

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

THIRD SECTION

DECISION

Application no. 33800/14
Štefan HARABIN
against Slovakia

The European Court of Human Rights (Third Section), sitting on 2 June 2015 as a Chamber composed of:

Josep Casadevall, *President,*
Luis López Guerra,
Kristina Pardalos,
Johannes Silvis,
Valeriu Griţco,
Iulia Antoanella Motoc,
Branko Lubarda, *judges,*

and Stephen Phillips, *Section Registrar,*

Having regard to the above application lodged on 28 April 2014,

Having regard to the decision to grant priority to the above application under Rule 41 of the Rules of Court.

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Štefan Harabin, is a Slovak national, who was born in 1957 and lives in Bratislava. He was represented before the Court by Mr B. Novák, a lawyer practising in Banská Bystrica.

The circumstances of the case

2. The facts of the case, as submitted by the applicant, may be summarised as follows.

1. Background

3. The applicant is a judge. At the relevant time, he was the President of the Supreme Court.

4. On 18 November 2010 the Minister of Justice initiated disciplinary proceedings against the applicant by way of representation. Such proceedings fell by law to be conducted by the Constitutional Court, which was to decide in its plenary composition, normally consisting of all thirteen judges (Articles 131 § 1, 134 § 1, and 136 § 3 of Constitutional Law no. 460/1992 Coll., as amended – "the Constitution").

5. In order to sit as a plenary formation, at least seven judges have to be present. In order for a decision to be passed, an absolute majority of all the constitutional judges is required. If no such majority has been obtained, the request is to be dismissed (Article 131 § 1 of the Constitution and section 4(2) of Law no. 38/1992 Coll., as amended – "the Constitutional Court Act").

6. In the course of the proceedings, the Minister challenged three of the constitutional judges for bias. The applicant, for his part, challenged four.

7. On 10 May 2011 the Constitutional Court dismissed the challenges for bias and declared the Minister's representation admissible. It held *inter alia* that the fact that four of its judges (including two of those challenged by the applicant) had earlier been excluded from other sets of constitutional proceedings involving the applicant could not affect the position as regards their impartiality in the present proceedings. The Constitutional Court found that the determination of the disciplinary offence imputed to the applicant was within the exclusive jurisdiction of its plenary session. Excessive formalism and disregarding the statements of the individual judges posed the risk that the proceedings would be rendered ineffective. Examination of the case by a plenary session of the Constitutional Court represented a guarantee that constitutional principles, including independence, would be respected. Furthermore, all the constitutional judges had pledged to decide cases independently and impartially, to the best of their abilities and conscience.

8. On 29 June 2011 the Constitutional Court, sitting in plenary formation in which all thirteen judges took part, found the applicant to have committed the disciplinary offence in question. The decision was subject to no appeal (Article 133 of the Constitution, as applicable at that time; for comparison to the current version of the provision, see paragraph 21 below).

9. For more factual details concerning the background see the Court's judgment of 20 November 2012 in the case of *Harabin v. Slovakia* (no. 58688/11) and decision of 29 June 2004 in *Harabin v. Slovakia* (no. 62584/00, ECHR 2004-VI).

2. Application no. 58688/11

10. In application no. 58688/11, the applicant mainly asserted a violation of his rights under Article 6 § 1 of the Convention in the disciplinary proceeding against him mentioned above.

11. In its judgment of 20 November 2012 the Court found that in the impugned proceedings the applicant's right to a hearing by an impartial tribunal had not been respected. There had therefore been a violation of Article 6 § 1 of the Convention on that account.

12. The Court's finding was preceded by the following reasoning;

> "135. In the proceedings under consideration the Constitutional Court faced a situation where the parties challenged for bias seven of its thirteen judges. As regards the four constitutional judges challenged by the applicant, two of them [...] had been excluded for bias in earlier proceedings before a chamber of the Constitutional Court which had involved the applicant. The Constitutional Court did not attach decisive weight to that fact (similarly to the fact that two other constitutional judges challenged by the Minister of Justice had also been excluded for bias in the past) and decided not to exclude any of its judges. It noted, among other things, that the determination of the disciplinary offence allegedly committed by the applicant was within the exclusive jurisdiction of its plenary session, and considered that excessive formalism and overlooking the statements of the individual judges posed the risk of rendering the proceedings ineffective. The decision on the applicant's case was taken by secret vote and, for that reason, the Constitutional Court joined no separate opinion of its judges to it.
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> 136. The Court considers that the Constitutional Court, when balancing between the two positions, namely the need to respond to the request for exclusion of its judges and the need to maintain its capacity to determine the case, failed to take appropriate stand from the point of view of the guarantees of Article 6 of the Convention in that it did not answer the arguments for which the exclusion of its judges had been requested.
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> 137. The Court notes, firstly, that two of the judges challenged by the applicant and two other judges challenged by the Minister had been excluded in earlier sets of proceedings before the Constitutional Court involving the applicant. Doubts were likely to arise on that ground as to their impartiality. Convincing arguments should be adduced to clearly indicate why the challenges in their respect could not be accepted in the case under consideration.
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> 138. Secondly, as to the other judges challenged by the parties, the mere fact that a party requests the exclusion of a judge for bias, even repeatedly, does not automatically have a consequence that the judge should withdraw or be excluded. It does not appear from the documents submitted that the Constitutional Court took a stand as to whether the reasons invoked by the parties justified their exclusion.
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> 139. It is only after answering the parties' arguments and establishing whether or not the challenges to the judges were justified that the question could have arisen as to whether there was any need and justification for not excluding any of the judges. In that context the Court has noted that the Bangalore Principles of Judicial Conduct (see [the relevant paragraphs of that judgment]) include the 'doctrine of necessity' which enables a judge who is otherwise disqualified to hear and decide a case where failure to do so may result in an injustice. However, it is not required to examine whether that doctrine is compatible with the guarantees of Article 6 of the Convention as, for the

reasons set out above, such situation was not shown to have obtained in the present case.

140. The reasons invoked by the Constitutional Court, namely the need to maintain its capacity to determine the case, cannot therefore justify the participation of two judges who had been excluded for lack of impartiality in earlier cases involving the applicant and in respect of whose alleged lack of impartiality the Constitutional Court failed to convincingly dissipate doubts which could be held to be objectively justified."

13. The relevant part of the judgment concerning the applicant's claim in respect of non-pecuniary damage reads as follows:

"177. The Court further restates that a judgment in which it finds a violation of the Convention or its Protocols imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and make all feasible reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach occurred (see *Lungoci v. Romania*, no. 62710/00, § 55, 26 January 2006, with further references).

178. In the event of a violation of Article 6 of the Convention, the applicant should as far as possible be put in the position he or she would have been in had the requirements of this provision not been disregarded. The most appropriate form of redress in cases like the present one would be the reopening of the proceedings, if requested, by a tribunal complying with the requirement of impartiality within the meaning of Article 6. The Court has noted in that respect that the Constitution or the Constitutional Court Act 1993 do not expressly provide for the possibility of reopening of proceedings before the Constitutional Court. However, the Constitutional Court Act 1993 allows the Constitutional Court to apply as appropriate the Code of Civil Procedure and the Code of Criminal Procedure, which do provide for the possibility of proceedings being reopened where the Court concludes in a judgment that a court's decision or proceedings prior to it were in breach of the fundamental human rights or freedoms of the party (see *Vojtěchová v. Slovaki*a, no. 59102/08, §§ 23 and 27, 25 September 2012, and [the relevant paragraph of that judgment])."

14. The judgment of 20 November 2012 became final on 20 February 2013.

3. Request for reopening

15. On 18 February 2013 the applicant lodged a request with the Constitutional Court that his above disciplinary proceedings be reopened. He relied on the Court's judgment of 20 November 2012, referring mainly to its paragraph 178 (cited above), and requested that, along with the reopening of the proceedings, the convicting decision of 29 June 2011 be quashed.

16. On 29 October 2013 the Constitutional Court decided to dismiss the request. It sat in its plenary formation, but only ten of its thirteen-judge bench took part. Those present included two of the four judges whom the

applicant had challenged in the original disciplinary proceedings. One of those two had earlier been excluded from sitting in another matter before the Constitutional Court concerning the applicant on grounds of bias.

17. The Constitutional Court summarised the applicant's request, its decision of 29 June 2011 (see paragraph 8 above) and the Court's judgment of 20 November 2012 (see paragraph 11 above). It went on to recapitulate the applicable rules on the relevant quorum (see paragraph 5 above) and held that:

> "When voting on the rapporteur's proposal [to accede to the applicant's request], the proposal has not obtained the absolute majority of all [constitutional] judges.
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> In view of the above, having examined this matter, the plenary of the Constitutional Court has dismissed the rapporteur's proposal on procedural grounds."

18. The President, the judge rapporteur, and one other constitutional judge dissented. In their separate opinions, attached to the Constitutional Court's decision, they considered *inter alia* that, although there was no direct legal basis for it, the reopening of the applicant's disciplinary proceeding was permitted by analogy with the relevant rules of the Code of Criminal Procedure and the Code of Civil Procedure, which in turn was authorised by the Constitutional Court Act. In their view, such interpretation was not contrary to the constitutional provisions under which there was no remedy against a decision of the Constitutional Court. That constitutional provision was to be interpreted restrictively, not in isolation, but rather in the context of Slovakia's duties under international law. Such duties included those under Article 46 § 1 of the Convention and other Council of Europe instruments and it was the Constitutional Court's task to use all resources in order to ensure the execution of the Court's judgment of 20 November 2012.

19. The Constitutional Court's decision was served on the applicant on 10 February 2014.

4. Execution of the Court's judgment in application no. 58688/11

20. The execution of the Court's judgment of 20 November 2012 is still pending before the Committee of Ministers of the Council of Europe.

21. On 11 June 2014 the respondent Government submitted an action plan which is under assessment. It contains the following passage:

> "Individual measures:
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> The applicant was awarded just satisfaction for non-pecuniary damage. His request to reopen the disciplinary proceedings in his case before the Constitutional Court was rejected on procedural grounds [...] The Constitutional Court Act did not explicitly provide for the possibility of reopening the proceedings before this court. On 4 June 2014 an amendment to Article 133 of the Constitution was adopted, introducing the possibility to lodge a remedy against a decision of the Constitutional Court following a decision of an international organisation in the application of a binding international

treaty. The amendment shall come into force on 1/09/2014. The applicant will then be able to apply for reopening of the proceedings.

General measures:

The judgment was published and disseminated among the judges of the Constitutional Court. The new wording of article 133 of the Constitution, as amended on 4 June 2014, shall enable the Constitutional Court to implement the requirements following from the judgment of the Court. The authorities committed to inform the Committee of the Ministers about further developments."

22. The applicant has not made use of the possibility of reapplying for reopening of his disciplinary proceedings as referred to in the Government's action plan (see paragraph 25 below).

COMPLAINT

23. The applicant complained under Article 6 § 1 of the Convention that the dismissal of his application for reopening of his disciplinary proceedings following the Court's judgment of 20 November 2012 had been arbitrary and had constituted a denial of his right to a fair trial.

In support of that claim, he pointed out that the Constitutional Court's bench, which had taken that decision, comprised a judge challenged in the original proceedings. The dismissal of his application for reopening was thus not only arbitrary in terms of the result, but also vitiated by the same error as the original disciplinary proceedings in terms of procedure.

In other words, in the applicant's view, by not executing the judgment of 20 November 2012, the respondent Government had repeatedly violated Article 6 § 1 of the Convention, in conjunction with Articles 1 and 46 § 1 of the Convention. He argued that he had retained the status of a victim directly affected by what he considered to be continuing serious consequences of the violation of his Convention right.

THE LAW

24. The applicant complained that the dismissal of his request for reopening of his disciplinary proceedings violated his rights under Article 6 § 1 of the Convention, in conjunction with Articles 1 and 46 § 1 of the Convention. The relevant part of these Articles reads as follows:

Article 1:

"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention."

Article 6 § 1:

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

Article 46:

"1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

25. As a preliminary observation, the Court notes that the enforcement of its judgment of 20 November 2012 is still pending and that, in the course of the enforcement, the legislative situation has changed. In particular, it appears that as from 1 September 2014 there is a specific possibility for the applicant to seek reopening of his disciplinary proceedings on the basis of the Court's judgment by way of a new application. In his own submission, the applicant has not made use of this possibility on the ground that, in his view, the time-limits for an application under the amended provisions in a situation such as his are unclear.

26. Irrespective of that, the Court notes that the present application is a sequel to a previous application lodged by the same applicant in relation to disciplinary proceedings against him mentioned above. The Court held in its judgment of 20 November 2012 that those disciplinary proceedings had fallen short of the guarantees of an impartial tribunal under Article 6 § 1 of the Convention. At the same time, the Court held that the most appropriate form of redress would be the reopening of these proceedings. The applicant then unsuccessfully sought the reopening of those proceedings at the national level and that request for reopening forms the central point of the present application.

27. In such circumstances, the Court must determine in the first place whether it is prevented by Article 46 of the Convention from dealing with the present submission made by the applicant, in view of the distribution of powers effected by the Convention between the Committee of Ministers and the Court as regards the supervision of the execution of the Court's judgment (see, for instance, *Lyons and Others v. the United Kingdom* (dec.), no. 15227/03, ECHR 2003‑IX). Secondly, insofar as it is not so prevented, it must examine whether the domestic proceedings on the applicant's request for reopening attracted the guarantees of Article 6 § 1 of the Convention (see *Steck-Risch and Others v. Liechtenstein* (dec.), no. 29061/08, 11 May 2010) and, if so, whether the requirements of that Article were complied with.

28. The Court has recently summarised the relevant principles in its judgment in *Bochan v. Ukraine (no. 2)* [GC] (no. 22251/08, §§ 31, 33 and 34, and 42 – 50, 5 February 2015, with further references), including those

previously summarised in its judgment in the case of *Egmez v. Cyprus* ((dec.), no. 12214/07, §§ 48-56, 18 September 2012) as follows:

> "50. Consequently, the Court has consistently emphasised that it does not have jurisdiction to verify whether a Contracting Party has complied with the obligations imposed on it by one of the Court's judgments. It has therefore refused to examine complaints concerning the failure by States to execute its judgments, declaring such complaints inadmissible *ratione materiae* (see *Moldovan and Others v. Moldova* (dec.), no. 8229/04, 15 February 2011; *Dowsett v. the United Kingdom (no. 2)* (dec.), no. 8559/08, 4 January 2011; *Öcalan v. Turkey* (dec.), no. 5980/07, 6 July 2010; *Haase v. Germany*, no. 11057/02, ECHR 2004 III; *Komanický v. Slovakia* (dec.), no. 13677/03, 1 March 2005; *Lyons and Others*, cited above; *Krčmář and Others* [v. the Czech Republic (dec.), no. 69190/01, 30 March 2004]; and [*Fischer*] *v. Austria* (dec.), no. 27569/02, ECHR 2003 VI).
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> 51. However, the Committee of Ministers' role in this sphere does not mean that measures taken by a respondent State to remedy a violation found by the Court cannot raise a new issue undecided by the judgment (see *Verein gegen Tierfabriken Schweiz (VgT)* [*v. Switzerland (no. 2)* [GC], no. 32772/02, § 62, ECHR 2009]; *Hakkar v. France* (dec.), no. 43580/04, 7 April 2009; *Haase*, cited above; *Mehemi* [*v. France (no. 2)*, no. 53470/99, § 43, ECHR 2003‑IV]; *Rongoni v. Italy*, no. 44531/98, § 13, 25 October 2001; *Rando v. Italy*, no. 38498/97, § 17, 15 February 2000; *Leterme v. France*, 29 April 1998, Reports 1998-III; *Pailot v. France*, 22 April 1998, § 57, Reports 1998-II; and *Olsson v. Sweden (no. 2)*, 27 November 1992, Series A no. 250) and, as such, form the subject of a new application that may be dealt with by the Court."

29. The present application comprising several elements, the Court will examine them below in turn.

30. In so far as the applicant may be understood as wishing to complain about an alleged lack of execution of the Court's judgment of 20 November 2012 and an alleged lack of rectification of the shortcomings in the original proceedings that formed the subject-matter of that judgment, the complaint falls outside the scope of the Court's material jurisdiction (see *Bochan (no. 2)* [GC], cited above, § 35 and also *Komanický* (cited above)).

31. To the extent the applicant claims that his situation is one of a continued violation of his rights (see paragraph 23 above), the Court notes that the disciplinary proceedings underlying the applicant's request for reopening ended with the Constitutional Court's decision of 29 June 2011, against which there was no appeal (see paragraph 8 above), and that the proceedings on whether or not to reopen those proceedings, as such being of a preliminary nature (see also paragraph 36 below), were not a continuation of those proceedings. It therefore finds that the applicant's situation is conceptually different from those in which it has found it justified in the past to examine a continuing violation of a Convention right following adoption of a judgment in which it had previously found a violation of that right with reference to a certain preceding period of time (see, amongst others *Ivanţoc and Others v. Moldova and Russia*, no. 23687/05, §§ 93-96, 15 November 2011 regarding continuing detention; *Wasserman v. Russia*

(no. 2), no. 21071/05, §§ 36-37, 10 April 2008 as to the non-enforcement of a domestic judgment; and *Rongoni v. Italy*, no. 44531/98, § 13, 25 October 2001, concerning length of proceedings).

32. The next issue is whether the applicant's submission to the Court contains any other elements that could be considered as constituting new facts or grievances going not so much to the outcome of the proceedings in his request for reopening as to the conduct and fairness of those proceedings (see *Bochan (no. 2)* [GC], cited above, §§ 36 *et seq*.).

33. In so far as he may be understood as wishing to complain that, in the determination of his request for reopening of his disciplinary proceedings, he has been denied the procedural guarantees of Article 6 § 1 of the Convention, the Court reiterates that that provision is not normally applicable to extraordinary appeals seeking the reopening of terminated judicial proceedings, but that the nature, scope and specific features of the proceedings on a given extraordinary appeal in the particular legal system concerned may be such as to bring the proceedings on that kind of appeal within the ambit of the said provision and of the safeguards of a fair trial that it affords to litigants (see *Bochan (no. 2)* [GC], cited above, § 50, and also *Šidlová v. Slovakia* (dec.), no. 50224/99, 22 February 2005).

34. The Court will accordingly examine the nature, scope and specific features of the proceedings in the applicant's request for reopening in the instant case.

35. From that perspective, the Court notes that the request for reopening of the applicant's disciplinary proceedings was examined essentially in the same procedural framework as the original disciplinary proceedings: the jurisdiction was bestowed upon the Constitutional Court, the Constitutional Court was to sit in its plenary formation, the quorum to sit and to decide was in principle the same, that is at least seven of its thirteen judges, and, depending on whether a proposal obtained such a majority or not, it was approved or dismissed (see paragraphs 4, 5 and 17 above)

36. The Court also notes that the applicant's request of 18 February 2012 was aimed at having the disciplinary proceedings reopened and the convicting decision of 29 June 2011 quashed (see paragraph 15 above), it being understood that this preliminary phase of the proceedings would be followed by a new examination of the Minister's representation of 18 November 2010 in the reopened proceedings. Therefore, at this preliminary stage, the applicable rules did not envisage a determination of the applicant's civil rights and obligations in terms of the Court's case law.

37. As to the manner in which the applicant's request was actually examined, the Court notes that it was dismissed on the ground that it had not received the support of the requisite majority of the Constitutional Court's judges, with no other grounds being provided. However, it is plain from the dissenting opinions and the Government's action plan for the execution of the Court's judgment that the lack of support for the applicant's request

among the Constitutional Court's judges flowed from the lack of a direct statutory basis for allowing it.

38. The request therefore cannot be said to have entailed or actually resulted in a reconsideration of the case afresh (see *Bochan (no. 2)* [GC], cited above, § 46, with further references), in proceedings of a similar nature and scope as ordinary appellate proceedings (see *Bochan (no. 2)* [GC], cited above, §§ 47 et seq., with further references), or in a prolongation of the original (terminated) disciplinary proceedings in a similar fashion (see *Bochan (no. 2)* [GC], cited above, §§ 53 *et seq.*).

39. The nature and scope of the Constitutional Court's examination of the applicant's reopening request was therefore not such as to attract the guarantees of Article 6 § 1 of the Convention.

40. It follows that the application as a whole falls outside the Court's competence *ratione materiae* within the meaning of Article 35 § 3 (a) of the Convention. It must therefore be rejected in accordance with its Article 35 § 4.

For these reasons, the Court unanimously

Declares the application inadmissible.

Done in English and notified in writing on 25 June 2015.

Stephen Phillips
Registrar

Josep Casadevall
President