CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

FINAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 62584/00
by Štefan HARABIN
against Slovakia

The European Court of Human Rights (Fourth Section), sitting on 29 June 2004 as a Chamber composed of:

Sir Nicolas BRATZA, *President*,
Mr M. PELLONPÄÄ,
Mrs V. STRÁŽNICKÁ,
Mr R. MARUSTE,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Mr J. BORREGO BORREGO, *judges*,

and Mrs F. ELENS-PASSOS, *Deputy Section Registrar*,

Having regard to the above application lodged on 14 October 2000,

Having regard to the partial decision of 9 July 2002,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Štefan Harabin, is a Slovakian national who was born in 1957 and lives in Bratislava. He was represented before the Court by Mrs E. Ľalíková, a lawyer practising in Bratislava. The respondent Government were represented by their Agent, Mr P. Vršanský, succeeded by Mr P. Kresák as from 1 April 2003.

A. The circumstances of the case

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

On 11 February 1998 the National Council of the Slovak Republic elected the applicant President of the Supreme Court for a five-year period.

On 16 August 2000 the Government adopted a resolution under which it initiated the revocation of the applicant's appointment. The background for the resolution was a proposal submitted by the Minister of Justice in which the following reasons for the applicant's removal from office were invoked.

According to the proposal, the applicant, in his speeches, attitudes and decisions, had taken several steps which cast doubt on the trustworthiness of the Supreme Court and of the judiciary as a whole.

Firstly, the applicant had failed to initiate disciplinary proceedings to dismiss J.Š. from his appointment as a judge. J.Š. was then the Vice-President of the Supreme Court and had forcibly entered premises belonging to the Ministry of Justice and had used force against a high-ranking official of that Ministry in June 1999. According to the Minister's proposal, the applicant's behaviour in the matter had not been appropriate.

Secondly, the applicant had initiated, in September 1999, the amendment of several laws concerning the judiciary. Those proposals clearly exceeded the legitimate interest in ensuring that the Supreme Court should have its own chapter in the State budget. If they had been approved, the President of the Supreme Court would have had the exclusive right to determine the number of judges of the Supreme Court and to decide on the assignment or transfer of judges to it. This initiative had been strongly criticised in a declaration adopted by the Council of the Association of Judges of Slovakia in October 1999. According to the declaration, the proposal was against the principle of transparency in staff matters and created the danger of making decision-making on judges' careers much less objective. The Minister's report concluded that the applicant had sought to obtain more power rather than to strengthen the self-administration of judges.

Thirdly, the applicant had taken into account the views expressed by organs of self-administration of judges only in cases where it suited his interests. Thus the applicant had not accepted the transfer of a judge to the Supreme Court despite the fact that it had been recommended by the Council of Judges of the Slovak Republic. On the other hand, the applicant had proposed to assign temporarily to the Supreme Court a District Court judge who clearly failed to meet the professional and moral requirements for holding a post at the Supreme Court. The Minister's report concluded that the applicant had failed to apply correct professional and ethical criteria when proposing to fill posts at the Supreme Court.

Fourthly, the applicant had not acted in a correct manner when presenting his views on a draft amendment to the Constitution. In particular,

in a letter addressed to a representative of the European Commission, the applicant had stated that, in the opinion of almost all judges of the ordinary courts, the draft amendment to the Constitution was contrary to the principle of the separation of powers and permitted interference with the independence of judges. That was contrary to the views expressed by the Council of Judges of the Slovak Republic, by the Association of Judges of Slovakia and by the National Association of Female Judges of Slovakia, those being organisations which represented a majority of judges. Furthermore, the applicant had incorrectly alleged that the whole judiciary including the Supreme Court would be ruled by a member of the Government if the Judicial Council were to be established in accordance with the draft amendment to the Constitution, whereas under the amendment the Judicial Council was to be composed of nine judges elected by judges and of another nine members, of whom three were to be appointed by the Parliament, three by the President of Slovakia and three by the Government.

The applicant's comments on the draft amendment were "noteworthy" in that they showed that he did not understand the purpose of an amnesty in a democratic State. The report also stated that the applicant's comments showed that the real reason for his disagreement with the draft amendment to the Constitution was the point concerning the termination of the powers of the President of the Supreme Court.

Fifthly, several cases taken up by the media had impaired the trustworthiness of the judiciary. For example, a representative of the Supreme Court was suspected of having forged an official document concerning the use of a building in which the Supreme Court had its seat. The applicant was not in a position to show that the suspicion was unsubstantiated and had frequently changed his explanation of the relevant facts. Furthermore, the applicant had failed to initiate disciplinary proceedings against a Supreme Court judge who had been treated free of charge in a spa. The applicant had taken an inappropriate initiative in the context of judicial proceedings in that he had informed the media, on his own initiative, about a Supreme Court decision and commented upon it prior to its delivery to the parties.

The Minister's report concluded that the applicant's actions and behaviour showed that he did not meet the professional and moral requirements for holding the post of President of the Supreme Court. In performing his duties, the applicant had laid emphasis on his material status and the strengthening of his powers rather than on professional and ethical problems of the judiciary.

The applicant filed a petition to the Constitutional Court under Article 130(3) of the Constitution. With reference to the Government's proposal, he alleged a violation of his right to freedom of expression as

guaranteed by Article 26 § 1 and also a violation of Article 30 §§ 1 and 4 of the Constitution.

On 10 October 2000 the Constitutional Court dismissed the applicant's petition as being manifestly ill-founded. The decision stated that the Government's proposal to revoke the applicant's appointment as President of the Supreme Court did not amount to a violation of any of his constitutional rights. The Constitutional Court pointed out, in particular, that there was no right under the Constitution to exercise the post to which the applicant had been elected. Furthermore, there was no indication that the applicant's right to freedom of expression or his other constitutional rights had been violated as a result of the proposal to remove him from the post since that proposal did not, as such, directly affect the applicant's rights or his interests protected by law.

On 19 December 2000 in the National Council of the Slovak Republic the motion that the applicant's appointment be revoked was defeated by 62 votes to 60, with 15 abstentions.

Following the entry into force, on 1 July 2001, of a constitutional amendment the post of President of the Supreme Court was to be filled in accordance with Article 145(3) of the Constitution. The applicant was a successful candidate for that post in an election held by the Judicial Council on 20 December 2001. Subsequently the Constitutional Court invalidated the election on the ground that the other candidate had been at a disadvantage vis-à-vis the applicant. The subsequent elections having not resulted in the appointment of the President of the Supreme Court pursuant to Article 145(3) of the Constitution, the applicant held the post of President of the Supreme Court until February 2003 when the term for which he had been appointed expired. Since then he has performed the duties of a Supreme Court judge.

B. Relevant domestic law

1. The Constitution

The following provisions of the Constitution, as in force at the relevant period, are pertinent in the present case.

Article 26(1) guarantees the freedom of expression and the right to information. Paragraph 2 of Article 26 guarantees to everyone the right to express his or her views orally, in writing, through the press, pictures or by other means and to freely seek, receive and impart ideas and information. Paragraph 3 of Article 26 prohibits censorship. Under paragraph 4 of Article 26, freedom of expression and the right to seek and impart information may be restricted by law where it is necessary in a democratic society for the protection of rights and freedoms of others, in the interest of

state security or public order or for the protection of public health and morals.

Under Article 30(1), citizens have the right to participate in the administration of public affairs either directly or by electing their representatives. Paragraph 4 of Article 30 entitles citizens to have access to public posts on equal terms.

Under Article 145(1), as in force until 30 June 2001, judges were elected by the National Council of the Slovak Republic upon the Government's proposal for a four-year period. After the expiry of that period the National Council elected judges, upon the Government's proposal, for an indefinite period.

Paragraph 2 of Article 145, as in force until 30 June 2001, provided that the President and Vice-Presidents of the Supreme Court were to be elected by the National Council from the judges of the Supreme Court for a five-year period. Such posts could not be held by the same persons for more than two consecutive periods of five years.

Under Article 147(1) as in force until 30 June 2001, the appointment of a judge could be revoked by the National Council of the Slovak Republic either after his or her final conviction for an intentional criminal offence or when he or she had committed a disciplinary offence which was incompatible with the office of a judge. Paragraph 3 of Article 147, as in force until 30 June 2001, provided that, prior to revoking the appointment of a judge, the National Council had to ask the competent disciplinary court for an opinion.

Following an amendment to the Constitution, the following relevant provisions entered into force with effect from 1 July 2001.

Article 141a(1) provides for establishment of the Judicial Council, composed of the President of the Supreme Court, eight judges elected by the judges who may revoke their appointment, and another nine members, three of whom are appointed by the Parliament, three by the President of the Slovak Republic and three by the Government. Under paragraph 4(c) of Article 141a, the Judicial Council has the right to propose to the President of Slovakia the names of persons to be appointed to the posts of President and Vice-President of the Supreme Court and to call for their removal from office.

Pursuant to Article 145(3), the President and Vice-President of the Supreme Court are appointed by the President of the Slovak Republic, upon the proposal of the Judicial Council, from among the judges of the Supreme Court for a five-year period. Prior to the expiry of that period the President of the Slovak Republic can revoke the appointments to the posts of President and Vice-President of the Supreme Court for any of the reasons laid down in Article 147 of the Constitution.

2. The State Administration of Courts Act of 1992

Act No. 80/1992 governs, *inter alia*, the State administration of courts, which consists in setting up necessary conditions for the proper administration of justice without interfering with the independence of the judiciary.

Under Section 8(1), the central authority charged with State administration of justice is the Ministry of Justice. Paragraph 2 of Section 8 provides that the other authorities in charge of State administration of Justice are the President and the Vice-President of the Supreme Court and the presidents and vice-presidents of Regional Courts and District Courts.

Pursuant to Section 9(2), State administration of the Supreme Court is carried out by the Ministry of Justice through the President of the Supreme Court.

Section 12(1)(d) provides that the Ministry of Justice organises, directs and controls the State administration of courts by their presidents.

Pursuant to Section 13(1), the President of the Supreme Court carries out the State administration of that court in that he or she (a) ensures the functioning of the Supreme Court in terms of personnel and organisation, being responsible in particular for filling the expert and other posts with duly qualified staff and for dealing with personnel matters relating to judges and the other staff of the court, (b) ensures the functioning of the Supreme Court from the economic, material and financial point of view and (c) attends to the professional education of judges and other staff members of the Supreme Court.

Under paragraph 2 of Section 13, the President of the Supreme Court also takes care to ensure that the dignity of judicial proceedings is respected, that the rules of judicial ethics are complied with and that proceedings before the Supreme Court are conducted without undue delays.

Paragraph 3 of Section 13 entitles the President of the Supreme Court to initiate complaints in the interest of the law in the cases provided for by law.

3. The Civil Code

According to Article 11, any natural person has the right to protection of his or her personality, in particular of his or her life and health, civil and human dignity, privacy, name and personal characteristics.

Pursuant to Article 13(1), any natural person has the right to request that unjustified infringement of his or her personal rights should be stopped and the consequences of such infringement eliminated, and to obtain appropriate satisfaction.

Article 13(2) provides that in cases where the satisfaction obtained under Article 13(1) is insufficient, in particular because a person's dignity and position in society has been considerably diminished, the injured person is

entitled to compensation for non-pecuniary damage. According to paragraph 3 of Article 13, when determining the amount of such compensation the courts have to take into account the seriousness of the prejudice suffered by the person concerned and also the circumstances under which the violation of that person's rights occurred.

COMPLAINTS

1. Under Article 10 of the Convention the applicant complained that his right to freedom of expression had been infringed in that he was to be punished by revocation of his appointment as President of the Supreme Court for the views which he had expressed on the separation of powers and the guarantees of the independence of the judiciary in Slovakia.

2. The applicant alleged a violation of Article 14 of the Convention in that, unlike the other judges, he could be removed from office without a finding by a court that he had committed a criminal or disciplinary offence.

THE LAW

1. The applicant complained that his right to freedom of expression had been infringed in that the Government had sought the termination of his appointment as President of the Supreme Court. He relied on Article 10 of the Convention the relevant part of which provides as follows:

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

The Government contended that the applicant had not exhausted domestic remedies, as in his constitutional petition he had explicitly invoked only the first paragraph of Article 26 of the Constitution. As a result, the Constitutional Court was not required to examine whether the other provisions of Article 26 of the Constitution had been respected. In addition, the arguments which the applicant had raised in the proceedings before the Constitutional Court were not the same as those on which he later relied in his application to the Court. The applicant could also have sought redress by

means of an action for protection of his personal rights pursuant to Article 11 et seq. of the Civil Code.

The Government further contended that the applicant could not claim to be the victim of a violation of his rights under Article 10 as Parliament had not accepted the Government's proposal concerning his removal from office and since he had continued to occupy his post until the expiry of the term for which he had been appointed. During that period, the applicant had been free to express his views and had actually availed himself of that right both in Slovakia and abroad on many occasions.

As to the merits, the Government argued that there had been no interference with the applicant's right to freedom of expression. They pointed out, with reference to the reasons invoked in the Minister's report, that the background to the initiative to revoke the applicant's appointment had been his failure to properly carry out his functions as an official charged with State administration of the Supreme Court and to meet the moral and professional requirements for the post which he had held.

The applicant maintained that the only remedy which he had at his disposal was a petition to the Constitutional Court. The latter had looked into the merits of his complaint about an infringement of his right to freedom of expression. Domestic remedies had therefore been exhausted.

As to the merits, the applicant contended that the arguments put forward by the Government were unsubstantiated and aimed at discrediting his person. He pointed out, in particular, that he had been the successful candidate for the post of President of the Supreme Court in the election held by the newly established Judicial Council on 20 December 2001. He denied the allegation that the Supreme Court staff had forged a public document and argued that Supreme Court judge J.Š. had neither acted contrary to the law nor committed any disciplinary offences. As President of the Supreme Court, the applicant considered himself entitled to participate in the selection of judges who were to be transferred to that court.

The applicant also argued, with reference to his comments on the draft amendment to the Constitution, that the Government had intended to punish him for his views concerning the position of the judiciary. Those views were compatible with the views of other judges and had been upheld at international meetings and conferences which the applicant attended. Finally, the applicant pointed out that the Government could have initiated disciplinary proceedings against him if they considered that he did not meet the professional and moral requirements for holding the post. The fact that they had failed to do so showed, in the applicant's view, that the purpose of the Government's initiative had been to punish him for his views.

As regards the remedy under Article 11 et seq. of the Civil Code, the Court notes that its purpose would have been to redress any negative consequences the Government's proposal to remove the applicant from office might have had on his personal rights. It was not, however, designed

to protect the applicant's freedom of expression as such. The conclusion that an action under Article 11 et seq. of the Civil Code was not a remedy which the applicant was required to exhaust is supported also by the fact that the Constitutional Court dealt with the applicant's petition and did not reject it for the applicant's failure to exhaust other remedies available or on the ground that the case fell within the jurisdiction of the ordinary courts. The Court further notes that the Constitutional Court looked into the merits of the applicant's complaint about an infringement of his right to freedom of expression and that, at the relevant time, the Constitutional Court lacked the power to provide redress to successful parties in proceedings under Article 130(3) of the Constitution (see *Nemec and Others v. Slovakia* (dec.), no. 48672/99, 18 January 2001, with further reference, *Marônek v. Slovakia* (dec.), no. 32686/96, 27 April 2000, and *Feldek v. Slovakia* (dec.), no. 29032/95, 15 June 2000, all unpublished).

In these circumstances, the Government's objection relating to non-exhaustion of domestic remedies cannot be upheld.

The Court does not consider it necessary to determine whether the applicant can claim to be a victim, within the meaning of Article 34 of the Convention, as this part of the application is in any event inadmissible for the reasons set out below.

Turning to the complaint raised by the applicant, the Court observes that the status which the applicant enjoyed as President of the Supreme Court did not deprive him of the protection of Article 10. Moreover, having regard in particular to the growing importance attached to the separation of powers (see *Kleyn and Others v. the Netherlands* [GC], nos. 39343/98, 39651/98, 43147/98 and 46664/99, § 193, ECHR 2003-VI; *Stafford v. the United Kingdom* [GC], no. 46295/99, § 78, ECHR 2002-IV) and the importance of safeguarding the independence of the judiciary, any interference with the freedom of expression of a judge in a position such as the applicant's calls for close scrutiny on the part of the Court. However, in order to determine whether this provision was infringed it must first be ascertained whether the disputed measure amounted to an interference with the exercise of the applicant's freedom of expression – in the form of a "formality, condition, restriction or penalty" – or whether it lay within the sphere of the right of access to or employment in the civil service, a right not secured in the Convention. In order to answer this question, the scope of the measure must be determined by putting it in the context of the facts of the case and of the relevant legislation (see *Wille v. Liechtenstein*, judgment of 28 October 1999, *Reports of Judgments and Decisions* 1999-VII, §§ 42 and 43, with further references).

In examining whether there was an interference with the applicant's right to freedom of expression, the report submitted by the Minister of Justice should be at the centre of the Court's attention as it expressed the reasons for the applicant's proposed dismissal, and since it was on the basis of this

report that the Government adopted its resolution to propose that the National Council revoke the applicant's appointment.

According to that report, the applicant's actions and behaviour showed that he did not meet the professional and moral requirements for holding the post of President of the Supreme Court. In support of this conclusion reference was made to:

(i) the applicant's failure to initiate the dismissal of a Supreme Court judge who had attacked an official of the Ministry of Justice;

(ii) his alleged attempts to obtain the exclusive right to determine the number of judges of the Supreme Court and assignment or transfer of judges to that court, an initiative which was criticised by an association of judges;

(iii) his alleged failure to apply correct professional and ethical criteria when proposing to fill the posts at the Supreme Court;

(iv) his statement that his views on the draft amendment to the Constitution were supported by almost all judges, which was contrary to the position of several associations of judges representing the majority of judges;

(v) his allegedly incorrect allegation that the whole judiciary including the Supreme Court would be ruled by a member of the Government if the Judicial Council were to be established in accordance with the draft amendment to the Constitution and the arguments he put forward in that context which allegedly showed that he did not understand the purpose of an amnesty in a democratic State; and

(vi) his indirect involvement or his failure to act in an appropriate manner in several cases taken up by the media which allegedly impaired the trustworthiness of the judiciary.

In view of the above, the Court considers that the disputed measure essentially related to the applicant's ability properly to exercise the post of President of the Supreme Court, that is to the appraisal of his professional qualifications and personal qualities in the context of his activities and attitudes relating to State administration of the Supreme Court. In this context it should be noted that, under Section 8(1) of the State Administration of Courts Act, the central authority charged with State administration of courts is the Ministry of Justice and that pursuant to Section 9(2) of that Act, State administration of the Supreme Court is carried out by the Ministry of Justice through the President of the Supreme Court.

The measure complained of therefore lay, as such, within the sphere of holding a public post related to State administration of justice, a right not secured in the Convention. The Court is therefore not required to determine whether the arguments put forward in the Minister's report were well-founded.

It is true that the Minister's report also referred to the views which the applicant had expressed on the draft amendment to the Constitution and which the report described as "noteworthy" in that they showed that the applicant had not understood the purpose of an amnesty in a democratic State. However, the documents before the Court do not indicate that the proposal to remove the applicant from office was exclusively or preponderantly prompted by those views. Even assuming that the Government's initiative had a chilling effect on the exercise by the applicant of his freedom of expression, it was limited in duration, since on 19 December 2000 the National Council of the Slovak Republic disapproved of the motion that the applicant's appointment be revoked.

Considering the scope of the measure in issue in the context of the facts of the case and the relevant law, the Court concludes that there was no interference with the exercise of the applicant's right to freedom of expression, as secured in Article 10 § 1.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

2. The applicant complained that he had been discriminated against in that, unlike other judges, he could be removed from office for the views which he had expressed and without a finding by a court that he had committed a criminal or disciplinary offence. He alleged a violation of Article 14 of the Convention, which provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The Court recalls that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification (see *Thlimmenos v. Greece* [GC], no. 34369/97, § 44, ECHR 2000-IV).

In the present case the applicant ran the risk of being removed from office as President of the Supreme Court. However, his possible dismissal from that post was not capable of affecting his position as a judge to which he had been earlier elected and from which he could only be removed, like other judges, in the cases provided for by law. Accordingly, the applicant cannot be said to have been treated differently from persons in an analogous situation.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the remainder of the application inadmissible.

Françoise ELENS-PASSOS
Deputy Registrar

Nicolas BRATZA
President