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

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Article 6 § 1 requirements met by disciplinary proceedings against judge and subsequent review by High Court of Cassation and Justice

In today's **Chamber** judgment[1] in the case of Cotora v. Romania (application no. 30745/18) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights.

The case concerned disciplinary proceedings against the applicant, a judge and – at the time – President of a Court of Appeal, which had resulted in a disciplinary sanction in the form of a salary reduction.

The Court held, contrary to what the applicant had argued, that the Judicial Disciplinary Board of the National Council of Judges and Prosecutors had been a "judicial body with full jurisdiction" for the purposes of Article 6. The Court did not discern any factors capable of establishing bias on the part of the Council members concerned, or of casting doubt on their independence. Nor did it see any reason to doubt their objective impartiality in the present case. The assessment carried out by the Council's Judicial Disciplinary Board did not appear arbitrary or manifestly unreasonable and the disciplinary proceedings could not be regarded as "unfair" for the purposes of Article 6 § 1. The Court therefore concluded that the proceedings of the Judicial Disciplinary Board had satisfied the requirements of Article 6 § 1 of the Convention.

As to the matter of the "subsequent review", the High Court of Cassation and Justice had shown that it had jurisdiction to engage with the issues of fact which it saw as relevant and with the legal characterisation of the applicant's conduct as a disciplinary offence. It was apparent from the legal provisions in place that, had that court found merit in the applicant's proposed grounds of review, it would have had the power to quash the Council's decision and remit the case to it to be decided anew. It therefore appeared that the scope of the review performed by the High Court of Cassation and Justice in this case had been sufficient.

A legal summary of this case will be available in the Court's HUDOC database (link)

Principal facts

The applicant, Mihaela-Elisabeta Cotora, is a Romanian national who was born in 1960 and lives in Craiova, Romania. At the relevant time, she was a judge and President of the Craiova Court of Appeal.

On 7 October 2015, a prosecutor for the National Anti-corruption Directorate sent a memorandum to the National Council of Judges and Prosecutors ("the Council") setting out facts which suggested that Ms Cotora, the President of a Court of Appeal, had been involved in the process of appointing two Vice-Presidents to that court. The memorandum indicated that Ms Cotora had, directly or through C.I. and C.P. (colleagues of hers on the bench) contacted certain members of the Selection Panel formed to decide the results of a competition, with a view to furthering the prospects of particular candidates. The criminal investigation ended with a decision not to prosecute, on the

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

grounds that the allegations against the applicant were of a disciplinary, rather than a criminal, nature.

On 20 October 2015 the judge acting for the Judicial Inspectorate of the Council opened a disciplinary investigation into Ms Cotora's conduct. Her fellow judges, C.I. and C.P., were also investigated in the same proceedings.

On 4 November 2015 two judges of the Judicial Inspectorate moved the Council to institute disciplinary proceedings against Ms Cotora for interfering with the professional duties of a judge. The investigation found that Ms Cotora had, in October 2013, used the opportunity afforded by an event organised by the Court of Appeal of which she was President to make contact, directly or through her fellow judges C.I. and C.P., with certain members or alternate members of the Selection Panel so as to intimate to them her preference for certain candidates for the vacant seats on that court. The Judicial Inspectorate also found that in November 2013 she had sought to overturn the results of the selection procedure through D.S., a colleague of hers who was Vice-President of a judges' and prosecutors' rights association.

On 13 January 2016, at a hearing before the Judicial Disciplinary Board of the Council, Ms Cotora raised a constitutionality challenge regarding the lack of a limitation period on disciplinary allegations against judges and prosecutors.

On 27 October 2016 the Constitutional Court of Romania ruled that the constitutionality challenge could not be entertained. It affirmed the Council's status as a disciplinary tribunal but held that it was merely a non-judicial body, appeals from which lay to the High Court of Cassation and Justice, which could not hear constitutionality challenges.

By decision of 31 October 2016 the Council upheld by 4 votes to 3 the disciplinary allegations brought by the Judicial Inspectorate against Ms Cotora. It found her guilty of a disciplinary offence and ordered a 20% reduction in her salary for three months. It dismissed the disciplinary allegations against the two other judges, C.I. and C.P, for lack of merit.

Ms Cotora appealed to the High Court of Cassation and Justice.

On 23 October 2017 the High Court of Cassation and Justice affirmed the legality and correctness of the Council's decision and dismissed Ms Cotora's appeal for lack of merit. It noted that her latest alleged misconduct had occurred on 5 November 2013, and that the case had been laid before the Judicial Disciplinary Board of the Council on 5 November 2015, within the statutory time-limit. Regarding the events prior to 5 November 2013, the Council had not failed to apply the two-year limitation period, since it had concluded that disciplinary proceedings in respect of the events of 23 and 24 October 2013 were time-barred. The court went on to hold that, contrary to what the applicant had argued, the act of interfering in a judge's duties was a disciplinary offence even where the perpetrator of the act had failed in the purpose sought to be achieved, and the duties of a member of a Selection Panel, while not specifically judicial in nature, were not put beyond the scope of the disciplinary offence with which section 99 (l) of Law no. 303/2004 was concerned. In its view the Council had correctly determined the facts in finding that the applicant had approached members of the Selection Panel to further the prospects of particular candidates.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right to a fair trial), the applicant alleged that the High Court of Cassation and Justice had not carried out a "sufficient review" to cure the flaws in the disciplinary proceedings in which the Judicial Disciplinary Board of the National Council of Judges and Prosecutors had issued its decision of 31 October 2016. She also complained that the Judicial Disciplinary Board had refused to consider some of the evidence she had sought to adduce.

The application was lodged with the European Court of Human Rights on 21 June 2018.

Judgment was given by a Chamber of seven judges, composed as follows:

Gabriele **Kucsko-Stadlmayer** (Austria), *President*,
Tim **Eicke** (the United Kingdom),
Faris **Vehabović** (Bosnia and Herzegovina),
Iulia Antoanella **Motoc** (Romania),
Armen **Harutyunyan** (Armenia),
Anja **Seibert-Fohr** (Germany),
Ana Maria **Guerra Martins** (Portugal),

and also Ilse **Freiwirth**, *Deputy Section Registrar.*

Decision of the Court

Article 6 § 1

The Court observed that a disciplinary sanction had been imposed on the applicant following proceedings before the Judicial Disciplinary Board of the National Council of Judges and Prosecutors ("the Council"), a body competent to adjudicate on disciplinary offences committed by judges and duty-bound to apply a specific procedure. The Court first had to determine whether those proceedings had complied with the requirements of Article 6 § 1 of the Convention. In so doing it did not have regard to the conclusions reached in the judgment of the Grand Chamber of the Court of Justice of the European Union (CJEU) of 18 May 2021 in joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, paragraphs 186-207, concerning, among other things, the EU law compatibility of the implementation of Government Ordinance no. 77/2018 (amending the National Council of Judges and Prosecutors Act (Law no. 317/2004)), as that ordinance had come into force on 5 September 2018, after the events of the present case.

The Court reiterated that the word "tribunal", as used in its judgments, was not necessarily to be understood as signifying a court of law of the classic kind, integrated within the standard judicial machinery of the country. An authority could come within the concept of a "tribunal" in the substantive sense where its function was to determine matters within its competence on the basis of rules of law, exercising full jurisdiction, after proceedings conducted in a prescribed manner. Furthermore, entrusting the adjudication of disciplinary offences to a professional disciplinary body did not in itself infringe the Convention.

The Court observed, firstly, that the Council, which had decided the case, had been a body established by law – specifically by the Constitution and the National Council of Judges and Prosecutors Act (Law no. 317/2004). It further observed that the Council had had full power to carry out prior investigations through the Judicial Inspectorate, adjudicate disciplinary cases against judges and render disciplinary decisions. The Judicial Disciplinary Board of the Council had been competent to determine and assess the facts of such cases and their legal consequences after an examination of the evidence. Furthermore, judges and prosecutors against whom proceedings were brought before it could be represented or assisted by a fellow judge or prosecutor or by counsel of their choosing; they were to be heard and given the opportunity to submit a written answer to the allegations and were entitled to inspect any documents on record and seek to introduce evidence in their defence. What was more, the legal provisions on proceedings of the Judicial Disciplinary Board were supplemented by the general procedural rules laid down in the Code of Civil Procedure. In the circumstances the Court considered that, contrary to the position contended for by the applicant, the Judicial Disciplinary Board of the Council had been a "judicial body with full jurisdiction" for the purposes of Article 6.

As to whether the Judicial Disciplinary Board of the Council had been "independent" and "impartial" within the meaning of Article 6 § 1 of the Convention, the Court referred to the relevant principles stated in its judgment in Denisov v. Ukraine.

The Court noted that the members of the Judicial Disciplinary Board of the Council had been elected from the ranks of the judiciary during General Meetings of Judges and Prosecutors (not in itself a violation of the principle of judicial independence) for non-renewable six-year terms; they had been hierarchically independent and subject to removal from office only in certain circumstances expressly laid down by law. The Court had not discerned any factors that might establish bias on the part of the Council members concerned or cast doubt on their independence. Nor did it see any reason to doubt their objective impartiality in the present case.

As to the fairness of the proceedings before the Judicial Disciplinary Board of the Council, the Court pointed out that the law offered specific procedural safeguards and that the decisions of the Council had been open to scrutiny by the High Court of Cassation and Justice. The proceedings before the Judicial Disciplinary Board had afforded the applicant an opportunity to defend the allegations.

Specifically, the Judicial Inspectorate of the Council had made all the material in the record of the disciplinary investigation available to the applicant; statements had been taken from 15 witnesses; and the applicant had been interviewed in person and given the opportunity to enter into the record documentary evidence in her defence. The Judicial Inspectors had given detailed reasons for rejecting some of the evidence she had sought to introduce and had gone on to determine the facts from the evidence on record. Once the Judicial Inspectorate had brought the allegations before the Judicial Disciplinary Board, the applicant had been able to participate in all the hearings before it with the assistance of counsel of her choosing, set out her defence orally, call witnesses, file a written answer to the allegations, secure consideration of all her objections, enter additional evidence into the record and lodge written submissions. After considering all the evidence on record and disposing of the applicant's main arguments and evidential motions, the Judicial Disciplinary Board of the Council had found that the applicant had committed the disciplinary offence of interfering with the duties of other judges and had done so with a view to furthering the prospects of particular candidates for the offices of Vice-President of the Court of Appeal of which she had been President. The Court observed that the assessment of the Judicial Disciplinary Board of the Council in the case did not appear arbitrary or manifestly unreasonable and the disciplinary proceedings could not be regarded as "unfair" for the purposes of Article 6 § 1.

The Court concluded that the proceedings of the Judicial Disciplinary Board of the Council had satisfied the requirements of Article 6 § 1 of the Convention.

As to the matter of the "subsequent review" carried out by the High Court of Cassation and Justice, the Court noted that it was apparent from the judgment of 23 October 2017 that that court had analysed both the legality and the correctness of the disciplinary decision, in the spirit of the Constitutional Court's ruling and the approach adopted in the legal orders of most member States. The court had dealt with the applicant's submissions in support of her grounds of review, and with her criticisms of the interpretation given to the offence of interference with the duties of a judge, explaining that the purpose of the interference did not necessarily have to be achieved and that the offence did not need to concern duties of C.H. and E.R. that were specifically judicial in character. Like the Government, the Court also observed that the High Court of Cassation and Justice had undertaken a fresh analysis of the allegations against the applicant, referring to the evidence on record (witness statements and transcripts of telephone conversations), and had concluded that she had sought to intimate to C.H. and E.R., as members of the Selection Panel, her desire to see particular candidates appointed to the offices of Vice-President of the Court of Appeal under her presidency. The court had attached weight to C.H. and E.R.'s statements that they had perceived the applicant's purpose in reaching out to them to be to influence their decision on the outcome of the

competition and had held that the Council had correctly determined the facts in finding the applicant guilty of the disciplinary offence under section 99 (l) of Law no. 303/2004.

In conclusion the Court considered that in the present case the High Court of Cassation and Justice had shown that it had jurisdiction to engage with the issues of fact which it saw as relevant and with the legal characterisation of the applicant's alleged conduct as a disciplinary offence. It was apparent from the legal provisions in place that, had the High Court of Cassation and Justice found merit in the applicant's proposed grounds of review, it would have had the power to quash the Council's decision and remit the case to it to be decided anew. It therefore appeared that the scope of the review performed by the High Court of Cassation and Justice in this case had been sufficient.

There had therefore been no violation of Article 6 § 1 of the Convention.

The judgment is available only in French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.