

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

SECOND SECTION

CASE OF KARTAL v. TÜRKİYE

(Application no. 54699/14)

JUDGMENT

Art 6 § 1 (civil) • Access to court • Lack of judicial review of premature termination *ex lege,* after legislative reform, of a serving judge's term of office as vice-president of the Inspection Board of the High Council of Judges and Prosecutors • Art 6 applicable • Genuine and serious dispute over arguable civil right under domestic law not to have his term of office terminated arbitrarily • Second condition of the *Eskelinen* test not met since applicant's exclusion from access to court was not justified on objective grounds in State's interest • Termination *ex lege* not compatible with the rule of law and might threaten the independence of the judiciary • No weighty reasons exceptionally justifying absence of judicial review • Very essence of right of access to court impaired

Prepared by the Registry. Does not bind the Court.

STRASBOURG

26 March 2024

FINAL

23/09/2024

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



In the case of Kartal v. Türkiye,

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

Arnfinn Bårdsen*, President*,
Egidijus Kūris,
Pauliine Koskelo,
Saadet Yüksel,
Frédéric Krenc,
Diana Sârcu,
Davor Derenčinović*, judges*,
and Hasan Bakırcı, *Section Registrar,*

Having regard to:

the application (no. 54699/14) against the Republic of Türkiye lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr Adem Kartal ("the applicant"), on 24 July 2014;

the decision to give notice to the Turkish Government ("the Government") of the complaint under Article 6 §1 of the Convention ;

the observations submitted by the respondent Government and the observations in reply submitted by the applicant;

the comments submitted by *Volunteer Jurists*, who were granted leave to intervene by the President of the Section;

Having deliberated in private on 13 February 2024,

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

INTRODUCTION

1. The instant case concerns the lack of access to a court for the applicant in connection with the premature and allegedly arbitrary termination of his office as vice-president of the Inspection Board of the High Council of Judges and Prosecutors by the entry into effect of a law. The applicant complained of a violation of his right (under Article 6 § 1 of the Convention) of access to a court.

THE FACTS

2. The applicant was born in 1972 and lives in Ankara. He was represented by Ms K. Kıldan, a lawyer practising in Antalya.

3. The Government were represented by their Agent, Mr Hacı Ali Açıkgül, the head of the Department of Human Rights of the Ministry of Justice of the Republic of Türkiye.

4. At the time of the events in question, the applicant, who is a judge by profession, occupied the post of vice-president of the Inspection Board of the High Council of Judges and Prosecutors (*Hakimler ve Savcılar Yüksek Kurulu*

– "the HSYK)), which was later renamed as the Council of Judges and Prosecutors ("the HSK") following the entry into force of constitutional amendments of 2017. He was appointed to that post on 30 December 2011 by the plenary assembly of the HSYK, which had chosen him from among the judges and prosecutors of the first grade, with his consent and under section 15 of Law no. 6087 on the Council of Judges and Prosecutors (see paragraph 16 below).

I. THE ADOPTION OF LAW NO. 6524 AMENDING LAW NO. 6087 ON THE HIGH COUNCIL OF JUDGES AND PROSECUTORS, AND THE REVIEW OF ITS CONSTITUTIONALITY

5. On 15 February 2014, the Grand National Assembly of Türkiye adopted Law no. 6524 on amendments to certain laws; published in the Official Gazette of 27 February 2014, this Law set out amendments to Law no. 6087. The explanatory memorandum to Law no. 6524 explained that the need for certain comprehensive amendments to Law no. 6087 had become apparent, since the restructuring of the HSYK by means of constitutional amendments enacted in 2010, in order to reinforce the independence and impartiality of the judiciary, to eliminate certain problems, and to make the functioning of the judiciary more effective.

Law no. 6524 introduced several changes to Law no. 6087 in respect of: the election procedure for membership of the HSYK; the membership of its chambers and their working methods and duties; the lodging of objections against the decisions and proceedings of the chambers; the duties of the plenary assembly of the HSYK; the appointment of the president, secretary-general, deputy secretaries general of the HSYK; the appointment of the president and the vice-presidents of the Inspection Board ("the Inspection Board"); and the appointment of the inspectors and rapporteur judges of the HSYK.

Law no. 6524 also set out transitional provisions concerning the terms of office of existing staff working at the HSYK at the time of its entry into force. The explanatory memorandum to the Law stated that these transitional provisions had been introduced in order to avoid uncertainty regarding the date of entry into force of the Law owing to the reorganisation of the structure of the HSYK. Accordingly, section 39 of the Law added provisional section 4 to Law no. 6087; provisional section 4 provided that the terms of office of the secretary-general, deputy general secretaries, president and vice-presidents of the Inspection Board, and the inspectors, the rapporteur judges and administrative staff of the HSYK would end when the Law entered into force. Furthermore, within ten days of the entry into force of this law, either the president, vice-presidents and deputy general secretaries of the Inspection Board were to be reappointed by the president of the HSYK (paragraph 17 below), or new persons were to be appointed to those posts.

6. A total of 130 members of the Grand National Assembly of Türkiye lodged an application with the Constitutional Court challenging the constitutionality of Law no. 6524 and requesting the annulment of section 39 of that Law, together with other provisions.

7. By a judgment rendered on 10 April 2014 (E. 2014/57, K. 2014/81) and published in the Official Gazette on 14 May 2014, the Constitutional Court unanimously held, *inter alia*, that section 39 of Law no. 6524 was unconstitutional as it breached the principle of legal certainty and annulled the disputed provision. The Constitutional Court decided that, in order to avoid a legal void, the judgment annulling section 39 of Law no. 6524 would enter into force three months after it was published in the Official Gazette. It also considered that the conditions for the suspension of the execution of the annulled provision had not been met.

The relevant part of this judgment reads as follows:

> "In the ... application it is stated: that all officials working at the HSYK (except for the members of the HSYK) have been dismissed; that the authority to determine the new management has been left entirely to the president [of the HSYK]; that the dismissal of the [judges] endowed with [security of tenure] and their replacement [with staff appointed] by the Minister [of Justice] was contrary to the principle of the separation of powers and the rule of law, and [constituted] a clear interference by the executive in the [affairs of] the HSYK, which ... should function according to the [principle of the] independence of the courts and the [security of tenure of judges]; that it is stipulated [by the Constitution] that all staff are to be organised according to the principle of the independence of the courts, without making any distinction between judicial staff and civil servants; that ... the Constitutional Court has found that the termination by law of the duties of public officials working within certain ministries is not unconstitutional, [because] those institutions are classic public institutions and such individuals are persons who do not have the independence and [security of tenure enjoyed by judges] in respect of the executive; that the right of staff (whose duties have been terminated by means of the rule that is the subject of the instant application) to lodge an application for a review of the legality of the termination of their duties has been violated by the restriction of their right to seek justice; that the duties of the members [of the HSYK's] chambers have been cancelled; that (directly or indirectly) granting authority to the Minister of Justice to take measures concerning the independent courts that exercise judicial power was contrary to 'judicial authority' and the principle of the 'separation of powers', ...and violated the principle of independence of the courts; and that the rule [that is the subject of the instant application] contravenes to Articles 2, 4, 6, 9, 11, 138, 139, 140 and 159 of the Constitution.
>
> Provisional section 4 (added to Law no. 6087) states in its first paragraph that the duties of the secretary-general, the deputy secretaries-general, the president ...and the vice-presidents of the Inspection Board, [and] the [duties of the] HSYK inspectors, the rapporteur judges and the administrative staff serving at the HSYK shall be terminated on the date of the entry into force of this Law; in its second paragraph that the president [of the HSYK] shall appoint the president ..., the vice-presidents [of the Inspection Board] and the deputy secretaries-general within ten days of the entry into force of this Law, and that the General Assembly shall determine the candidates for secretary-general [of the HSYK] in accordance with the procedure stipulated by this Law; in its third paragraph that the president shall appoint the secretary-general [of the HSYK] within three days of the nomination of the candidates for secretary-general; in

its fourth paragraph that the secretary general, the deputy secretaries-general, the president ... [and] the vice-presidents of the Inspection Board, [and] the HSYK inspectors and the rapporteur judges, whose duties at the HSYK are terminated, shall be appointed to positions deemed appropriate by taking into account their vested interests [*müktesep* – that is, their acquired or guaranteed interests]; and in its fifth paragraph that the administrative staff (whose duties at the HSYK have been terminated) shall be appointed by the Ministry of Justice to positions in the central or provincial organisation of the Ministry, in accordance with their vested interests.

Paragraph (1) of this section determines the persons whose duties will be terminated on the date that this Law enters into force.

Article 159 of the Constitution defines the positions to be [filled by persons] appointed by the HSYK. Accordingly, the authority to appoint the HSYK's inspectors and the judges and prosecutors to be employed by the HSYK rests with the HSYK. It is clear that the president and the vice-presidents of the Inspection Board must also be appointed by the HSYK under Article 159 of the Constitution.

The termination by law of the duties of persons whom the HSYK has the sole authority, under Article 159 of the Constitution, to appoint and whose appointments are made by the HSYK, under this Article [of the Constitution], renders Article 159 of the Constitution inoperative and is contrary to Article 159 of the Constitution in this respect.

On the other hand, the principle of legal security, which is one of the requirements of the rule of law enshrined in Article 2 of the Constitution, requires rules to be predictable, individuals to have confidence in the State [when carrying out] all their actions and transactions, and the State to avoid methods that undermine this sense of confidence in legal regulations.

It is a requirement [stemming from] the principle of legal security that public officials cannot be dismissed from their duties unless there is a justifiable reason for their dismissal. In cases of legal and factual necessity, it is accepted that the removal of public officials from their current positions and their reassignment to another position may be subject to legal regulations.

The termination of the duties of public officials working in certain positions in institutions and organisations whose organisational structure has been changed and their appointment to other positions within the scope of the restructuring of public institutions and organisations is an example of [the effect of] legal regulations [that have been] introduced owing to legal and factual necessities. In this case, the reason for the appointment of those concerned to other positions is the reorganisation of the institution or organisation in question – a completely different [situation] from that [pertaining to] the transfer-appointment procedures established by the administration on the basis of the laws in force and taking into account the subjective situation of the public official [concerned]. Owing to the aforementioned legal and factual necessities, [appointing persons] to other positions while preserving the [acquired or guaranteed] rights [of those concerned] is within the discretion of the legislature.

It is stated in the explanatory memorandum to [Article 39 of Law no. 6524] that transitional provisions have been introduced in order to avoid uncertainty (due to the reorganisation of the structure of the HSYK) as at the date of the entry into force of the Law; however, when the amendments made to Law no. 6087 by Law no. 6524 are examined as a whole, it is [clear] that there has been no ... change within the structure of the HSYK. Therefore, since it is not possible to talk about legal and factual necessities that require the termination (as a result of structural change) of the duties of

public officials serving at the HSYK, terminating the duties of such persons through legal regulations would lead to a violation of the principle of legal security.

Paragraphs (2), (3), (4) and (5) of [Article 39 of Law no. 6524] provide the procedures and principles pertaining to appointments [that are] made to fill vacant positions and the appointments [to other positions] of persons whose duties are to be terminated.

The unconstitutionality of paragraph (1), which regulates the termination of the offices [of people working at the HSYK], renders paragraphs (2), (3), (4) and (5) (which are based on the regulation in this paragraph, and which constitute the results of this regulation) also unconstitutional.

For the reasons explained, paragraphs (1), (2), (3), (4) and (5) of provisional Article 4 of Law [no. 6087] are contrary to Articles 2 and 159 of the Constitution. They must be annulled.

..."

II. THE TERMINATION OF THE APPLICANT'S OFFICE AT THE HSYK BY LAW NO. 6524

8. Following the entry into force of Law no. 6524 on 27 February 2014, the applicant's mandate as vice-president of the Inspection Board was terminated in accordance with section 39 of that Law, which added provisional section 4 to Law no. 6087.

9. On 27 February 2014, a new president and a new vice-president were appointed to the Inspection Board by the president of the HSYK. On 3 March 2023, the plenary assembly of the HSYK reappointed twenty-four out of fifty-nine ex-chief inspectors, thirty-three out of seventy-five ex-inspectors and eighteen out of forty-two ex-rapporteur judges to the positions that they had held at the HSYK before the termination of their respective offices under Law no. 6524. The applicant was not among those persons reappointed to the HSYK.

10. By a decision of 6 March 2014, the first chamber of the HSYK appointed the applicant as a public prosecutor at the Court of Cassation.

11. Given that under Article 153 of the Constitution decisions of the Constitutional Court cannot be applied retroactively (see paragraph 15 below), the applicant was not reinstated in his position as vice-president of the Inspection Board following the Constitutional Court's decision of 14 April 2014 annulling section 39 of Law no. 6524 (see paragraph 7 above).

12. The applicant lodged an individual application with the Constitutional Court, citing his right of access to a court in order to contest the premature termination by Law no. 6524 of his office within the Inspection Board. On 30 November 2015, the Constitutional Court declared the application inadmissible as incompatible *ratione materiae* with the provisions of the Constitution, as it did not have jurisdiction to examine legal instruments within the framework of an individual application.

III. SUBSEQUENT MEASURES CONCERNING THE APPLICANT

13. On 16 July 2016, the applicant was suspended from his profession as a magistrate and his office as a prosecutor at the Court of Cassation. On 24 August 2016 he was dismissed from his office under a decision taken by the HSYK within the framework of the measures adopted during the state of emergency declared in the aftermath of an attempted 15 July 2016 coup against the Turkish government. A request that he lodged with the HSYK for decision to be re-examined was rejected on 29 November 2016.

14. On 31 October 2017, the Erzurum Assize Court convicted the applicant of membership of an armed terrorist organisation described by the Turkish authorities as the Fetullahist Terror Organisation/Parallel State Structure (*Fetullahçı Terör Örgütü/Paralel Devlet Yapılanması* – hereinafter referred to as "the FETÖ/PDY"), which was considered by the authorities to have been the orchestrator of the above-mentioned coup attempt; the court sentenced him to seven years and six months in prison. Following an appeal by the applicant, this judgment was confirmed by the Court of Cassation on 20 October 2020.

RELEVANT LEGAL FRAMEWORK

I. DOMESTIC LAW AND PRACTICE

A. **Constitution**

15. The relevant provisions of the Constitution, as in force at the material time, provided as follows:

> **"Article 2**
>
> The Republic of Türkiye is a democratic, secular, and social State [that is] governed by the rule of law (and according to the concepts of public peace, national solidarity and justice), [respects] human rights, [is] loyal to the nationalism of Atatürk, and [is] based on the fundamental principles set forth in the preamble.
>
> ...
>
> **Article 36**
>
> Everyone shall have the right to present and defend himself as a plaintiff or defendant before the judicial authorities and to a fair trial that employs legitimate means and procedures.
>
> ...
>
> **Article 138**
>
> In the performance of their duties, judges shall be independent; they shall give judgment, according to their personal conviction, in accordance with the Constitution, statute and the law.

No organ, authority, officer, or other person may give orders or instructions to courts or to judges in respect of [those judges'] exercise of their judicial powers, send them circulars or make recommendations or suggestions to them.

..."

Article 139

Judges and public prosecutors shall not be removed from office or compelled to retire without their consent before [they reach] the age prescribed by the Constitution; nor shall they be deprived of their salaries, allowances or other rights relating to their status – even as a result of the abolition of a court or post.

Article 140

Judges shall discharge their duties in accordance with the principles of the independence of the courts and the security of tenure of judges.

The qualifications, appointment, rights and duties, salaries and allowances of judges and public prosecutors, their promotion, any temporary or permanent change in their positions or place of duties, the initiation of disciplinary proceedings against them and the imposition of disciplinary penalties, the conduct of investigations concerning them and [any] subsequent decision to prosecute them on account of offences committed in connection with (or in the course of) their duties, any conviction for offences or instances of incompetence requiring their dismissal from the profession, their in-service training, and other matters relating to their staff status shall be regulated by law in accordance with the principles of the independence of the courts and the security of tenure of judges.

Judges and public prosecutors shall be attached to the Ministry of Justice with respect to their administrative functions.

Those judges and public prosecutors working in administrative positions of [departments providing] judicial services shall be subject to the same provisions as [all] other judges and public prosecutors. Their categories and grades shall be determined according to the principles that apply to judges and public prosecutors, and they shall enjoy all the rights accorded to judges and public prosecutors.

...

Article 153

The decisions of the Constitutional Court are final. Decisions [annulling laws or decrees that have the force of law] cannot be made public without a written statement of reasons.

In the course of annulling the whole, or a provision, of laws (or decrees that have the force of law), the Constitutional Court shall not act as a lawmaker and pass any judgment leading to [the creation of new rules].

Laws, decrees that have the force of law, or the Rules of Procedure of the Grand National Assembly of Türkiye (or provisions thereof) shall cease to have effect from the date of the publication in the Official Gazette of the annulment thereof. Alternatively, the Constitutional Court may decide on the date on which the annulment decision shall come into effect. That date shall not be later than one year after the date of the publication of the decision in the Official Gazette. In the event of the postponement of the date on which an annulment decision is to come into effect, the Grand National Assembly of Türkiye shall give priority to debating and deciding on

any proposed draft ... law designed to fill the legal void arising from the annulment decision.

Annulment decisions cannot be applied retroactively.

Decisions of the Constitutional Court shall be published immediately in the Official Gazette, and shall be binding on the legislative, executive, and judicial organs, on the administrative authorities, and on persons and corporate bodies.

...

Article 159

The High Council of Judges and Prosecutors shall be established and shall exercise its functions in accordance with the principles of the independence of the courts and the security of tenure of judges.

The High Council of Judges and Prosecutors shall be composed of twenty-two regular and twelve substitute members; it shall comprise three chambers.

The president of the Council is the Minister of Justice. The Undersecretary to the Ministry of Justice shall be an *ex officio* member of the Council. For a term of four years, four regular members of the Council, the [required] qualities of whom are defined by law, shall be appointed by the President of the Republic from among ... teaching staff in the fields of law, economics and political sciences [and from among] high-ranking executives and lawyers; three regular and three substitute members shall be appointed by the plenary assembly of the Court of Cassation from among members of the Court of Cassation; two regular and two substitute members shall be appointed by the plenary assembly of the Supreme Administrative Court from among members of the Supreme Administrative Court; one regular and one substitute member shall be appointed by the plenary assembly of the Justice Academy of Türkiye from among its members; seven regular and four substitute members shall be elected by civil judges and public prosecutors from among those who are judges and prosecutors of the first grade and who have not lost the qualifications required for being a judge or prosecutor of the first grade; three regular and two substitute members shall be elected by administrative judges and public prosecutors from among those who are judges and prosecutors of the first grade and who have not lost the qualifications required for being a judge or prosecutor of the first grade. They may be re-elected at the end of their term of office ...

In the elections, every member [of the Court of Cassation, the Supreme Administrative Court and the Justice Academy of Türkiye] shall vote for [persons] to be elected to the High Council by the plenary assemblies of the Court of Cassation, the Supreme Administrative Court and the Justice Academy of Türkiye and every judge and prosecutor shall vote for the members to be elected to the High Council from among judges and public prosecutors of the first grade working at civil and administrative courts; the candidates receiving the greatest number of votes shall be elected as regular and substitute members, respectively. These elections shall be held once in respect of each term and [shall be conducted] by secret ballot ...

The Council shall conduct the proceedings regarding: admission to the profession of judges and public prosecutors of ordinary and administrative courts; appointment [and] transfer to other positions; the delegation of temporary powers; the promotion, and classification [of judges and prosecutors] as “of the first grade”; decisions concerning those whose continuation in the profession is found to be unsuitable; the imposition of disciplinary penalties; and removal from office. The Council shall take final decisions on proposals [made] by the Ministry of Justice concerning the abolition of a court, or

changes to the territorial jurisdiction of a court; it shall also exercise the other functions given to it by the Constitution and laws.

The supervision of judges and public prosecutors with regard to [i] their performance of their duties in accordance with the laws, regulations, by-laws and circulars (administrative circulars, in the case of judges),[ii] investigations into whether they have committed offences in connection with (or in the course of) their duties, [iii] whether their behaviour and conduct are in conformity with the requirements of their status and duties (and, if necessary, enquiries and investigations concerning them) shall be carried out by the Council's inspectors, upon the proposal of the related chambers and with the permission of the president of the High Council of Judges and Prosecutors.

Inquiries and investigations may also be assigned to a judge or public prosecutor who is senior to the judge or public prosecutor to be investigated. Decisions of the Council – other than [a decision to dismiss someone] from the profession – shall not be subject to judicial review.

A general secretariat shall be established under the Council. The secretary-general shall be appointed by the president of the Council from three candidates [chosen and proposed by the Council] from the ranks of the judges and public prosecutors of the first grade.

The Council shall be empowered to appoint (with their consent) the Council inspectors, [and also] judges and public prosecutors to be temporarily or permanently assigned to the Council ..."

B. Law on the High Council of Judges and Prosecutors (Law no. 6087)

16. The relevant provisions of Law no. 6087 on the High Council of Judges and Prosecutors, adopted on 11 December 2010 and published in the Official Gazette on 18 December 2010, as in force at the time, provided as follows:

"Section 12 – Rapporteur judges

"(1) There are sufficient numbers of rapporteur judges under the general secretariat to be assigned in the Council.

(2) Rapporteur judges shall be assigned [with their consent] temporarily or permanently by the plenary assembly [of the HSYK] from among those who have actually served at least five years [as judges] or [as prosecutors] at a prosecutor's office and who are recognised to be [potentially] useful ... to the Council, given their outstanding achievements.

(3) The rapporteur judges shall fulfil the duties assigned to them by the president [of the HSYK], the head of the relevant department and the secretary-general.

...

Section 14 – The formation and duties of the [HSYK's] Inspection Board

...

(4) The duties and authorities of the Inspection Board are as follows:

a) To inspect whether civil and administrative judiciary judges and prosecutors perform their duties in [a manner that is in] compliance with laws, regulations, by-laws and circulars, and to examine whether they commit offences in connection with or during the exercise of their duties – or whether their behaviour and actions are in

compliance with the requirements of their capacities and duties – and if necessary, to initiate examinations or investigations about them. b) to conduct the necessary research and enquiries into the legislative deficiencies and malfunctions in the implementation of relevant matters falling within the scope of its duties and to submit proposals to the Council regarding the judicial and administrative measures to be taken.

c) to perform similar duties that are specified in the laws, by-laws, and regulations or assigned by the Council ...

Section 15 – Assignment process

1) The members of the Inspection Board shall be appointed with their consent by the plenary assembly [of the HSYK] as follows:

a) The president and the vice-president of the Inspection Board shall be appointed from among judges and prosecutors of the first grade,

b) The chief inspectors of the Council shall be appointed, according to order of seniority, from among those inspectors who have actually completed five years of service with the Inspection Board [of the HSYK], who have been appointed as [judges] of the first grade and who have not lost their qualifications to be appointed as "of the first grade."

c) The inspectors of the Council shall be appointed from among those judges and prosecutors who have at least eight years of experience in their profession and who have been proved to provide beneficial services to the Council by virtue of their extraordinary achievements..."

...

Section 33 – Re-examination, objection, and judicial remedy

(1) The president [of the HSYK] or the persons concerned may lodge a request with the plenary assembly for the re-examination of any decision that has been adopted by the plenary assembly for the first time, within ten days of their being notified of that decision. Decisions taken after a request for re-examination shall be final.

(2) The president or the persons concerned may lodge a request with [an HSYK] chamber for the re-examination of a decision rendered by that chamber, within ten days of their being notified that decision.

(3) The president and the persons concerned may, within ten days of being notified, lodge an objection with the plenary assembly against decisions rendered by the [HSYK chambers] upon a request for re-examination. Decisions rendered following [the lodging of] objections shall be final.

...

(5) Recourse may be had with judicial authorities against final decisions of the plenary assembly and of chambers concerning [a judge's or prosecutor's] dismissal from [his or her] post; other decisions shall be beyond judicial review. The Supreme Administrative Court (as a first-instance court) shall hear actions for annulment brought against decisions delivered in respect of [a judge's or a prosecutor's] dismissal from [his or her] post. Such actions shall be deemed to be urgent.

...

Section 42 – Reassignment

(1) The secretary-general, the deputy secretary-general, the rapporteur judges, and the inspectors [serving] in the Council shall be appointed – [either] upon their own request

or *ex officio* – to a post deemed appropriate by the first chamber upon the decision of the plenary assembly, taking into account their [respective] merits."

C. Law no. 6524 on amendments to certain laws

17. Section 39 of Law no. 6524 on amendments to certain laws, adopted on 15 February 2014 and published in the Official Gazette on 27 February 2014, as in force at the time, provided:

"Section 39

The following provisional articles have been added to Law no. 6087.

"PROVISIONAL ARTICLE 4 – (1) The duties of the secretary-general, deputy secretaries-general, president ..., [and] vice-presidents of the Inspection Board, [HSYK] inspectors, rapporteur judges and administrative staff serving in the Council shall be terminated as of the effective date of this Law.

(2) Within ten days of the entry into force of this Law;

a) The president [of the HSYK] shall appoint the president of the Inspection Board, the vice-presidents of the Inspection Board and deputy general secretaries.

b) The plenary assembly shall nominate candidates for secretary-general, in accordance with the procedure prescribed by this Law.

(3) Within three days of the designation of candidates for secretary-general, the president [of the HSYK] shall appoint a secretary-general.

(4) The secretary-general, deputy secretaries-general, the president ... and the vice-presidents of the Inspection Board, and rapporteur judges whose duties in the Council are terminated shall be appointed to such [positions] as are deemed to be appropriate, taking into account their vested interests.

(5) Administrative staff whose duties in the Council are terminated shall be appointed by the Ministry of Justice to positions in the central or provincial organisation of the Ministry that reflect their vested interests.

(6) a) All circulars issued by the Council shall cease to be in force on the date of the entry into force of this Law.

b) Those provisions of the regulations issued by the Council that are not contrary to this Law shall continue to be applied.

..."

D. Law on Judges and Prosecutors (Law no. 2802)

18. The provisions of Law no. 2802 on judges and prosecutors, adopted on 24 February 1983 and published in the Official Gazette on 26 February 1983, as in force at the time, provided:

"Section 106

An additional payment shall be made to the judicial inspectors at the rate of 5% of their gross monthly salaries, in accordance with section 103 [of Law no. 2802]".

II. INTERNATIONAL LAW AND PRACTICE

19. A description of the relevant international law and practice may be found in *Grzęda v. Poland* ([GC], no. 43572/18, §§120-144, 15 March 2022).

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

20. The Government lodged preliminary objections on several grounds. They argued that the applicant did not submit an authority form authorising a lawyer to represent him before the Court, that he had not been a victim of a Convention violation, and that he had failed to exhaust all domestic remedies available to him.

A. Authority Form

21. The Government alleged that after they had been given notice of the application, the applicant had failed to submit, in accordance with Rule 36 §§ 2 and 4 of the Rules of Court, an authority form authorising a lawyer to represent him in the proceedings before the Court. Accordingly, the Government invited the Court to strike the application out of its list of cases, pursuant to Article 37 § 1 (a) of the Convention.

22. The Court observes that the applicant's representative submitted a duly completed authority form to the Court on 13 November 2011. Consequently, the Court finds no grounds to discontinue the examination of the application under Article 37 § 1 (c) of the Convention. It therefore rejects the Government's preliminary objection.

B. Victim status

1. The parties' submissions

(a) The Government

23. In support of its objection regarding the applicant's victim status, the Government submitted that the applicant could no longer claim to be a victim within the meaning of Article 34 of the Convention, since the Constitutional Court, by virtue of the judgment that it had delivered on 14 April 2014, had annulled section 39 of Law no. 6524, which had added provisional section 4 to Law no. 6087. They argued in this regard that, in the reasoning of its 14 April 2014 judgment, the Constitutional Court had emphasised that the dismissal from their respective offices of persons serving at the HSYK by means of legal instruments, and without any legal or factual necessity, had amounted to a violation of the principle of legal certainty; they further argued that, by virtue of this judgment (even though it could not be applied

retroactively), the Constitutional Court had acknowledged, in substance, that a violation of the Convention had occurred.

24. The Government observed, moreover, that following the entry into force of Law no. 6524, new assignments had been allocated among the staff who had been dismissed from office under that Law; the judges and prosecutors who had been removed from their duties and who had not been reassigned to other positions within the HSYK had been appointed to positions within other organisations in accordance with their acquired or guaranteed rights and taking into account their requests (and the nature of their respective principal professions (as either judges or prosecutors). The Government also specified in this respect that the above-mentioned additional monthly payment (in an amount equivalent to 5% of gross monthly salary) granted to those serving in the position of inspector and chief inspector at the HSYK for the term of their respective offices was not an acquired or guaranteed personal right but was granted by way of compensation for the difficult nature of their duties. Thus, the Government argued that the negative legal effects of the termination of the office of the applicant had been eliminated as a result of the decisions issued by the HSYK.

25. The Government also argued that even in the event that the applicant's office had not been terminated by Law no. 6524, the plenary assembly of the HSYK would still have had the power to end his office in the HSYK, given the fact that he had not benefitted from security of tenure in respect of his post as vice-president of the Inspection Board. They further noted that in view of the fact that the plenary assembly of the HSYK had had discretionary power in the matter of appointments, there had been no obligation for it to reappoint the applicant to his post at the HSYK following the judgment of the Constitutional Court by which it had annulled Article 39 of Law no. 6524.

26. The Government concluded that the application should therefore be rejected, pursuant to Articles 34 and 35 of the Convention, because the applicant lacked victim status.

(b) The applicant

27. The applicant contested the Government's arguments. He stressed that he had not had any effective remedy in respect of the premature termination by Law no. 6524 of his office at the HSYK. In this regard, he submitted that although the relevant provision of the disputed law had been annulled by the Constitutional Court, the Constitutional Court's judgment had not acknowledged any violation of his right of access to a court. He further submitted that his reassignment to another post at his request following the premature termination of his office could not be considered to have constituted any kind of remedy.

2. The Court's assessment

28. The Court reiterates that a decision or measure favourable to the applicant is not, in principle, sufficient to deprive him of his status as a "victim" for the purposes of Article 34 of the Convention unless the national authorities have acknowledged (either expressly or in substance) and then afforded redress for the breach of the Convention (see *Scordino v. Italy (no. 1)* [GC], no. 36813/97, §§ 179-80, ECHR 2006-V; *Gäfgen v. Germany* [GC], no. 22978/05, § 115, ECHR 2010; *Kurić and Others v. Slovenia* [GC], no. 26828/06, § 259, ECHR 2012 (extracts); and *Cristea v. the Republic of Moldova*, no. 35098/12, § 25, 12 February 2019). Only where both these conditions have been satisfied does the subsidiary nature of the protective mechanism of the Convention preclude an examination of the application (see *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, § 218, 22 December 2020).

29. The Court observes that section 39 of Law no. 6524, which added provisional section 4 to Law no. 6087, was annulled by the Constitutional Court's judgment of 14 April 2014; under that judgment, the court's judges unanimously held that that provision was unconstitutional as it breached the principle of legal certainty. Nevertheless, the judgment of the Constitutional Court did not make an assessment or reach a finding as to the applicant's grievance relating to his lack of access to a court in respect of the premature termination of his office at the HSYK; in any event, under Article 153 of the Constitution, that judgment did not have retroactive effect (see paragraph 15 above). Thus, by the very nature of the procedure it constituted an abstract constitutional review, and in view of the framework within which it was rendered, it could not be considered that that judgment provided the applicant with a procedure capable of redressing the effects of a possible violation of the Convention.

30. In so far as the Government argues that (i) the termination by Law no. 6524 of the office that the applicant held at the HSYK did not have any negative effect on the applicant to the extent that he was appointed (at the applicant's request, by a decision that the plenary assembly of the HSYK adopted under its discretionary power regarding the matter of appointments) to another post, and (ii) taking into account, as in the case of all other judges and prosecutors whose offices at the HSYK were terminated, his acquired or guaranteed rights, the Court notes that this point is irrelevant to the complaint in issue, which concerns the applicant's alleged lack of access to a court in respect of the termination of the office that he held at the HSYK.

31. Given the above-noted circumstances, the applicant may claim to be a victim of a violation of his right of access to a court. Accordingly, the Government's objection must be dismissed.

C. Non-exhaustion of domestic remedies

1. The parties' submissions

(a) The Government

32. The Government argued that the applicant had failed to exhaust the domestic remedies available to him. In that respect, they first submitted that the applicant could have brought an action in an administrative court seeking an annulment of the Minister's decision to appoint new persons as vice-presidents of the Inspection Board following the termination of his office as vice-president with the entry into force of Law no. 6524. Within the framework of such an action the applicant could have alleged, through the procedure of an abstract constitutional review, the incompatibility of the relevant provisions of Law no. 6524 with the Constitution.

33. The Government also emphasised that following the entry into force of Law no. 6524, the applicant could have requested to remain at the Inspection Board as a chief inspector or as an inspector instead of the office of the vice-president of the Inspection Board. Moreover, the applicant had not asked the plenary assembly of the HSYK to re-examine its decision not to reappoint him to the HSYK or to reappoint him to the HSYK following the judgment of the Constitutional Court by which it annulled Article 39 of Law no. 6524.

34. The Government accordingly argued that the applicant's complaint had to be declared inadmissible for non-exhaustion of domestic remedies.

(b) The applicant

35. The applicant contested the Government's arguments and alleged that he had exhausted all the domestic remedies available to him, including that of lodging an individual application with the Constitutional Court, before lodging his application with the Court. He also submitted that bringing an action for the annulment of the legal instrument authorising the appointment of other persons as vice-presidents of the Inspection Board following the termination of his office by law and lodging a request to be reappointed to the HSYK could not be regarded as constituting an adequate remedy for his case as his complaint concerned the lack of judicial review of the premature termination of his office by means of a legislative amendment.

2. The Court's assessment

36. The Court reiterates that the only remedies that Article 35 § 1 of the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient (see *Paksas v. Lithuania* [GC], no. 34932/04, § 75, ECHR 2011 (extracts)) and that there is no obligation to have recourse to remedies that are inadequate or ineffective

(see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 73, 25 March 2014).

37. In the instant case, the applicant complained that his office as vice-president of the Inspection Board had been terminated with the entry into force of Law no. 6524 and that the domestic law did not provide him with any possibility of appeal or any remedy providing his right to seek judicial review of the termination of his office. The Court considers that the remedies suggested by the Government – namely, the applicant (i) bringing an administrative action for the annulment of the decision of the Minister of Justice to appoint new persons as vice-presidents of the Inspection Board, in the framework of which he could also request an abstract constitutional review of the relevant provisions of Law no. 6524, (ii) requesting the HSYK to keep him on with the Inspection Board as chief inspector or inspector, or (iii) requesting the HSYK to re-examine its decision not to reappoint him to the HSYK following the judgment of the Constitutional Court of 14 April 2014 – cannot be regarded as relevant in respect of the complaint at hand. The Court further reiterates that it held in its judgments in *Bilgen v. Turkey* (no. 1571/07, 9 March 2021) and *Eminağaoğlu v. Turkey* (no. 76521/12, 9 March 2021) that the HSYK could not be regarded as a "tribunal" on account of, *inter alia*, the shortcomings in the procedure before it (see the above-cited cases of *Bilgen*, § 74, and *Eminağaoğlu*, §§ 99-100). Moreover, under Article 153 of the Constitution, judgments delivered by the Constitutional Court cannot have retroactive effect (see paragraph 15 above).

38. In the light of the above, the Court considers that the Government has not shown that the remedies referred to were adequate or effective in the particular circumstances of this case'. Therefore, the Government's objection of non-exhaustion of domestic remedies must be dismissed.

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

39. The applicant complained that he had been denied his right to have access to a court in order to contest the premature and allegedly arbitrary termination of his office as vice-president of the Inspection Board following the entry into force of Law no. 6524. In this regard he alleged that although section 39 of the disputed law (that is, Law no. 6524) had been annulled by the Constitutional Court, that remedy (that is, the annulment procedure) had not been effective, as the judgments of the Constitutional Court did not have retroactive effect. He also stated that the Constitutional Court lacked the authority to examine individual applications directed against a law. Thus, he argued that he had had no effective remedy that he could use with a view to contesting the premature termination of his office, even though there had been no objective grounds for restricting his right of access to a court. He therefore alleged that the premature termination of his office had violated Article 6 § 1 of the Convention, the relevant part of which reads:

"In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

A. Admissibility

1. The Parties' submissions

(a) The Government

40. The Government disputed the admissibility of the complaint. They argued that Article 6 was not applicable in the instant case as the applicant's complaint was incompatible *ratione materiae* with the provisions of the Convention.

41. The Government firstly noted that the relevant domestic law and regulations had not granted the applicant, as vice-president of the Inspection Board, the right to remain in that administrative position for a certain and definite period of time. They emphasised in that connection that there was a distinction between the applicant's status as a judge and his functions as vice-president of the Inspection Board, as the latter was administrative in nature. The Government thus argued that in the instant case the applicant – whose post as vice-president had not constituted a judicial post but rather an administrative function – could not claim the right to security of tenure in respect of his office as vice-president of the Inspection Board.

42. The Government further argued that even if the applicant's office had not been terminated by Law no. 6524, it had nevertheless been at the discretion of the plenary assembly of the HSYK as to whether or not to end his office. They also noted that during his term of office the applicant had always had the right to resign from his administrative duties and to ask to be reappointed as a regular judge. The Government asserted that the HSYK, which had had the right to act at its own discretion in this respect under the provisions of the Constitution, had not been required to appoint the applicant to the Inspection Board – following the Constitutional Court's judgment annulling section 39 of Law no. 6524.

43. The Government, referring to section 106 of Law no. 2802 (see paragraph 18 above), further noted that an additional monthly payment in an amount equivalent to 5% of gross monthly salary granted to those serving in the positions of inspector and chief inspector at the HSYK during their term of office had not constituted an acquired or guaranteed personal right but rather compensation for the difficulty of the duties during the term of office. Therefore, the Government considered that the applicant did not have any right whatsoever that could be claimed under Article 6 § 1 of the Convention in the instant case.

44. With regard to the civil nature of the right cited, referring to *Vilho Eskelinen and Others v. Finland* [GC] (no. 63235/00, ECHR 2007-II) judgment, the Government argued that both conditions of the test mentioned in that judgment had been met in the instant case. Concerning the first

condition of the test, the Government submitted that the nature of the impugned measure itself, as a legal instrument, had rendered the applicant's access to a court impossible. They further noted that even before the entry into force of Law no. 6524, the termination of the administrative offices of the judges and prosecutors working at the HSYK had not been subject to judicial review and that there had been no legal remedy against the said decisions of the HSYK.

45. The Government stressed that the appointment of a judge to another judicial office without her/his consent might be justified in the event of reforms being made to the organisation of the judicial system. In that regard, the Government argued that in the period following the 2010 Constitutional amendments the decisions taken by the chambers of the HSYK had been influenced by the FETÖ/PDY, as that organisation had gained effective control over the judiciary. They further alleged that since magistrates belonging to that group had gained a majority within the HSYK, they had structured the Inspection Board as they wished, had taken decisions pursuing the aims of the organisation and had disregarded illegal acts committed by magistrates belonging to the FETÖ/PDY, and that that fact had subsequently been revealed through the confessions and witness statements obtained in the course of the investigations and prosecutions carried out following the 15 July 2016 coup attempt. The Government accordingly submitted that in the light of the aims of the FETÖ/PDY organisation, it had been necessary to make certain amendments to Law no. 6087 in order to prevent the justice system being hijacked or instrumentalised by any group, structure or ideological organisation and that with those aims in mind Law no. 6524 had entered into force on 27 February 2014, introducing several changes within the scope of a reform to the structure of the HSYK. They asserted that the duties of all staff working at the HSYK had been terminated without discrimination under provisional section 4 of Law no. 6087; the termination of the applicant's duties had been a natural consequence of the amendments made to the structure of the HSYK within the framework of a judicial reform; and although the Constitutional Court had annulled the provision in question, that finding did not have a retroactive effect. Thus, they considered that the termination of the applicant's office and his non-reappointment as vice-president of Inspection Board had been and remained lawful.

46. The Government emphasised that the instant case concerned the termination of the applicant's administrative duties at the HSYK and that no action had been taken to threaten the applicant's security of tenure as a judge. The Government further noted that the applicant had accordingly been appointed as a public prosecutor but that he had continued to benefit from the security of tenure that he had enjoyed as a magistrate. Accordingly, they submitted that the argument that judicial remedies were necessary, in order to preserve and safeguard the independence and impartiality of judges, was not relevant.

47. The Government concluded that the dismissal of the applicant from his administrative duties at the HSYK had not constituted a routine arbitrary administrative practice but rather a process for which there had been just and compelling reasons within the context of a judicial reform. In that respect they considered that the failure to afford the applicant access to a court had (viewed objectively) been in the State's interest and that the second condition of the *Eskelinen* test had therefore been met in respect of the present application.

(b) The applicant

48. The applicant argued that Article 6 § 1 of the Convention under its civil limb was applicable to the instant case. He argued at the outset that the termination of his office had had clear pecuniary consequences for him as he had been deprived of substantial allowences, namely, the above-mentioned additional monthly payment in an amount equivalent to 5% of his gross monthly salary, for his services as vice-president of the Inspection Board. He further submitted that as no definite period in respect of his service in this position had been agreed or stipulated, he had had a legitimate expectation of continuing his office until otherwise decided by the HSYK, under the terms of the security of tenure accorded to judges.

49. The applicant contested the Government's arguments that the termination of his office had constituted a part of the process of reforming the structure of the HSYK and submitted that the premature termination of the terms of office of the judges and prosecutors serving at the HSYK had been authorised in order to enable the executive to exert undue influence over the judiciary. He asserted that, as stated in the reasoning of the Constitutional Court's judgment, no structural change within the HSYK had been brought about by the alleged reform.

50. As regards the first condition of the *Eskelinen* test, the applicant agreed with the Government that the premature termination of his office by the entry into effect of a law was not open to judicial review. He added that even if his office had ended by means of a decision of the HSYK, rather than by the entry into effect of a law, that measure would not have been open to judicial review either, and it would not have changed or affected (i) the unlawfulness of the termination of his duties by a legal instrument and (ii) the lack of any legal remedy for his grievances.

51. The applicant further argued that the termination of his office by means of legislation without giving him the right of access to a court in order to contest that termination had contravened the rule of law and the independence of judiciary. He concluded that the second condition of the *Eskelinen* test had not been met and that Article 6 § 1 of the Convention was applicable to his case.

(c) Third-party intervener

52. The third-party intervener, the Volunteer Jurists Association, maintained that under section 42 of Law no. 6087 the applicant had been entitled to work at the HSYK until his retirement unless exceptional grounds for the early termination of his office had materialised. It further noted that under Article 140 of the Constitution, judges and public prosecutors working in administrative positions within judicial services should be subject to the same provisions as other judges and public prosecutors and that those principles had afforded the applicant protection against arbitrary removal from his office. Accordingly, it argued that the applicant had had a legitimate expectation of continuing his office at the HSYK until he reached retirement age provided by Law no. 6087.

53. The Volunteer Jurists Association noted that the applicant's office at the HSYK had been terminated immediately following the entry into force of Law no. 6524, that the disputed law had not provided any objective criteria for the termination of the applicant's office, and that the applicant's claim relating to the arbitrary termination of his office had thus been legitimate. The intervener further submitted that the arbitrary premature termination of the applicant's office might have a considerable negative impact on his professional and private life and had in fact had actual pecuniary effects – such as a decrease in his salary and the loss of his allowances; that fact, in the intervener's view, had given rise to a civil right under Article 6 of the Convention.

54. Referring to the *Eskelinen* test, the intervener lastly argued that the application of Article 6 § 1 of the Convention to the instant case was manifestly justified because the applicant had not been provided with any remedy *via* which to challenge the arbitrariness of the premature termination of his office and had not been afforded access to a court because the termination of his office had been a direct result of legislation enacted by Parliament. It also stated that denying the applicant access to a court had not, viewed objectively, been in the State's interest. In that respect, it asserted that the enactment of Law no. 6524 had had nothing to do with a reform implemented in order to ensure the effectiveness or efficiency of the HSYK (in accordance with the rule-of-law principle); rather, it had been aimed at weakening the independence and impartiality of the judiciary and at consolidating the influence of political power over the HSYK and the judiciary.

2. The Court's assessment

(a) General principles

55. The Court reiterates that for Article 6 § 1 in its civil limb to be applicable, there must be a "dispute" ("*contestation*" in French) over a right that can be said, at least on arguable grounds, to be recognised under domestic

law, irrespective of whether that right is protected under the Convention. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, lastly, the result of the proceedings must be directly decisive for the right in question – mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play (see, among many other authorities, *Baka v. Hungary* [GC], no. 20261/12, § 100, 23 June 2016). Lastly, the right must be a "civil" right (see *Grzęda v. Poland* [GC], no. 43572/18, § 257, 15 March 2022).

56. In order to decide whether the right in question has a basis in domestic law, the starting-point must be the provisions of the relevant law and their interpretation by the domestic courts (see, for example, *Al-Dulimi and Montana Management Inc v. Switzerland* [GC], no. 5809/08, § 97, 21 June 2016). The Court reiterates that it is primarily for the national authorities (in particular the courts) to resolve problems arising from the interpretation of domestic legislation. Unless the interpretation is arbitrary or manifestly unreasonable, the Court's role is confined to ascertaining whether the effects of that interpretation are compatible with the Convention (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 149, 20 March 2018). Thus, where the superior national courts have analysed in a comprehensive and convincing manner the precise nature of the impugned restriction of access to a court, on the basis of the relevant Convention case-law and principles drawn therefrom the Court would need strong reasons to differ from the conclusion reached by those courts by substituting its own views for theirs on a question of interpretation of domestic law and by finding, contrary to their view, that there was arguably a right recognised by domestic law (see *Grzęda*, cited above, § 259).

57. As regards public servants employed in the civil service, according to the criteria established in *Vilho Eskelinen and Others* (cited above) the respondent State cannot rely before the Court on an applicant's status as a civil servant to exclude the protection embodied in Article 6 unless two conditions are fulfilled. Firstly, the State in its national law must have excluded access to a court for the post or category of staff in question (see *Grzęda*, cited above, § 292). Secondly, the exclusion must (viewed objectively) be in the State's interest. In order for the exclusion to be justified, it is not enough for the State to establish that the civil servant in question participates in the exercise of public power or that there exists a special bond of trust and loyalty between the civil servant and the State, as employer. It is also for the respondent State to show that the subject matter of the dispute in issue is related to the exercise of State power or that it has called into question the special bond. Thus, there can in principle be no justification for the exclusion from the Article 6 guarantees of ordinary labour disputes, such as those relating to salaries, allowances, or similar entitlements, on the basis of the special nature of the relationship between the particular civil servant and

the State in question. There will, in effect, be a presumption that Article 6 applies. It will be for the respondent State to demonstrate, first, that a civil servant applicant does not have a right of access to a court under national law and, secondly, that the exclusion of the rights under Article 6 for the civil servant is justified (ibid., § 62; see also the above-cited cases of *Baka*, § 103, and *Grzęda*, § 261).

58. The Court reiterates that, in order for national legislation excluding access to a court to have any effect under Article 6 § 1 in a particular case, it should be compatible with the rule of law. This concept, which is not only expressly mentioned in the Preamble to the Convention but is also inherent in all the Articles of the Convention, requires, *inter alia*, that any interference must in principle be based on an instrument of general application (see the above-cited cases of *Baka*, § 117, and *Grzęda*, § 299).

59. While the Court stated in *Vilho Eskelinen and Others* (cited above, § 61) that its reasoning in that case was limited to the situation of civil servants, it has extended the application of the criteria established in that judgment to various disputes regarding judges. It has noted that although the judiciary is not part of the ordinary civil service, it is considered to constitute a part of the public services (see the above-cited cases of *Baka*, § 104, and *Grzęda*, § 262). The Court has applied the criteria set out in *Vilho Eskelinen and Others* (cited above) to all types of disputes concerning judges, including those relating to: a person who has been removed from a judicial post (for example, the president of a supreme court, the president of a court of appeal or the vice-president of a regional court) while remaining in his or her post as a judge (see *Baka*, cited above, §§ 34 and 107-11; *Denisov v. Ukraine* [GC], no. 76639/11, § 54, 25 September 2018; and *Broda and Bojara v. Poland* (nos. 26691/18 and 27367/18, §§ 121-23, 29 June 2021); judges who have been prevented from exercising their judicial functions after a legislative reform (see *Gumenyuk and Others v. Ukraine*, no. 11423/19, §§ 61 and 65-67, 22 July 2021); the premature termination of the term of office of a chief prosecutor (see *Kövesi v. Romania*, no. 3594/19, §§ 124-25, 5 May 2020); and the premature termination of the term of office of a judicial member of the National Council of the Judiciary (but not of his or her post as a serving judge – see *Grzęda*, cited above, §§ 287-327).

60. Furthermore, the employment relationship of judges with the State must be understood in the light of the specific guarantees essential for judicial independence. Thus, when reference is made to the "special trust and loyalty" that they must observe, it is loyalty to the rule of law and democracy (and not to holders of State power) that is meant. This complex aspect of the employment relationship between a judge and the State makes it necessary for members of the judiciary to be sufficiently distanced from other branches of the State in the performance of their duties, so that they can render decisions *a fortiori* on the basis of the requirements of law and justice, without fear or favour. It would be a fallacy to assume that judges can uphold

the rule of law and give effect to the Convention if domestic law deprived them of the guarantees of the Articles of the Convention on matters directly touching upon their individual independence and impartiality (see the above-cited cases of *Bilgen*, § 79; *Broda and Bojara* § 120; and *Grzęda*, § 264).

***(b)* Application of the general principles to the instant case**

(i) Existence of a right

61. The Court notes that, at the material time, the applicant was a judge, and he had been serving as vice-president of the Inspection Board since his assignment to that post by the plenary assembly of the HSYK on 30 December 2011 (see paragraph 4 above).

62. The Court further notes that the applicant's office as vice-president of the Inspection Board was terminated (although he continued to serve as a judge) by Law no. 6524, which entered into force on 27 February 2014 (see paragraph 5 above). The said law was adopted, as explained in its explanatory memorandum, in order to reinforce the independence and impartiality of the judiciary, to eliminate the problems encountered in practice and to make the functioning of the judiciary more effective (ibid.). Law no. 6524, along with many changes it brought to the election and appointment procedures in respect of the members and the staff of the HSYK and to the formation, working methods and duties of its decision bodies (ibid.), added (under its section 39 – see paragraph 17 above) provisional section 4 to Law no. 6087 on the High Council of Judges and Prosecutors, which provided that the terms of office of the secretary-general, the deputy secretaries-general, the president and vice-presidents of the Inspection Board and the inspectors, the rapporteur judges and the staff of the High Council of Judges and Prosecutors would end when the Law entered into force (see paragraph 5 and above).

63. The Court also notes that the Constitutional Court reviewed section 39 of Law no. 6524 within the framework of an abstract constitutional review proceedings and unanimously held, in its decision of 14 April 2014 (published in the Official Gazette on 14 May 2014), that section 39 of Law no. 6524 was unconstitutional as it was in conflict with the principle of legal certainty. In its reasoning, the Constitutional Court noted that the termination by law of the office of persons who had been appointed by the HSYK under Article 159 of the Constitution had been in breach of that very same provision which, otherwise, would have been rendered inoperative by the law in dispute (that is, Article 39 of Law no. 6524, if that Law had remained in force). The Constitutional Court further referred to the principle of legal certainty enshrined in Article 2 of the Constitution and stated that it was a requirement of the principle of legal security that public officials could not be dismissed from their respective offices unless there was a justifiable reason for their dismissal (such as a reform of the organisational structure of the public institutions in question). Finding that no structural change within the HSYK

had been brought about by Law no. 6087, the Constitutional Court deemed that the termination by means of a legal instrument of the terms of office of the persons serving at the HSYK had constituted a violation of the principle of legal security. The Constitutional Court thus annulled paragraphs 1,2, 3, 4 and 5 of provisional section 4 (which had been added to Law no. 6087 – see paragraph 7 above). Despite that judgment of the Constitutional Court, the applicant was not restored to his office, as the judgments of the Constitutional Court could not (under Article 153 of the Constitution) be applied retroactively (see paragraph 15 above).

64. The Court observes that Article 159 of the Constitution does not set a fixed term of office for the inspectors working at the HSYK (see paragraph 15 above). Likewise, section 15 of Law no. 6087 does not provide a fixed term of office for the judges working at the HSYK (see paragraph 16 above). Section 42 of Law no. 6087 regulates the conditions for the reassignment of HSYK staff; that section provides that the inspectors working at the HSYK shall be appointed by the first chamber of the HSYK – either upon their own request or of the HSYK's own motion – to a post deemed to be appropriate in line with the decision adopted by the plenary assembly of the HSYK, taking into account their respective merits and strengths (ibid.).

65. In this regard even though the Government maintained that the applicant had not been appointed for a set period of time as the vice-president of the Inspection Board, which in their view was an administrative post without security of tenure, and that in any case the termination of his office had been at the discretion of the plenary assembly of the HSYK, the Court is not convinced that those arguments would justify the conclusion that the applicant did not enjoy in the instant case a right to protection against the arbitrary termination of his term of office.

66. In the instant case, the Court observes that under section 42 of Law no. 6087, legal grounds for the termination of the applicant's office as vice-president of Inspection Board could only be either its termination (i) by a decision of the plenary assembly of the HSYK, or (ii) at his own request (see paragraph 16 above). The Court next notes that under section 139 of the Constitution judges and public prosecutors may not be removed from their office or compelled to retire without their consent before the age prescribed by the Constitution (see paragraph 15 above). The Court further notes that Article 140 of the Turkish Constitution provides, as a safeguard in respect of matters relating to the status of judges, that changes to their positions or places of duty should be regulated by legislation in a manner that accords with the principles of the independence of the courts and the security of tenure of judges (ibid.). There can therefore be no doubt that judges may argue, on the basis of the constitutional protection afforded to them, that the principles of the independence of the judiciary and the security of tenure of judges should be fully complied with in measures that affect their status or career (including those concerning transfers), and that the legal instruments (adopted

by Parliament) must, as an additional safeguard against arbitrariness or the improper use of legislative discretion, provide specific criteria that should be respected in matters relating to transfers of judges *(*see *Bilgen*, cited above, § 60).

67. Article 140 of the Constitution also provides that judges and public prosecutors working in administrative positions of judicial services must be subject to the same provisions as other judges and public prosecutors (see paragraph 15 above). In this connection, the Court considers that having regard to the guarantees provided by the Constitution with respect to the independence and impartiality of judges and security of tenure, there was in domestic law an arguable right for a judge to expect to be able to continue his office, even carrying out judicial services whilst serving in an administrative post, save for the exceptions explicitly provided by domestic law (see section 14 of Law no. 6087, paragraph 16 above; see also, *mutatis mutandis*, *Denisov*, cited above, §§ 47-49, which concerned the dismissal of the applicant from his administrative position as president of a court despite the fact that his tenure at this position was recognized under domestic law). It notes that these guarantees should apply *a fortiori* to magistrates working in a judicial body responsible for the inspection of judges and prosecutors and for ensuring that they duly discharge their duties in a manner that is in conformity with the principle of the independence of judiciary – as in the case of the applicant (who held the office of vice-president of the Inspection Board at the time of the events in question). Indeed, the applicant's claim to be entitled to continue in his office at the HSYK is also supported by the fact that the HSYK is a body established by the Constitution to exercise its functions in accordance with the principles of the independence of the courts and the security of tenure of judges (see Article 159 of the Constitution, paragraph 15 above; see also, *mutatis mutandis*, the above-cited cases of *Gumenyuk and Others*, § 54, and *Grzęda*, § 284). In view of the foregoing, the Court considers that the applicant's position as vice-president of the Inspection Board of the HSYK cannot be seen as a mere "advantage which it is not possible to have recognised in the courts" (see, *in contrario*, *Davchev v. Bulgaria* (dec), no. 39247/14, § 39, 19 September 2023, and *Stylianidis v. Cyprus* (dec), no. 24269/18, § 45, 8 February 2024).

68. Furthermore, the Court sees no reason to call into question the Constitutional Court's conclusion in its above-mentioned judgment, in which it held (i) that the termination of the terms of office of public officials could be justified under the Constitution only if it was done within the context of a fundamental reform aimed at restructuring the organisation of the public institutions in question and (ii) that the reform carried out under Law no. 6524 in respect of the HSYK had not justified the termination of the offices of persons serving at the HSYK as at the date of the adoption of that law (see paragraph 7 above).

69. The Court considers that the fact that the applicant's term of office was terminated *ex lege* on the date of the entry into force of Law no. 6524 cannot be regarded as removing, retroactively, the arguability of the right that he could have claimed, under the rules in force at the time of his appointment as vice-president of the Inspection Board, to hold his post without any arbitrary interference, unless there are grounds specified by law for him to be removed from his post. As noted above, these rules did not clearly establish a definite term of office for that position; rather, they exhaustively enumerated the specific grounds on which it could be terminated. Since it was the new legislation introduced by Law no. 6524 that set aside the former rules, that legislation constituted the object of that very dispute in regard to which the right to a fair hearing (under Article 6 § 1) should arguably have applied. Given the circumstances of the instant case, the question of whether a right existed under domestic law cannot therefore be answered on the basis of the new legislation (see *Baka*, cited above, § 110, and *Grzęda*, § 285).

70. In the light of the foregoing, the Court concludes that in the instant case there was a genuine and serious dispute over a right – namely, the right of the applicant not to have his term of office as vice-president of the Inspection Board terminated arbitrarily; the applicant could claim that right on arguable grounds under domestic law (see, *mutadis mutandis*, the above-cited cases of *Baka*, § 111; *Denisov*, §§ 47-49; *Bilgen* §§ 63-64; and *Grzęda*, § 286).

(ii) Civil nature of the right in question: the Eskelinen test

71. The Court will next determine, in the light of the criteria set out in the above-mentioned *Vilho Eskelinen and others* judgment, whether the right claimed by the applicant, that is, his right not to have his term of office as vice-president of the Inspection Board terminated arbitrarily, was "civil" within the autonomous meaning of Article 6 § 1. In this connection the Court will first examine whether the first condition of the *Eskelinen* test has been met in the instant case. As the two conditions stipulated in the *Vilho Eskelinen and others* judgment are cumulative, where the first one is not met, that suffices for it to be found that Article 6 is applicable, without there being any need to consider the second limb of the test (see *Baka*, cited above, § 118).

(α) The first condition of the Eskelinen test

72. The Court points out that the case of *Baka* (cited above) involved a situation where the applicant's access to a court had been impeded, *inter alia*, by the fact that the impugned measure – namely the premature termination of his term of office as president of the Supreme Court – had been one of the measures set out in the transitional provisions of the Fundamental Law. This had precluded Mr Baka (the applicant) from contesting that measure before the relevant judicial body, which he would have been able to do had he been

dismissed on the basis of the previous legal framework (ibid., § 115). Given that context, the Court considered that it had to determine whether access to a court had been denied under domestic law prior to (rather than at) the time when the impugned measure concerning the applicant had been adopted. To hold otherwise would have meant that the impugned measure itself (which constituted the alleged interference with the applicant's right) could at the same time constitute the legal basis for preventing the applicant from having access to a court, thereby opening the way to abuse (ibid., § 116; see also *Grzęda* cited above, § 290).

73. In the instant case, the parties agree that the possibility of the applicant having access to a court for purposes of contesting the termination of his term of office was excluded by domestic law at all times, since access to a court in order to contest the application of Law no. 6524 to his position (to end the applicant's office) was impossible and that even before the entry into force of that Law, the termination of the administrative offices of the judges and prosecutors working at the HSYK was not subject to judicial review (see paragraphs 27 and 33 above). In this connection, the Court reiterates that, as regards the first condition of the *Vilho Eskelinen* test, it held in its judgments in *Bilgen* (cited above) and *Eminağaoğlu*, (cited above) that except where they concerned dismissal from the judicial professions, decisions made by the HSYK in respect of judges and prosecutors were not amenable to judicial review and that, moreover, the HSYK itself could not be regarded as a "tribunal" for the purposes of the *Vilho Eskelinen* test on account of, *inter alia*, the shortcomings in the procedure before it (see the above-cited cases of *Bilgen*, § 74, and *Eminağaoğlu*, §§ 99-100). The Court also deemed recently that the shortcomings identified by it in the judgments in *Bilgen* and *Eminağaoğlu* (both cited above) had remained the same in respect of the new composition of the HSK (the legal successor to the HSYK following the above-mentioned 2017 constitutional amendments); that fact rendered it unnecessary for it to conduct a fresh examination of whether the HSK could be regarded as a tribunal within the meaning of Article 6 § 1 of the Convention (see *Oktay Alkan v. Türkiye*, no. 24492/21, § 52, 20 June 2023).

74. The above-noted considerations suggest that the applicant did not have a right of access to a court in order to contest the premature termination by Law no. 6524 of his office within the Inspection Board, which is the point at issue in the instant case. While this finding could prompt the Court to rule that the first condition of the *Eskelinen* test, which refers to the exclusion of access to a court (see paragraph 57 above), might be satisfied, the Court does not consider it necessary to give a conclusive opinion in respect of the first condition, since, in any event, there are grounds on which to rule that the second condition of the *Eskelinen* test has not been satisfied (see, *mutatis mutandis, Gumenyuk and Others*, cited above, § 64).

(β) The second condition of the Eskelinen test

75. The Court will now analyse whether, in the instant case, the exclusion of the applicant from having access to a court was justified on objective grounds as being in the State's interest.

76. The Court reiterates that it has on many occasions emphasised the special role in society of the judiciary, which – as the guarantor of justice, and a fundamental value in a State governed by the rule of law – must enjoy public confidence if judges are to be successful in carrying out their duties (see, among other authorities, *Baka*, cited above, § 164; *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, § 283, 1 December 2020; and *Grzęda*, cited above, § 302). Given the prominent place that the judiciary occupies among State organs in a democratic society and the importance attached to the separation of powers and to the necessity of safeguarding the independence of the judiciary (see *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 196, 6 November 2018, with further references), the Court must be particularly attentive to the protection of members of the judiciary against measures that can threaten their judicial independence and autonomy (see *Bilgen*, § 58, and *Grzęda* § 302, both cited above,).

77. Given the role played by judicial councils, the same considerations should apply as regards the tenure of judges, such as the applicant in the instant case, who are appointed to serve on them because of their status and in view of the need to safeguard judicial independence, which is a prerequisite to the rule of law. In this connection, the Court considers that judicial independence should be understood in an inclusive manner and apply not only to a judge in his or her adjudicating role, but also to other official functions that a judge may be called upon to perform that are closely connected with the judicial system (*Grzęda*, cited above, § 303, and the references therein).

78. In the instant case, the Court observes that the premature termination of the applicant's office within the Inspection Board was based on a transitional provision introduced by Law no. 6524 which, according to the explanatory memorandum to the said law, was aimed at reforming the judiciary by restructuring the HSYK, reinforcing the independence and impartiality of the judiciary and ensuring its efficiency (see paragraph 5 above).

79. In this connection, the Court emphasises that the Convention does not prevent States from taking legitimate and necessary decisions to reform their judiciary. However, any reform of the judicial system should not result in the undermining of the independence of the judiciary and its governing bodies (see the above-cited cases of *Gumenyuk and Others*, § 43, and *Grzęda*, § 323). It is not the Court's role to adjudicate upon the appropriateness of the measures taken within the context of a judicial reform or whether it was justified under Türkiye's legal system; rather, its role is to determine whether

the exclusion from judicial review of disputes concerning the *ex lege* termination of the applicant's office at the HSYK is justified under the *Vilho Eskelinen* test.

80. The Court considers that its examination of the second condition of the *Eskelinen* test in the instant case must take due account of the fact that the circumstances of the instant case are closely related to judicial independence, since the dispute at issue concerns the vice-president of the Inspection Board of the HSYK, which is the constitutional body with responsibility for administering judicial bodies in accordance with the principles of the independence of the courts and the security of tenure of judges (see, *mutatis mutandis*, *Grzęda*, cited above, § 300).

81. That being so, the Court takes note of the reasoning of the judgment delivered by the Constitutional Court (see paragraph 7 above) in which it (i) annulled the disputed provision as unconstitutional, (ii) emphasised that Law no. 6524 had in point of fact made no structural change to the HSYK, and (iii) held that the dismissal of the persons serving at the HSYK at the time of the Law's entry into force from their posts by means of the above-mentioned legal instrument without any legal and factual necessity had amounted to a violation of the principle of legal certainty (see paragraph 7 above). Therefore, the office of the applicant in respect of his post as vice-president of the Inspection Board – which is a critical and sensitive position, involving as it does the supervision and inspection of all judiciary bodies and judges and prosecutors – was terminated not by the regular procedure provided by section 42 of Law no. 6087 (see paragraph 16 above), that is to say by a decision of the plenary assembly of the HSYK – but by a legal instrument adopted with the aim of reforming the judiciary. Moreover the Constitutional Court deemed that the reform effected in respect of the HSYK by Law no. 6524 had not justified the termination of the applicant's office. The Court further notes that some of the staff members serving at the HSYK before the entry into force of Law no. 6524 were reappointed to their previous positions by the HSYK after the termination of their terms of offices by the said Law, but that the applicant was, by contrast, appointed to another post at the Court of Cassation. Furthermore, the HSYK did not refer to the criteria that it had taken into account when reappointing the persons reassigned to their previous positions at the HSYK in its relevant decisions, which were not subject to judicial review (see paragraphs 9 and 10 above).

82. Having regard to the above, the Court emphasises that objective criteria accompanied by a transparent process are regarded as the standard in the selection, appointment and promotion of judges as a safeguard of judicial independence and autonomy, so as to avoid arbitrary interference or the improper use of discretion (*Bilgen*, cited above, § 63). Moreover, an exception to the principle of the irremovability of judges would only be acceptable "if it is justified by a legitimate objective, it is proportionate in the light of that objective and inasmuch as it is not such as to raise reasonable

doubt in the minds of individuals as to the imperviousness of the court concerned to external factors and its neutrality with respect to the interests before it" (see *Guðmundur Andri Ástráðsson*, cited above, § 239). In the instant case, the applicant's position as vice-president of the Inspection Board of the HSYK, a body with constitutional responsibility to exercise its functions in accordance with the principles of independence of the courts and the security of tenure of the judges (see Article 159 of the Constitution, paragraph 15 above), was terminated by operation of law in the absence of any judicial oversight of this measure, despite his right, secured by domestic law, not to have his term of office at this position terminated arbitrarily (see paragraph 70 above). Yet, members of the judiciary should enjoy – as do other citizens – protection from arbitrariness on the part of the legislative and executive powers, and only oversight by an independent judicial body of a measure such as removal from office is able to render such protection effective (see, *mutatis mutandis*, the above-cited cases of *Kövesi*, § 124; *Bilgen*, § 79; and *Grzęda*, § 327).

83. Against this background, the Court is not satisfied by the arguments of the Government that, in view of the particular circumstances of the instant case, the exclusion of the applicant from a fundamental safeguard for the protection of an arguable civil right closely connected with the protection of judicial independence would not undermine the interest of a State governed by the rule of law (see *Grzęda*, cited above, § 326). The Court therefore finds that the Government has not put forward grounds on which it could be justified to hold that the second criterion of the *Vilho Eskelinen* test was satisfied within the present context.

84. It therefore follows that Article 6 § 1 of the Convention under its civil head is applicable.

3. Conclusion on admissibility

85. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

86. The applicant submitted that he had been denied access to a court in respect of the termination of his office by means of Law no. 6524 and that any limitation on his right of access to a court in order to contest his removal from office had to pursue a genuine legitimate aim. He argued that such an aim had been absent in the instant case, referring in this respect to the finding of the Constitutional Court judgment regarding the absence of any structural

reform within the HSYK. He concluded that the impugned restriction on his access to a court had not pursued a legitimate aim and had not been proportionate as it had undermined the essence of the right of access to a court.

(b) The Government

87. The Government maintained that there had been no violation of Article 6 § 1 of the Convention in the instant case. They reiterated their arguments regarding the inapplicability of that provision to the instant case. In that regard, they argued that the restriction on the applicant's access to a court had been justified as it had been imposed by a law compatible with the principle of the rule of law within the context of a judicial reform and had pursued the legitimate aim of establishing the rule of law, protecting democracy, ensuring the impartiality and independence of the judiciary and building confidence in the judiciary within the context of the dominating influence exerted by the FETÖ/PDY within judicial bodies and the HSYK. The Government further submitted that the office of the applicant within the Inspection Board had been administrative in nature and had not been guaranteed for a determined period, and that following the termination of his duties he had been returned to his primary duties as a public prosecutor pursuant to the appointment decision of the HSYK and in accordance with the security of tenure of judges, as safeguarded by the Constitution.

2. The Court's assessment

(a) General Principles

88. The Court reiterates that the right of access to a court was established as an aspect of the right to a fair hearing guaranteed by Article 6 § 1 of the Convention in *Golder v. the United Kingdom*, (21 February 1975, §§ 28-36, Series A no. 18l). In that case, the Court found that the right of access to a court constituted an inherent aspect of the safeguards enshrined in Article 6, referring to the principles of the rule of law and the avoidance of arbitrary power that underlay much of the Convention. Thus, Article 6 § 1 secures to everyone the right to have a claim relating to their civil rights and obligations brought before a court (see *Zubac v. Croatia* [GC], no. 40160/12, § 76, 5 April 2018, and *Grzęda,* cited above, § 342, with further references).

89. In respect of matters that fall within the ambit of the Convention, the Court's case-law shows that where there is no access to an independent and impartial court, the question of compliance with the rule of law will always arise (see *Golder*, cited above, § 34). However, the Court has itself acknowledged that the right of access to the courts is not absolute and 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 the above-cited cases of § 120, *Zubac*, § 78, and *Grzęda*, § 343).

(b) Application of the general principles to the instant case

90. The Court will now determine whether the applicant's lack of access to the domestic courts, in order to have examined the genuine and serious dispute over his arguable right not to have his term of office as vice-president of the Inspection Board terminated arbitrarily (see paragraph 52 above), was justified under the general principles emanating from the Court's case-law.

91. The Court reiterates that the necessity to have in place procedural safeguards and the possibility of appeal against decisions affecting the career, including the status, of a judge is widely acknowledged because what is at stake is public trust in the functioning of the judiciary (see *Bilgen*, cited above, § 96 with further references). Restriction of the right of a member of the judiciary to contest premature dismissal or a measure that amounts to constructive dismissal may be incompatible with the independence of the judiciary in the event that such a measure is taken without any specific reason (see *Gumenyuk and Others*, cited above, § 72).

92. The Court considers that the right of access to a court constitutes one of the fundamental procedural rights for the protection of members of the judiciary and that the applicant should have in principle enjoyed direct access to a court in respect of his allegation that the termination of his duties at the HSYK by a law had been unlawful. For these reasons, the abstract constitutional review undertaken by the Constitutional Court could constitute a supplementary guarantee but it could not replace the right of a member of the judiciary to bring a court action in his or her personal capacity (see, *mutatis mutandis*, *Gumenyuk and Others*, cited above, § 73).

93. In its above-mentioned judgment in respect of the case of *Grzęda*, the Court, referring to its analysis regarding the issue of the applicability of Article 6 § 1, in particular (i) the importance of the National Council of the Judiciary's office in Poland to safeguard judicial independence, and (ii) the link between the integrity of the judicial appointment process and the requirement of judicial independence, considered that similar procedural safeguards to those that should be available in cases involving the dismissal or removal of judges should likewise be available where a judicial member of the national council of the judiciary has been removed from his position (see *Grzęda*, cited above, 345). It further emphasised the need to protect a judicial council's autonomy – notably in respect of matters concerning judicial appointments – from encroachment by the legislative and executive powers, and its role as a bulwark against political influence over the judiciary (ibid*.,* § 346). In assessing any justification for excluding access to a court with regard to membership of judicial governance bodies, it considered it

necessary to take into account the strong public interest in upholding the independence of the judiciary and the rule of law (*ibidem*).

94. Turning to the circumstances of the instant case, the Court notes that although the applicant's office as vice-president of the Inspection Board was terminated, he continued serving as a judge under Law no. 6524, which was adopted within the context of a legislative reform by which the authorities aimed to reinforce the independence and impartiality of the judiciary and ensure its efficiency (see paragraph 5 above). While some of the staff members of the HSYK whose offices were also terminated by Law no. 6524 were reappointed to their previous positions, the applicant was not reassigned to his post at the Inspection Board, but rather appointed by the HSYK as a prosecutor at the Court of Cassation (see paragraphs 9 and 10 above).

95. The Court further observes that section 39 of Law no. 6524 was annulled by the the Constitutional Court's judgment of 14 April 2014 as unconstitutional within the framework of an abstract constitutional review initiated by certain members of the parliament (see paragraph 6 above). The Constitutional Court held that as no actual structural change within the HSYK had been brought about by the above-mentioned reform, the termination of the duties of persons serving at the HSYK, by means of enacting new legal regulations, had constituted a violation of the principle of legal security (see paragraph 7 above). The Court notes nevertheless that, under Article 153 of the Constitution, judgments delivered by the Constitutional Court cannot have retroactive effect (see paragraph 15 above) and that the applicant was not party to the proceedings before that court. Therefore, this judgment, which was rendered within the context of an abstract constitutional review, did not provide the applicant with a procedure capable of offering him a possibility to contest the termination of his office and redressing the effects of a possible violation of the Convention (see, *mutatis mutandis*, *Gumenyuk and Others*, cited above, § 62). Furthermore, the Constitutional Court declared inadmissible the individual application lodged by the applicant relating to his lack of access to a court concerning the termination of his office by means of enacting new legal regulations; the Constitutional Court did so because it deemed that it did not have jurisdiction to examine legal instruments within the framework of the individual application procedure (see paragraph 12 above).

96. As to whether the complete absence of judicial review of *the ex lege* termination of the applicant's office within the framework of the above-mentioned reform is compatible with the rule of law and Article 6 § 1 of the Convention, the Court refers to the finding of the Constitutional Court that Law no. 6524 had not actually led to any structural reform within the HSYK and that the termination of the offices of all public officials working at the HSYK by means of that law had constituted a breach of the principles of legal security, which is one of the requirements of the rule of law enshrined in Article 2 of the Constitution (see paragraph 7 above). Echoing the reasoning

of the Constitutional Court, the Court considers that the termination of the office of the applicant at the Inspection Board by means of legislative interference was not compatible with the rule of law and might threaten the independence of the judiciary. Furthermore, the Court considers that in order for national legislation excluding access to a court to have any effect under Article 6 § 1 in a particular case, it should be compatible with the rule of law (*Grzęda*, cited above, § 299).

97. Accordingly, the Court finds that in the instant case there were no weighty reasons exceptionally justifying the restriction of the applicant's right of access to a court (see *Nedelcho Popov v. Bulgaria*, no. 61360/00, § 39, 22 November 2007, and *Bilgen*, cited above, § 96).

98. Having regard to the foregoing, the Court finds that the respondent State impaired the very essence of the applicant's right of access to a court on account of the lack of judicial review in the instant case (*Grzęda*, cited above, § 349).

99. There has accordingly been a violation of the applicant's right of access to a court, as guaranteed by Article 6 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

100. Article 41 of the Convention provides:

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

A. Damage

101. The applicant claimed 15,000 Turkish liras (TRY) (approximately 1,514 euros (EUR)) in respect of pecuniary damage. He submitted in this regard that as a result of the impugned measure, he had lost the substantial allowances to which he had had a right (namely, an additional monthly payment in an amount equivalent to 5% of his gross monthly salary) for his services as vice-president of the Inspection Board. The amount of pecuniary damage claimed by the applicant thus corresponds to the additional allowance that he allegedly would have received during the period between the termination of his office at the Inspection Board in 2014 and his dismissal from his post as a prosecutor in 2016.

102. The applicant also claimed EUR 50,000 in respect of non-pecuniary damage sustained owing to the distress that he had allegedly suffered as a result of the actions taken against him.

103. The Government considered that the applicant's claim in respect of pecuniary damage was unsubstantiated and excessive, in addition to being unrelated to the subject matter of the instant case. They further submitted that

there was no causal link between the applicant's claims in respect of pecuniary and non-pecuniary damage on the one hand and the alleged violation on the other. Lastly, they argued that the applicant's claim in respect of non-pecuniary damage was unsubstantiated and excessive and did not correspond to the amounts awarded by the Court in other similar cases.

104. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. However, the Court considers it reasonable to award the applicant EUR 7,800 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

105. The applicant also claimed EUR 2,000 for lawyer's fees incurred before the Court. He submitted a copy of the legal services agreement concluded with his lawyer, which states that TRY 20,000 (approximately EUR 1,767 at the relevant date) would be paid to the lawyer in representation fees. He also claimed EUR 175 for costs and expenses allegedly incurred before the Constitutional Court, without providing any document in this regard.

106. The Government urged the Court to reject those claims, arguing that the applicant had failed to submit relevant supporting documents.

107. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum (see, among many other authorities, *L.B. v. Hungary* [GC], no. 36345/16, § 149, 9 March 2023). In the instant case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,767 for costs and expenses incurred in the proceedings before it, plus any tax that may be chargeable to the applicant.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final, in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 7,800 (seven thousand eight hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 1,767 (one thousand seven hundred sixty-seven euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points;

4. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 26 March 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı	Arnfinn Bårdsen
Registrar	President

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

A.B.
H.B.

CONCURRING OPINION OF JUDGE KOSKELO

1. I agree with the outcome in the present case, namely that there has been a violation of Article 6 § 1 regarding the right of access to a court. I find, however, that the reasoning adopted in the judgment raises several questions which remain unaddressed in the case-law. At the root of the problem is the fact that the impugned termination of the applicant's term of office occurred *ex lege*, in other words as a direct result of an act of parliament.

2. The judgment in the present case squarely follows the approach taken by the Grand Chamber in *Grzęda v. Poland* ([GC], no. 43572/18, 15 March 2022), which in turn was guided by the judgment in *Baka v. Hungary* ([GC], no. 20261/12, 23 June 2016). In both of those cases, as well as in the present case, the question of the applicability of Article 6 § 1 was assessed exclusively on the basis of the so-called "*Eskelinen* test", as set out in *Vilho Eskelinen and Others v. Finland* ([GC], no. 63235/00, ECHR 2007-II). This is notwithstanding the fact that the last-mentioned case was not concerned with *ex lege* measures and, above all, that there is long-standing case-law to the effect that Article 6 § 1 does not guarantee individuals a right to contest before the courts the validity of a provision of law enacted by the legislature.

3. That long-standing and established case-law goes back to *Ruiz-Mateos and Others v. Spain* (no. 14324/88, Commission decision of 19 April 1991, DR 69, p. 227), according to which "enactment of a legislative measure by the parliament ... does not constitute a determination of civil rights and obligations within the meaning of Article 6 para. 1". In subsequent case-law, the Court has held that Article 6 does not entail a right of access to a court with power to invalidate or override a law enacted by the legislature (see, for instance, *Posti and Rahko v. Finland*, no. 27824/95, § 52, ECHR 2002-VII, and *Alatulkkila and Others v. Finland* no. 33538/96, § 50, 28 July 2005; see, as more recent examples, *Kristiana Ltd. v. Lithuania*, no. 36184/13, § 123, 6 February 2018; *Sakskoburggotski and Chrobok v. Bulgaria*, nos. 38948/10 and 8954/17, § 272, 7 September 2021; and *Gyulumyan and Others v. Armenia*, no. 25240/20, 21 November 2023).

4. Indeed, as matters stand, several Contracting States do not provide for individual access to constitutional review, or review of conventionality, of legislative measures as such, in the sense that only individual application measures may be contested before the courts (indirect review of constitutionality/conventionality). The question of the scope of Article 6 § 1 in this regard therefore remains one of major importance.

5. It should be recalled that the *Eskelinen* test concerns whether the right relied on under domestic law is of a "civil" nature within the meaning of Article 6 § 1. What might amount to the "determination" of such a right within the meaning of that provision is a distinct issue. The case-law cited in paragraph 3 above concerns the latter question. It should also be recalled that

the *Eskelinen* test was not developed in the context of, or with regard to, disputes arising as a direct result of legislative measures. Thus, it is clear that the adoption of that test did not, and could not, overrule or override the established general case-law relating to measures of that type. Yet neither in *Baka* nor in *Grzęda* – both of which concerned *ex lege* measures – did the Grand Chamber address how the position taken in those cases could be reconciled with, or how it related to, the above-mentioned general restriction in the scope of Article 6 § 1. This is as surprising as it is problematic in terms of transparency, legal certainty and judicial method.

6. The circumstance which may explain (although not justify) the failure to engage with the above-mentioned issue conceivably lies in the fact that in *Baka* there were strong indications that the impugned legislative measure was not only limited to but also directed at the removal from office of a specific individual. In that connection, the Court cited, and relied on (see *Baka*, cited above, § 117), the opinion of the Venice Commission, which had stated the following (ibid., § 59):

> "Article 25 of the Fundamental Law provides that the supreme judicial body shall be the *Curia*. According to Article 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 [of the Organisation and Administration of the Courts Act] 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."

7. Accordingly, the most plausible understanding of the legal position appears to be that, for the assessment of the scope of Article 6 § 1, a distinction must be made between, on the one hand, "normal" types of legislative measures, which are of a more or less general nature and the effects of which on individuals are concretised through specific application measures and, on the other hand, *ad hominem* legislative measures, that is, legislative measures directed at a specific person. The question then arises of how, specifically, to draw the line between those two types of legislative measures. Transitional provisions especially, which are often indispensable in the context of legislative changes, may well concern strictly limited, identifiable groups of people, without necessarily being "directed at" them in any illegitimate sense.

8. In *Grzęda*, which concerned transitional provisions in the context of legislative changes relating to the National Council of the Judiciary, this question was not specifically addressed either. The focus was on the protection of the independence of the judiciary and the associated need to

ensure the autonomy of that Council. The fact remains, however, that even in the context of judicial reforms, transitional provisions affecting people in specific positions may be both indispensable and fully legitimate in the exercise of legislative power (see *Gyulumyan and Others v. Armenia*, cited above, relating to constitutional reform). Thus, the question remains as to how to determine the distinction between *ex lege* measures requiring access to a court under Article 6 § 1 and those remaining outside the scope of that provision by virtue of the case-law cited in paragraph 3 above. This may inevitably raise difficult and delicate issues depending, *inter alia*, on the political context in which such reforms are pursued and enacted.

9. Turning to the present case, the judgment follows the line taken in *Grzęda*. Thus, it addresses the question of the applicability of Article 6 § 1 without any mention of the case-law referred to in paragraph 3 above, or the unresolved incoherence or lack of clarity in this regard. The judgment is framed as if the issue of an arguable claim under domestic law and that of the "civil" nature of the right at issue as per the *Eskelinen* test were the only ones to be considered despite the fact that the complaint is directed at an *ex lege* measure. This approach may be viewed in the light of the fact that this is a Chamber judgment, whereas ultimate clarification of the case-law emanating from the Grand Chamber would fall to the Grand Chamber itself. This does not mean, however, that the issue should continue to be ignored altogether.

10. For my part, given the existing legal uncertainty in the aforementioned regard, and in the light of the circumstances before the Court, I agree that Article 6 § 1 is applicable, on the following grounds. First, an arguable right can be derived from domestic law. Second, the right in question can be regarded as "civil" in nature based on the *Eskelinen* test and the state of the case-law on that matter. And third, the impugned transitional provision terminating the applicant's term of office appears to be part of legislative changes which were aimed at excluding, from the Council of Judges and Prosecutors, presumed or alleged adherents of a particular ideological movement disapproved by the government, thus constituting an *ex lege* measure directed at specific individuals, including the applicant, because of reasons relating to their actual or presumed personal attributes (see, in particular, paragraph 45 of the judgment).

11. One peculiar aspect of the case-law relating to Article 6 § 1, as it has evolved in cases involving the *Eskelinen* test, lies in the fact that it has given rise to a situation where, as regards the right of access to a court, the questions of applicability and merits become conflated in a rather unusual way, despite these issues being separate in principle. Even where Article 6 § 1 is applicable, the right of access to a court is not absolute. The Court has rightly emphasised the maintenance of the rule of law as a key consideration underscoring the importance of access to a court. The requirements of the rule of law, however, must be evaluated in each situation, taking into account the relevant constitutional principles as a whole.

12. Where an *ex lege* measure is at issue, the standard of reference for any judicial review will be the constitution or other applicable legal rules of higher rank. In the present case, the Constitutional Court, seised of the matter in the exercise of its power of abstract constitutional review, had held that the impugned transitional provision was contrary to the constitutionally enshrined principle of legal security. That finding, however, was rendered legally irrelevant by the absence of any available remedy for those affected, including the applicant. As a result, a constitutionally invalidated transitional provision was able to produce legal effects for the person concerned. In other words, the lack of individual access to a court was instrumental in enabling an unconstitutional legal situation to prevail. Under such circumstances, I agree that there was a violation of Article 6 § 1.

13. At the same time, it is worth contemplating another scenario – one where the court of competent jurisdiction has examined the constitutionality of the impugned provision and has found it compatible with the constitution or other relevant norms of higher rank. Under such circumstances, the situation would be significantly different. If Article 6 § 1 were to impose a requirement of access to a court even for the purpose of contesting the legal effect of a constitutionally validated (transitional) provision, the effect would be to undermine the authority of the court having jurisdiction for constitutional review. That would risk weakening the rule of law instead of supporting it.

14. The overarching point here is that the interpretation of Article 6 § 1 – as applicable across the Contracting States – always calls for a substantial degree of reflection, differentiation and clarity. Especially in matters with constitutional implications for various jurisdictions, such as the right of domestic access to a court in order to contest legislative acts, the Court should provide a greater degree of clarity than that offered by the case-law as it currently stands.