry into force of the Fundamental Law.

22. On 28 November 2011 Parliament enacted both the Organisation and Administration of the Courts Bill (as Act CLXI of 2011) and the Constitution of the Republic of Hungary (Amendment) Bill (as Act CLIX of 2011), the content of which is described above. The Transitional Provisions of the Fundamental Law of Hungary Bill was adopted without amendment on 30 December 2011 and published (as Transitional Provisions of the Fundamental Law of Hungary) in the Official Gazette on 31 December 2011. The date of the entry into force of the Fundamental Law was scheduled for 1 January 2012.

23. The applicant's mandate was terminated on 1 January 2012, three and a half years before its normal date of expiry.

D. Election of a new president to the Kúria

24. In order for a new president to be elected to the Kúria in due time, the Constitution of the Republic of Hungary (Amendment) Act (Act CLIX of 2011, adopted on 28 November 2011, see paragraph 22 above) entered into force on 2 December 2011. On 9 November 2011, the Organisation and Administration of the Courts Bill was amended with the introduction of a new criterion for the election of the new president of the Kúria. It provided that he or she would be elected by Parliament from among the judges

appointed for an indeterminate term, having served at least five years as a judge (section 114(1) of Act CLXI of 2011 – see Relevant domestic law below). On 9 December 2011, the President of the Republic proposed that Parliament elect Péter Darák as President of the Kúria and Tünde Handó as President of the National Judicial Office. On 13 December 2011, Parliament elected those candidates in accordance with the proposal of the President of the Republic.

E. Consequences of the early termination of the applicant's mandate as President of the Supreme Court

25. The applicant is serving as a judge of the new Kúria (civil section). According to the internal regulation on press contacts at the Kúria, he is no longer entitled to express his opinions freely, as the giving of interviews is subject to prior consent by the President of the Kúria.

26. The premature termination of the applicant's mandate has also had pecuniary consequences. Firstly, he has lost the remuneration and other benefits (social security, presidential residence, personal protection) to which a president of the Supreme Court is entitled throughout the period of the fixed presidential term. Secondly, outgoing presidents of the Supreme Court had the statutory right to certain benefits (an allowance for six months following the termination of his or her mandate, an office and a secretariat with two employees for two years, a pension supplement for life) of which the applicant was also deprived. The Remuneration and Allowances Act 2000 dealing, *inter alia*, with the entitlements of the President of the Supreme Court, was repealed as from 1 January 2012. Section 227(1) of the Legal Status and Remuneration of Judges Act 2011 (as amended on 28 November 2011, in force from 1 January 2012) supplemented this abrogation and stipulated that the repealed legislation would be applied to any former president of the Supreme Court only to the extent that he or she was entitled to the allowance specified in sections 26(1) and 22(1) (pension supplement for life), if he or she had reached retirement age at the time of the entry of force of the Act and had requested the allowance.

27. Since the applicant had not attained retirement age by 1 January 2012, he could not claim payment of that post-function benefit.

F. European Commission procedures and the proceedings before the Court of Justice of the European Union

28. On 12 December 2011, EU Justice Commissioner Viviane Reding wrote a letter to the Hungarian authorities raising concerns on the issue of the retirement age of judges. An annex to the letter also raised the issues of the President of the new National Judicial Office and the transformation of

the Supreme Court into the Kúria, in particular the early termination of the applicant's mandate as President of the Supreme Court before the end of the regular term. The Hungarian authorities answered and the European Commission, on 11 January 2012, issued a statement on the situation of Hungary.

29. On 17 January 2012, the Commission decided to open "accelerated" infringement proceedings against Hungary on, *inter alia,* the independence of the judiciary.[1] As regards the new mandatory retirement age for judges (and prosecutors), the Commission stated that EU rules on equal treatment in employment (Directive 2000/78/EC) prohibited discrimination at the workplace on grounds of age. Under the case-law of the Court of Justice of the EU, an objective and proportionate justification was needed if a government were to decide to reduce the retirement age for one group of people and not for others. The Commission did not find any objective justification for treating judges and prosecutors differently from other groups, notably at a time when retirement ages across Europe were being progressively increased. The Commission also asked Hungary for more information regarding the new legislation on the organisation of the courts. In its press release IP/12/24, the Commission stated as follows:

> "[u]nder the law, the president of a new National Judicial Office concentrates powers concerning the operational management of the courts, human resources, budget and allocation of cases. ... In addition, the mandate of the former president of the Supreme Court, who was elected for six years in June 2009, was prematurely terminated at the end of 2011. In contrast, other former judges of the Supreme Court continue their mandate as judges of the new Curia, which has replaced the Supreme Court."

30. On 7 March 2012, the Commission decided to send Hungary a reasoned opinion on the measures regarding the retirement age of judges and an administrative letter asking for further clarifications regarding the independence of the judiciary, in particular in relation to the powers attributed to the President of the National Judicial Office (powers to designate a court in a given case and the transfer of judges without consent).

31. On 7 June 2012, the European Commission referred the case to the Court of Justice of the European Union (case C-286/12). On 6 November 2012, the Court of Justice declared that by adopting a national scheme requiring the compulsory retirement of judges, prosecutors and notaries when they reach the age of sixty-two – giving rise to a difference in treatment on grounds of age which is not proportionate as regards the objectives pursued – Hungary had failed to fulfil its obligations under

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[1] Article 258 of the Treaty on the Functioning of the European Union (TFUE) gives the Commission, as guardian of the Treaties, the power to take legal action against a Member State that is not respecting its obligations under EU law.

Council Directive 2000/78/EC of 27 November 2000, which established a general framework for equal treatment in employment and occupation. The court observed that the categories of persons concerned by the provisions at issue benefited, until their entry into force, from a derogation allowing them to remain in office until the age of seventy, which gave rise, in those persons, to a well-founded expectation that they would be able to remain in office until that age. However, the provisions at issue abruptly and significantly lowered the age-limit for compulsory retirement, without introducing transitional measures to protect the legitimate expectations of the persons concerned.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitution of 1949

32. The relevant articles of the Constitution (as amended and in force at the material time) provided as follows:

Article 47

"(1) The Supreme Court shall be the highest judicial organ of the Republic of Hungary.

(2) The Supreme Court shall ensure uniformity in the application of the law by the courts; its uniformity resolutions shall be binding on all courts."

Article 48 (1)

"[t]he President of the Supreme Court shall be elected by Parliament upon the recommendation of the President of the Republic ... A majority of two-thirds of the votes of Members of Parliament shall be required to elect the President of the Supreme Court."

B. Organisation and Administration of the Courts Act (Act LXVI of 1997)

33. Section 62 of the Act listed the president of a court among the so-called "court executives", that is judges responsible for the management and administration of courts and judicial organisational units.

34. Under section 69 of the Act, court executives were appointed for six years.

35. Section 73 of the Act contained an exhaustive list of reasons for terminating the mandates of court executives. It provided that:

"[t]he term of office of a court executive shall come to an end by:

a) mutual agreement,

b) resignation,

c) dismissal,

d) the expiry of the period of the term of office,

e) the termination of the person's judicial mandate".

36. Under section 74/A(1) of the Act, if an appraisal of the court executive's management activity established his or her incompetence for such a managerial position, the court executive was to be dismissed from his or her office with immediate effect. The dismissed court executive was entitled to seek a legal remedy before the Service Tribunal to contest the dismissal within fifteen days of service of a dismissal notice (section 74/A(2)).

37. The Act established the National Council of Justice and added the function of being at the same time President of that Council to those of President of the Supreme Court. The President of the National Council of Justice was under an explicit statutory obligation to express an opinion on parliamentary Bills that affected the judiciary, after having gathered and summarised the opinions of different courts via the Office of the National Council of Justice (section 46(1)(q) of the Act).

C. Legal Status and Remuneration of Judges Act (Act LXVII of 1997)

38. Under section 57(2), sub-paragraphs (ha) and (hb) of the Act, a judge was entitled to serve beyond the general retirement age, up to the age of seventy.

D. Fundamental Law of Hungary of 25 April 2011, which entered into force on 1 January 2012

39. Articles 25 and 26 of the Fundamental Law provide as follows:

Article 25

"(1) The courts shall administer justice. The supreme judicial body shall be the Kúria.

(2) The courts shall decide on:

a) criminal matters, civil disputes, and other matters defined by law;

b) the legitimacy of administrative decisions;

c) the conflict of local ordinances with other legislation and on their annulment;

d) the establishment of non-compliance by a local authority with its statutory legislative obligations.

(3) In addition to the responsibilities defined by paragraph (2), the Kúria shall ensure uniformity in the judicial application of laws and shall make decisions accordingly, which shall be binding on the courts.

...

(8) The detailed rules for the organisation and administration of the courts, and of the legal status and remuneration of judges shall be regulated by a Cardinal Act[2].”

Article 26

“(1) Judges shall be independent and only subordinated to laws, and may not be instructed in relation to their judicial activities. Judges may be removed from office only for the reasons and in a procedure defined by a Cardinal Act. Judges shall not be affiliated to any political party or engage in any political activity.

(2) Professional judges shall be appointed by the President of the Republic as defined by a Cardinal Act. No person under thirty years of age shall be eligible for the position of judge. With the exception of the President of the Kúria, no judge may serve after reaching the general retirement age.

(3) The President of the Kúria shall be elected by Parliament from among the judges for nine years on the proposal of the President of the Republic. The election of the President of the Kúria shall require a two-thirds majority of the votes of Members of Parliament.”

E. Constitution of the Republic of Hungary (Amendment) Act (Act CLIX of 2011), which entered into force on 2 December 2011

40. The Constitution of Hungary was amended as follows, with regard to the election of the President of the Kúria:

Section 1

“The Constitution shall be amended with the following section:

“Section 79. In accordance with Article 26 § 3 of the Fundamental Law, Parliament shall elect the President of the Kúria by 31 December 2011 at the latest.”

F. Transitional Provisions of the Fundamental Law of Hungary, 31 December 2011

41. The Transitional Provisions of the Fundamental Law of Hungary read, in so far as relevant, as follows:

Section 11

“(1) The legal successor of the Supreme Court, the National Council of Justice and their President shall be the Kúria for the administration of justice, and the President of the National Judicial Office for the administration of the courts, with any exceptions defined by the relevant Cardinal Act.

(2) The mandates of the President of the Supreme Court and the President and members of the National Council of Justice shall be terminated when the Fundamental Law comes into force.”[3]

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[2] Cardinal Acts need a two thirds majority to be adopted or changed.

Section 12

"(1) If a judge has reached the general retirement age defined by Article 26 § 2 of the Fundamental Law before 1 January 2012, his or her service shall be terminated on 30 June 2012. If a judge reaches the general retirement age defined by Article 26 § 2 of the Fundamental Law in the period between 1 January and 31 December 2012, his or her service shall be terminated on 31 December 2012."

Section 29

"(2) ... The Transitional Provisions shall form part of the Fundamental Law."

G. Organisation and Administration of the Courts Act (Act CLXI of 2011)

42. The relevant parts of the Organisation and Administration of the Courts Act read as follows:

Chapter VIII
President of the Kúria and court leaders

32. President of the Kúria

Section 114

"(1) The President of the Kúria shall be elected by Parliament from among judges appointed for an indeterminate duration and with at least 5 years of judicial service in accordance with Article 26 § 3 of the Fundamental Law."

Chapter XV

Transitional Provisions

58. Election of the President of the NJO and the President of the Kúria for the First Time

Section 177

"(1) The President of the Republic shall nominate the President of the NJO and the President of the Kúria for the first time by 15 December 2011, at the latest. The nominees shall be heard by the committee of Parliament responsible for justice.

(2) Parliament shall elect the President of the NJO and the President of the Kúria for the first time by 31 December 2011...."

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[3] The Fourth Amendment to the Fundamental Law of 25 March 2013 transferred the text of section 11 of the Transitional Provisions into point 14 of the Final Provisions of the Fundamental Law.

60. Determination of Date of Expiry of Mandates and Beginning of New Mandates

Section 185

"(1) The mandates of the National Council of Justice (hereinafter the NCJ) and its members, its President as well as the President and the Vice-President of the Supreme Court and the Head and Deputy Head of the Office of the NCJ shall be terminated upon the entry into force of the Fundamental Law.

(2) The mandates of the President of the National Judicial Office and the President of the Kúria shall commence as of 1 January 2012. ..."

Section 187

"The mandates of court executives appointed before 1 January 2012 shall be valid for the term determined in their appointments, except as set forth in section 185(1)."

Section 188

"(1) The legal successor of the Supreme Court, the National Council of Justice and its President is the Kúria for the purposes of activities related to the administration of justice, while in respect of the administration of courts, the President of the National Judicial Office, except as determined in the Cardinal Laws."

43. Under section 173 of the Act, section 177 entered into force on the day following its promulgation (3 December 2011), and sections 185, 187 and 188 entered into force on 1 January 2012.

H. Legal Status and Remuneration of Judges Act (Act CLXII of 2011), which entered into force on 1 January 2012

44. The relevant parts of the Legal Status and Remuneration of Judges Act provide as follows:

Section 90

"A judge shall be exempted [from judicial service]:

...

(h) if the judge

(ha) has reached the applicable retirement age (hereinafter referred to as the "upper age limit"). This provision does not apply to the President of the Kúria ...".

Section 227

"(1) The person who occupied the office of President of the Supreme Court prior to the entry into force of the present Act shall be governed by the provisions of Act XXXIX of 2000 on the remuneration and benefits of the President of the Republic, the Prime Minister, the Speaker of the House, the President of the Constitutional Court and the President of the Supreme Court, inasmuch as he shall be entitled to the benefits under section 26(1) and section 22(1) of Act XXXIX of 2000 on the remuneration and benefits of the President of the Republic, the Prime Minister, the Speaker of the House, the President of the Constitutional Court and the President

of the Supreme Court if he had reached retirement age at the time of the entry into force of the present Act and requested the benefits."

Section 230

"(1) The provisions of the present Act shall govern judges reaching the upper age limit before 1 January 2013, subject to the differences set forth in subsections (2) and (3).

(2) If a judge has reached the upper age limit before 1 January 2012, the initial date of the exemption period is 1 January 2012, while the closing date is 30 June 2012, and his judicial mandate shall cease as of 30 June 2012. The proposal concerning exemption shall be made at a time which permits the adoption of the decision on exemption on 30 June 2012, at the latest.

(3) If the judge reaches the upper age limit between 1 January 2012 and 31 December 2012, the initial date of the exemption period is 1 July 2012, while the closing date is 31 December 2012, and his judicial mandate shall cease as of 31 December 2012. The proposal concerning exemption shall be made at a time which permits the adoption of the decision on exemption on 31 December 2012, at the latest."

I. Constitutional Court's judgment no. 33/2012 of 16 July 2012

45. In its judgment of 16 July 2012, the Constitutional Court declared unconstitutional and, therefore, annulled the provisions on the compulsory retirement age of judges (sections 90(ha) and 230 of the 2011 Act) as of 1 January 2012 (the date of entry into force of the Legal Status and Remuneration of Judges Act). The Constitutional Court held that the new regulation violated the constitutional requirements for judicial independence on both "formal" and "substantive" grounds. From the formal point of view, a Cardinal Act must determine the length of judicial service and the retirement age in order to guarantee the irremovability of judges. Reference to the "general retirement age" in an ordinary Act does not fulfil that requirement. As regards the substantive unconstitutionality of the provision, the new regulation resulted in the removal of judges within a short period of three months. Notwithstanding the relative freedom of the legislator to determine the maximum age of judges, and the fact that a certain age cannot be deduced from the Fundamental Law, the Constitutional Court held that the introduction of a lowered retirement age for judges must be made gradually, with an appropriate transition period and without violating the principle of the irremovability of judges. The greater the difference between the new retirement age and seventy years of age, the longer the transitional period required for introducing a lower retirement age. Otherwise, the irremovability of judges, which constitutes an essential element of independence of the judiciary, is violated.

J. Constitutional Court's decision no. IV/2309/2012 of 19 March 2013

46. The Vice-President of the Supreme Court, appointed by the President of the Republic following the applicant's proposal as of 15 November 2009, for six years, was also removed from his executive position as of 1 January 2012 by virtue of section 185(1) of the Organisation and Administration of the Courts Act (Act CLXI of 2011), which stated that the mandate of the Vice-President of the Supreme Court must be terminated when the Fundamental Law enters into force. The former Vice-President submitted a constitutional complaint to the Constitutional Court claiming that the termination of his position violated the rule of law, the prohibition of retroactive legislation and his right to a remedy. In its decision no. IV/2309/2012, passed by eight votes to seven, the Constitutional Court rejected the complaint. It stated that the premature termination of the claimant's term of office as Vice-President of the Supreme Court had not violated the Fundamental Law, since it was sufficiently justified by the full-scale reorganisation of the judicial system and the important changes in the tasks and competences of the President of the Kúria. It noted that the Kúria's tasks and competences had been broadened, in particular with regard to the supervision of the legality of municipal council regulations. Seven judges dissented and considered that changes with regard to the judicial system or the new Kúria had not fundamentally affected the status of the Vice-President. The dissenting judges concluded that the premature termination of the claimant's term of office had weakened the guarantees for the separation of powers, had been contrary to the prohibition of retroactive law-making and had breached the principle of the rule of law and the right to a remedy.

III. COUNCIL OF EUROPE MATERIAL

A. Opinions of the Venice Commission

47. The relevant extracts from the Opinion on the Fundamental Law of Hungary adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011, CDL-AD(2011)016), read as follows:

> "107. According to Article 25 (1) of the new Constitution, the 'Curia' (the Hungarian historical name for the Supreme Court), will be the highest justice authority of Hungary. In the absence of transitional provisions and despite the fact that the election rules for its president remain unchanged in the new Constitution a question arises: will this change of the judicial body's name result in replacement of the Supreme Court's president by a new president of the 'Curia'? As to the judges, they 'shall be appointed by the President of the Republic as defined by a cardinal Act.' (Article 26 (2)). This also leaves of margin of interpretation as to the need to change (or not) the composition of the supreme body.

108. As stipulated by Article 26 (2), the general retirement age will also be applied to judges. While it understands that the lowering of the judge's retirement age (from 70 to 62) is part of the envisaged reform of the judicial system, the Commission finds this measure questionable in the light of the core principles and rules pertaining to the independence, the status and immovability of judges . According to different sources, this provision entails that around 300 of the most experienced judges will be obliged to retire within a year. Correspondingly, around 300 vacancies will need to be filled. This may undermine the operational capacity of the courts and affect continuity and legal security and might also open the way for undue influence on the composition of the judiciary. In the absence of sufficiently clear information on the reasons having led to this decision, the Commission trusts that adequate solutions will be found, in the context of the reform, to address, in line with the requirements of the rule of law, the difficulties and challenges engendered by this measure. ...

140. As previously indicated, the reference in the second paragraph of the Closing Provisions to the 1949 Constitution seems to be in contradiction with the statement, in the Preamble, by which the Hungarian 1949 Constitution is declared as invalid. The Venice Commission tends to interpret this apparent inconsistency as a confirmation of the fact that the said statement does not have legal significance. Nevertheless, it is recommended that this is specifically clarified by the Hungarian authorities. The adoption of transitional provisions (as required by the third paragraph of the Closing Provisions), of particular importance in the light of the existence, for certain provisions of the new Constitution, of possibly diverging interpretations, could be used as an excellent opportunity for providing the necessary clarifications. This should not be used as a means to put an end to the term of office of persons elected or appointed under the previous Constitution."

48. In the Position of the Government of Hungary on this Opinion, transmitted by the Minister for Foreign Affairs of Hungary on 6 July 2011 (see CDL(2011)058), the Government fully subscribed to the suggestion in paragraph 140 of the Opinion and assured the Venice Commission that the drafting of the transitional provisions of the Fundamental Law would not be used to unduly put an end to the terms of office of persons elected under the previous legal regime.

49. The relevant extracts from the Opinion on the Legal Status and Remuneration of Judges Act (Act CLXII of 2011) and the Organisation and Administration of the Courts Act (Act CLXI of 2011), adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012, CDL-AD(2012)001), read as follows:

"**2. The President of the *Curia***

111. In its opinion on the new Constitution, the Venice Commission appealed to the Hungarian authorities that the occasion of adopting transitional provisions 'should not be used as a means to put an end to the term of office of persons elected or appointed under the previous Constitution'. In its reply to the Venice Commission, the Hungarian Government pointed out that 'Hungary fully subscribes to this suggestion and assures the Commission that the drafting of transitional provisions will not be used to unduly put an end to the terms of office of persons elected under the previous legal regime.'

112. Article 25 of the Fundamental Law provides that the supreme judicial body shall be the Curia. According to Art. 11 of the Temporary Provisions of the

Fundamental Law, the Curia is the heir (legal successor) to the Supreme Court. All judges of the Supreme Court remained in office as judges with the exception of its President. Section 114 AOAC established a new criterion for the election of the new President, which leads to the ineligibility of the former President of the Supreme Court as President of the Curia. This criterion refers to the time served as a judge in Hungary, not counting the time served as a judge for instance in a European Court. Many believe that the new criterion was aimed at preventing an individual person – the actual president of the Supreme Court - from being eligible for the post of the President of the Curia. Although the Law was formulated in a general way, its effect was directed against a specific person. Laws of this type are contrary to the rule of law.

113. Other countries have rules that accept time periods that judges have spent abroad. Section 28.3 ALSRJ states that a judge's long-term secondment abroad shall be regarded as time completed at the service post occupied prior to the commencement of his or her time abroad. The Law does not provide for a minimum time a judge must have spent in Hungary before being posted abroad. Therefore, regulations of equivalence between national and international functions should be established, particularly with regard to requirements that a person has to fulfil in order to be appointed e.g. President of the Curia. Furthermore, it is highly uncommon to enact regulations that are retroactive and lead to the removal from a high function such as the President of the Curia.

114. The unequal treatment between the judges of the Supreme Court and their President is difficult to justify. The Hungarian authorities seem to argue that the nature of the tasks of the President of the Curia and of the Supreme Court are radically different, and that the latter would be more engaged in administrative matters as the President of the previous National Council of the Judiciary, whereas the President of the Curia would deal more with substantive law and ensure the uniformity of the case-law. However, this argument is not convincing. The experience of the European Court of Human Rights could be particularly useful for the tasks of the President of the Curia.

115. Since the provision of the Fundamental Law concerning the eligibility to become President of the Curia might be understood as an attempt to get rid of a specific person who would be a candidate for the President, who has served as president of the predecessor of the Curia, the law can operate as a kind of a sanction of the former president of the Supreme Court. Even if this is not the case, the impression, that this might be the case, bears the risk of causing a chilling effect, thus threatening the independence of the judiciary."

50. The relevant extracts from the Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary, adopted by the Venice Commission at its 92nd Plenary Session (Venice, 12-13 October 2012, CDL-AD(2012)020), read as follows :

"XII. Transitional issues - Retirement of judges and President of the *Curia*

74. The amendments to the ALSRJ (Act CLXII of 2011 on the Legal Status and Remuneration of Judges) did not pertain to the criticisms expressed in the Opinion of the Venice Commission on the provisions on the retirement age. All those judges who would have reached the age limit by 31 December 2012 at the latest were released by presidential order of 7 July 2012.

75. The Venice Commission acknowledges the judgment no. 33/2012 (VII. 17) AB határozat of 16 July 2012 of the Hungarian Constitutional Court, which declared the sudden reduction of the upper-age limit for judges unconstitutional. It trusts that the Hungarian authorities will respect this judgment and ensure its implementation, i.e. re-instate the former judges to their previous positions. It seems that the labour courts have started to reinstate the retired judges. The Venice Commission's delegation has however learned that the implementation of this judgment has resulted in considerable legal uncertainty. While the legal basis of early retirement was annulled with *ex tunc* effect, the individual resolutions of the President of Hungary, which dismissed some ten per cent of the Hungarian judges, are considered to remain in force, even if their legal basis had ceased to exist. The President of Hungary did not repeal them. The Legislator should adopt provisions re-instating the dismissed judges in their previous position without requiring them to go through a re-appointment procedure.

76. The President of the NJO invited the judges concerned to appeal to the labour courts in order to have their dismissal reversed. Several judges already won their cases before the labour courts, but these judgments were appealed against by the President of the NJO because she disagreed with their reasoning. Most importantly, even final judgments of the labour courts would not result in a reinstatement of the judges concerned in their previous position, but they will go through a new appointment process and could be assigned to other courts than those, which they belonged to before their dismissal.

77. In September 2012, the Hungarian Government introduced the legislative proposal T/8289, which would amend the Transitory Provisions of the Fundamental Law, introducing a new retirement age of 65 years for judges and prosecutors. Judges who are older than 65 would (after their re-appointment) be able to continue in office for one year before they would have to retire. The legislative proposal remains however silent on how the dismissed judges should be reinstated, leaving open only the way through the labour courts.

78. The Commission's delegation was told that automatic reinstatement would be impossible because new judges had been appointed in the meantime and not all judges wished to be reinstated. The Commission is of the opinion that it should be possible to find a legislative solution that takes into account the various cases.

79. Furthermore, the legislative proposal provides that judges who are over the age of 62 cannot have leading positions in the courts. This concerns reinstated judges but in the future also all other judges who turn 63. They would lose their leading position and would have to terminate their career as an ordinary judge. Apart from the fact that these judges are the most experienced to lead the courts, such a limitation constitutes evident age discrimination. The delegation was told that these experienced judges should train younger judges rather than hold leading positions in courts. This argument is hard to follow because younger judges learn from older ones precisely when they see how they act in leading positions.

80. The situation of the dismissed judges is very unsatisfactory. The Legislator should adopt provisions re-instating dismissed judges who so wish in their previous position without requiring them to go through a re-appointment procedure.

81. The Hungarian Legislator did not address the remarks on the eligibility to become President of the *Curia*, which should be revised."

B. Press Release of the Council of Europe Commissioner for Human Rights

51. The relevant extracts from the press release published on 12 January 2012 by the Council of Europe Commissioner for Human Rights read as follows:

> "Furthermore, the Commissioner has noted steps taken in Hungary which might undermine the independence of the judiciary. As a consequence of the lowering of the retirement age for judges, more than 200 new judges will now have to be appointed. This measure has been accompanied by a change in the procedure for such appointments, which now rests on the decision of a single politically appointed individual. Moreover, the Commissioner considers it unfortunate that, as a consequence of the new law on the judiciary, the mandate of the President of the Supreme Court has been terminated before the end of the regular term. The approach whereby judges are appointed by the President of the National Judicial Office, who is nominated by the government for nine years, gives rise to serious reservations. The judiciary must be protected from undue political interference."

C. The Parliamentary Assembly

52. On 25 April 2013 the Committee on the Honouring of Obligations and Commitments by the Member States of the Parliamentary Assembly adopted Opinion AS/Mon(2013)08 and recommended that the Assembly open a monitoring procedure in respect of Hungary because of the serious and sustained concerns about the extent to which the country was complying with its obligations to uphold the highest possible standards on democracy, human rights and the rule of law. The relevant extracts of the Opinion concerning the case of the applicant read as follows:

> "4.3.3. The dismissal of the President of the Supreme Court
>
> 113. The Curia that was established by the Fundamental Law is the legal successor to the Supreme Court of Hungary. The Cardinal Act on the Judiciary therefore provides that all judges of the Supreme Court can serve until the end of their mandate. However, an exception was made for the President of the Supreme Court, who needed to be re-elected. In addition, a new election criterion for the President of the Supreme Court was adopted. According to this new criterion, a candidate must have at least five years' experience as a judge in Hungary. Time served on international tribunals is not taken into account.
>
> 114. The unequal treatment of the President of the Supreme Court is highly questionable. These new provisions are widely seen as being solely adopted to dismiss the sitting President of the Supreme Court, Mr Baka, who in the past had been critical of the government's policies of judicial reform and who had successfully challenged a number of government decisions and laws before the Constitutional Court. Mr Baka was the Hungarian Judge to the European Court of Human Rights from 1991 to 2007, and was elected President of the Supreme Court by the Hungarian parliament in June 2009. Mr Baka had not previously served a five year term as a judge in Hungary, and was therefore, despite his 17 years of experience as a judge on the ECHR, ineligible for the post of President of the Curia. The widespread perception that these

legal provisions were adopted against a specific person is strengthened by the fact that in June 2011 the parliament adopted a decision that suspended all appointment procedures for judges until 1 January 2012, when Mr Baka would no longer be in office. This despite the backlog in cases that is often mentioned by the authorities as one of the underlying reasons for the reform of the judiciary. As mentioned by the Venice Commission, generally formulated legal provisions that are in reality directed against a specific person or persons are contrary to the rule of law. In addition the politically motivated dismissal of the President of a Supreme Court could have a chilling effect that could threaten the independence of the judiciary."

53. On 25 June 2013, the Parliamentary Assembly decided not to open a monitoring procedure in respect of Hungary, but resolved to follow the situation in the country closely. The Parliamentary Assembly called on the Hungarian authorities to continue their open and constructive dialogue with the Venice Commission (Resolution 1941(2013)).

D. European Charter on the Statute for Judges of 8-10 July 1998

54. The relevant extracts from the Charter read as follows:

"1.3. In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary. ...

5.1. The dereliction by a judge of one of the duties expressly defined by the statute, may only give rise to a sanction upon the decision, following the proposal, the recommendation, or with the agreement of a tribunal or authority composed at least as to one half of elected judges, within the framework of proceedings of a character involving the full hearing of the parties, in which the judge proceeded against must be entitled to representation. The scale of sanctions which may be imposed is set out in the statute, and their imposition is subject to the principle of proportionality. The decision of an executive authority, of a tribunal, or of an authority pronouncing a sanction, as envisaged herein, is open to an appeal to a higher judicial authority. ...

7.1. A judge permanently ceases to exercise office through resignation, medical certification of physical unfitness, reaching the age limit, the expiry of a fixed legal term, or dismissal pronounced within the framework of a procedure such as envisaged at paragraph 5.1 hereof.

7.2. The occurrence of one of the causes envisaged at paragraph 7.1 hereof, other than reaching the age limit or the expiry of a fixed term of office, must be verified by the authority referred to at paragraph 1.3 hereof."

E. Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities

55. The relevant extracts from the appendix to this recommendation read as follows:

"Tenure and irremovability

49. Security of tenure and irremovability are key elements of the independence of judges. Accordingly, judges should have guaranteed tenure until a mandatory retirement age, where such exists.

50. The terms of office of judges should be established by law. A permanent appointment should only be terminated in cases of serious breaches of disciplinary or criminal provisions established by law, or where the judge can no longer perform judicial functions. Early retirement should be possible only at the request of the judge concerned or on medical grounds. ...

52. A judge should not receive a new appointment or be moved to another judicial office without consenting to it, except in cases of disciplinary sanctions or reform of the organisation of the judicial system."

IV. THE EUROPEAN PARLIAMENT

56. The European Parliament, in its resolution of 16 February 2012 on the recent political developments in Hungary (2012/2511(RSP)), expressed serious concern at the situation in Hungary in relation, among other things, to the exercise of democracy, the rule of law, respect for and protection of human and social rights, and the system of checks and balances. It explained that under the Fundamental Law and its Transitional Provisions, the Supreme Court had been renamed the Kúria, and the six-year mandate of the former President of the Supreme Court had ended prematurely after two years. The European Parliament called on the European Commission to monitor closely the possible amendments and the implementation of the criticised laws and their compliance with European treaties, and to conduct a thorough study to ensure

"the full independence of the judiciary, in particular ensuring that the National Judicial Authority, the Prosecutor's Office and the courts in general are governed free from political influence, and that the mandate of independently-appointed judges cannot be arbitrarily shortened."

V. OTHER INTERNATIONAL TEXTS ON THE INDEPENDENCE OF THE JUDICIARY

57. The Basic Principles on the Independence of the Judiciary were adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan in 1985. They were endorsed by UN General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. The relevant points read as follows:

"12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists. ...

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties. ...

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings. ..."

58. In its General Comment no. 32 on Article 14 of the International Covenant on Civil and Political Rights (Right to equality before courts and tribunals and to a fair trial) published on 23 August 2007, the United Nations Human Rights Committee stated:

"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.

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."

59. The Inter-American Court of Human Rights, in its case-law concerning the independence of the judiciary, has referred to the UN Basic Principles on the Independence of the Judiciary and to the General Comment No. 32 of the Human Rights Committee. In its case of *The Constitutional Court (Camba Campos and Others) v. Ecuador,* judgment of 28 August 2013, paragraph 199, the Inter-American Court established that the independence of the judiciary covers the subjective right of the judge not to be removed from office except in the cases provided for by law, either through a fair procedure ensuring judicial guarantees or where his/her term of office has expired. When the right of the judge to remain in

office is arbitrarily affected, the Inter-American Court finds a violation of the right to judicial independence guaranteed by Article 8.1 of the American Convention on Human Rights, in conjunction with the right to have access and remain in the exercise of public service, under general conditions of equality, protected by Article 23.1.c of the American Convention.

60. The Universal Charter of the Judge was approved by the International Association of Judges on 17 November 1999. Its Article 8 reads as follows:

> "Art.8 Security of office
>
> A judge cannot be transferred, suspended or removed from office unless it is provided for by law and then only by decision in the proper disciplinary procedure.
>
> A judge must be appointed for life or for such other period and conditions, that the judicial independence is not endangered.
>
> Any change to the judicial obligatory retirement age must not have retroactive effect."

61. The Mt. Scopus Revised International Standards of Judicial Independence were approved on 19 March 2008 by the International Association of Judicial Independence and World Peace International Project of judicial independence. Their relevant part reads as follows:

> "3.2. Legislation introducing changes in the terms and conditions of judicial service shall not be applied to judges holding office at the time of passing the legislation unless the changes improve the terms of service and are generally applied.
>
> 3.3. In case of legislation reorganising or abolishing courts, judges serving in these courts shall not be affected, except for their transfer to another court of the same or materially comparable status."

THE LAW

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

62. The applicant complained that he had been denied access to a tribunal to defend his rights relating to his premature dismissal as President of the Supreme Court. He contended that his dismissal was the result of legislation at constitutional level, thereby depriving him of any possibility of seeking judicial review, even by the Constitutional Court. Article 6 § 1 of the Convention provides, in so far as relevant, as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. The parties' submissions

1. The Government

63. The Government argued that Article 6 was not applicable in the present case and that therefore the applicant's complaint was incompatible *ratione materiae* with the provisions of the Convention. They maintained that the two cumulative conditions of the *Eskelinen* test (see *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, § 62, ECHR 2007-II) had been met, rendering Article 6 inapplicable to the applicant's dispute. First, as the applicant had admitted, access to a court in order to appeal against the termination of his mandate as President of the Supreme Court had been excluded by the very nature of the act complained of. Therefore the Government were of the opinion that the first condition of the *Eskelinen* test had been fulfilled. In this regard, they noted that other cases in which the Court had considered Article 6 applicable to civil servants' disputes did not concern the right of access to a court as such, but rather the question of whether the procedural guarantees of Article 6 § 1 had been complied with. Secondly, as regards the second condition of the *Eskelinen* test, they submitted that the applicant's post as President of the Supreme Court had involved, by its very nature, the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State (the Government referred to *Harabin v. Slovakia* (dec.), no. 62584/00, 9 July 2002). The exclusion of access to a court in respect of the termination of that post had therefore been justified on objective grounds in the State's interest.

2. The applicant

64. The applicant contended that none of the conditions of the *Eskelinen* test had been met in order to render Article 6 inapplicable in his case. As regards the first condition, an implied bar was not enough; the national law must expressly exclude access to court for a certain post or category of staff, and that exclusion must be of an abstract nature, that is, it must concern all office-holders and not a specified person. Hungarian law, rather than excluding access to a court, expressly ensured that a court executive had the right of access to a court in the event of his or her dismissal, in accordance with the general rules applicable to all court executives, including the President of the Supreme Court (see paragraphs 34-36 above). The applicant had been *de facto* dismissed from his position as court executive and should have had the right of access to a court under the domestic law. However, he had had no opportunity to contest that measure because the respondent State, by legislating for his personal dismissal in the Fundamental Law, had effectively deprived him of his existing right of access to a court. In the

applicant's view, the nature of the impugned act could not be the ground for exclusion, as the Government had argued.

65. As regards the second condition of the *Eskelinen* test, the applicant argued that the *Harabin* decision to which the Government had referred was irrelevant in the present case, since it had been adopted before the *Eskelinen* judgment. Only the post-*Eskelinen* case-law should be taken into consideration in respect of judges' employment disputes (see *Olujic v. Croatia,* no. 22330/05, 5 February 2009, and *Harabin v. Slovakia,* no. 58688/11, 20 November 2012). Therefore, the nature of the applicant's post as President of the Supreme Court did not justify, in itself, the exclusion of access to a court in respect of his dismissal. Quite the contrary, given the principle of judicial independence, it might be highly advisable to provide for judicial review in order to safeguard the security of tenure and the irremovability of the Chief Justice. Moreover, considering that his dismissal had been the result of abusive legislation, the applicant maintained that abusive resort to legislation could not be justified on objective grounds in a democratic society governed by the rule of law.

B. The Court's assessment

1. Admissibility

66. Before the judgment in the *Vilho Eskelinen* case, the Court had held that employment disputes between the authorities and public servants whose duties typified the specific activities of the public service, in so far as the latter was acting as the depositary of public authority responsible for protecting the general interests of the State, were not "civil" and were therefore excluded from the scope of Article 6 § 1 of the Convention (see *Pellegrin v. France* [GC], no. 28541/95, § 66, ECHR 1999-VIII). Likewise, employment disputes involving posts in the judiciary were also excluded from the scope of Article 6 § 1 because although the judiciary was not part of the ordinary civil service, it was nonetheless considered part of typical public service (see *Pitkevich v. Russia* (dec.), no. 47936/99, 8 February 2001; as regards the president of a Supreme Court, see *Harabin* (dec.), cited above).

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

and Article 6 § 1 would apply (see *Vilho Eskelinen and Others* [GC], cited above, § 61).

68. According to that case-law, an applicant's status as a civil servant can justify excluding the protection embodied in Article 6 subject to two conditions. Firstly, the State in its national law must have expressly excluded access to court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the State's interest (ibid., § 62). In order for the exclusion to be justified, it is not enough for the State to establish that the civil servant in question participates in the exercise of public power. The State must also show that the subject matter of the dispute at issue is related to the exercise of State power. Thus, there can in principle be no justification for the exclusion from the guarantees of Article 6 of ordinary employment disputes on the basis of the special nature of the relationship between the particular civil servant and the State in question. There will, in effect, be a presumption that Article 6 applies. It will be for the respondent Government to demonstrate, firstly, that its national law has expressly excluded access to court for the civil-servant applicant and, secondly, that the exclusion of the rights under Article 6 for the civil servant is justified (ibid. § 62).

69. Following the *Vilho Eskelinen* case, the Court has found Article 6 to be applicable to disputes concerning the payment of judges' salaries and other benefits (see *Petrova and Chornobryvets v. Ukraine*, nos. 6360/04 and 16820/04, § 15, 15 May 2008). It has also found it to be applicable to disputes concerning judges' appointment (see *Juricic v. Croatia,* no. 58222/09, §§ 53-57, 26 July 2011), promotion (see *Dzhidzheva-Trendafilova v. Bulgaria* (dec.), no. 12628/09, §§ 42-50, 9 October 2012), transfer (see *Tosti v. Italy* (dec.), no. 27791/06, 12 May 2009), disciplinary measures (see *Harabin,* cited above, §§ 122-23) and removal from office (see *Olujić v. Croatia*, cited above, §§ 31-44, and *G. v. Finland*, no. 33173/05, § 34, 27 January 2009) in cases where the domestic law allowed access to a court to challenge the relevant decisions. In particular, it has found Article 6 to be applicable under its civil head to disciplinary proceedings against the president of a Supreme Court (see *Harabin*, cited above, §§ 122-23), including those leading to the latter's dismissal (see *Olujic*, cited above, §§ 34-45; see also, for the dismissal of a judge of the Supreme Court, *Oleksandr Volkov v. Ukraine*, no. 21722/11, §§ 87-91, 9 January 2013).

70. The Court has found Article 6 to be inapplicable to proceedings concerning recruitment (see *Apay v. Turkey* (dec.), no. 3964/05, 11 December 2007) and disciplinary proceedings concerning the termination of employment of public prosecutors (see *Nazsiz v. Turkey* (dec.), no. 22412/05, 26 May 2009), on the ground that the domestic law expressly excluded the right of access to court and that this exclusion was objectively based on the State's interest.

71. Turning to the present case, the Court notes that the criterion introduced in the *Vilho Eskelinen and Others* judgment in respect of its competence *ratione materiae* relates to and is indistinguishable from the merits of the applicant's complaint that he was denied access to a tribunal competent to examine his grievances related to his premature dismissal as President of the Supreme Court. Accordingly, the Court holds that the issue of whether the Court is competent *ratione materiae* to examine the applicant's complaint under Article 6 of the Convention should be joined to the merits (see, *mutatis mutandis, Nedelcho Popov v. Bulgaria*, no. 61360/00, § 32, 22 November 2007).

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

2. Merits

73. The Court reiterates that Article 6 § 1 of the Convention secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way it embodies the "right to a court", of which the right of access – that is, the right to institute proceedings before the courts in civil matters – constitutes one aspect (see *Golder v. the United Kingdom,* judgment of 21 February 1975, § 36, Series A no. 18). However, the right of access to the courts is not absolute but may be subject to limitations that do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Ashingdane v. the United Kingdom,* judgment of 28 May 1985, § 57, Series A no. 93, and *Markovic and Others v. Italy* [GC], no. 1398/03, § 99, ECHR 2006-XIV).

74. In the present case, the Court notes that under the Hungarian domestic system, judges of the Supreme Court, including their president, were not expressly excluded from the right of access to a court (see, conversely*, Apay* and *Nazsiz*, cited above). Domestic law expressly provided for the right to a court in the event of dismissal of a court executive: the dismissed court executive was entitled to contest his or her dismissal before the Service Tribunal (section 74/A(2) of the Organisation and Administration of the Courts Act (Act LXVI of 1997), see paragraph 36 above).

75. The Court observes that the applicant's access to a court was impeded, rather than by express exclusion, by the fact that the impugned measure, namely the premature termination of his mandate as President of the Supreme Court, had been written into the Fundamental Law itself

(section 11(2) of the Transitional Provisions of the Fundamental Law of Hungary, see paragraph 41 above) and was therefore not subject to any form of judicial review, including by the Constitutional Court. Unlike the former Vice-President of the Supreme Court, who was able to file a constitutional complaint with the Constitutional Court against the statutory provision which terminated his term of office (see paragraph 46 above), the termination of the applicant's mandate as President of the Supreme Court was provided for by the Fundamental Law and as such could not be challenged before the Constitutional Court. In those circumstances, the nature of the impugned measure itself rendered the applicant's access to a court impossible in practice. The Court reiterates that in order for the first condition of the *Eskelinen* test to be met, national law must expressly exclude access to a court for the post or category of staff in question.

76. In view of the above, the Court considers that the Government have not demonstrated that the legal policy choice of enacting the premature termination of the applicant's mandate, as President of the Supreme Court, into the Fundamental Law involved an express identification by the Government, in particular the national legislature, of an "[area] of public service involving the exercise of the discretionary powers intrinsic to State sovereignty where the interests of the individual must give way", as elaborated in *Vilho Eskelinen* (see § 61). Therefore, it cannot be concluded that the national law "expressly excluded access to a court" for the applicant's claim. The first condition of the *Eskelinen* test has not been met and Article 6 applies under its civil head.

77. Furthermore, even assuming that the national legislative framework specifically denied the applicant the right of access to a court and that the first condition of the *Eskelinen* test was therefore met, as the Government claimed, the Court considers that the applicant's exclusion from the right of access to a court was not justified. Relying on the Court's reasoning in its decision in the case of *Harabin* (cited above), the Government maintained that the applicant's post as President of the Supreme Court involved by its very nature the exercise of powers conferred on him by public law and duties designed to safeguard the general interests of the State. The Court reiterates that according to the new approach adopted in *Vilho Eskelinen*, the mere fact that the applicant is in a sector or department which participates in the exercise of power conferred by public law is not in itself decisive. In order for the exclusion to be justified, it is for the State to show that the subject matter of the dispute at issue is related to the exercise of State power or that it has called into question the special bond of trust and loyalty between the civil servant and the State (see *Vilho Eskelinen and Others*, cited above, § 62). In the present case, the Government have not adduced any arguments to show that the subject matter of the dispute, which related to the premature termination of the applicant's mandate as President of the Supreme Court, was linked to the exercise of State power in such a way that

the exclusion of Article 6 guarantees was objectively justified. In this regard, the Court considers it significant that the former Vice-President of the Supreme Court, unlike the applicant, was able to challenge the premature termination of his mandate before the Constitutional Court (see paragraph 46 above).

78. In these circumstances, and in applying the *Vilho Eskelinen* criteria, the Court finds that it is competent *ratione materiae* to examine the present complaint and, furthermore, that there has been a violation of the applicant's right of access to a tribunal competent to examine the premature termination of his mandate as President of the Supreme Court, as guaranteed by Article 6 § 1 of the Convention.

79. The Court accordingly dismisses the Government's preliminary objection and finds that there has been a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

80. The applicant complained that he had been dismissed as a result of the views he had expressed publicly in his capacity as President of the Supreme Court and the National Council of Justice on four issues of fundamental importance for the judiciary. He alleged that there had been a breach of Article 10 of the Convention, which, in so far as relevant, provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. The parties' submissions

1. The applicant

81. The applicant contended that he had been dismissed from his position as President of the Supreme Court for expressing his views, in his professional capacity, on four issues of fundamental importance for the judiciary (the Nullification Act, the retirement age of judges, the amendments to the Code of Criminal Procedure and the new legislation on the Organisation and Administration of the Courts). It was not only his right to express his opinion, but also one of his duties as President of the National

Council of Justice. There was a causal relationship between the expression of those views and his premature dismissal. According to the applicant, his allegation was corroborated by the fact that the Government had previously denied that the new regulation on the competences of the new Kúria would necessitate the termination of the mandates of persons elected under the previous Constitution (see Position CDL(2011)058 of the Government transmitted to the Venice Commission on 6 July 2011, paragraph 48 above). The idea of the applicant's dismissal did not emerge until late November 2011, subsequent to the criticisms expressed by him (including in his parliamentary speech of 3 November 2011). In order to show that his removal from office was the result of the expression of his views, he referred to several statements in the Hungarian and international press, as well as to reports by international organisations (see the Opinions of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe, paragraph 52 above, and of the Venice Commission (CDL-AD(2012)001, § 115), paragraph 49 above).

The applicant argued that the alleged link between the changes affecting the Supreme Court and the termination of his mandate had been created only as a subsequent pretext by the Government. In any event, although the institution's name had changed, both the function of the new Kúria and the nature of the role of its president remained essentially the same. The function for which the applicant had been elected had not ceased to exist. In this regard, the applicant emphasised that in a democratic society governed by the rule of law, no reconsideration, either by the legislature or by the executive, of the suitability of any elected judicial official was allowed before the expiry of the term of office of that official, without prejudice to the statutory grounds for dismissal or revocation. In his case, it had been proved beyond reasonable doubt by many sufficiently strong, clear and concordant inferences that the premature termination of his mandate as President of the Supreme Court amounted to an interference with his right to freedom of speech.

82. The applicant further argued that the interference with his freedom of expression was not "prescribed by law", as required by the second paragraph of Article 10. The impugned legislative provisions removing him from office were aimed at him as an individual. They were arbitrary, abusive, retroactive and incompatible with the Convention requirements concerning the quality of law in a democratic society governed by the rule of law. Moreover, the legislature had failed to demonstrate the existence of a legitimate aim.

83. Lastly, the applicant considered that the interference of which he was complaining could not be regarded as "necessary in a democratic society". In discharging his constitutional duty as head of the judiciary, he had freely and legitimately expressed his views on new legislation affecting the judiciary. As a result, he had not only been dismissed from his position

but all of the benefits and allowances due to an outgoing president of the Supreme Court had also been removed retroactively. Those disproportionate and punitive measures, with their potential chilling effect, compromised the independence of the judiciary as a whole.

2. The Government

84. The Government contended that there had been no interference with the applicant's freedom of expression, since the termination of his mandate as President of the Supreme Court was not related to the opinions he had expressed. The fact that the public expression of his opinions pre-dated the termination of his mandate was not sufficient to prove that there was a causal link between them. The applicant's mandate had been terminated because of the fundamental changes in the functions of the supreme judicial authority in Hungary, renamed as Kúria. The function for which the applicant had been elected had ceased to exist upon the entry into force of the Fundamental Law. His election and activities had been mostly connected with the functions of the President of the National Council of Justice, which had been separated from those of the President of the new Kúria. In addition, the functions and competences of the Kúria itself had also been changed and broadened. Therefore, the professional requirements stemming from those new functions could not have been taken into account when the applicant's suitability for the post of President of the Supreme Court had been considered. Relying on the Constitutional Court's judgment of 19 March 2013 concerning the termination of the mandate of the Vice-President of the Supreme Court, the Government were of the opinion that the major changes in the functions of the President of the Supreme Court also justified reconsideration of his suitability for the post of President of the new Kúria. Furthermore, the requirement that the new President of the Kúria should have at least five years' judicial service guaranteed the influence of the judiciary in the selection of candidates for that post. The post was now more judicial and less managerial than that of the President of the Supreme Court. The Government invited the Court to conclude that the applicant's complaint under Article 10 was manifestly ill-founded.

B. Observations of the third-party interveners

85. The Hungarian Helsinki Committee, the Hungarian Civil Liberties Union and the Eötvös Károly Institute observed that the present case was an outstanding example of how violations of individual fundamental rights were intertwined with processes threatening the rule of law. In their view, this case was part of a general pattern of weakening of the system of checks and balances that had taken place in the past three years in Hungary. They referred to other legislative steps aimed at the early removal of individual State officials, notably the Supreme Court's Vice-President, whose

constitutional complaint had been examined by the Constitutional Court (see paragraph 46 above), but also the Data Protection Commissioner and members of the National Election Committee. They also referred to other examples of legislation targeting individuals, retroactive legislation (see *N.K.M. v. Hungary,* no. 66529/11, 14 May 2013) and other legislative measures threatening the independence of the judiciary (such as the right of the president of the National Judicial Office to transfer cases). They maintained that this case should be examined in the general context in Hungary and in the light of the importance of the rule of law and the independence of the judiciary. The widespread use of legislation targeting individuals could remove a wide range of significant issues from judicial scrutiny. The Court should therefore delve "behind the appearances" and examine the real purpose of such legislation and the effect it might have on individuals' Convention rights.

86. The Helsinki Foundation for Human Rights of Poland considered that this case was of high significance not only to Hungary but also in terms of constitutional relations between legislative or executive authorities and the judiciary in general. They referred to the principle of the irremovability of judges as one of the most important guarantees of judicial independence (see paragraphs 55, 57 and 60 above), as well as to the principle of the separation of powers (see *Sacilor-Lormines v. France*, no. 65411/01, ECHR 2006-XIII). They stressed that while legislative authorities had the power to introduce reforms of the constitutional system of justice, that power could not be regarded as unlimited. The reorganisation of the courts system must not have a negative effect on judges currently holding office (they cited the Mt. Scopus Revised International Standards of Judicial Independence, see paragraph 61 above) and thus it should not be used as a tool to remove a particular judge.

C. The Court's assessment

1. Admissibility

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

2. Merits

88. The Court notes that the status which the applicant enjoyed as President of the Supreme Court did not deprive him of the protection of Article 10 (see *Harabin v. Slovakia,* no. 58688/11, § 149, 20 November 2012). Moreover, having regard in particular to the growing importance attached to the separation of powers (see *Kleyn and Others v. the Netherlands* [GC], nos. 39343/98, 39651/98,

43147/98 and 46664/99, § 193, ECHR 2003-VI, and *Stafford v. the United Kingdom* [GC], no. 46295/99, § 78, ECHR 2002-IV) and the importance of safeguarding the independence of the judiciary, any interference with the freedom of expression of a judge in a position such as the applicant's calls for close scrutiny on the part of the Court (see *Harabin* (dec.), no. 62584/00, 29 June 2004). However, in order to determine whether this provision was infringed, it must first be ascertained whether the disputed measure amounted to an interference with the exercise of the applicant's freedom of expression – in the form of a "formality, condition, restriction or penalty" – or whether it lay within the sphere of the right of access to or employment in the civil service, a right not secured in the Convention. In order to answer this question, the scope of the measure must be determined by putting it in the context of the facts of the case and of the relevant legislation (for recapitulation of the relevant case-law, see *Wille v. Liechtenstein* [GC], no. 28396/95, §§ 42-43, ECHR 1999-VII; *Harabin* (dec.), cited above; *Kayasu v. Turkey*, nos. 64119/00 and 76292/01, §§ 77-79, 13 November 2008; *Kudeshkina v. Russia*, no. 29492/05, § 79, 26 February 2009; *Poyraz v. Turkey*, no. 15966/06, §§ 55-57, 7 December 2010; and *Harabin v. Slovakia,* cited above, § 149).

89. In the *Wille* case*,* the Court found that a letter sent to the applicant (the President of the Liechtenstein Administrative Court) by the Prince of Liechtenstein announcing his intention not to reappoint him to a public post constituted a "reprimand for the previous exercise by the applicant of his right to freedom of expression" (see *Wille*, cited above, § 50). The Court observed that in that letter the Prince had criticised the content of the applicant's lecture and announced the intention to sanction him because he had freely expressed his opinion on questions of constitutional law. The Court therefore concluded that Article 10 was applicable and that there had been an interference with the applicant's right to freedom of expression. Similarly, in *Kudeshkina v. Russia* (cited above), the Court observed that the decision to bar the applicant from holding judicial office had been prompted by her statements to the media. Neither the applicant's eligibility for public service nor her professional ability to exercise judicial functions was part of the arguments before the domestic authorities. Accordingly, the measure complained of essentially related to freedom of expression, and not to the holding of a public post in the administration of justice, the right to which is not secured by the Convention.

90. On the contrary, in the *Harabin case* (see *Harabin* (dec.), cited in § 88 above), the Court considered that the Government's proposal (based on a report by the Minister of Justice) to revoke the applicant's appointment as President of the Supreme Court essentially related to the applicant's ability to exercise his functions, that is, to the appraisal of his professional qualifications and personal qualities in the context of his activities and attitudes relating to State administration of the Supreme Court. In the

Court's view, the measure complained of lay, as such, within the sphere of holding a public post related to State administration of justice, a right not secured in the Convention. The documents before the Court did not indicate that the proposal to remove the applicant from office had been exclusively or preponderantly prompted by the views that he had expressed on a draft amendment to the Constitution. The Court concluded that there had been no interference with the exercise of the applicant's right to freedom of expression. Similarly, in the *Harabin* judgment it was the applicant's professional behaviour in the context of the administration of justice which represented the essential aspect of the case. The disciplinary proceedings related to the discharge by the applicant of his duties as President of the Supreme Court, and therefore lay within the sphere of his employment in the civil service. The disciplinary offence of which the applicant was accused and found guilty did not involve any statements or views expressed by him in the context of a public debate or in the media. The Court also concluded that the disputed measure did not amount to an interference with the exercise of the applicant's right to freedom of expression (see *Harabin* judgment, cited above, §§ 150-53).

91. The Court considers that the issue at the heart of the present case is whether the applicant's mandate as President of the Supreme Court was terminated solely as a result of the reorganisation of the judiciary in Hungary, as the Government have claimed, or whether, as the applicant has argued, as a consequence of the views he expressed publicly on legislative reforms affecting the judiciary.

92. The Court notes at the outset that in his capacity as President of the Supreme Court and the National Council of Justice, the applicant expressed his views on different legislative reforms affecting the judiciary between 12 February and 3 November 2011 (see paragraphs 11-16 above). He expressed his opinions through his spokesman, through public letters or communiqués, including with other members of the judiciary, by challenging legislation before the Constitutional Court, or by directly addressing Parliament in a speech (3 November 2011). On 19 November 2011, a bill proposing an amendment to the 1949 Constitution was submitted to Parliament by a member of the governing party. The amendment proposed that Parliament should elect the president of the new Kúria by 31 December 2011 at the latest. On 20 November 2011, two leaders of the political parties forming the parliamentary majority submitted to Parliament a Bill on the Transitional Provisions of the Fundamental Law. Pursuant to section 11(2) of the Bill, the mandate of the President of the Supreme Court would be terminated upon the entry into force of the Fundamental Law. That measure was also included in a proposal to amend the Organisation and Administration of the Courts Bill (Bill T/4743), submitted by another member of the governing party on 23 November 2011. On 28 November and 30 December 2011, all those proposals were adopted

and enacted. The effect was to terminate the applicant's term of office as President of the Supreme Court as of 1 January 2012, when the Fundamental Law entered into force and the new Kúria became the legal successor of the Supreme Court.

93. The Court also notes that on 9 November 2011, the Organisation and Administration of the Courts Bill was amended and a new criterion was introduced as regards eligibility for the post of President of the Kúria. This criterion related to the time served as a judge in Hungary (at least five years); the time served as a judge in an international court was not counted. The fact that the applicant did not meet the new requirement led to his ineligibility for the post of President of the new Kúria.

94. The Court observes that the proposals to terminate the applicant's mandate as President of the Supreme Court as well as the new eligibility criterion for the post of President of the Kúria were all submitted to Parliament after he had publicly expressed his views on the legislative reforms at issue, and were adopted within an extremely short time. In fact, in two interviews given on 14 April and 19 October 2011 – that is, before those proposals were submitted to Parliament – two members of the parliamentary majority, one of whom was State Secretary of Justice, had declared that the President of the Supreme Court would continue as President of the Kúria. The Court further notes that on 6 July 2011, the Government of Hungary assured the Venice Commission that the drafting of the transitional provisions of the Fundamental Law would not be used to unduly put an end to the terms of office of persons elected under the previous legal regime.

95. The Court is not convinced by the Government's arguments that the impugned measure was a necessary consequence of the fundamental changes in the functions of the supreme judicial authority in Hungary and its president. The fact that the functions of the President of the National Council of Justice were separated from those of the President of the new Kúria is not sufficient in itself to conclude that the functions for which the applicant had been elected ceased to exist on the entry into force of the Fundamental Law, as the Government have argued. Furthermore, neither the applicant's ability to exercise his functions as president of the highest court in Hungary, nor his professional behaviour were called into question before the domestic authorities (see, conversely, *Harabin* (judgment), cited above, § 151; and *Harabin* (dec.), cited above).

96. The Court considers that the above facts and the sequence of events in their entirety corroborate the applicant's version of events, namely that the early termination of his mandate as President of the Supreme Court was not the result of a justified restructuring of the supreme judicial authority in Hungary, but in fact was set up on account of the views and criticisms that he had publicly expressed in his professional capacity on the legislative reforms concerned.

97. In view of the above, the Court concludes that the early termination of the applicant's mandate as President of the Supreme Court was a reaction against his criticisms and publicly expressed views on judicial reforms and thereby constituted an interference with the exercise of his right to freedom of expression, as guaranteed by Article 10 of the Convention. The Court will therefore examine whether it was justified under paragraph 2 of Article 10 of the Convention.

98. The Court notes that the applicant contested that the interference with his freedom of expression was "prescribed by law" or pursued a legitimate aim. However, even if such interference were "prescribed by law" and in pursuit of legitimate aims so as to satisfy the requirements of Article 10 § 2 of the Convention in that respect, the Court considers that it was not "necessary in a democratic society", for the following reasons.

99. The Court attaches particular importance to the office held by the applicant, the statements or views that he expressed publicly, the context in which they were made and the reaction thereto. In his professional capacity as President of the Supreme Court and of the National Council of Justice, the applicant expressed his opinion on four legislative reforms affecting the judiciary. The reforms concerned issues related to the functioning and reform of the judicial system, the independence and irremovability of judges and the retirement age of judges. The Court reiterates that issues concerning the functioning of the justice system constitute questions of public interest, the debate of which enjoys the protection of Article 10 (see *Kudeshkina,* cited above, § 86). Even if an issue under debate has political implications, this is not in itself sufficient to prevent a judge from making a statement on the matter (see *Wille*, cited above, § 67).

100. The Court notes that it was not only the applicant's right but also his duty as President of the National Council of Justice to express his opinion on legislative reforms affecting the judiciary, after having gathered and summarised the opinions of different courts. The applicant also used his prerogative to challenge some of the legislation concerned before the Constitutional Court and the possibility to express his opinion directly before Parliament during the relevant parliamentary debate. There is no evidence to conclude that the views expressed by the applicant went beyond mere criticism from a strictly professional perspective, or that they contained gratuitous personal attacks or insults.

101. As regards the proportionality of the interference, the Court notes that the applicant's term of office as President of the Supreme Court was terminated three and a half years before the end of the fixed term applicable under the legislation in force at the time of his election. Furthermore, although the applicant remained in office as a judge of the new Kúria, the premature termination of his mandate as President of the Supreme Court had pecuniary consequences, namely the loss of the remuneration and other benefits applicable to that post for the rest of his presidential term. The

Court reiterates that the fear of sanction has a "chilling effect" on the exercise of freedom of expression and in particular risks discouraging judges from making critical remarks about public institutions or policies, for fear of losing their judicial office (see, *mutatis mutandis*, *Wille*, cited above, § 50, and *Kudeshkina,* cited above, §§ 98-100). This effect, which works to the detriment of society as a whole, is also a factor that concerns the proportionality of, and thus the justification for, the sanction imposed on the applicant.

102. The Court reiterates that the fairness of proceedings and the procedural guarantees afforded (see, *mutatis mutandis*, *Steel and Morris v. the United Kingdom*, no. 68416/01, § 95, ECHR 2005-II, § 95, and *Kudeshkina,* cited above, § 83) are factors to be taken into account when assessing the proportionality of an interference with the freedom of expression guaranteed by Article 10. The absence of an effective judicial review of the impugned measure may also lead to the violation of Article 10 (see *Saygılı and Seyman v. Turkey,* no. 51041/99, §§ 24-25, 27 June 2006, and *Lombardi Vallauri v. Italy,* no. 39128/05, §§ 45-56, 20 October 2009). In the instant case, in the light of the considerations that led it to find a violation of Article 6 of the Convention, the Court considers that the impugned measure was not subject to effective judicial review by the domestic courts.

103. Having regard to the foregoing considerations, the Court finds that the interference with the applicant's right to freedom of expression was not necessary in a democratic society. Accordingly, there has been a violation of Article 10 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

104. The applicant further complained that his premature dismissal from his position had unjustifiably deprived him of the peaceful enjoyment of his possessions, namely: (a) the vested benefits that would have been due to him during his term of office, and (b) the post-term benefits as an outgoing president of the Supreme Court. He complained that the post-term benefits had been abrogated by customised and retroactive legislative measures. He relied on Article 1 of Protocol No. 1. In his observations, the applicant submitted that if the Court would not allow full compensation for those claims as damage inextricably linked to the violation of Article 10, he would maintain his position as to the need for separate scrutiny under this provision. Article 1 of Protocol No. 1 reads, in its relevant part, as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

105. The Court reiterates that future income cannot be considered to constitute "possessions" unless it has already been earned or is definitely payable (see *Erkan v. Turkey* (dec.), no. 29840/03, 24 March 2005 and *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 64, ECHR 2007-I). There is no right under the Convention to continue to be paid a salary of a particular amount (see *Vilho Eskelinen and Others* [GC], cited above, § 94). The dismissal of the applicant from the post of President of the Supreme Court indeed precluded him from receiving a further salary in that post. Furthermore, the new legislation passed in 2011 prevented him from enjoying the special post-retirement benefits as a former President of the Supreme Court. However, that income had not been actually earned. Nor can it be argued that it was definitely payable (see *Volkov v. Ukraine* (dec.), no. 21722/11, 18 October 2011; see conversely*, N.K.M. v. Hungary*, no. 66529/11, 14 May 2013).

106. It follows that this complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

107. The applicant complained, under Article 13 taken in conjunction with Article 10 of the Convention and Article 1 of Protocol No. 1, that he had been deprived of an effective domestic remedy in relation to his premature dismissal from office.

108. The Government contended that Article 13 was not applicable in the present case, since the applicant could not be considered to have an arguable claim under Article 10.

109. The Court reiterates that Article 13 requires a remedy in domestic law only in respect of grievances which can be regarded as "arguable" in terms of the Convention (see *Boyle and Rice v. the United Kingdom,* 27 April 1988, § 52, Series A no. 131).

110. In so far as the complaint under Article 13 concerns the existence of a domestic remedy in respect of his complaints under Article 1 of Protocol No. 1, the Court notes that it has already declared them inadmissible in paragraph 106 above. Accordingly, the applicant did not have an "arguable claim" of a violation of Article 1 of Protocol No. 1 and, therefore, Article 13 of the Convention is inapplicable.

111. It follows that this part of the complaint under Article 13 of the Convention is incompatible *ratione materiae* with the provisions of the

Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4 thereof.

112. In so far as the complaint under Article 13 concerns the existence of a domestic remedy in respect of the complaint under Article 10, the Court considers that it is admissible. However, the Court notes that the role of Article 6 in relation to Article 13 is that of a *lex specialis*, the requirements of Article 13 being absorbed by more stringent requirements of Article 6 (see, for example, *Efendiyeva v. Azerbaijan*, no. 31556/03, § 59, 25 October 2007). Given the Court's findings under Article 6 of the Convention, the present complaint does not give rise to any separate issue (see *Oleksandr Volkov*, cited above, § 189).

113. Consequently, the Court holds that it is not necessary to examine the complaint under Article 13 in conjunction with Article 10 of the Convention separately.

V. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

114. Lastly, the applicant complained that he had been treated differently from other office holders in analogous situations (other court executives, the president of the Constitutional Court), as a consequence of his having expressed politically controversial opinions. The measures directed against him therefore constituted unjustified differential treatment on the ground of "other opinion". He relied on Article 14 of the Convention, taken in conjunction with Articles 6 and 10 and Article 1 of Protocol No. 1.

115. The Government argued that since Article 6 was not applicable in the present case, Article 14 was not applicable either. As regards the applicant's complaint under Article 14 read in conjunction with Article 10, they were of the opinion that this complaint was essentially the same as the one under Article 10, and therefore should also be declared manifestly ill-founded. Nevertheless, they noted that the applicant's position as President of the Supreme Court differed from that of other judges and other holders of public office elected by Parliament.

116. As the Court has consistently held, Article 14 of the Convention complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see *Hans-Adam von Liechtenstein v. Germany* [GC], no. 42527/98, § 91, ECHR 2001-VIII).

117. The Court has already found that the facts at issue do not fall within the ambit of Article 1 of Protocol No. 1. It therefore concludes that they do not attract the protection of Article 14 in conjunction with Article 1 of

Protocol No. 1. It follows that the applicant's complaint is incompatible *ratione materiae* with the provisions of the Convention and the Protocols thereto, within the meaning of Article 35 § 3 (a) of the Convention, and must be rejected pursuant to Article 35 § 4.

118. As regards the applicant's complaints under Article 14 read in conjunction with Articles 6 and 10, the Court finds that these complaints are intrinsically linked to the complaints submitted under Articles 6 and 10 of the Convention and must therefore be declared admissible. However, having regard to its findings in paragraphs 79 and 103 above, the Court considers it unnecessary to examine these complaints separately.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

119. 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."

120. The applicant claimed that as a result of the premature termination of his mandate as President of the Supreme Court and the entry into force of retroactive legislation concerning the remuneration of his post, he had lost his salary as President, other benefits attached to that position as well as the post-term benefits (severance allowance and pension supplement for life) to which he would have been entitled as a former President of the Supreme Court. He provided a detailed calculation of his claim for pecuniary damage, which amounted to 742,520 euros (EUR). He also claimed that as a consequence of the premature termination of his mandate, his professional reputation and career had been damaged and he had suffered considerable frustration. He sought an award of just satisfaction for non-pecuniary damage in the amount of EUR 20,000.

121. As regards the costs and expenses before the Court, the applicant claimed EUR 153,532. The claim consisted of legal fees of the applicant's representatives, who had spent 669.5 hours working on the case; fees for other legal work (research, translations) amounting to 406.9 hours; and other expenses (details of which were provided).

122. The Government contested the applicant's claim for pecuniary damage and submitted that through this claim he had reintroduced his complaint under Article 1 of Protocol No. 1. They contended that his claims for damages for the loss of future income and other property-related damages were unfounded and irrelevant. As regards costs and expenses, the Government argued that the applicant's costs incurred on account of claiming damages for loss of future income as well as his complaint concerning the violation of his right to property could not be considered to have been necessarily incurred or reasonable.

123. In the circumstances of the present case, the Court considers that the question of the application of Article 41 is not ready for decision. That question must accordingly be reserved and the subsequent procedure fixed, having regard to any agreement which might be reached between the Government and the applicant (Rule 75 §§ 1 and 4 of the Rules of Court).

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join to the merits the issue of whether it is competent *ratione materiae* to examine the complaint under Article 6 § 1 of the Convention;

2. *Declares* the complaints concerning Articles 6 § 1, 10, 13 in conjunction with Articles 10, and 14 in conjunction with Articles 6 § 1 and 10 admissible and the remainder of the application inadmissible;

3. *Holds* that it is competent *ratione materiae* to examine the complaint under Article 6 § 1 of the Convention and that there has been a violation of the said article;

4. *Holds* that there has been a violation of Article 10 of the Convention;

5. *Holds* that there is no need to examine the complaint under Article 13 in conjunction with Article 10 of the Convention;

6. *Holds* that there is no need to examine the complaint under Article 14 in conjunction with Articles 6 § 1 and 10 of the Convention;

7. *Holds* that the question of the application of Article 41 of the Convention is not ready for decision and accordingly,

   (a) *reserves* the said question;

   (b) *invites* the Government and the applicant to submit, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;

   (c) *reserves* the further procedure and *delegates* to the President of the Chamber the power to fix the same if need be.

Done in English, and notified in writing on 27 May 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos Deputy Registrar	Guido Raimondi President

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

G.RA.
A.C.

CONCURRING OPINION OF JUDGE SPANO

1. This case discloses a clear-cut violation of Article 10 of the Convention. I therefore fully concur with my colleagues. I write separately to address an issue not examined in the Court's judgment (see paragraph 98), namely whether the interference with the applicant's Article 10 rights pursued a "legitimate aim" as required by Article 10 § 2.

2. The Court correctly concludes that the "early termination of the applicant's mandate as President of the Supreme Court was a reaction against his criticism and publicly expressed views on judicial reforms and thereby constituted an interference with the exercise of his right to freedom of expression" (see paragraph 97 of the judgment).

3. When considering whether such a measure pursued a legitimate aim within the meaning of Article 10 § 2 of the Convention, it bears reiterating that the right to freedom of expression has as its fundamental purpose the safeguarding of the democratic process, the "rule of law" being one of the "fundamental principles of a democratic society" (see *Klass and Others v. Germany*, 6 September 1978, § 55, Series A no. 28). Furthermore, the Court has previously held in a case concerning the freedom of expression of civil servants that issues relating to the "separation of powers" can involve "very important matters in a democratic society which the public has a legitimate interest in being informed about and which fall within the scope of political debate" (see *Guja v. Moldova* [GC], no. 14277/04, § 88, ECHR 2008).

4. In the present case, the highest judicial office-holder of a constitutionally separate and independent branch of government lost his position as President of the Supreme Court prematurely, due only to his expressive activity in furtherance of a statutory duty to promote the interests of the judiciary in its relations with the other branches. The measure used by the legislature to remove him from office was a singular law of constitutional pedigree, clearly directed at the applicant and at him alone. Hence, it is axiomatic that the premature termination of the applicant's mandate, on the basis of his publicly expressed views on the separation of powers and the independence of the judiciary, did not and could not have pursued a legitimate aim within the meaning of Article 10 § 2 of the Convention.