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

THIRD SECTION

CASE OF BESNIK CANI v. ALBANIA

(Application no. 37474/20)

JUDGMENT

PENDING ANSWER

STRASBOURG

4 October 2022

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Besnik Cani v. Albania,

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

Georges Ravarani, *President,*
Georgios A. Serghides,
María Elósegui,
Darian Pavli,
Peeter Roosma,
Andreas Zünd,
Frédéric Krenc, *Judges,*
and Milan Blaško, *Section Registrar,*

Having regard to:

the application (no. 37474/20) against the Republic of Albania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Albanian national, Mr Besnik Cani ("the applicant"), on 25 August 2020;

the decision to give notice to the Albanian Government ("the Government") of a part of the complaints under Article 6 § 1, Article 8 and Article 13 of the Convention and to declare inadmissible the remainder of the application;

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

Having deliberated in private on 13 September 2022,

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

INTRODUCTION

1. The applicant is a former prosecutor and the case concerns his complaint under Article 6 § 1 of the Convention that the Special Appeal Chamber that dismissed him from his former office was not "a tribunal established by law", given that one of the judges that heard his case had been appointed to that position in violation of a statutory eligibility criterion.

THE FACTS

2. The applicant was born in 1970 and lives in Tirana. He was represented before the Court by Mr E. Halimi, a lawyer practising in Tirana.

3. The Government were initially represented by their former Agent, Ms B. Lilo and subsequently by Mr O. Moçka, General State Advocate.

4. The facts of the case may be summarised as follows.

I. BACKGROUND TO THE VETTING PROCEEDINGS IN ALBANIA

A. General background

5. In 2016 Albania embarked on a far-reaching justice system reform, which led to amendments to the Constitution and the enactment of a number of statutes relating to, among other things, the re-evaluation of all serving judges and prosecutors, and certain legal advisors/assistants (otherwise referred to as the "vetting process") (see *Xhoxhaj v. Albania*, no. 15227/19, §§ 4-7, 9 February 2021). The most important provisions regarding the vetting process were included in an annex to the Constitution.

6. The vetting process would be carried out by an Independent Qualification Commission (*Komisioni I Pavarur I Kualifikimit* – "the IQC") at first instance and – in the event of an appeal – a Special Appeal Chamber ("the SAC") attached to the Constitutional Court (jointly referred to as "the vetting bodies"). Albanian citizens who, among other conditions, had not been subjected to the disciplinary measure of dismissal from office (*masë disiplinore e largimit nga puna*) or who had not been subjected to another disciplinary measure that was still in force could be appointed members of the vetting bodies (ibid., § 123; see also paragraph 50 below). Following a pre-selection process undertaken by the President of the Republic (or in certain cases by the People's Advocate), the candidates would be interviewed and subsequently appointed by Parliament.

7. The IQC and the SAC would re-evaluate all serving judges and prosecutors on the basis of three criteria: (i) an evaluation of their personal assets, (ii) an integrity background check aimed at determining any possible links to organised crime and (iii) an evaluation of their professional expertise. The Public Commissioner's Office would represent the public interest before the vetting bodies; the International Monitoring Operation ("IMO"), led by the European Commission and composed of international observers, would support, monitor and supervise the re-evaluation process. At the conclusion of each set of re-evaluation proceedings, the vetting bodies would give reasoned decisions confirming in office or suspending or dismissing from office the person being vetted.

B. Appointments and dismissals of judge L.D.

1. Appointment and dismissal as a judge of the District Court of Tirana

8. On 24 April 1994 L.D. was appointed as a judge of the District Court of Tirana. On 24 December 1997 the High Council of Justice ("the HCJ"), which at the time in question was the body that appointed and dismissed judges, dismissed L.D. from his office for breaching the law and for incompetence (*shkelje të ligjës dhe paaftësi në detyrë*).

9. Following an open call for the recruitment of five judges to the District Court of Tirana and L.D.'s application for one of the positions, on 5 November 2016 the HCJ decided to disqualify L.D. from the competition on the grounds that he had been dismissed from the same position on 24 December 1997.

2. L.D.'s appointment to and dismissal from the SAC

10. In response to a public call for expressions of interest issued by the Peoples' Advocate, on 3 February 2017 L.D. submitted an application expressing his interest in, among other vacancies, the position of SAC judge. In his application L.D. enumerated the main eligibility criteria for the position and stated that he met all of them. In particular, he stated in his application the following:

> "... against me there has not been taken the disciplinary measure of dismissal from office or any other disciplinary measure that is still in force, pursuant to the law applicable at the time of [my] application [for the position of SAC judge]."

11. Following the establishment by the People's Advocate of an *ad hoc* commission that would review all applications received for positions on the vetting bodies, on 13 February 2017 the said commission and the IMO adopted a protocol on the method by which the compliance of candidates with the statutory eligibility criteria would be evaluated. In so far as relevant, the protocol provided that a self-declaration from the candidates would be sufficient to consider that a candidate had not been "subjected to the disciplinary measure of dismissal from office or any another disciplinary measure that had been still in force at the time of applying" for a position on one of the vetting bodies, as required by section 6(1)(dh) of the Vetting Act (see paragraph 50 below).

12. Following a number of exchanges between the Peoples' Advocate, the IMO and Parliament, the Peoples' Advocate ultimately forwarded to Parliament a list of the candidates who met the statutory eligibility criteria. The list included L.D.

13. On 2 June 2017 an *ad hoc* commission of Parliament held a hearing during which it interviewed L.D. and other candidates for the vetting bodies. One of the members of the commission asked L.D. whether he had been dismissed or had resigned from his former position as judge of the District Court of Tirana. L.D. answered that he had resigned.

14. By decision no. 82/2017 of 17 June 2017 Parliament confirmed *en bloc* the list of members of the vetting bodies, L.D. being appointed to the position of SAC judge.

15. On 17 January 2020, while the applicant's re-evaluation proceedings were ongoing before the SAC (see paragraphs 33-34 below), the applicant lodged a criminal complaint in respect of L.D. The complaint referred to L.D.'s dismissal in 1997 from his office as a judge of the District Court of

Tirana (see paragraph 8 above) and alleged that L.D. had engaged in the "falsification of documents" by submitting to the Peoples' Advocate an application which had stated that he had never been dismissed from any office (see paragraph 10 above). Following a decision adopted by the prosecutor's office on 15 July 2020 to charge L.D. with falsifying documents, on 24 July 2020 the SAC decided to suspend L.D. from his office as SAC judge.

16. Following the Supreme Court's confirmation of L.D.'s conviction for the said offence (see paragraph 27 below), on 31 May 2021 the disciplinary commission of the SAC ("the Disciplinary Commission") – which is the body with authority to decide on disciplinary breaches committed by judges of the SAC – dismissed L.D. from his office of SAC judge. The Disciplinary Commission referred to Article 128 § 2 (b) of the Constitution, finding that L.D.'s criminal conviction amounted to a disciplinary breach that rendered him unfit to continue holding the office of SAC judge. In response to L.D.'s argument that his conviction was contrary to the law, the Disciplinary Commission noted that its jurisdiction was confined to the question of whether L.D. had been convicted or not and that it could not hear arguments regarding the merits of the conviction.

C. Criminal proceedings against L.D.

1. First-instance judgment

17. In its indictment against L.D. the prosecutor's office submitted, in so far as relevant, that under domestic law only candidates who had not been previously dismissed from an office could be appointed as judges of the SAC. They further argued that L.D. had lodged a forged application with the domestic authorities, contrary to Article 186 § 1 of the Criminal Code; the forgery had consisted of a written statement asserting that he had never been dismissed from any office.

18. L.D. denied the charge. He submitted that the 1997 disciplinary measure against him had been removed from his record (expunged) pursuant to section 33(6) of the 2008 Judiciary Act (Law no. 9877/2008 on the organisation and functioning of the judiciary, as amended) (see paragraph 55 below), which in his view provided that disciplinary measures in respect of serious breaches were to be removed from the record of the judge concerned within three years if no additional disciplinary measure had been imposed during that period.

19. On 1 December 2020 the Anti-Corruption and Organised Crime Court of First Instance found L.D. guilty of forging documents and sentenced him to six months' imprisonment, suspended for twelve months.

20. The court held that under domestic law a candidate was disqualified from holding the office of SAC judge if he/she had been subjected to the disciplinary measure of dismissal from office, regardless of the date on which that measure had been imposed.

21. Furthermore, the court noted that under section 6(1) (dh) of the Vetting Act, if a candidate had been subjected to the disciplinary measure of dismissal from office it meant that that candidate did not meet the statutory conditions for appointment to the position of SAC judge.

22. In response to L.D.'s argument that the measure against him had been removed from his record, the court noted that section 32(1) of the 2008 Judiciary Act provided for three kinds of disciplinary measures, namely: (i) less serious measures, (ii) serious measures and (iii) very serious measures. In the court's view, section 33(6) of the 2008 Judiciary Act provided that all *less serious* and *serious* disciplinary measures were to be removed from the record of the judge concerned upon the expiry of the relevant time-limits; however, it did not provide for the removal of *very serious* disciplinary measures, such as dismissal from office. The court also cited section 150 § 3 of the Status of Judges and Prosecutors Act (Law no. 96/2016, as amended – see paragraph 54 below), which governed the matter after the repeal of the 2008 Judiciary Act and which provided that the disciplinary measure of dismissal from office could not be removed from a judge's record. The court therefore concluded that the 1997 disciplinary measure against L.D. had not been removed from his record.

23. Lastly, the court also stated that had L.D.'s dismissal from his office in 1997 been known to the domestic authorities, it would have disqualified him from being appointed as an SAC judge.

2. Second-instance judgment

24. Following an appeal lodged by L.D., on 8 March 2021 the Anti-Corruption and Organised Crime Court of Appeal upheld the first-instance judgment, essentially reiterating the same reasons.

25. The appellate court stated in particular that:

> "The content of the application/request [lodged by L.D. for a position on the SAC] in this case is important and carries consequences, as the non-fulfilment of the formal criteria provided [in section 6(1) of the Vetting Act] leads to the disqualification of the candidate/applicant. This rule demonstrates the importance that the lawmaker attached to these criteria, which relate to the personal qualities that an applicant/candidate must possess in order to be appointed to the institutions [overseeing the] transitional re-evaluation of judges and prosecutors. These qualities/criteria, [which are] required by law, are important when cited before a public institution – all the more so in the case at hand, where the whole process of the transitional re-evaluation of judges and prosecutors is directly related to public trust in the justice [system] (which is the purpose of the creation of these institutions)"

26. The appellate court also held that:

> "... the fact that the bodies empowered by law for the verification of candidates to the transitional re-evaluation institutions of judges and prosecutors have not performed the relevant verifications in accordance with the legal requirements [...], does not exclude the liability of the defendant, who, intentionally and in full awareness has presented in his application a false circumstance, [thereby] hiding a disqualifying condition related

to the existence of a disciplinary measure of removal/dismissal from office imposed on him."

3. The Supreme Court's judgment

27. On 26 October 2021 the Supreme Court rejected as inadmissible a cassation appeal lodged by L.D. and in essence upheld the reasoning and conclusions of the lower courts.

28. The Supreme Court stated that a previous dismissal from an office disqualified a candidate from holding certain public functions and confirmed that disciplinary measures for very serious breaches were not removed from a judge's record with the passage of time. The court further found that:

> "69. ... [L.D.] deliberately provided false information in his application for the position of judge with the Special Appeal Chamber, for which position he [was deemed] qualified and [was later] appointed, precisely because of the untrue information that he had provided in the application form. If the petitioner [L.D.] had disclosed in his application his dismissal from his office in 1997 he would have risked being disqualified under the law [from being considered] for the positions [on the vetting bodies].
>
> 70. The failure of the relevant bodies under Law no. 84/2016 ... to verify the conditions that must be met by candidates for positions [on] the re-evaluation bodies does not absolve the applicant of responsibility for declaring false information in his application."

29. Further on, the Supreme Court stated:

> "78. It is understandable that the Law on the transitional re-evaluation of judges and prosecutors ... in setting out the criteria provided under Article 6, aimed to appoint ... to re-evaluation institutions [people] who enjoyed high moral and professional integrity."

30. One judge appended a dissenting opinion which argued that L.D.'s application for the position of SAC judge was merely a private document which could not be subject to forgery; he further submitted that, in any event, L.D.'s defence that he had believed that the disciplinary measure had been removed from his record was arguable, and that no criminal intent could therefore be inferred from the circumstances of the case.

31. In the dissenting judge's opinion, criminal courts were not competent to make a final determination that L.D.'s dismissal in 1997 disqualified him from holding the position of SAC judge; moreover, even assuming that the 1997 dismissal had disqualified L.D., his appointment as an SAC judge had only been possible thanks to the failure of the People's Advocate and Parliament to verify whether he had fulfilled the relevant criteria (and not to the application that L.D. had lodged with the People's Advocate).

II. THE VETTING PROCEEDINGS IN RELATION TO THE APPLICANT

A. Proceedings before the Independent Qualification Commission

32. The applicant was appointed to the post of prosecutor in 2003. Upon the entry into force of the Vetting Act in 2016 and his appointment as a member of the governing body of the prosecutor's office (namely, the High Prosecutorial Council), the applicant was added to a priority list of persons to be vetted.

33. On 27 November 2018 the IQC confirmed the applicant in his position. The IQC found that the applicant had not concealed any assets: it did find a number of inaccuracies in his annual declarations of assets, and the applicant was unable to demonstrate the lawful source of various payments totalling 819,812 Albanian leks (ALL – approximately 6,800 euros (EUR)) that he had received over an eleven-year period; however, in the IQC's view the size of those sums were insufficient to justify his dismissal. Moreover, the IQC concluded that the applicant had not had any inappropriate contact with individuals involved in organised crime and that no problematic issues had been found during his integrity background check. Lastly, the IQC found that there had been some circumstances that had called into question the applicant's professionalism and ethics; however, they had not constituted sufficient grounds for concluding that the applicant did not meet the minimum professional or ethical standards. Accordingly, the IQC referred those matters to the body in charge of disciplinary breaches for further verification.

34. Following an appeal by the Public Commissioner's Office against the IQC's decision, the case was allocated to the SAC, sitting as a bench of five judges (including L.D.).

B. Proceedings before the SAC

35. On 17 January 2020 the applicant – alleging, *inter alia*, that L.D. had been appointed to the SAC despite the fact that he had not met the statutory eligibility requirements (see paragraph 8 above and paragraph 50 below) – lodged a request that the SAC terminate L.D.'s term of office ("the first request"). On the same date, the applicant lodged a criminal complaint against L.D. alleging forgery (see paragraph 15 above). On 3 February 2020 the president of the SAC responded to the applicant by means of a letter indicating that the SAC did not have jurisdiction to examine the request in so far as it was related to events that had occurred prior to the appointment of L.D. as an SAC judge (*nuk ka per kompetencë dhe juridiksion shqyrtimin e kërkeses suaj ... pasi pretendimet tuaja i përkasin periudhës përpara emërimit të* [L.D.] *në funksionin e anëtarit të Kolegjit*).

36. Meanwhile, on 20 January 2020 the applicant lodged another request with the SAC on the basis of the same facts and arguments as those on which the first request had been based, whereby he requested that L.D. be excluded from examining his case ("the second request"). The applicant also pointed out that as a result of his criminal complaint against L.D. (see paragraph 15 above), the latter lacked impartiality to hear the applicant's case. On 5 February 2020 the SAC, sitting as a different bench from that which was examining the merits of the applicant's re-evaluation process, refused the second request on the same grounds as those set out in the previous paragraph – namely, that the SAC did not have jurisdiction to examine the request in so far as it related to events that had occurred prior to the appointment of the SAC's members. It also concluded that the applicant's criminal complaint against L.D. did not impact his impartiality to hear the case.

37. On 7 February 2020 the applicant lodged a constitutional complaint with the Constitutional Court requesting that the court declare unconstitutional Parliament's decision appointing L.D. to the SAC (see paragraph 14 above), as L.D. had not met the relevant eligibility criteria.

38. Subsequently, at a public hearing of 11 February 2020 before the SAC, the applicant requested that the vetting proceedings against him be stayed until the Constitutional Court had delivered a decision on his complaint and until the criminal proceedings against L.D. (which at the time were ongoing) had come to an end. The SAC refused the request.

39. On 27 February 2020 the SAC, after considering the parties' written submissions and undertaking a fresh reassessment of the evidence in the case file, overturned the IQC's decision and dismissed the applicant from his office with immediate effect. The SAC held that, on the basis of a "financial analysis" that it had conducted, the applicant had made an inaccurate and insufficient declaration of the assets belonging to him and persons related to him. It further found that, owing to a commercial agreement entered into by the applicant and a petrol company, there had been a conflict of interest with his position as sitting prosecutor that had undermined the public's trust in the justice system.

40. Two judges appended a concurring opinion to the SAC's decision, arguing that they disagreed with the weight that the majority had granted to the applicant's inaccurate declarations in respect of a car and a garage that he had purchased in the course of his career.

C. Constitutional Court's decision

41. In response to the applicant's complaint (see paragraph 37 above), the Constitutional Court adopted decision no. 62 of 29 April 2020 rejecting as inadmissible the applicant's challenge against L.D.'s appointment to the SAC.

42. In so far as the complaint had been based on paragraph (e) of Article 131 § 1 of the Constitution, which provided the Constitutional Court's jurisdiction to verify the eligibility and appointment of officers of constitutional bodies (see paragraph 45 below), the court held that individuals did not have standing to initiate such a constitutional review. It accordingly concluded that the applicant's challenge against the appointment of a member of the SAC was incompatible *rationae personae* with the Constitution.

43. In so far as the applicant had complained under paragraph (f) of Article 131 § 1 of the Constitution (ibid.) that L.D.'s appointment to the SAC in breach of domestic law had violated the applicant's individual right to a "tribunal established by law" in the course of the vetting proceedings, the Constitutional Court dismissed the complaint, reasoning as follows:

> "20. Returning to the present case, the [Constitutional Court's] Bench notes that the applicant alleges a violation of his right to a fair hearing by virtue of an act undertaken by a public authority before the end of the proceedings before the SAC, and, consequently, does not raise any claim against the final outcome of the [vetting] process. He challenged ... the appointment [of L.D. to the SAC] and [requested] the partial invalidation of the decision of the Parliament which appointed L. D. as a member of the SAC.
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> 21. The Constitutional Court has emphasised that the right to fair hearing, including complaints related to a tribunal established by law, is guaranteed during a legal or judicial process, in connection with the final result ["*ne funksion të rezultatit përfundimtar*"] which generates concrete and direct consequences for applicants as holders of procedural and substantive constitutional rights. The Bench considers that in the process of transitional re-evaluation too, the procedural rights of the individuals being re-evaluated should be guaranteed within the judicial process conducted by the Special Appeal Chamber, according to the competencies assigned to them by the Constitution and the law.
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> ...
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> 23. Furthermore, the Bench notes that the jurisdiction of the Constitutional Court in reviewing the individual constitutional complaint of the applicant in respect of his re-evaluation process as a prosecutor, is limited by the powers that the Constitution itself, in its annex, has conferred to the re-evaluation bodies. Thus, Article 179/b, paragraph 2 of the Constitution provides that the re-evaluation process, which is carried out by the IQC and the SAC, will be based on the principle of a fair hearing as well as respect for the fundamental rights of the individuals being re-evaluated.
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> ...
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> 24. The Bench reiterates that the constitutional procedural rights [...], including the right to a "tribunal established by law", have been guaranteed by the Constitution to the individuals being re-evaluated, by virtue of the judicial process carried out by the SAC and, subsequently, by virtue of the possibility of exercising the right to complain to the European Court of Human Rights. In view of the powers of the SAC to hear appeals against the decisions of the IQC, the court has held that this [appeal] process includes a review of the compatibility of the proceedings with the Constitution ... "

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. RELEVANT DOMESTIC LAW

A. Constitution

44. The relevant parts of Articles 127 and 128 of the Constitution, as amended in 2016 read as follows:

"**Article 127**

1. The term of Constitutional Court judges shall end when:

...

d) it is established that he/she fails to comply with the eligibility and incompatibility requirements;

...

Article 128

...

2. Disciplinary proceedings against a judge [of the Constitutional Court] shall be conducted by the Constitutional Court, which shall order the dismissal of that judge if he or she:

...

b) has been convicted by a final court judgment of the commission of a crime."

45. Article 131 of the Constitution, as amended in 2015 and 2016, reads as follows:

"The Constitutional Court decides on:

...

(e) the matters related to the eligibility and incompatibilities in the exercise of their functions of the President of the Republic, the members of the Parliament, the officers of the bodies provided for in the Constitution, as well as [matters related] to the verification of their appointment.

...

(f) the complaints of individuals against any acts of the public authorities or judicial decisions violating the fundamental rights and freedoms guaranteed by the Constitution, after all effective legal remedies for the protection of those rights have been exhausted, unless otherwise provided by the Constitution."

46. Pursuant to Article 179/b § 5 of the Constitution, the SAC was established as one of the chambers of the Constitutional Court for a period limited to nine years.

47. Under Article C § 3 of the annex to the Constitution, judges of the SAC have the status of judges of the Constitutional Court.

48. Article F § 8 of the annex to the Constitution provides that persons being vetted have the right to complain (*ushtrojnë ankim*) to the European Court of Human Rights.

B. The Transitional Re-evaluation of Judges and Prosecutors Act (Law no. 84/2016 – "the Vetting Act")

49. Under section 4(6), the vetting bodies may apply the procedures provided in the Code of Administrative Procedure (Law no. 44/2015 as amended) or the Administrative Courts Act (Law no. 49/2012, as amended) when they deem it appropriate and when a certain procedure is not provided by the Constitution or the Vetting Act.

50. Section 6(1) (dh) of the Vetting Act reads:

"**Section 6 – Conditions for the appointment of members of the re-evaluation institutions**

1. An Albanian citizen may be appointed as a member of the [Independent Qualification] Commission or [Special] Appeal Chamber if he fulfils the below-stated conditions:

...

c) [he/she] has received positive evaluations of his professional skills, ethics and moral integrity, in the event that he has been subjected to previous evaluations;

...

dh) there has been no instance of the disciplinary measure of dismissal from office [undertaken] against him, or any other disciplinary measure that is still in force, pursuant to the legislation at the time of his applying [for a position on the vetting bodies];"

C. Status of Judges and Prosecutors Act (Law no. 96/2016, as amended)

51. The Status of Judges and Prosecutors Act, which entered into force on 22 November 2016, lays down the rules regarding the status of "magistrates" (*magjistratët*) – that is to say of judges and prosecutors.

52. Section 28 provides the conditions that an individual must meet in order to be appointed as a magistrate; point (dh) thereof provides that a person has the right to apply for admission to the initial training course for magistrates if he or she has not been dismissed from an office on disciplinary grounds and is not subject to any disciplinary sanction that is still in force.

53. Section 66 of the Act reads:

"**Section 66 - Ineligibility and Incompatibility**

1. The status of [a person as] a magistrate shall end on the day when the competent authority establishes the causes of ineligibility as follows:

a) The magistrate does not fulfil the criteria set out in Article 28 of this Act;

b) The appointment decision is invalid and does not generate any legal consequences and is declared null and void.

...

4. The [High Judicial] Council shall adopt a decision declaring the termination of a person's status [as a magistrate] no later than two weeks of it being notified of the grounds for [that person's] ineligibility or incompatibility.

5. The decision shall state the date of the ending of the person's status as magistrate, as set out in paragraph 1 or 2 of this Section.

6. Any action carried out by the magistrate following this date shall be invalid and it shall be deemed to have brought no legal consequences and be considered null and void."

54. Section 150(3) states that the disciplinary sanction of dismissal from office imposed on judges and prosecutors will not be expunged or erased from the register of disciplinary sanctions kept by the responsible authorities.

D. The 2008 Judiciary Act (Law no. 9877/2008 of 18 February 2008 on the organisation and functioning of the judiciary, as amended - in force until 22 November 2016)

55. The relevant sections of the 2008 Judiciary Act read as follows:

"**Section 32 - Disciplinary violations**

1. Disciplinary violations by judges are divided into the following categories:

a) very serious;

b) serious;

c) minor.

...

Section 33 - Disciplinary measures

1. Disciplinary measures are imposed in fair proportion to the violation committed.

2. The disciplinary measures that may be imposed are:

a) a reprimand;

b) a reprimand with a warning;

c) temporary demotion to a lower-level court for a period of one to two years;

ç) a transfer for one to two years to a court of the same level outside the judicial district to which the judge [in question] was appointed;

d) dismissal from office.

3. For very serious violations ... the disciplinary measure [of dismissal from office] provided in point "d" of subsection 2 of this section shall be imposed.

4. For serious violations ..., the disciplinary measures provided in points "c" and "ç" of subsection 2 of this section shall be imposed.

5. For minor violations ..., the disciplinary measure provided in points "a" and "b" of subsection 2 of this section shall be imposed.

6. For the purposes of disciplinary proceedings, serious disciplinary measures are removed [from the record of the person concerned] within three years of the date on which they were imposed if no other disciplinary measure has been imposed, while minor disciplinary measures are removed within two years from the date on which they were pronounced if no other disciplinary measure has been imposed."

E. Other relevant provisions

56. Article 494 § (ë) of the Code of Civil Procedure provides that a party may request the revision of a judgment that has become final in the event that the European Court of Human Rights finds a violation of the Convention or those of its protocols that have been ratified by Albania.

57. Paragraph 3 of section 71/c of the Constitutional Court Act (Law no. 8577 of 10 February 2000, as amended by Law no. 99/2016) provides that following a judgment by an international court finding that a decision of the Constitutional Court has violated a party's basic rights and freedoms, the interested party may apply for the reopening of the proceedings in question before the Constitutional Court. Under paragraph 5(b) of that same section, such an application shall not be allowed if the international court granted just satisfaction but did not indicate that the domestic proceedings in question should be reopened.

58. The other relevant provisions of domestic law and practice have been set out in *Xhoxhaj*, cited above, §§ 93-209.

II. RELEVANT DOMESTIC PRACTICE

The Constitutional Court's case-law

59. By decision no. 59 of 23 December 2014 the Constitutional Court rejected a complaint lodged by several members of parliament who had sought, *inter alia*, that the court declare unconstitutional three decisions of Parliament dismissing the director – and subsequently appointing a new director – of the High Inspectorate for the Declaration and Audit of Assets and Conflicts of Interest (an independent administrative body). The court found, *inter alia*, that rather than being general regulatory acts the impugned acts had been individual decisions relating to the dismissal of a public officer; therefore, any assessment of their compatibility with the Constitution fell under the jurisdiction of the regular administrative courts, before which proceedings had indeed already been initiated by the interested party.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION AS REGARDS THE RIGHT TO A TRIBUNAL ESTABLISHED BY LAW ON ACCOUNT OF L.D.'S SITTING ON THE SPECIAL APPEAL CHAMBER BENCH

60. The applicant complained under Article 6 § 1 of the Convention that his civil rights and obligations had not been determined by a "tribunal established by law", given that L.D. (who had sat on the SAC bench that had heard the applicant's case) had been appointed to office in violation of domestic law.

61. The relevant part of Article 6 § 1 of the Convention reads as follows:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

A. Admissibility

1. The parties' submissions

62. The Government submitted that according to the well-established case-law of the Constitutional Court (see paragraph 59 above), the constitutionality of individual (non-regulatory) acts – including Parliament's decision to appoint the SAC member at issue in the applicant's case – should have been challenged in the regular administrative courts rather than the Constitutional Court. Given that the applicant had failed to initiate such proceedings, in the Government's view, he had failed to exhaust the available domestic remedies.

63. In addition, the Government stated that the applicant's complaint was manifestly ill-founded.

64. The applicant submitted that he had exhausted the available domestic remedies by raising the issue of the unlawful appointment of judge L.D. separately before, respectively, the SAC and the Constitutional Court, both of which had declined to examine his allegations. He argued that the administrative courts had no jurisdiction to rule on whether a judge had been appointed to the SAC in accordance with the law and pointed out that the constitutional case-law cited by the Government concerned a challenge against the appointment of an officer to an administrative body, and was therefore not relevant to the instant case.

2. The Court's assessment

65. As a preliminary remark, the parties did not dispute, and the Court agrees, that Article 6 § 1 of the Convention applicable under its civil head to

the proceedings in respect of the vetting of the applicant (see *Xhoxhaj v. Albania*, no. 15227/19, § 288, 9 February 2021).

66. Turning to the exhaustion of domestic remedies, the Court reiterates that the rule referred to in Article 35 § 1 of the Convention obliges those seeking to bring a case against the State before an international judicial body to use first the remedies provided by the national legal system, thus dispensing States from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal systems. In order to comply with the rule, normal recourse should be had by an applicant to remedies that are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17135/11 and 29 others, § 70, 25 March 2014).

67. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time. Once this burden has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from this requirement (ibid., § 77).

68. Turning to the present case, the Court notes that the Government did not respond to the applicant's specific contention that it was not for an administrative court of first instance to rule on the lawfulness of the appointment of a judge to the SAC, one of the highest courts in the country. The Court shares the applicant's doubts in this respect.

69. Be that as it may, the Court agrees with the applicant's argument that the case-law relied on by the Government does not appear to be relevant, as it concerned the dismissal and appointment by Parliament of an officer of an administrative body, whereas the applicant's complaint concerned a judge of the SAC, which is a judicial and constitutional body (see paragraph 59 above) whose judges have the status of judges of the Constitutional Court (see paragraph 47 above). Moreover, the Government did not cite any judgments delivered by an administrative court of first instance that had served as an effective remedy in situations comparable to that of the applicant.

70. Most importantly, the Court notes that the SAC and the Constitutional Court – in which the applicant brought proceedings in respect of this matter and which thus had the possibility to apply the allegedly well-established case-law cited by the Government – did not refer to that jurisprudence or point to the administrative court of first instance as a remedy to be used by the applicant. Neither did they identify any non-exhaustion issue in respect of the applicant's actions.

71. On the contrary, one of the reasons referred to by the Constitutional Court when rejecting the applicant's complaint was that the applicant's right to a "tribunal established by law" was to be guaranteed in the course of vetting proceedings conducted before and by the SAC (see §§ 21 and 24 of the Constitutional Court's judgment set out in paragraph 43 above), whose exclusive jurisdiction in this respect removed the matter from the ordinary jurisdiction of the general Constitutional Court. This conclusion reached by the Constitutional Court places in doubt the Government's stance that the applicant's complaint regarding his right to "a tribunal established by law" fell within the jurisdiction of the administrative courts.

72. Accordingly, the Court is unable to follow the Government's contention that the administrative court of first instance was an effective remedy in respect of the applicant's challenge to L.D.'s appointment to the SAC (see paragraph 67 above).

73. In view of the above, the Government's non-exhaustion plea is dismissed.

74. The Court notes that this complaint 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

75. The applicant submitted that the SAC bench that had heard his case had not constituted a "tribunal established by law" within the meaning of Article 6 § 1 of the Convention, as one of the judges, namely L.D., had not fulfilled the statutory eligibility conditions to be appointed to the SAC as a judge.

76. In particular, the applicant submitted that section 6(1) (dh) of the Vetting Act had provided that candidates who had been previously dismissed from an office could not be appointed as SAC judges; therefore, L.D. who had been dismissed in 1997 from his office as a judge of the District Court of Tirana had not fulfilled that condition and had consequently been appointed in violation of the law.

77. Moreover, the applicant contended that L.D. had failed to fulfil a number of other eligibility criteria relating to the length of his professional experience, the average grade that he had achieved during his law studies, his academic degrees and his command of the English language.

78. In view of the foregoing, the applicant maintained that the People's Advocate and Parliament should have screened candidates for the SAC more carefully and should have ensured that all members of the SAC possessed a high level of moral and professional integrity, given their power to decide on

the termination of the careers of magistrates who had served for many years within the justice system. In the applicant's opinion, that had been the only way to ensure that the vetting process was lawful and trustworthy in the eyes of both the people and of the magistrates.

(b) The Government

79. The Government disputed the applicant's assertion that there had been a violation of the "tribunal established by law" requirement under Article 6 § 1 of the Convention.

80. They argued that given that L.D. had concealed the fact that he had not met the eligibility criteria set forth in section 6(1) (dh) of the Vetting Act, the Peoples' Advocate and IMO had had no reason to conduct a thorough inquiry into his career history. Similarly, L.D. had concealed his previous dismissal when asked specifically by the *ad hoc* Parliamentary commission if he had ever been dismissed from any post; therefore, Parliament could not be criticised for having appointed L.D. to the SAC. In the Government's view the circumstances prohibiting (*fakti ndalues*) L.D.'s appointment to the SAC had only become known at a later stage and Parliament had not acted arbitrarily or intentionally in appointing L.D. to the SAC.

81. The Government further argued that the present case should be distinguished from the case of *Guðmundur Andri Ástráðsson v. Iceland* ([GC], no. 26374/18, 1 December 2020), as there had been no political interference in the appointment of L.D. Moreover, they argued that, generally speaking, the rules governing the appointment of L.D. to the SAC had been complied with, whereas the breach alleged by the applicant had not been of significant gravity; therefore, there had been no breach of any fundamental rule concerning the procedure for appointing judges.

82. As to whether the applicant's allegations had been addressed by the domestic authorities, the Government referred to the requests lodged by the applicant with the SAC (see paragraphs 35 and 36 above), his constitutional and criminal complaints and the disciplinary proceedings against L.D., submitting that it was clear that the domestic authorities had duly addressed the applicant's allegations.

2. The Court's assessment

(a) Regarding the effect of L.D.'s earlier dismissal from office on his subsequent appointment to the SAC

(i) General principles

83. In its judgment in the case of *Guðmundur Andri Ástráðsson* (cited above, § 218 et. seq.) the Grand Chamber of the Court clarified the scope of, and the meaning to be given to, the concept of a "tribunal established by law". The Court analysed the individual components of that concept and considered

how they should be interpreted so as to best reflect its purpose and, ultimately, ensure that the protection it offered was truly effective.

84. As regards the notion of a "tribunal", in addition to the requirements arising from the Court's settled case-law, the Court emphasised the paramount importance of a rigorous process for the appointment of judges to ensure that the most qualified candidates – in terms of both technical competence and moral integrity – are appointed to judicial posts. The Court noted that the higher a tribunal is placed in the judicial hierarchy, the more demanding the applicable selection criteria should be. In the Court's view, such merit-based selection not only ensures the technical capacity of a judicial body to deliver justice as a "tribunal", but it is also crucial in terms of ensuring public confidence in the judiciary (ibid., § 222).

85. As regards the term "established", the Court found that the process of appointing judges necessarily constituted an inherent element of the concept "established by law" regard being had of its fundamental implications for the proper functioning and the legitimacy of the judiciary in a democratic State governed by the rule of law. In the Court's view, breaches of the law regulating the judicial appointment process might render the participation of the relevant judge in the examination of a case "irregular" (ibid., §§ 226-227).

86. As regards the phrase "by law", the Court clarified that the third component also meant a "tribunal established in accordance with the law". It observed that the relevant domestic law on judicial appointments should be couched in unequivocal terms, to the extent possible, so as not to allow arbitrary interferences in the appointment process (ibid., §§ 229-230).

87. Subsequently, the Court noted that although the right to a "tribunal established by law" was a stand-alone right under Article 6 § 1 of the Convention, a very close interrelationship had been formulated in the Court's case-law between that specific right and the guarantees of "independence" and "impartiality". The institutional requirements of Article 6 § 1 shared the ordinary purpose of upholding the fundamental principles of the rule of law and the separation of powers (ibid., §§ 231-233).

88. In this connection the Court also noted that the principle of the rule of law encompasses a number of other equally important and potentially countervailing principles (ibid., §§ 237-240). These include in particular legal certainty and respect for the force of *res judicata*, as well as the principle of irremovability of judges during their term of office; departures from those principles can be justified only in exceptional and well-defined circumstances. It is for the national authorities in each case to "determine whether there is a pressing need – of a substantial and compelling character – justifying a departure" from the principles of legal certainty and public confidence in the judiciary "in the particular circumstances of a case" (ibid. § 240).

89. In order to assess whether the irregularities in a given judicial appointment procedure were of such gravity as to entail a violation of the

right to a tribunal established by law, and whether the balance between the competing principles had been struck by State authorities, the Court developed a threshold test made up of three criteria, taken cumulatively (ibid., § 243).

90. In the first place, there must, in principle, be a manifest breach of the domestic law, in the sense that the breach must be objectively and genuinely identifiable. In determining this matter, the Court will cede to the national courts' interpretation as to whether there has been a breach of the domestic law, unless the breach is "flagrant" – that is, unless the national courts' findings can be regarded as arbitrary or manifestly unreasonable. However, the absence of such a breach does not rule out the possibility of a violation of the right to a tribunal established by law, since a procedure that is seemingly in compliance with the domestic rules may nevertheless produce results that are incompatible with the object and purpose of that right. If this is the case, the Court must pursue its examination under the second and third limbs of the test set out below, as applicable, in order to determine whether the results of the application of the relevant domestic rules were compatible with the specific requirements of the right to a "tribunal established by law" within the meaning of the Convention (ibid., §§ 244-245).

91. Secondly, the breach in question must be assessed in the light of the object and purpose of the requirement of a "tribunal established by law" – namely, to ensure the ability of the judiciary to perform its duties free of undue interference and thereby to preserve the rule of law and the separation of powers. Accordingly, breaches of a purely technical nature that have no bearing on the legitimacy of the appointment process must be considered to fall below the relevant threshold. Conversely, breaches that wholly disregard the most fundamental rules in the appointment procedure (such as the appointment of a person as judge who did not fulfil the relevant eligibility criteria) or breaches that may otherwise undermine the purpose and effect of the "established by law" requirement (as interpreted by the Court) must be considered to contravene that requirement (ibid., § 246).

92. Thirdly, the review conducted by national courts, if any, as to the legal consequences – in terms of an individual's Convention rights – of a breach of a domestic rule regarding judicial appointments plays a significant role in determining whether such a breach amounted to a violation of the right of access to a "tribunal established by law", and thus forms part of the test itself. An assessment by the national courts of the legal effects of such a breach must be carried out on the basis of the relevant Convention case-law and the principles derived therefrom (ibid., §§ 248 and 250).

93. The Court has applied the above test in a number of recent cases pertaining to the requirement under Article 6 § 1 of the Convention that a tribunal be established by law (see, most recently, *Advance Pharma sp. z o.o v. Poland*, no. 1469/20, § 349, 3 February 2022; *Dolińska-Ficek and Ozimek v. Poland*, nos. 49868/19 and 57511/19, § 353, 8 November 2021;

Reczkowicz v. Poland, no. 43447/19, § 280, 22 July 2021; and *Xero Flor w Polsce sp. z o.o. v. Poland*, no. 4907/18, § 289, 7 May 2021).

(ii) Application of the above-noted principles to the instant case

(α) Whether there was a manifest breach of the domestic law

94. In determining whether there was a breach of domestic law as a result of the appointment of judge L.D. to the SAC, the Court must identify the domestic authorities' position in respect of this question. In this connection the Court notes that the SAC and the Constitutional Court declined to examine this issue (see paragraphs 35, 36 and 41 above), whereas the disciplinary proceedings against L.D. were undertaken on the grounds that he had been convicted of a criminal offence after his appointment to office (see paragraph 16 above); therefore, those proceedings did not determine the distinguishable question of whether L.D.'s initial appointment had been in accordance with the law. As regards the criminal proceedings against L.D., those concerned the question of whether he had committed forgery in his application for the position of SAC judge; again, this question is distinguishable from the question of whether his appointment was lawful. Admittedly, in the examination of the *mens rea* element of the forgery charge against L.D. the domestic criminal courts made a number of statements on whether L.D. had fulfilled the requirements of domestic law in respect of his application for the position of SAC judge. However, it does not appear that the ordinary courts, including the Supreme Court, had the power to pass judgment on the lawfulness of the appointment (*zgjedhshmerinë*) of L.D. who, as a SAC judge, had the status of a Constitutional Court judge. Furthermore, those statements were limited to the question of L.D.'s criminal liability. Accordingly, the Court considers that the question of whether there had been a manifest breach of domestic law in the appointment of L.D. to the SAC was not answered by domestic courts. The Court may nevertheless take into consideration the contextual findings made by the domestic courts in this respect.

95. In assessing the question of whether there was indeed a manifest breach of domestic law the Court will take note of the following circumstances, which were not disputed by the parties. Firstly, section 6(1)(dh) of the Vetting Act provided that a candidate who had been subject to the disciplinary measure of dismissal from office at the time of his application for the position of SAC judge could not be appointed to that position (see paragraph 50 above). Accordingly, the appointment to the SAC of a candidate who failed to fulfil that condition would be contrary to domestic law. Secondly, L.D. was subjected to the disciplinary measure of dismissal from office in 1997 for a breach of the law and for incompetence (see paragraph 8 above).

96. Another undisputed matter between the applicant and the Government was that the disciplinary measure against L.D. continued to be in force – that is to say it had not been removed from his record. Although the Supreme Court took the view that the disciplinary measure against L.D. had not been removed from his record, the Court reiterates that those findings were limited to the purpose of assessing L.D.'s criminal liability in relation to statements made in his application for the SAC position, rather than the lawfulness of his original appointment by Parliament as such. The latter question would turn on the interpretation of the relevant rules set out by Albanian law on the removal from judges' records of disciplinary offences committed by them, read together with section 6(1) (dh) of the Vetting Act. In addition, section 6(1)(c) of the Vetting Act (see paragraph 50 above) mandated that candidates for the position of judge on one of the vetting bodies should have obtained in the course of their careers positive evaluations of their professional skills and ethics and of their moral integrity, which seems hardly compatible with prior dismissal for "breach of the law and incompetence."

97. While it is not for the Court to render a definitive interpretation of national law, especially in the absence of clear and authoritative pronouncements by the national courts, it seems clear that L.D.'s dismissal from office in 1997 as a judge of the District Court of Tirana raised serious questions as to the lawfulness of his appointment by Parliament to the position of SAC judge, which was furthermore specifically challenged by the applicant during the domestic proceedings. The Court will therefore proceed on the basis that the applicant's claim in this regard was arguable and sufficiently serious as to have triggered an obligation on the part of the national courts to consider the question.

98. In view of the foregoing, the Court concludes that the applicant made out a serious and arguable claim of a manifest breach of domestic law in the appointment of L.D. to the SAC.

(β) Whether the breach of the domestic law pertained to a fundamental rule of the procedure for appointing judges

99. When determining whether a particular defect in the judicial appointment process was of such gravity as to amount to a violation of the right to a "tribunal established by law", regard must be had, *inter alia*, to the purpose of the law purportedly breached – that is, whether it sought to prevent any undue interference by the executive or the legislature with the judiciary, and whether the breach in question undermined the very essence of the right to a "tribunal established by law" (see *Guðmundur Andri Ástráðsson*, cited above, §§ 226 and 255). In this connection, the Court has already noted that eligibility requirements for the appointment of judges are considered fundamental rules whose breach undermines the purpose and effect of the "established by law" requirement (see, ibid., § 246).

100. Accordingly, the Court will determine this point in the light of the purpose of the rule that was purportedly breached – namely section 6(1) (dh) of the Vetting Act. The Government's argument that the other rules governing the appointment of the judges of the SAC had been complied with carries limited weight in this assessment.

101. The Court notes that, except for the above-noted argument that the other rules governing the appointment of judge L.D. to the SAC had been observed, the Government did not submit any comments regarding the purpose of section 6(1)(dh) of the Vetting Act; neither did they put forward any reasons as to why that rule should be considered to be a technical rule, a breach of which would not be of any significant gravity.

102. On the other hand, the applicant submitted – and the Court agrees – that the rule in question aimed at upholding the legitimacy of and public trust in the vetting process. The Court is also inclined to agree with the domestic courts, which – in so far as they approached this question within the context of the criminal proceedings against L.D. – made similar statements in respect of the importance of the eligibility requirement provided under section 6(1)(dh) of the Vetting Act (see paragraphs 25 and 29 above). It seems obvious that the appointment of a person who does not meet the statutory criteria for a certain judicial office is capable of undermining the legitimacy of the judicial function in question. In the Court's view, the importance of the statutory eligibility criteria for judges is also apparent from the Status of Judges and Prosecutors Act, which provides that a failure to fulfil the eligibility criteria leads to the termination of a magistrate's term of office as of the date of the decision recognising such failure, and irrespective of the passing of time since the original appointment (see paragraph 53 above).

103. The Court would further note that as far as vetting proceedings are concerned the SAC is the highest tribunal in the country. Accordingly, the appointment to the SAC of a candidate who had been previously dismissed from an office for a breach of the law and for incompetence (see paragraphs 9 and 51 above) is difficult to reconcile with the requirement that the higher a tribunal is placed in the judicial hierarchy, the more demanding the applicable selection criteria should be (see paragraph 84 above).

104. Although they did not contest the assertion that L.D. had been appointed in contravention of section 6(1) (dh) of the Vetting Act, the Government contended that there had been no breach of the applicant's right to a "tribunal established by law", as L.D. had not disclosed the disciplinary measure taken against him and the authorities had had no knowledge thereof. They further maintained that, contrary to circumstances in the case of *Guðmundur Andri Ástráðsson*, in the instant case the domestic authorities had not interfered with L.D.'s appointment procedure in a way that would have placed his independence in question. The Court will therefore address these arguments in turn.

105. As regards the Government's argument that the authorities' ignorance of L.D.'s dismissal in 1997 from his office as a judge of the District Court of Tirana must be seen as excluding the possibility that they had violated the applicant's right to a "tribunal established by law", the Court notes that States have a general obligation to organise their legal systems so as to ensure compliance with the requirements of Article 6 § 1 (see, *mutatis mutandis*, *Krastanov v. Bulgaria*, no. 50222/99, § 74, 30 September 2004). Therefore, it fell to the domestic authorities to employ all the means available to them to ensure that judges of the SAC fulfilled the statutory requirements for their position. In this connection, the Court agrees with the domestic courts' statements that the relevant authorities were under an obligation to verify that L.D.'s application for the position of SAC judge complied with the statutory requirements for his position (see paragraphs 26 and 28 above).

106. Furthermore, the Government did not refer to any difficulties in verifying whether L.D. had been subjected to the disciplinary measure of dismissal from office in the past. On the contrary, that information was a matter of official record and had been cited no later than in 2016 in disqualifying L.D. from the position of judge of the District Court of Tirana (see paragraph 9 above). It is furthermore relevant that a member of the *ad hoc* parliamentary committee asked L.D. a question specifically related to his earlier departure from the judiciary (see paragraph 13 above).

107. As regards the argument that L.D.'s independence *vis-à-vis* the domestic authorities is not in question, the Court notes that the requirements that a tribunal be "established by law" and "independent" constitute stand-alone rights. The fact that they are at times examined in conjunction with one another on account of their close connection does not mean that possible compliance with the "independence" requirement rules out a violation of the requirement that a tribunal be "established by law" (see paragraph 87 above).

108. In view of the foregoing, the Court considers that the question of judge L.D.'s fitness for office concerned a fundamental rule in respect of the appointment of SAC judges.

(γ) Whether the allegations regarding the right to a "tribunal established by law" were effectively reviewed and remedied by the domestic courts

109. The Government submitted that, unlike in the case of judges of the regular Constitutional Court, there is no specific provision under Albanian law providing for the early termination of the term of office of an SAC judge on the grounds that he/she failed to meet the eligibility conditions. At the same time, they referred to the combined effect of the proceedings before the SAC, the Constitutional Court and the criminal courts, arguing that the domestic authorities had reviewed the applicant's allegations regarding the SAC not being a "tribunal established by law" and had remedied his complaints.

110. In the request that he lodged on 17 January 2020 (see paragraph 35 above) while his vetting case was pending before the SAC, the applicant provided that body with relevant factual and legal information supporting his arguable claim that L.D. was not fit for judicial office owing to his failure to meet the eligibility criteria at the time of his original appointment (see paragraph 35 above). This notwithstanding, the Court has already found (see paragraph 94 above) that no domestic authority examined – let alone remedied – the question of whether L.D. had been appointed to the SAC in accordance with domestic law. In particular, the domestic authorities did not adopt a clear position as to whether L.D.'s term of office could be brought to an end (and if so by which authority), or whether he could be excluded from examining the applicant's case on account of his failure to comply with the relevant eligibility criteria.

111. In this connection the constitutional and disciplinary decisions were incapable of remedying the applicant's complaint, as those proceedings came to an end after the applicant had been dismissed by a final and unappealable judgment of the SAC.

112. The only decision that was delivered before the applicant's dismissal was that of the SAC, which on 5 February 2020 declined to examine the applicant's requests for the exclusion of L.D. from the panel hearing his case on the grounds that it lacked jurisdiction to consider questions related to his appointment to that office (see paragraph 36 above). The SAC's approach appears to be inconsistent with the Constitutional Court's subsequent decision finding that it was for the SAC, as a separate chamber of the Constitutional Court, to ensure compliance with the applicant's right to a tribunal established by law. Lastly, in its decision dismissing L.D. from his office, the Disciplinary Commission of the SAC found that he had the status of a Constitutional Court judge, and was liable to be dismissed from office under the same conditions as those that applied to a Constitutional Court judge under Article 128 § 2 (b) of the Constitution (see paragraph 44 above). However, the SAC appears to have deemed, for reasons not articulated in its decision of 5 February 2020, that the related Article 127 § 1 (d) of the Constitution – which provides for the termination of the term (removal from office) of a Constitutional Court judge on the grounds that he or she does not comply with the statutory eligibility requirements (ibid.) – was not applicable to SAC judges.

113. Finally, an irregularity in the appointment procedure of a judge may not necessarily be open to a challenge by an individual relying on the "tribunal established by law" right in an indefinite or unqualified manner. With the passage of time, the preservation of legal certainty and the security of judicial tenure will carry increasing weight in relation to the individual litigant's right to a "tribunal established by law" in the balancing exercise that must be carried out (see *Guðmundur Andri Ástráðsson*, cited above, §§ 252

and 284). However, no balancing of any kind was carried out by the domestic courts in the present case.

114. The combined effect of the domestic proceedings – in particular, the suspension and subsequent dismissal of L.D. from the SAC on the basis of his criminal conviction – was able to prevent future similar allegations. However, the Court does not consider that those proceedings remedied the applicant's complaint.

(δ) Conclusion

115. The Court has established that there was an arguable claim of a manifest breach of a fundamental rule of the domestic law that had adversely affected the appointment of L.D. as a SAC judge.

116. In the light of the foregoing, and having regard in particular to the failure of the national courts to properly consider the relevant Convention questions raised by the applicant, the Court concludes that there has been a violation of Article 6 § 1 of the Convention owing to the fact that L.D. sat on the SAC bench that examined the applicant's case.

(b) As regards the alleged failure of L.D. to fulfil the other statutory eligibility criteria

117. Having regard to the nature and scope of the violation found under Article 6 § 1 of the Convention in respect of the applicant's right to a tribunal established by law (see paragraph 116 above), the Court decides to dispense with the examination of the admissibility and merits of this part of the complaint (see paragraph 77 above).

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

118. The applicant submitted that he had had no effective remedy before a national authority before which to challenge his allegedly unlawful dismissal by the SAC. In his view, there had, accordingly, been a violation of Article 13 of the Convention.

119. The Government referred to *Xhoxhaj* (cited above, § 416) and submitted that the SAC had exercised its full jurisdiction in assessing all the factual and legal arguments submitted by the applicant. They further argued that adding a third level of jurisdiction to the vetting proceedings would have complicated and prolonged the process.

120. The Court notes that the applicant's complaint is directed not against the authorities' failure to deal with the substance of his complaint under Article 6 § 1 regarding the "tribunal established by law" aspect, but rather towards the general absence of the possibility to lodge an appeal against the decision of the SAC. Accordingly, the complaint falls to be considered in conjunction with the complaint under Article 8 of the Convention that the

applicant's dismissal was in violation of his right to private life (see paragraph 127 below).

121. In this connection, the Court reiterates that where a violation of the Convention is alleged to have been committed by the highest court or authority, the application of Article 13 is subject to an implied limitation since it cannot be construed as requiring that special bodies be set up for the purpose of examining complaints against decisions by the highest courts (see *Stoyanova-Tsakova v. Bulgaria*, no. 17967/03, § 32, 25 June 2009).

122. Turning to the present case, the Court notes that the SAC is the court of last resort in respect of vetting proceedings. It follows that this complaint is manifestly ill-founded and must be rejected, in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

123. The applicant lodged a number of additional complaints under Article 6 § 1 of the Convention.

124. In the first place, he complained that the SAC had not been a tribunal established by law on account of the additional non-compliance of judge A.H.'s appointment with the statutory eligibility criteria. In particular, in the applicant's view, judge A.H. lacked the required length of professional experience, had achieved an average grade of only eight out of ten during his academic studies, had not possessed any academic titles, had not had any study experience outside Albania and had not had a very good command of the English language, as required by law.

125. Secondly, the applicant complained that judges L.D. and A.H. had lacked the necessary impartiality to hear the applicant's case as he had requested that their terms of office be terminated and had lodged a criminal complaint against L.D.

126. Thirdly, the applicant also complained that the proceedings before the SAC had been unfair owing to that court's failure to disclose to the applicant a copy of the "financial analysis" on which it had relied to dismiss him and which had amounted to a breach of the principle of adversarial proceedings.

127. Lastly, relying on his right to respect for his private life under Article 8 of the Convention, the applicant alleged that the SAC's decision to dismiss him had amounted to an interference with that right, which had been neither in accordance with the law nor proportionate to the legitimate aims pursued.

128. The Government contested the above complaints and argued that there had been no violation of those provisions of the Convention.

129. Having regard to the nature and scope of the violation found under Article 6 § 1 of the Convention in respect of the applicant's right to a tribunal

established by law (see paragraph 116 above), the Court decides to dispense with the examination of the admissibility and merits of these complaints.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

130. 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

131. The applicant asked the Court to award him pecuniary damages in an amount equal to his monthly salary (approximately 2,200 euros (EUR)) covering the period from the date of his dismissal until the date of his reinstatement in his position.

132. In respect of non-pecuniary damage, the applicant submitted that the damage to his image and reputation, as well as the emotional stress that he had suffered, could not be assigned a monetary value. He accordingly asked the Court to award the symbolic amount of EUR 1.

133. The Government submitted that the claims were unreasonable.

134. The Court notes that it has found a violation of the right to "a tribunal established by law" under Article 6 § 1 of the Convention without expressing any opinion on the merits of his dismissal. The Court cannot speculate on what the outcome of the vetting proceedings against the applicant would have been had the requirements of Article 6 § 1 of the Convention been complied with and it does not discern any causal link between the procedural violation that it found and the pecuniary damage alleged; it therefore rejects this claim.

135. In respect of non-pecuniary damage, the Court considers that the finding of a violation of Article 6 § 1 of the Convention constitutes adequate just satisfaction for the purposes of the Convention.

B. Costs and expenses

136. The applicant did not submit any claims for costs and expenses. The Court therefore does not make an award in this respect.

V. APPLICATION OF ARTICLE 46 OF THE CONVENTION

137. Article 46 of the Convention provides:

> "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."

A. Applicable principles

138. The Court reiterates that under Article 46 of the Convention the Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers. It follows, *inter alia*, that a judgment in which the Court finds a breach of the Convention or the Protocols thereto 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, the 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 to redress as far as possible the effects (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII, and *Stanev v. Bulgaria* [GC], no. 36760/06, § 254, ECHR 2012).

139. The Court further notes that its judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order in order to discharge its obligation under Article 46 of the Convention (see, for instance, *Öcalan v. Turkey* [GC], no. 46221/99, § 210, ECHR 2005-IV), provided that such means are compatible with the conclusions and spirit of the Court's judgment (see, for instance, *Scozzari and Giunta*, cited above, § 249, and *Ilgar Mammadov v. Azerbaijan* (infringement proceedings) [GC], no. 15172/13, §§ 148-49, 29 May 2019). However, in certain special circumstances the Court has found it useful to indicate to a respondent State the type of measures that might be taken to put an end to the situation – often a systemic one – which has given rise to the finding of a violation (see, for instance, *Ilgar Mammadov*, cited above, § 153).

140. The Court does not have jurisdiction to order, in particular, the reopening of proceedings (see *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, § 89, ECHR 2009). Nevertheless, as stated in Recommendation No. R (2000)2 of the Committee of Ministers, the practice of the Committee of Ministers in supervising the execution of the Court's judgments shows that in exceptional circumstances the re-examination of a case or the reopening of proceedings has proved the most efficient, if not the only, means of achieving *restitutio in integrum* (see *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, § 48, 11 July 2017).

141. In a number of cases in which the Court has found a violation of the right to a tribunal established by law, it has indicated that the most appropriate form of redress would be a retrial or the reopening of domestic proceedings (see *Ilatovskiy v. Russia*, no. 6945/04, § 49, 9 July 2009; *Momčilović v. Serbia*, no. 23103/07, § 41, 2 April 2013; *Ezgeta v. Croatia*, no. 40562/12, § 49, 7 September 2017; *Gurov v. Moldova*, no. 36455/02,

§ 43, 11 July 2006; and *Zeynalov v. Azerbaijan*, no. 31848/07, § 41, 30 May 2013).

142. In other cases the Court has left it to the discretion of the domestic authorities as to whether to reopen proceedings (see, for example, *Chim and Przywieczerski v. Poland*, nos. 36661/07 and 38433/07, § 219, 12 April 2018, and *Dolińska-Ficek and Ozimek*, cited above, § 368) or has endorsed arrangements made by them aimed at the reconciliation of respect for individuals' rights under Article 6 § 1 of the Convention with the principles of legal certainty, respect for *res judicata* and other particular considerations related to the circumstances at hand (see *Advance Pharma sp. z o.o*, cited above, §§ 127 and 365).

143. Lastly, following the Court's judgment in the case of *Guðmundur Andri Ástráðsson* (cited above), the Court decided under Article 37 § 1 (c) of the Convention to strike out of its list of cases two similar applications against Iceland on the grounds that the respondent Government had acknowledged the violation complained of and that there existed a realistic possibility that the domestic proceedings would be reopened (see *Friðjón Björgvin Gunnarsson v. Iceland* (dec.), no. 48281/18, §§ 11-12, 2 June 2022, and *Haukur Sigurbjörn Magnússon v. Iceland* (dec.), no. 6696/19, §§ 11-12, 2 June 2022).

B. Application of those principles to the present case

144. In respect of general measures, the Court notes that L.D. was suspended from exercising his functions as an SAC judge on 24 July 2020 and permanently removed from that office on 31 May 2021 (see paragraph 114 above). Furthermore, the Court reiterates that the finding of a violation of the right to a tribunal established by law in the present case may not in itself be taken to impose on the respondent State an obligation under the Convention to reopen all similar cases that have since become res judicata under domestic law (see *Guðmundur Andri Ástráðsson*, cited above, § 314, and paragraph 88 above).

145. Turning to the individual measures, the Court notes at the outset that the vetting proceedings in respect of the applicant concerned primarily his own rights and obligations as a career prosecutor and did not have any implications for, at least directly, the rights and obligations of any third parties. Furthermore, it is clear that the outcome of those proceedings, which resulted in his immediate dismissal and the statutory imposition of a lifetime ban on his returning to the post of magistrate (see *Xhoxhaj*, cited above, § 363), had serious consequences for his professional career.

146. The Government stated that it was not entirely clear under domestic law whether there could be a reopening of the vetting proceedings.

147. On the one hand, they indicated that there was no specific provision in domestic law allowing for the reopening of vetting proceedings. They

suggested that this could have been a deliberate choice on the part of the legislature, as vetting proceedings were limited by time constraints and reopening them could complicate the process. They also stated that Article F § 8 of the annex to the Constitution, which provided that persons being vetted had the right to "appeal" (*ushtrojnë ankim*) to the Court, could be construed as indicative of the legislature's intention to exclude the possibility of reopening requests for proceedings that had been concluded by decisions of the SAC.

148. On the other hand, the Government referred to the State's obligation to abide by binding international law. They also pointed out that Article 494(ë) of the Code of Civil Procedure and section 71/c of the Constitutional Court Act (see paragraphs 49, 56 and 57 above) provided for the reopening of civil and constitutional proceedings, respectively, following a finding by the Court of a violation, subject to any other conditions stated therein. Those provisions could potentially serve as a basis for reopening the proceedings in question, and in such a case, in the Government's view, the SAC would be the body with jurisdiction to consider such requests.

149. The Court takes note of the Government's position that there might be a legal avenue for the applicant to seek the reopening of the proceedings. Accordingly, given the circumstances of the present case and to the extent that that might be possible under domestic law, the most appropriate form of redress for the violation of the applicant's right to a "tribunal established by law" under Article 6 § 1 of the Convention would be to reopen the proceedings, should the applicant request such reopening, and to re-examine the case in a manner that is keeping with all the requirements of Article 6 § 1 of the Convention.

150. Lastly, the applicant requested that the Court quash the SAC's decision of 27 February 2020 and order the Government to reinstate him immediately in his former office. In view of its jurisdiction (see paragraph 139 above) and the nature of the violation that was found in respect of the applicant's vetting proceedings, the Court refuses this request.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the complaint under Article 6 § 1 of the Convention concerning the applicant's right to a "tribunal established by law" admissible and the complaint under Article 13 of the Convention concerning the lack of an effective remedy against the decision of the SAC inadmissible;

2. *Holds*, unanimously, that there has been a violation of Article 6 § 1 of the Convention as regards the applicant's right to a "tribunal established by law";

3. *Holds*, by six votes to one, that there is no need to examine the remaining complaints under Articles 6 § 1 and 8 of the Convention;

4. *Dismisses*, unanimously, the applicant's claim for just satisfaction in respect of pecuniary damage;

5. *Holds*, by six votes to one, that the finding of a violation constitutes sufficient just satisfaction in respect of any non-pecuniary damage.

Done in English, and notified in writing on 4 October 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Registrar

Georges Ravarani
President

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

G.R.
M.B.

PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE SERGHIDES

I. Introduction

1. This case mainly concerns the applicant's complaint that his dismissal as a prosecutor by the Special Appeal Chamber was in breach of his right to a fair trial under Article 6 § 1 of the Convention. This was because the Special Appeal Chamber was not "a tribunal established by law", as one of the judges who sat on that Chamber and heard his case had been appointed to that position in violation of a statutory eligibility criterion.

It should be emphasised that in *DMD GROUP, a.s. v. Slovakia* (no. 19334/03, § 58, 5 October 2010) the Court held that "under Article 6 § 1 of the Convention a tribunal must always be 'established by law'" and that "this expression reflects the principle of the rule of law which is inherent in the system of protection established by the Convention and its Protocols".

2. To state my position as to the operative provisions of the judgment, I agree with points 1, 2 and 4, and I respectfully disagree with points 3 and 5. I will explain below the reasons for my disagreement.

II. Consequences of finding that there is not "a tribunal established by law"

3. In particular, I respectfully disagree with paragraph 129 of the judgment and the corresponding point 3 of its operative provisions, namely that because of the finding that there was not "a tribunal established by law", there is no need to examine the remaining complaints under Article 6 § 1 and Article 8 of the Convention. In my view, after the finding that there was not "a tribunal established by law", the alleged "remaining complaints" became immediately and automatically devoid of object and existence *ex tunc* and, therefore, they should have been rejected as inadmissible *ratione materiae*, by virtue of Article 35 §§ 3 (a) and 4 of the Convention. The lack of "a tribunal established by law" had two kinds of consequences regarding Article 6, firstly rendering the whole trial unfair, and secondly, rendering any other complaints under this provision *ratione materiae* inadmissible. On the other hand, the lack of any other guarantees of Article 6 may render the whole trial unfair but cannot render any other complaint under Article 6 *ratione materiae* inadmissible.

4. Indeed, the approach of the judgment in the present case is similar to the judgment in *Guðmundur Andri Ástráðsson v. Iceland* ([GC], no. 26374/18, § 295 and point 2 of the operative part, 1 December 2020), where, after finding that there had been no "tribunal established by law" – a guarantee provided in Article 6 – the Court decided by a majority that there was "no need to examine the remaining complaints under Article 6 § 1", that

is, the complaints alleging the lack of independence and impartiality of a tribunal.

5. However, in my partly dissenting opinion in *Guðmundur Andri Ástráðsson*, I disagreed with the majority that there was no need to examine the remaining complaints and I proposed that, after the finding that there was no tribunal established by law, the alleged "remaining complaints", namely those concerning the guarantees of an independent and impartial tribunal, became immediately and automatically devoid of object and existence *ex tunc* and, therefore, they should have been rejected as inadmissible *ratione materiae*, by virtue of Article 35 §§ 3 (a) and 4 of the Convention.[1] I also argued[2] that when there is no "tribunal", as was the finding of the Court in that case, because of the absence of a tribunal established by law, there is no noun and thus no object to which the adjectives "independent" and "impartial" can correspond, with the result that these adjectives become devoid of object and existence. All requirements of the right to a fair trial specified by Article 6 § 1 are indispensable, and without them that right cannot be secured. Nevertheless, the only free-standing requirement of Article 6 § 1 is that there must be a lawful tribunal. This requirement is a *central* feature of a fair trial as it refers to the *very essence* of the relevant right. All other requirements of Article 6 § 1 presuppose the fulfilment of this central demand, the establishment of a tribunal by law. In other words, the "independence" and "impartiality" requirements/guarantees are intrinsic and inseparable qualities related to the very existence of "a tribunal established by law". It is impossible to examine the qualities of a tribunal that does not exist, just as it is impossible to examine the qualities of a non-existent person or building. Therefore, any hope that a tribunal is independent and impartial will hinge on the fact that it is a tribunal established by law in the first place. The former qualities are dependent on the latter and cannot be left in a vacuum. Regrettably, the Court in *Guðmundur Andri Ástráðsson*, by finding that there was no need to examine the complaints of a lack of independence and impartiality, gave the impression that it was referring to the merits of those complaints, thus suggesting that they remained admissible. However, as submitted in this opinion, these complaints had become inadmissible and should have been rejected as such.

6. I had the opportunity to further explain and elaborate on the approach which I followed in *Guðmundur Andri Ástráðsson* and in the present case, in my dissenting opinion in *Angerjärv and Greinoman v. Estonia* (nos. 16358/18 and 34964/18, 4 October 2022 – thus, a judgment delivered on the same date as the present judgment). In brief, I submitted in that opinion that there should be a hierarchy of guarantees in Article 6 and that the guarantee of "a tribunal established by law" should be placed at the apex of

[1] See paragraph 4 of the opinion.
[2] Ibid., at paragraph 5.

the hierarchy.[3] I also submitted that, since the guarantees of the right to a fair trial under Article 6 are components of this right, the principle of effectiveness, in order to fulfil its aim, must assist in giving these guarantees – in the present case the guarantee of "a tribunal established by law" – their fullest weight and effect and their corresponding full consequences according to the norm of effectiveness.[4]

7. One issue remains to be examined in this connection, namely that of the consequences of the lack of the Article 6 guarantee of "a tribunal established by law" for the remaining complaints. It must be noted that the remaining complaints in *Guðmundur Andri Ástráðsson* were also complaints under Article 6 – in particular, the lack of the guarantees of the independence of a tribunal and of the impartiality of the tribunal. In the present case, however, the remaining complaints concerned both complaints under Article 6 and a complaint under Article 8 of the Convention. As is noted in paragraph 127 of the judgment, relying on his right to respect for his private life under Article 8 of the Convention, the applicant alleged that the Special Appeal Chamber's decision to dismiss him had amounted to an interference with that right, which had been neither in accordance with the law nor proportionate to the legitimate aims pursued. Hence, the question arises whether my approach in *Guðmundur Andri Ástráðsson*, namely that the other complaints under Article 6 were rendered inadmissible *ratione materiae*, also applies regarding the complaint under Article 8, which is a substantive right.

8. It should be made clear that the complaint under Article 8 could not be dissociated from the complaint that there was no tribunal established by law under Article 6. The alleged violation of Article 8 did not exist prior to the alleged violation of Article 6 (that is to say, that the Special Appeal Chamber was not a tribunal established by law), nor was it independent of that complaint. On the contrary, the complaint of a violation of the right to private life under Article 8 was a direct corollary of the violation of the right to a tribunal established by law under Article 6. Had the alleged violation of Article 8 pre-existed or been independent of the violation of Article 6, the issue would have been different.

9. So, in my view, the impact of the lack of the guarantee of "a tribunal established by law" on the Article 8 complaint would be the same as that of the other complaints under Article 6, thus rendering all of those complaints *ratione materiae* inadmissible and entailing their rejection. And given that all those remaining complaints are thus automatically inadmissible as a result of the finding that there is no tribunal established by law, it is not, in my view, correct or at least accurate to say, as the judgment does, that there is no need to examine those complaints. This apparent and automatic inadmissibility should have immediately been acknowledged and stated by the Court as such,

[3] See paragraph 28 of that opinion.
[4] See paragraphs 30-31 of that opinion.

and the Court should not simply have said that it was not necessary to examine the remaining complaints.

III. Finding a violation is not in itself adequate just satisfaction

10. I respectfully disagree with paragraph 135 of the judgment and the corresponding point 5 of its operative provisions, namely that the finding of a violation of Article 6 § 1 of the Convention constitutes adequate or sufficient just satisfaction for the purposes of the Convention, in particular in respect of any non-pecuniary damage. As I have also submitted in other opinions, Article 41 of the Convention, as worded, cannot be interpreted as meaning that the finding of a violation of a Convention provision could in itself constitute sufficient "just satisfaction to the injured party". This is because the former is a prerequisite for the latter, and one cannot take them to be the same (see paragraphs 5-9 of my joint partly dissenting opinions with Judge Felici in *Grzęda v. Poland* [GC] no. 43572/18, 15 March 2022; paragraph 2 of my partly dissenting opinion in *Assemblée chrétienne des Témoins de Jéhovah d'Anderlecht and Others v. Belgium*, no. 20165/20, 5 April 2022; and paragraph 9 of my partly dissenting opinion in *Abdi Ibrahim v. Norway* [GC], no. 15379/16, 10 December 2021).

Failure to award the applicant a sum in respect of non-pecuniary damage for the violation of his rights amounts, in my view, to rendering the protection of his right illusory and fictitious (see, to similar effect, the opinions referred to above). This runs counter to the Court's case-law to the effect that the protection of human rights must be practical and effective and not theoretical and illusory, as required by the principle of effectiveness which is inherent in the Convention (see *Artico v. Italy*, 13 May 1980, §§ 33 and 47-48, Series A no. 37).

11. Had the applicant not asked to be awarded the symbolic amount of EUR 1 in respect of non-pecuniary damage (see paragraph 132 of the judgment), and had I not been in the minority, I would have awarded the applicant a substantial amount in respect of non-pecuniary damage. However, since the issue concerns non-pecuniary damage and following the *non ultra petita* (not beyond the request) rule, I would have ultimately awarded him what he asked for, and I would have applied neither the admissibility criterion in Article 35 § 3 (b) (no significant disadvantage) nor the rule *de minimis non curat praetor* (the court is not concerned with trifles).

IV. Conclusion

12. In the light of the above, I conclude, regarding the points on which I differ from the majority, that: (a) by finding that there was not "a tribunal established by law", the remaining complaints were automatically rendered *ratione materiae* inadmissible, and therefore the Court should have reached

a conclusion to that effect and not left them undecided; and (b) that the applicant should have been awarded the symbolic amount which he asked for in respect of non-pecuniary damage.