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Citation
Lawson, R. A. (2018). Protecting the independence of the judiciary: possibilities and limits of the European Convention on Human Rights. *Revista Do Instituto Brasileiro De Direitos Humanos*, *17/18*, 249-268. Retrieved from https://hdl.handle.net/1887/78374

Version:	Publisher's Version
License:	Leiden University Non-exclusive license
Downloaded from:	https://hdl.handle.net/1887/78374

Note: To cite this publication please use the final published version (if applicable).

PROTECTING THE INDEPENDENCE OF THE JUDICIARY: POSSIBILITIES AND LIMITS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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ABSTRACT

Against the background of 'reform measures' aimed at the judiciary in various Council of Europe Member States, this contribution addresses the question what one may expect from the European Convention on Human Rights (ECHR) when the independence of the judiciary comes under pressure. An analysis of the Strasbourg case-law shows growing concern for judicial independence. As a result, the position of both judges and litigants is strengthened. The principle of irremovability of judges is now clearly protected as an integral part of the right to a fair trial. Also it is now accepted that, as a general rule, Article 6 ECHR will apply to all types of disputes concerning disciplinary measures against judges. This means that a judge should have access to an effective remedy to challenge his dismissal. If an individual complains about a lack of independence of the courts, the Strasbourg Court will follow an objective, functional approach: it will examine if there are adequate guarantees against arbitrariness. The individual judge may have acted in an irreproachable way and there may have been no actual interference with his independence – all that is necessary but not sufficient to meet the requirements of Article 6 ECHR. If safeguards against abuse are absent, the mere possibility that the executive *could have* interfered is enough to affect the independence of the court. In practical terms, however, it must be acknowledged that the ECHR has its limits: the dismissal of a judge is often a *fait accompli* that the Court may be unable to change.

Keywords

Article 6 ECHR; Dismissal of judges; European Convention on Human Rights (ECHR); European Court of Human Rights; fair trial; independence, of the judiciary; Irremovability, of judges; judicial review; lustration.

1. INTRODUCTION

After decades of strong growth, the European system for the protection of human rights faces a serious recession. Traditional support for multilateralism is giving way to nationalism, populism and authoritarianism. Systemic human rights problems remain unaddressed in a number of countries, draining the resources of the Council of Europe's supervisory bodies. The ideology of the 'illiberal democracy', proclaimed in 2014 by Hungarian strong man Victor Orbán, has been embraced by politicians across Central and Eastern Europe – and beyond. It is against this bleak background that the Polish judiciary has had to endure the series of 'reform measures' that Dr Paweł Filipek described in great detail in his contribution to this *Revista*. The situation in Poland is, unfortunately, not unique. As the Secretary-General of the Council of Europe remarked, efficient, impartial and independent judiciaries are an obstruction to populism:

It should therefore come as no surprise that undermining the judiciary is on page one of the populist playbook. Many politicians may find themselves frustrated by judicial decisions. Often, when this occurs, they blame the law in question and seek legislative reform. The populist response, on the other hand, is to blame the courts themselves. Either the system is declared defunct or individual judges are portrayed as out-of-touch, self-serving and even corrupt. Such criticisms pave the way for political acts which circumvent the established

legal order and for reforms which weaken judicial authority and enable greater political influence.[1]

In this contribution, I want to address the logical follow-up question: what can we expect from the European Convention on Human Rights (ECHR) when the independence of the judiciary is under pressure? For sure, Article 6 ECHR protects the independence of the courts:

> Article 6 – Right to a fair trial
>
> 1. 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. …

But what can the European Court of Human Rights actually *do* to ensure that the courts are independent? Can it protect judges against unjustified dismissal? Can it support judges who are subjected to more or less subtle methods to 'discipline' them? Is there anything the Strasbourg Court can do about vehement attacks on the authority of the judiciary? One may recall a president slamming the order of a "so-called judge" as "ridiculous", or a tabloid portraying judges as "enemies of the people".[2] Does the Court have anything to offer to litigants who claim that their case was heard by a court that lacked independence? What is the correlation between an overall break-down of the guarantees of the independence of the judiciary and the quality of individual courts and judges? If an individual complains about a perceived 'systemic' lack of independence, without being able to show that 'his' judge was under pressure, isn´t that an *actio popularis*? How to measure independence, and how to prove a lack of it?

Big questions, but this article has modest ambitions. Rather than dwelling on theoretical perspectives on the concept of independence, it will look at practice – that is: the case-law of the Strasbourg Court. And it will explore only two perspectives: that of the applicant who claims that his case was not heard by an "independent" court (§ 2), and that of the judge who has been removed from office (§ 4). To what extent can they rely on the European Convention? In both areas there are interesting developments to report. Two special issues will be addressed as well, as a sort of side-steps: the question whether the ECHR allows extradition to a country where the judiciary is no longer independent (§ 3), and the question whether a judge who has been removed from office has the right of access to the confidential information that formed the basis of his dismissal (§ 5). Both issues attract particular attention in this day and age.

But we will start with the perspective of the individual applicant who invokes the right to an independent court. This will provide us with the necessary context to understand how the Strasbourg Court has approached the notion of judicial independence in general.

2. INDEPENDENCE OF THE JUDICIARY AND ARTICLE 6 ECHR: THE LITIGANT'S PERSPECTIVE

2.1 *General explorations*

Remarkably little attention is given in the standard ECHR textbooks to the independence of the judiciary. That is surprising, as no-one in his right mind will deny the importance of having independent courts. Indeed, in the case of *Micallef,* dealing with injunction proceedings, the Court considered that the independence of the judiciary belongs to the 'hard core' of the right to a fair trial:

> the Court accepts that in exceptional cases – where, for example, the effectiveness of the measure sought depends upon a rapid decision-making process – it may not be possible immediately to comply with all of the requirements of Article 6. Thus, in such specific cases, *while the independence and impartiality of the tribunal or the judge concerned is an indispensable and inalienable safeguard* in such proceedings, other procedural safeguards may apply only to the extent compatible with the nature and purpose of the interim proceedings at issue.[3]

"An indispensable and inalienable safeguard": this is a guarantee to be reckoned with. Yet this importance does not translate into lengthy treatises – quite to the contrary. The excellent textbook of Harris, O'Boyle & Warbrick, for instance, spends no more than *three* pages – of a total of more than 1000! – on the issue.[4] The same picture emerges from the other textbooks.[5] The explanation may well be that the independence of the courts was seen as a fairly obvious prerequisite, a mere foundation of the democracies that make up the Council

of Europe: indispensable but hardly visible. The case-law was about *other* things.

To the extent that the textbooks pay any attention at all to the independence of the judiciary, it is typically observed that there is a close inter-relationship between the guarantees of an 'independent' and an 'impartial' tribunal. In practice most cases relate to a perceived lack of impartiality of judges. In a few instances the Court found that there was actual dependence, prejudice or bias; but in real life this so-called 'subjective' test is difficult to meet because of evidentiary problems.[6] This difficulty is compensated to an extent by the use of an 'objective' test and the identification of 'functional' problems: the judge's personal conduct was not at all impugned, but the exercise of different functions within the judicial process by the same person, or hierarchical links with another actor in the proceedings justified misgivings as to the impartiality of the tribunal. [7]

The leading case on independence is still *Campbell and Fell v. UK* from 1984, where the Court explained which factors it will take into consideration:

> In determining whether a body can be considered to be "independent", notably of the executive and of the parties to the case, the Court has had regard to the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence. … the irremovability of judges by the executive during their term of office must in general be considered as a corollary of their independence and thus included in the guarantees of Article 6 § 1.[8]

Violations were found, but they were rare and related to rather specific issues: some features of the UK court-martial system, the participation of military judges in Turkish civil courts, the prosecution of civilians before military courts. [9] Outside these more or less exotic situations, only few violations were established. Part of the explanation is that the Court was quite lenient; a short term of office, for instance, was accepted as permissible. In a situation where the law did not formally recognize the irremovability of judges, the Court considered that this did not in itself imply a lack of independence, since the irremovability of judges was recognised in fact and other guarantees were present. [10]

It should be noted, however, that most of this 'classic' case-law relates to administrative and disciplinary bodies. Moreover, it dates back to the 1980s and 1990s.

2.2 *Recent case-law*

During the 1990s many States from Central and Eastern Europe ratified the ECHR. When under Communist rule, these countries had not been in a position to develop a strong tradition of separation of powers. [11] This may explain why judicial independence gradually started to receive more attention. Shortly after the turn of the century, for example, the Court was confronted with a practice – fairly common in Central and Eastern Europe – that the executive could challenge final judgments by lodging an objection *(protest)*. In the *Sovtransavto* case (2002) the Court found in unambiguous terms that such a system is incompatible with the rule of law.[12] Other cases featured complaints about the position of the court president, who is traditionally a very powerful figure in a number of countries in this region. In the Croatian case of *Parlov and Tkalic* (2009) the Strasbourg Court underlined that individual judges must be free not only from undue influences outside the judiciary, but also from within: there must be safeguards securing the independence of judges vis-à-vis their judicial superiors.[13]

The *Brudnicka* case (2005) involved a shipwreck in which both passengers and crew members lost their lives. When proceedings were instituted, in Poland, to establish the cause of the shipwreck, a Maritime Chamber held that the crew had been partly liable. The heirs of the sailors who died in the shipwreck then turned to the European Court, arguing that the Maritime Chamber had not been independent and impartial. The Court agreed:

> In maintaining confidence in the independence and impartiality of a tribunal, appearances may be important. Given that the members of the maritime chambers (the president and vice-president) are appointed and removed from office by the Minister of Justice in agreement with the Minister of Transport and Maritime Affairs, they cannot be regarded as irremovable, and they are in a subordinate position vis-à-vis the Ministers. Accordingly, the maritime

> chambers, as they exist in Polish law, cannot be regarded as impartial tribunals capable of ensuring compliance with the requirement of "fairness" laid down by Article 6 of the Convention. In the Court's view, the applicants were entitled to entertain objective doubts as to their independence and impartiality. There has therefore been a violation of Article 6 § 1 of the Convention. [14]

The judgment was drafted in general terms – "the maritime chambers, as they exist in Polish law" – and the Court's finding of a violation was in no way caused by the conduct of the individual judges in this specific case. Also it is worth observing that the Court confined itself to analysing the system as it was set out in law, and did not inquire whether judges were ever removed from office in actual fact. [15] The Court clearly attached more weight to the formal guarantees surrounding the irremovability of judges than it did in earlier case-law.

A similar violation of Article 6 was found in another Polish case, *Henryk Urban and Ryszard Urban* of 2010. The applicants had been convicted by a district court composed of an assessor (junior judge). Under Polish law as it stood at the time, a candidate for the office of district-court judge first had to serve a minimum of three years as an assessor. Assessors were legally qualified and appointed by the Minister of Justice. One year after the Urbans had been convicted, the Constitutional Court held that the situation was unconstitutional: assessors did not offer the guarantees of independence that were required of judges.

In their application to the European Court the Urbans alleged that the district court that had heard their case was not an "independent tribunal". The Court agreed:

> Having regard to the foregoing, the Court considers that the assessor B.R.-G. lacked the independence required by Article 6 § 1 of the Convention, the reason being that she could have been removed by the Minister of Justice at any time during her term of office and that there were no adequate guarantees protecting her against the arbitrary exercise of that power by the Minister (see, by contrast, *Stieringer v. Germany*, no. 28899/95, Commission decision of 25 November 1996, in which the relevant German regulation provided that dismissal of probationary judges was susceptible to judicial review). It is not necessary to consider other aspects of the status of assessors since their removability by the executive is sufficient to vitiate the independence of the Lesko District Court which was composed of the assessor B.R.-G. [16]

Apparently the Government had learned from the *Brudnicka* case and supplied statistics indicating that the Minister of Justice had never exercised the power to remove an assessor. This did not, however, persuade the Court. A violation of Article 6 was found.

There is a certain 'hypothetical' element in the *Brudnicka* and *Urban & Urban* judgments which is important to acknowledge. The Minister *could have* removed the president from the Maritime Chambers, he *could have* removed the assessor from the District Court. It is immaterial that he did not; it is even immaterial that he never did this before. Apparently the mere possibility – nothing more, nothing less – of arbitrary interferences with judicial independence is sufficient to taint the independence of the court.

The Polish cases echo an older and rather peculiar case: *Van den Hurk* (1994). Shortly after the Second World War a new type of economic regulation was introduced in the Netherlands. When in that context a new court, the Industrial Appeals Tribunal, was established, the Crown (i.e. the Minister) was given the power to refuse to execute its judgments, if this was considered necessary in the general interest. In practice this had never happened, and well before Mr Van den Hurk brought his case to the Tribunal, the Minister of Justice had stated in Parliament that this so-called section 74 procedure was a dead letter. Yet, section 74 had not been repealed and, as the Court noted, "there was nothing to prevent" the Crown from availing himself of the powers conferred upon it. As a result the Industrial Appeals Tribunal did not qualify as an "independent" court and a violation of Article 6 was found.[17] A year later the Court took the same approach in the British case of *Bryan*.[18]

An interesting aspect of the *Van de Hurk* case is that the Court flatly rejected the applicant's claim that the mere existence of the Crown's power had influenced the Tribunal's decisions. He pointed out that only a very limited proportion of the appeals had been successful and suggested that in deciding these cases the

Tribunal had borne in mind the possibility of the Crown exercising its powers under section 74. Clearly the Court did not wish to speculate, nor was it necessary to do so:

> The Court finds that there is nothing in the information at its disposal to indicate that the mere existence of the Crown's powers under section 74 had any influence on the way the Tribunal handled and decided the cases which came before it. In particular, no significance can be attributed to the low success rate of appeals (…). Whether or not the requirements of Article 6 have been met cannot be assessed with reference to the applicant's chances of success alone, since this provision does not guarantee any particular outcome. [19]

What was decisive was that the executive *could have* refused to execute judgments of the Tribunal, not whether the Tribunal's decisions had been influenced by the threat that the executive *might* use its powers.

2.3 *Consequences of finding a lack of judicial independence*

It is interesting to pause briefly and reflect on the aftermath of all these cases. What should happen once a lack of independence has been established?

In principle the victim should be given, if he or she so requests, a retrial or a reopening of the case by a court that does meet all the requirements of independence and impartiality. In several judgments the Court expressly stated that this would be the most appropriate form of redress.[20] Redress may also take the form of financial compensation. In several Strasbourg cases the applicant claimed damages, but such a claim rarely succeeds. In the case of *Van den Hurk*, for instance, the Court did not find a causal link between the lack of independence of the tribunal and the fact that the applicant had lost his case. [21] It may be of some comfort to Mr Van de Hurk that 'his' ruling served as a pilot judgment *avant la lettre*: a group of 23 similar cases ended in a friendly settlement between the applicants and the Dutch Government. [22]

The finding that a court lacks independence may affect very large groups of individuals who have been tried by that particular court at one stage. Are they all entitled to a rehearing of their case and/or financial compensation, or did they forfeit this right by failing to challenge the court? This question was addressed in the Polish case of *Urban & Urban*. Having found that the office of assessor was incompatible with the constitution, the Constitutional Court ordered that it should be abolished. But at the same time it adopted a pragmatic approach. Assessors constituted nearly 25% of the judicial personnel in the district courts and their immediate removal would seriously undermine the administration of justice. The Constitutional Court therefore left a period of eighteen months for Parliament to enact new legislation (which it did); in the meantime assessors were allowed to continue adjudicating. Having regard to the constitutional importance of the finality of rulings, the Constitutional Court also observed that it would be disproportionate and contrary to legal certainty to allow challenges to final rulings given by assessors in the period when the manner of conferring judicial powers on them had not been constitutionally questioned. Therefore its judgment could not serve as a ground for reopening cases which had been decided by the assessors. This approach met with approval by the Strasbourg Court.[23]

2.4 *Conclusion*

Five lessons can be derived from these explorations. The first one: in most cases involving judicial independence, the judge's personal conduct does not really matter. The individual judge may have acted in an irreproachable way and there may have been no actual interference with his independence – all that is necessary but not sufficient to meet the requirements of Article 6 ECHR. The Court often follows an objective, functional approach: it examines, in essence, if there are sufficient guarantees against arbitrariness.

The second lesson is related but distinct: the Court is inclined to analyse complaints in the abstract. That is to say: it is not necessary that an interference with judicial independence actually occurred to the detriment of the applicant. The mere possibility of such an interference is sufficient to affect the independence of the court.

The third lesson is the logical consequence: the finding that a court, or a category of courts, lacks independence in an objective/functional sense is by definition systemic in nature. All courts belonging to the same category will suffer from the same defect. The law will need to be changed and the victims are entitled to redress.

Legal certainty and pragmatic considerations may entail, however, that old cases will not be re-opened and that transitional measures are needed.

In the fourth place it is clear that there are varying degrees of seriousness. The mere existence of a competence, never used in practice, to set aside the rulings of a specialised economic court cannot really be compared to a package of measures deliberately seeking to foil the independence of the judiciary as a whole. However the Court has never had an opportunity to distinguish between these situations and it is as yet unclear if different consequences attach to different degrees of gravity.

Finally, in the assessment of independence the irremovability of judges has become a crucial element. In applying this requirement the Court has become considerably stricter.

3. A SIDE-STEP: EXTRADITION TO A COUNTRY WHERE THE JUDICIARY IS NO LONGER INDEPENDENT?

At the time of writing a lot of attention goes to the *A.C.* case, in which the Irish authorities are requested – by way of a European Arrest Warrant (EAW) – to surrender an individual to Poland for the purposes of conducting a criminal prosecution. In March 2018 the Irish High Court noted "a systemic breach to the rule of law in Poland" and raised the question whether "the breaches of the rule of law are so egregious that they amount to a fundamental flaw in the system of justice in Poland". This might entail that Mr A.C. would be placed "at real risk of an unfair trial" if he were to be surrendered to Poland.[24]

Against this background the High Court referred the matter to the EU Court of Justice for a preliminary ruling, essentially asking which kind of review is expected from the Irish courts before deciding whether to surrender Mr A.C. to Poland. The case is currently pending before the Luxembourg Court, and it is likely that a ruling will have been delivered by the time the present article sees the light of day. [25] There is little point in predicting the outcome, and a discussion of the extensive body of relevant EU law – tempting as it is – is beyond the scope of this contribution. But it *is* pertinent to dwell briefly on the requirements that flow from the ECHR in a situation such as this.

The first thing to note is that at present there is no Strasbourg case-law stating that the ECHR is opposed to extradition or surrender to Poland. Nor is there, to date, any judgment holding Poland in breach of the Convention because of recent changes in its justice system. Arguably it is too early for any pronouncement of the European Court, which typically needs three to four years (and often considerably longer) to deliver a judgment.[26] So we will need to develop our analysis by extrapolating existing case-law.

Already in 1989, in the leading case on extradition, *Soering,* the Strasbourg Court held that the Convention is opposed to extradition where the individual concerned "has suffered or risks suffering a flagrant denial of a fair trial in the requesting country".[27] The Court has consistently repeated this position, although few violations have actually been found. Indeed the Court's understanding of what constitutes a "flagrant denial of a fair trial" is quite strict:

> forms of unfairness that could amount to a flagrant denial of justice …. include conviction *in absentia* with no subsequent possibility to obtain a fresh determination of the merits of the charge; a trial which is summary in nature and conducted with a total disregard for the rights of the defence; detention without any access to an independent and impartial tribunal to have the legality of the detention reviewed and deliberate and systematic denial of access to a lawyer, especially for an individual detained in a foreign country.
>
> In other cases, the Court has also attached importance to the fact that if a civilian has to appear before a court composed, even only in part, of members of the armed forces taking orders from the executive, the guarantees of impartiality and independence are open to a serious doubt.
>
> However, "flagrant denial of justice" is a stringent test of unfairness. A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article. [28]

In the *Al Nashiri* case, where this quote comes from, the Court actually found that the threshold had been met, partly because the military commission that would try the applicant did not offer guarantees of independence of the executive. [29]

The important thing to note, however, is that this branch of case-law – including the "stringent test of unfairness" – was developed in the context of cases involving extradition to States not bound by the ECHR. It is clear that the Convention does not govern the actions of third States, nor does it require the Contracting Parties to impose Convention standards on other States.[30] This 'external' dimension is lacking in cases such as *A.C.*, where both states concerned are bound by the ECHR. That might be used as an argument *for* more leniency (one might expect other States Parties to comply with the Convention, so why insist?) or *against* it (by requiring full respect for Convention guarantees one does not introduce any new obligations). Leaving that aside, it must be acknowledged that the need to collaborate in the fight against crime – which is of course an argument for law enforcers not to create obstacles to measures such as extradition – is as legitimate a consideration in intra-EU cooperation as it is in international cooperation. Maybe it is an even stronger consideration, given the ease with which persons – including suspects and fugitive offenders – can cross borders within the EU. So the question is which "test of unfairness" is appropriate in a purely European setting. Should extradition (or "surrender" as it is called under the EAW system) only be refused if there is a risk of a "flagrant denial of a fair trial", as in *Soering*? Or should the threshold be lower? And if it is lower, is the prospect of "mere irregularities" sufficient to block extradition? Or should the threshold be somewhere in between?

States which are parties to the ECHR may assume that other Contracting States will perform their treaty obligations in good faith and hence secure the rights and freedoms laid down by the Convention. That expectation, however, does not always match reality. Depending on the circumstances, States parties may be obliged to verify the fate that awaits an individual who they are about to transfer to another Contracting State. In the context of asylum law, for instance, the Court has held that the presumption of compliance with the ECHR can be rebutted where "substantial grounds" have been shown for believing that the person whose return to another ECHR State is being ordered faces a "real risk" of being subjected to treatment contrary to Article 3 in the receiving country. [31]

In the case of the EAW, an assessment of this type is rendered more difficult since the EU Member States agreed on a system which recognises only a limited set of circumstances where the requested state can decide not to surrender the person. In itself that is not necessarily problematic. The Strasbourg Court has accepted various mutual recognition mechanisms which are founded on the principle of mutual trust between the Member States of the European Union. The Court has repeatedly asserted its commitment to international and European cooperation in civil and criminal matters.[32]

Nevertheless, the Court has stated, the methods used to bring about such cooperation must not infringe upon the guarantees of the Convention. The principle of mutual recognition should not be applied automatically and mechanically to the detriment of fundamental rights.[33] Mutual trust does not mean" blind trust. In the case of *Avotin*š (2016) the Court made clear what this means for the domestic courts:

> the court in the State addressed must at least be empowered to conduct a review commensurate with the gravity of any serious allegation of a violation of fundamental rights in the State of origin, in order to ensure that the protection of those rights is not manifestly deficient. … where the courts of a State which is both a Contracting Party to the Convention and a Member State of the European Union are called upon to apply a mutual recognition mechanism established by EU law, they must give full effect to that mechanism where the protection of Convention rights cannot be considered manifestly deficient.

Here the French version of the judgment is actually stronger: "c'est *en l'absence de toute insuffisance* manifeste des droits protégés par la Convention qu'elles donnent à ce mécanisme son plein effet". At any rate the judgment continues:

> However, if a serious and substantiated complaint is raised before them to the effect that the protection of a Convention

> right has been manifestly deficient and that this situation cannot be remedied by European Union law, they cannot refrain from examining that complaint on the sole ground that they are applying EU law.[34]

So courts must keep their eyes open and answer four questions: (1) did the individual raise a "serious and substantiated complaint", (2) does this complaint suggest that "the protection of a Convention right has been deficient", (3) is this deficiency "manifest" and (4) can the situation be remedied by European Union law?

No mention is made in *Avotin*š of a "stringent test of unfairness" as was developed in the *Soering* and *Al Nashiri* cases. The individual is not required to demonstrate that a "flagrant denial of justice" or "the destruction of the very essence of the right guaranteed by Article 6" awaits him in the receiving country. The condition that a deficiency is "manifest" is different: it is not about the nature or the seriousness of the alleged violation, but about whether it is clearly cognisable by a foreign court. [35]

*Avotin*š was about the enforcement of civil judgments. Does the same approach also apply in EAW cases? An affirmative answer was provided in the *Pirozzi* case of 17 April 2018. In this case Belgium surrendered the applicant to Italy in 2010 under an EAW, with a view to enforcing a lengthy prison sentence. Mr Pirozzi complained that the Belgian authorities had failed to review the EAW, although it had been based on a conviction, in 2002, resulting from a trial *in absentia*. The Court first confirmed the approach chosen in *Avotin*š*:* domestic courts must review serious allegations of violation of fundamental rights in the requesting State.[36] It then noted that the Belgian courts had actually examined the merits of the complaints that Mr Pirozzi had raised under the Convention. They had thus ensured that the execution of the EAW would not lead to a manifest lack of protection of the rights guaranteed by the Convention.[37] The Court did not find a violation, as Mr Pirozzi's criminal conviction in Italy did not appear to result from a procedure that was manifestly in breach of the ECHR. Again, the test was whether there was a "manifest" breach of the Convention, not whether there was a "flagrant" one. [38]

Back to the *A.C.* case. Having tried to connect the dots of the Strasbourg case-law, we should now be able to state whether the ECHR permits the surrender of Mr A.C. to Poland, or least which test will apply.

Unfortunately, despite all efforts we are still not there yet. The most appropriate cases – *Avotin*š and *Pirozzi* – are in a way looking back: they concern the question whether a foreign judgment, that has allegedly been rendered in breach of Article 6, should be enforced. In *Avotin*š the foreign judgment is of a civil nature, in *Pirozzi* it is criminal, but in both cases it is possible to establish with certainty if a violation of Article 6 has occurred. The case of Mr A.C. on the other hand, is forward-looking: what will happen to him once he is returned to Poland? There is a degree of speculation here. On the other hand, as we have seen in § 2, the finding that a court, or a category of courts, lacks independence in an objective/functional sense is by definition systemic in nature. Any individual appearing before these courts will be confronted with the same defect. It remains to be seen if this temporal aspect amounts to a meaningful difference. [39]

With that caveat in mind, it would seem that the position under the ECHR seems clear. It is up to Mr A.C. (1) to raise "serious and substantiated complaints" that (2) the protection of his rights in Poland is deficient whereas (3) this deficiency is "manifest". And it is up to the CJEU to give a reply to the fourth question: can the situation be remedied by European Union law? If the latter question is answered in the negative, then the case will sooner or later be brought before the Strasbourg Court.

As to the first requirement, is it indispensable for a "serious and substantiated complaint" to be based on existing Strasbourg case-law? Apparently not, at least not for the Irish High Court since it has established, on the basis of a lengthy analysis and a wealth of materials, the existence of "a systemic breach to the rule of law in Poland". On the second point it seems that for Mr A.C. to succeed he has to prove a lack of safeguards in Poland to such an extent as would result in a breach of Article 6 if occurring within Ireland itself. That should not be an insurmountable obstacle. This brings us to the third issue, i.e. how "manifest" the breaches of Article 6 in Poland need be. In this connection we have seen in § 2 that the focus will be on objective and functional questions. Are there guarantees against arbitrariness? Can judges be removed by the executive without any

effective judicial review? An individualised test would not be needed, nor would it be useful. It is rather difficult to predict the conduct of individual judges, and also – it is not decisive.

The final issue to be considered is which weight should be attached, if any, to the public interest in the fight against crime. Many cases are of a serious nature – Mr Pirozzi was convicted to 14 years' imprisonment for drug trafficking, Mr A.C. is wanted for similar offences. One would not want fugitive offenders to evade justice. But Article 6 ECHR does not contain a limitation clause as some other ECHR provisions do. And if the independence of the judiciary – unlike other procedural safeguards – is "an indispensable and inalienable safeguard", as the Court stated in *Micallef*, then there is very little room to balance interests. If this room does not exist in purely internal situations, then one would need compelling arguments and a creative interpretation of Article 6 to introduce it in cooperation schemes established in the framework of the EU, where all States involved are bound by the ECHR.

4. THE DISMISSAL OF JUDGES AND ARTICLE 6 ECHR

4.1 General remarks

Having made my first incursions into the Court's case-law, I will now focus on the second main topic of this article: if a judge has been removed from office, can he (or she[40]) rely on the European Convention to fight his dismissal?

As the Polish cases described above illustrate, the irremovability of judges is a cornerstone of judicial independence.[41] The dismissal of a judge, then, is arguably the most extreme intrusion that can occur. Dismissal will have on obvious impact on the individual concerned, but it is also likely have a chilling effect on the judiciary as a whole. Of course, there may be good reasons to take disciplinary measures against a judge, or even dismiss him. The European Convention does not guarantee the right to be a judge and the European Court is not a labour court; we cannot expect it to review the personnel file, assess the evidence and weigh the pros and cons of a particular disciplinary sanction as a sort of 'fourth instance' domestic court.

But what the Strasbourg Court can do, is ensure that a fair and proper procedure had been followed at the domestic level. The Court may be called upon to do this in very different circumstances:

- the classic scenario, whereby disciplinary measures are taken against an individual judge, in a procedure set out by law; [42]
- the authoritarian scenario, whereby the executive assumes the power to fire individual judges without further explanation; [43]
- the '*Baka* scenario', named after the former President of the Hungarian Supreme Court, Andras Baka, who was forced to resign following the introduction of new legislation changing the conditions for eligibility as a Supreme Court judge; [44]
- the lustration scenario, whereby employees in the public sector, including judges, are subjected to a vetting procedure, as a result of which they may lose their position.[45]

In each of these scenarios the judge who has been removed from office may claim that this is unjustified, and he may seek a domestic remedy to challenge his dismissal.

Leaving issues of reputation – as protected by Article 8 ECHR – aside,[46] the key question is: is Article 6 ECHR, the right to a fair trial, applicable if a judge is dismissed? The answer is less obvious than one might be inclined to think: for a long time the Court had taken the view that disputes relating to dismissal from the judiciary fell outside the scope of Article 6 ECHR. [47] The Court's position, however, is rapidly changing. In order to understand this development, we must take a few steps back and analyse Article 6 ECHR in a systematic way.

4.2 The scope of Article 6 ECHR – 'criminal' cases

One might expect that the dismissal of a judge, with all the serious consequences that it entails, can be seen as a "criminal charge" within the meaning of Article 6 ECHR. According to the Strasbourg case-law, however, this is far from obvious. To explain this, we need to go back in history and explore the scope of application of Article 6 ECHR. Already in 1976, in the famous case of *Engel*, the Court noted:

All the Contracting States make a distinction of long standing, albeit in different forms and degrees, between disciplinary

proceedings and criminal proceedings. For the individuals affected, the former usually offer substantial advantages in comparison with the latter, for example as concerns the sentences passed. Disciplinary sentences, in general less severe, do not appear in the person's criminal record and entail more limited consequences. It may nevertheless be otherwise; moreover, criminal proceedings are ordinarily accompanied by fuller guarantees. [48]

The Court then introduced three criteria to distinguish disciplinary sanctions from the penalties prescribed by criminal law: the domestic classification of the offence in question, the 'very nature of the offence', and the nature and severity of the penalty that may be imposed. It is the second criterion that is of most interest here. For the Court, disciplinary sanctions are generally designed to ensure that the members of a particular group comply with specific rules governing their conduct, whereas the norms of the criminal law are in principle addressed to the population as a whole.[49] Since *Engel* the Court has consistently held that disciplinary discharge from the armed forces cannot be regarded as a criminal penalty for the purposes of Article 6 of the Convention.[50]

This approach has consequences if a public servant is dismissed by way of a disciplinary measure. If domestic law classifies his misconduct as a disciplinary offence, and if this offence is linked to the exercise of specific functions within the State apparatus, then the Strasbourg Court will view the proceedings as being of a purely disciplinary nature, not belonging to the criminal sphere. [51] This also holds true if these measures are triggered by complaints alleging inappropriate behaviour that could also be viewed as a criminal offence, and even if these allegations will damage the reputation of the public servant in question.[52]

4.3 The lustration cases and the scope of Article 6 ECHR

Recently, however, the overall picture of the case-law in this area – strict but clear – has become somewhat blurred. This is the result of a number of cases in which the Court dealt with so-called 'lustration' schemes, as introduced by several East-European countries after the Cold War. These countries dealt with their past in different ways. Of course there was a certain focus on punishing acts committed during the communist regime, which raised questions concerning foreseeability and retroactive application of the law. [53] But of greater interest for present purposes are the various attempts to remove from public office those who were affiliated with the former communist regime.

Thus, in Lithuania former KGB employees were banned for a period of 10 years from working in the public sector and in certain private sector jobs. In Bulgaria a system was introduced, after lengthy negotiations, that merely aimed at "exposing" individuals who featured in the files of the former security services, without purporting to sanction or dismiss them. In Poland yet a different approach was chosen: the idea was to punish those who failed to disclose their past collaboration with the State's security services under the former communist regime. Thus, the 1997 Lustration Act introduced an obligation to make a declaration concerning work for or collaboration with those services, and provided for the dismissal from public office of persons who were found to have lied when making this declaration. In the latter case a ten-year ban on holding certain public offices was imposed. When this system was challenged in the *Matyjek* case, the Court was prepared to treat these measures as a criminal punishment within the meaning of Article 6, in view of their legal nature and their effects. [54] As a result, States adopting lustration measures have to ensure that persons affected thereby enjoy full procedural guarantees, including equality of arms. [55]

This is all well, but it raises a question: why does Article 6 apply to lustration cases, but not to individual cases where a public servant is dismissed by way of disciplinary measure? True, the Polish lustration measures could have "a very serious impact on a person", as the Strasbourg Court noted: although neither imprisonment nor a fine could be imposed, individuals could be deprived "of the possibility of continuing professional life". But that element did not play such a weighty role in the 'ordinary' cases concerning, for instance, disciplinary discharge from the armed forces. So how to explain the difference? Here we need to speculate since the Court did not attempt to distinguish the two categories of cases. The outside observer is left with the impression that the following factors may have played a role: the large group of individuals who were affected by the lustration laws; the institutionalised nature of the operation,

whereby all individuals were systematically vetted; and the nature of the proceedings which possessed many strong criminal connotations, involving a lustration court and a Commissioner of Public Interest who was vested with powers identical to those of the public prosecutor.

4.4 The scope of Article 6 ECHR – 'civil' cases – general considerations

Article 6 also applies to civil cases, and the question is whether the dismissal of public servants may fall under the "civil heading" of Article 6 ECHR. The importance of this question will be clear: an affirmative answer implies that the public servant must have access to court and should be able to enjoy all the guarantees of Article 6 § 1 ECHR. But the Court's initial position was that Article 6 ECHR does not cover these disputes at all: the decision to dismiss a public servant is a classic example of the exercise of State sovereignty. [56]

However in 1999, in the case of *Pellegrin v. France,* the Court changed direction. [57] Realising that there is a wide variety in the kind of work that public servants do – ranging from cleaners to diplomats – the Court introduced a new, "functional" criterion. It took the nature of the employee's duties and responsibilities as the defining point. What matters is if the person concerned exercises powers conferred by public law, designed to safeguard the general interests of the State. If this is the case, the Court ruled, then Article 6 will *not* apply – that is: the ECHR allows the situation where the executive authorities alone may decide on the dismissal of this specific category of public servants; and it accepts that the courts have no power to review this decision. Whereas in all other cases Article 6 will apply, an exception is made if the dismissal concerns a public servant who acted as the depositary of public authority and who was responsible for protecting the general interests of the State. A manifest example was provided, the Court said, by the armed forces and the police.

But this new approach did not live long. In 2007, in the Finnish case of *Vilho Eskelinen*, the Court realised that the application of the functional criterion could lead to anomalous results. [58] The case concerned six individuals who were involved in a labour dispute with their employer, the Ministry of the Interior. The dispute was identical for all the applicants, and they had actually defended their interests together in a joint action before the Finnish courts. In Strasbourg they complained that they were denied an oral hearing in the proceedings concerning their salaries and that the proceedings were excessive in length. But as it happened, five applicants were police officers; number six was an office assistant with a purely administrative task. On a strict application of the *Pellegrin* approach, the latter applicant would enjoy the guarantees of Article 6, whereas the police officers would not. The Court realised that this outcome would not be acceptable. It therefore introduced a new approach. In very many Contracting States, the Court noted, access to a court was accorded to public servants, allowing them to bring claims for salary and allowances, or even claims in relation to dismissal or recruitment, on a similar basis to employees in the private sector. The domestic system, in such circumstances, perceived no conflict between the vital interests of the State and the right of the individual to judicial protection. It would be strange if in these cases the Human Rights Court would *not* give this protection. The Court therefore adopted the following approach. If a State wants to argue that an individual cannot invoke Article 6 because he is a public servant, two conditions must be fulfilled. Firstly, the State in its national law must have expressly excluded access to a court for the category of staff in question. Secondly, this exclusion must be justified on objective grounds in the State's interest. The mere fact that the applicant was active in a sector which participated in the exercise of public power was not in itself decisive. The State would also have to show that the subject matter of the dispute in issue was related to the exercise of State power or that the special bond of trust between the State and the public servant had been called into question.

So since 2007 there is, in effect, a strong presumption that Article 6 applies to labour disputes between public servants and their State. In exceptional cases Article 6 may not apply, but then it is for the respondent Government to demonstrate, first, that the applicant in his capacity as a public servant does not have a right of access to a court under national law and, second, that the exclusion of his rights under Article 6 is justified.

4.5 The scope of Article 6 ECHR – 'civil' cases – dismissal of judges

What about the dismissal of judges? Here we see a considerable development in the case-law too. In 2001, in the case of *Pitkevich v. Russia*, the Court still held that disputes relating to dismissal from the judiciary fell outside the scope of Article 6 ECHR. [59] The Court recalled its *Pellegrin* judgment of two years before, and noted that a judge has specific responsibilities in the field of administration of justice, which is a sphere in which States exercise sovereign powers. The Court concluded Ms Pitkevich could not complain about the alleged failure to provide her with a fair trial after she was dismissed as a judge.

But since then the Court has changed direction. Already in 2009, two years after *Eskelinen*, the Court held Article 6 ECHR to be applicable to the proceedings concerning the disciplinary dismissal of Mr Olujić, the President of the Supreme Court of Croatia. Applying the *Eskelinen* test, the Court examined the extent to which domestic law limited access to the courts. In Croatia the law expressly excluded judicial protection in this area: the competence to impose disciplinary sanctions on judges was granted to the National Judicial Council (NJC) alone. Yet that was not the end of the story: the Strasbourg Court examined the powers of the NJC and the nature of the proceedings before it. It noted that these proceedings followed the rules of criminal procedure, which included all the guarantees provided by Article 6 of the Convention and enabled the accused to submit a defence. When ruling in disciplinary proceedings against judges, the NJC was empowered to establish the facts of a given case, hold hearings, hear witnesses, assess other evidence and decide on all the questions of fact and law. The Strasbourg Court therefore concluded that the NJC had actually exercised judicial powers in determining the disciplinary responsibility of Mr Olujić. Consequently, the disciplinary proceedings against him had been conducted before a "tribunal" for the purposes of Article 6 § 1 of the Convention. For the Court this was the reason to hold Article 6 applicable.[60]

Four years later, in 2013, the Strasbourg Court reached a similar conclusion in the case of Mr Volkov. Mr Volkov had been a judge of the Supreme Court of Ukraine. At one stage he was accused of misconduct, and in 2010 the Ukrainian Parliament voted for his dismissal. When Mr Volkov complained in Strasbourg of a violation of Article 6 ECHR, the Court again recalled its *Eskelinen* judgment of 2007, and repeated that labour disputes between public servants and the State may fall outside the scope of Article 6 only if the State in its national law has expressly excluded access to the courts. Now whereas Mr Olujić had been dismissed by the Croatian NJC, Mr Volkov had been dismissed by Parliament – and one might be tempted to think that Parliament is certainly not a court. But the Court held differently. It stated that it is not prevented from qualifying a particular domestic body, outside the domestic judiciary, as a "court" for the purpose of the *Eskelinen* test: "An administrative or parliamentary body may be viewed as a "court" in the substantive sense of the term, thereby rendering Article 6 applicable to civil servants' disputes".[61] A breach of the Convention was found in this case and the Strasbourg Court made clear that Ukraine should secure Mr Volkov's reinstatement "to the post of judge of the Supreme Court" – so not just reinstatement as 'a' judge, but quite specifically as judge of the Supreme Court – at the earliest possible date.

Then, in 2016, there was the high profile case of *Baka v. Hungary*.[62] The case concerned Mr Baka's dismissal as President of the Hungarian Supreme Court as a result of new legislation regulating the composition of the Supreme Court. The Grand Chamber of the European Court of Human Rights observed, first, that the domestic law provided Mr Baka with the right to serve his term of office until such time expired. This was also supported by constitutional principles regarding the independence of the judiciary and the irremovability of judges. Accordingly, Mr Baka had been entitled to protection against removal from office during his mandate. The fact that his mandate was terminated by new legislation could not remove, retrospectively, this right under the applicable rules in force at the time of his election.

Next the Court observed that Mr Baka had not been expressly excluded from the right of access to a court. The Court added that, even if national legislation would exclude access to a court, this would to have be compatible with the rule of law. And the rule of law forbids laws directed against a specific person, as in the applicant's case. In the light of these considerations, the

Court accepted that Article 6 was applicable under its civil head to the dismissal of Mr Baka. A violation was found. The key message of *Baka* is that there is a strong presumption that Article 6 applies to disputes concerning judges – all types of disputes, including those relating to recruitment/appointment, career/promotion, transfer and termination of service/dismissal.

Similar decisions were issued in recent years as regards Slovakia[63], Italy[64], Armenia[65], Macedonia[66], Portugal[67], Georgia[68] and Cyprus[69]. The Armenian case is worth mentioning in a bit more of detail. The applicant was a judge who was dismissed pursuant to a President's Decree. She was unable to contest this Decree before the domestic courts. Although Armenian law granted individuals the right to seek the annulment of unlawful acts of public authorities, the ordinary courts had developed a practice not to examine claims against the acts of certain public bodies, including the decrees of the President. The European Court of Human Rights noted on the one hand that national legislation did not expressly exclude access to a court – which meant that Article 6 was applicable – and on the other hand that the applicant had been unable to obtain a substantive court ruling on her case – which meant that Article 6 had been violated.

4.6 Article 6 ECHR and the dismissal of judges: conclusion

So what are we to make of this? First, actually a surprisingly high number of cases before the European Court of Human Rights, involving a wide variety of countries, deal with the dismissal of public servants, including judges. Second, in line with its general case-law, the Strasbourg Court has now firmly established a strong presumption that Article 6 ECHR applies to disputes about these disciplinary measures. Of course the mere fact that Article 6 applies does not mean that a dismissal is not justified; depending on the circumstances it may be perfectly legitimate to take disciplinary measures against a public servant. But the reasons justifying a dismissal will be subject to review by the courts. Third, this situation is the result of a rather creative application of the *Eskelinen* test. In the majority of cases the Court has found that the first condition, that is, whether national law "expressly excluded" access to a court for the post or category of staff in question, was not fulfilled and that Article 6 was thus applicable to the proceedings in question. But even if national law expressly excluded judicial review, that was not the end of the story. In *Baka* the Court stated that such exclusion has to be in conformity with the rule of law – a requirement that is difficult to fulfil. In other cases the Court considered whether the disciplinary authority in question qualifies as a "court" for the purposes of the *Eskelinen* test. To that end the Court looked at whether the disciplinary authority performed a judicial function and at the nature of the proceedings before it. And so the Court found that Article 6 was applicable in cases where the power to impose disciplinary measures had been reserved for a National Judicial Council or even Parliament.

It is submitted that by now the *Eskelinen* test is *de facto* amended, and that Article 6 will apply to public service cases *tout court*, even if we have to wait for a formal recognition of this reality. [70] But at any rate it is clear that the Court's more recent case-law has certainly strengthened the protection of public servants against arbitrariness in general, and the principle of irremovability of judges more in particular.

5. A SIDE-STEP: DISMISSAL OF JUDGES AND THE RIGHT OF ACCESS TO INFORMATION

Now that we have established that, as a rule, Article 6 ECHR will apply to cases involving the dismissal of judges, it is time to address a key issue in some cases: access to materials classified as confidential. The usual argument of those affected by lustration or similar measures is that these measures are based on unreliable materials or documents that do not show that they have really collaborated. But in order to substantiate that claim, they need to have access to the records.

Here we touch upon a classic dilemma. Typically the secret service or agency compiling the information may wish to deny access to its files, so as to avoid disclosing how much it actually knows, to protect its sources and to keep its working methods secret. On the other hand, if the person to whom the classified materials allegedly relate is denied access to all or most of the materials in question, his or her possibilities of contradicting the agency's version of the facts will be severely curtailed. By the same token the absence of truly adversarial proceedings may

make it more difficult for the unbiased judge to retain his neutral position. This dilemma is likely to play a role in any case involving the dismissal of public servants in order to protect national security, as it often does in cases involving corruption, terrorism and organised crime too.[71] But it is also highly relevant in Albania, for instance, where *all* judges are currently undergoing a vetting procedure; confidential information is bound to play a crucial role. [72]

In the post-communist lustration cases the question of access to materials assumed a distinct role since the proceedings were, by their very nature, oriented towards the establishment of facts dating back to the communist era. This inevitably depended on the examination of documents relating to the operations of the former communist security agencies. In this specific context the Court developed an important rule of thumb: unless the contrary is shown on the facts of a specific case, it cannot be assumed that there remains a continuing and actual public interest in imposing limitations on access to materials classified as confidential under former regimes.[73]

Outside the specific context of post-communist lustration measures, the issue of access to confidential materials took centre stage in the recent Grand Chamber judgment in the case of *Regner*.[74] Mr Regner was not a judge, but a high-ranking official at the Czech Ministry of Defence. In 2006 the National Security Authority (NSA) decided to revoke his security clearance, on the grounds that he posed a risk to national security. The decision did not indicate the confidential information on which it was based, as this was classified "restricted" and could not therefore legally be disclosed to Regner.

An application by Regner for judicial review of the decision was dismissed by the Czech courts. It is important to note that the NSA forwarded the documents in question to the courts. However, Regner was not permitted to consult them. Relying on Article 6 § 1 ECHR, Regner complained that the administrative proceedings had been unfair because he had been unable to have sight of decisive evidence. But in Strasbourg he lost his case too. In 2015, a Chamber of the Strasbourg Court held that there had been no violation of the Convention, finding that the decision-making procedure had as far as possible complied with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the applicant's interests.

In 2017, the Grand Chamber agreed. There were several key elements in the Court´s reasoning: the domestic courts had unlimited access to all the classified documents on which the NSA had based itself; they had the power to carry out a detailed examination of the reasons relied on by the NSA for not disclosing the classified documents; and they could order disclosure of those that they considered did not warrant that classification. They could also assess the merits of the NSA's decision revoking security clearance and quash, where applicable, an arbitrary decision. Their jurisdiction encompassed all the facts of the case and was not limited to an examination of the grounds relied on by Regner, who had been heard by the judges and had also been able to make his submissions in writing. In conclusion the Strasbourg Court ruled – in very cautious terms – that the fair balance between the parties had not been affected to such an extent as to impair the very essence of Regner's right to a fair trial. It should be noted, however, that a considerable minority disagreed and believed that the Czech courts should have gone further. [75]

In a nutshell: the Court is flexible and realistic; it gives considerable leeway to the national authorities which seek to defend national security. But at the same time the Court carries out a thorough review of the quality of the trial. The scope of the powers of the domestic courts is crucial in this respect. The Strasbourg Court insists on serious procedural safeguards so as to protect individual rights to the fullest extent possible and, in the final instance, to prevent arbitrariness.

6. CONCLUDING REMARKS: RIGHTS THAT ARE PRACTICAL AND EFFECTIVE?

The analysis of the Strasbourg case-law leads us to some final observations. The European Court shows concern, today to a much larger extent than before, for judicial independence and the protection of judges against undue pressure. From the perspective of the judiciary, the greatest gain is that the principle of irremovability of judges is now clearly established as a key element of the right to a fair trial. As a general rule, Article 6 ECHR

will apply to all types of disputes concerning disciplinary measures against judges, including those relating to recruitment/appointment, career/promotion, transfer and termination of service/dismissal.

If an individual complains about a lack of independence of the courts, the Strasbourg Court will follow an objective, functional approach: rather than looking at what actually happened in the court room, the Court will examine if there are adequate guarantees against arbitrariness. The individual judge may have acted in an irreproachable way and there may have been no actual interference with his independence – all that is necessary but not sufficient to meet the requirements of Article 6 ECHR. The mere possibility that the executive *could have* interfered is enough to affect the independence of the court.

This is 'good' news for the judges in Poland who have lost their position as a result of the recent package of reform measures. The presidents and vice-presidents of the ordinary courts who have been removed from their position by the Minister of Justice; the president and judges of the Supreme Court who have lost their seat as a result of the newly introduced age requirement; those who had been elected to the Constitutional Tribunal but were not sworn in by the President of the Republic – they all have a right to access to court to have their situation reviewed. The quality and usefulness of such a judicial review procedure will depend, of course, on the independence of the adjudicating body. There is some irony here, because their very dismissal may have affected or even undermined the independence of the courts they were forced to leave. But despite this catch-22, they have the right to a court. And in due course the Strasbourg Court may be called upon to review the existence and quality of the available remedies.

However, the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective – this has been *the* mantra in the Court's case-law since the 1970s. [76] When looking at the Court´s record in the field under consideration here, one cannot help wondering if the Court manages to live up to this ambition. It takes the Court a *very* long time to decide the cases before it. True, the *Baka* case was dealt with relatively quickly, the Court's judgment is very well drafted and its reasoning is compelling – but still the judgment was delivered about four years after Mr Baka was dismissed as President of the Hungarian Supreme Court. For Lajos Erményi, at the time the number 2 of the same court, the judgment came really too late: he died during the proceedings in Strasbourg. [77]

Of course these delays can be explained (the Court has a huge case-load) and to some extent unavoidable (cases need to be prepared). But there are at least two reasons why delays in this particular brand of cases are so damaging. The first one is simply that every case involving dismissal should be dealt with special diligence. [78] It is not just about preserving income, it is also about avoiding a *fait accompli*. A new president will have been appointed, and the longer one waits, the more irreversible the newly created situation becomes. Mr Volkov lost his seat in the Ukrainian Supreme Court in 2010. The Strasbourg Court found a violation of the Convention in 2013, and ordered Ukraine to secure Mr Volkov's reinstatement to his previous post. To date, that has not materialised. [79]

Secondly, while it may be true in many areas that delays can be fatal – think of child abduction cases – we are here concerned with violations that strike at the heart of the rule of law. They deserve the highest priority, since the enforcement of all other rights and freedoms depends on the quality of the domestic courts. One must not lose sight of why we have the European Court in the first place. It is useful to go back to 1949, and listen to the words of Pierre-Henri Teitgen:

> Democracies do not become Nazi countries in one day. Evil progresses cunningly, with a minority operating, as it were, to remove the levers of control. One by one freedoms are suppressed, in one sphere after another. Public opinion and the entire conscience are asphyxiated. And then, when everything is in order, the *Führer* is installed and the evolution continues even to the oven of the crematorium.
>
> It is necessary to intervene before it is too late. A conscience must exist somewhere which will sound the alarm to the minds of a nation menaced by this progressive corruption, to warn them of the peril and to show them that they are progressing down a long road which leads far, sometimes even to Buchenwald or Dachau.

> An international Court, within the Council of Europe, and a system of supervision and guarantees, could be the conscience of which we all have need, and of which other countries have perhaps a special need. [80]

If, as Teitgen argued, it is necessary to intervene before it is too late, then the intervention itself must be quick and decisive. An early warning system must be early, or it shall cease to be a system.

NOTES

1. See Report by the Secretary General of the Council of Europe, *State of democracy, human rights and the rule of law*, (Strasbourg, 2017), p. 15, at www.coe.int.
2. See D. Smith, "Trump lashes out again at judges over travel ban and calls hearing 'disgraceful'", 8 Feb. 2017, at www.theguardian.com, and *Daily Mail* of 4 November 2016, respectively.
3. ECtHR, judgment of 15 October 2009, *Micallef v. Malta* (no. 17056/06), § 86, emphasis added. Cf. ECtHR, judgment of 23 November 2006, *Jussila v. Finland* (no. 73053/01), § 43. All cases referred to can be found through the Court's search engine 'HUDOC', at www.echr.coe.int.
4. D.J. Harris et al., *Harris, O'Boyle & Warbrick, Law of the European Convention on Human Rights* (3rd ed., 2014), pp. 447-450.
5. See P. van Dijk et. al., *Theory and Practice of the European Convention on Human Rights* (5th ed., 2018), pp.600-601 (two pages of a total of over 1200), and B. Rainey et al., *Jacobs, White & Ovey, The European Convention on Human Rights* (7th ed., 2017), p. 299 (essentially one page; total 700). For an elaborate overview, see M. Kuijer, *The Blindfold of Lady Justice – Judicial Independence and Impartiality in the Light of the Requirements of Article 6 ECHR (*PhD thesis Leiden, 2004), Chapter 6.
6. The *locus classicus* is still ECtHR, judgment of 3 July 2007, *Flux v. Moldova (No. 2)* (no. 31001/03), with a scorching dissent from Judge Giovanni Bonello.
7. See, e.g., ECtHR, judgment of 15 December 2005, *Kyprianou v. Cyprus* (no. 73797/01), §§ 118-121.
8. ECtHR, judgment of 28 June 1984, *Campbell & Fell v. UK* (no. 7819/77), §§ 78, 80 (references omitted).
9. ECtHR, judgment of 25 February 1997, *Findlay v. UK* (no. 22107/93), judgment of 19 June 1998, *Incal v. Turkey* (no. 22678/93), judgment of 4 may 2006, *Ergin v. Turkey (no. 6)* (no. 47533/99).
10. *Campbell & Fell*, § 80.
11. See, e.g., F. Emmert & L. Hammer, *The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe* (2012); I. Motoc & I. Ziemele, *The Impact of the ECHR on Democratic Change in Central and Eastern Europe: Judicial Perspectives* (2016).
12. ECtHR, judgment of 25 July 2002, *Sovtransavto v. Ukraine* (no. 48553/99).
13. ECtHR, judgment of 22 December 2009, *Parlov and Tkalic v. Croatia* (no. 24810/06), § 86.
14. ECtHR, judgment of 3 March 2005, *Brudnicka v. Poland* (no. 54723/00), § 41 (reference omitted).
15. In *Brudnicka* the Court did not attach any weight either to the fact that the president and vice-president of the Maritime Chambers were recruited from among the judges of the ordinary courts and retained their judicial posts. Hence, I take it, if a president were ever to be removed from the Maritime Chambers, he could resume his work as judge of the ordinary courts.
16. ECtHR, judgment of 30 November 2010, *Henryk Urban and Ryszard Urban v. Poland* (no. 23614/08), § 53. Contrast *Campbell & Fell* (1984), § 80: "Although it appears that the Home Secretary could require the resignation of a member, this would be done only in the most exceptional circumstances and the existence of this possibility cannot be regarded as threatening in any respect the independence of the members of a Board in the performance of their judicial function".
17. ECtHR, judgment of 19 April 1994, *Van de Hurk v. Netherlands* (no. 16034/90).
18. ECtHR, judgment of 22 November 1995, *Bryan v. UK* (no. 19178/91), § 38.
19. *Van de Hurk,* § 50.
20. See e.g. ECtHR, judgment of 23 October 2003, *Gençel v. Turkey* (no. 53431/99), § 27; judgment of 11 July 2006, *Gurov v. Moldova* (no. 36455/02), § 43. See more in general ECtHR, judgment of 12 May 2005, Öcalan v. Turkey (no. 46221/99), § 210.
21. *Van de Hurk,* § 64. In similar vein, e.g., *Parlov and Tkalic*, § 104.
22. ECommHR, report of 23 January 1996, *J.S. a.o. v. the Netherlands* (no. 14561/89).
23. *Urban*, §§ 56 and 62-67.
24. High Court, 12 March 2018, [2018] IEHC 119. The full text of the decision can be found at www.courts.ie.

25. The case is registered as C-216/18 (PPU) under the less than exciting name *Minister for Justice and Equality*, Mr A.C. having requested anonymity after he realised that his full name was widely circulating. A hearing before the CJEU is anticipated on 31 May 2018.
26. The only thing that can be said is that by the end of March 2018 there were 1400 pending cases against Poland. Of these cases, over 650 await their first examination by a Chamber or Committee and another 600 have been communicated to the Government. An unknown number of applications involving Poland find themselves at a pre-judicial stage. See the statistics on www.echr.coe.int.
27. ECtHR, judgment of 7 July 1986, *Soering v. UK* (no. 14038/88), § 113.
28. ECtHR, judgment of 24 July 2014, *Al Nashiri v. Poland* (no. 28761/11), §§ 562-563.
29. *Al Nashiri*, § 567.
30. See *Soering*, § 86: "Article 1 cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention. Indeed, as the United Kingdom Government stressed, the beneficial purpose of extradition in preventing fugitive offenders from evading justice cannot be ignored in determining the scope of application of the Convention and of Article 3 in particular".
31. See e.g. ECtHR, judgment of 21 January 2011, *M.S.S. v. Belgium & Greece* (no. 30696/09), § 342 et seq.; judgment of 4 November 2014, *Tarakhel v. Switzerland* (no. 29217/12), § 104.
32. See, e.g., ECtHR, judgment of 18 February 1999, *Waite and Kennedy v. Germany* (no. 26083/94), §§ 63 and 72; judgment of 30 June 2005, *Bosphorus v. Ireland* (no. 45036/98), § 150 et seq.
33. See, m.m., ECtHR, judgment of 26 November 2013, X *v. Latvia* (no. 27853/09), §§ 98 and 107.
34. ECtHR, judgment of 23 May 2016, *Avotiņš v. Latvia* (no. 17502/07), §§ 114, 116.
35. The term "manifestly deficient " emerged for the first time in *Bosphorus*, § 156. In their concurring opinions several judges tried to elaborate this "relatively undefined" criterion.
36. ECtHR, judgment of 17 April 2018, *Pirozzi v. Italy* (no. 21055/11), § 64. The Court used the opportunity to add one small sentence to its standard case-law: if the situation cannot be remedied by EU law, "Il leur [i.e. the domestic courts] appartient dans ce cas de lire et d'appliquer les règles du droit de l'UE en conformité avec la Convention".
37. *Pirozzi*, § 67.
38. Admittedly in *Pirozzi*, § 71, the Court concludes that there had not been "un déni de justice *flagrant*" in this case. But the word 'flagrant' is not used as a threshold criterion as in *Soering*. Rather it is inspired by the particular circumstances of the case. The applicant had relied on the *Sejdovic* judgment, in which the Court had recalled that "the refusal to reopen proceedings conducted in the accused's absence, without any indication that the accused has waived his or her right to be present during the trial, has been found to be a 'flagrant denial of justice' rendering the proceedings 'manifestly contrary to the provisions of Article 6 or the principles embodied therein' (see ECtHR, judgment of 1 March 2006, *Sejdovic v. Italy* (no. 56581/00), § 84; see also the quote from *Al Nashiri*, above). When the Court in *Pirozzi* rejected the applicant's arguments, it simply noted that a 'flagrant denial of justice' à la *Sejdovic* had not occurred.
39. True, in *Soering* the Court did not distinguish between potential violations in the future and violations in the past: it discussed extraditions where the individual concerned "has suffered *or risks suffering* a flagrant denial of a fair trial in the requesting country". However, the *A.C.* case is – just like *Avotiņš* and *Pirozzi* – about an alleged violation of Art. 6 ECHR. In this respect they differ from the asylum cases where a real risk of treatment contrary to Art. 3. A possible reason behind the Court's approach in *Soering* is that treatment contrary to Art. 3 will often lead to irreparable harm. It is not good enough that the individual, following his transfer, could bring a complaint against the receiving country.
40. For reasons of readability, judges are referred to as 'him' – although in many countries a majority of judges is female.
41. See e.g. Basic Principles on the Independence of the Judiciary (UNGA Res. 40/32 of 29 November 1985), Art. 12: "Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists".

42. See, e.g., ECtHR, judgment of 9 January 2013, *Oleksandr Volkov v. Ukraine* (no. 21722/11).
43. According to Amnesty International, up to a third of Turkey's judges and prosecutors was dismissed and/or detained following the 2016 coup attempt. See "Turkey 2017/2018" at www.amnesty.org. In Poland the Law on Organization of Common Courts (2017) gave the Minister of Justice a six-month window in which he could dismiss presidents of courts and appoint new ones, without consultation. According to the Polish Ombudsman, almost 150 court presidents and vice presidents were replaced. See A. Bodnar, 9 April 2018, " Europe can save Poland from darkness", www.politico.eu.
44. See ECtHR, judgment of 23 June 2016, *Baka v. Hungary* (no. 20261/12).
45. Currently such a vetting procedure takes place in Albania, with involvement of the international community. See EWB, 16 January 2018, "Albania begins vetting with 36 judges and prosecutors", at www.europeanwesternbalkans.com.
46. Specifically on reputation and Art. 8 ECHR, see ECtHR, admissibility decision of 5 December 2017, *Anchev v. Bulgaria* (no. 38334/08).
47. See ECtHR, admissibility decision of 8 February 2001, *Pitkevich v. Russia* (no. 47936/99), and a series of admissibility decisions in Turkish cases: 12 June 2003, *Yilmazoğlu v. Turkey* (no 36593/97); 11 December 2007, *Apay v. Turkey* (no. 3964/05); 26 May 2009, *Nazsiz v. Turkey* (no. 22412/05); and 19 October 2010, *Özpınar v. Turkey* (no. 20999/04).
48. ECtHR, judgment of 8 June 1976, *Engel a.o. v. the Netherlands* (no. 5100/71), § 80.
49. ECtHR, judgment of 2 May 1990, *Weber v. Switzerland* (no. 11034/84), § 33, and admissibility decision of 21 November 1998, *Brown v. UK* (no. 38644/97).
50. ECtHR, admissibility decisions of 11 September 2001, *Tepeli a.o. v. Turkey* (no. 31876/96), and of 11 September 2007, *Suküt v. Turkey* (no. 59773/00).
51. See for a recent example ECtHR, judgment of 31 October 2017, *Kamenos v. Cyprus* (no. 147/07), § 51.
52. See e.g. ECtHR, judgment of 28 March 2017, *R.S. v. Germany* (no. 147/07), § 33.
53. See notably ECtHR, judgments of 22 March 2001, *Streletz, Kessler and Krenz v. Germany* (no. 35532/97); 7 May 2010, *Kononov v. Latvia* (no. 36376/04); and 19 September 2008, *Korbely v. Hungary* (no. 9174/02).
54. ECtHR, admissibility decision of 30 May 2006, *Matyjek v. Poland* (no. 38184/03), §§ 48-58.
55. ECtHR, judgment of 24 April 2007, *Matyjek v. Poland* (no. 38184/03). See also Parliamentary Assembly of the Council of Europe (PACE) Resolution 1096 (1996) on measures to dismantle the heritage of former communist totalitarian systems.
56. See ECtHR, judgment of 24 August 1993, *Massa v. Italy* (no. 14399-88), § 26; judgment of 17 March 1997, *Neigel v. France* (no. 18725/91), §§ 43-44.
57. ECtHR, judgment of 8 December 1999, *Pellegrin v. France* (no. 28541/95).
58. ECtHR, judgment of 19 April 2007, *Vilho Eskelinen v. Finland* (no. 63235/00).
59. ECtHR, admissibility decision of 8 February 2001, *Pitkevich v. Russia* (no. 47936/99).
60. The fact that Mr Olujić was able to file a constitutional complaint against the decision of the NJC was only seen as an additional factor. See ECtHR, judgment of 5 February 2009, *Olujić v. Croatia* (no. 22330/05), §§ 33-37. See in a similar vein ECtHR, judgments of 27 January 2009, *G. v. Finland* (no. 33173/05) and of 16 July 2009, *Bayer v. Germany* (no. 8453/04), § 38.
61. ECtHR, judgment of 9 January 2013, *Oleksandr Volkov v. Ukraine* (no. 21722/11), § 88.
62. ECtHR, judgment of 23 June 2016, *Baka v. Hungary* (no. 20261/12).
63. ECtHR, judgment of 20 November 2012, *Harabin v. Slovakia* (no. 58688/11).
64. ECtHR, judgment of 9 July 2013, *Di Giovanni v. Italy* (no. 51160/06).
65. ECtHR, judgment of 20 October 2015, *Saghatelyan v. Armenia* (no. 7984/06).
66. A whole series of cases including ECtHR, judgment of 7 January 2016, *Gerovska Popčevska v. FYROM* (no. 48783/07).
67. ECtHR, judgment of 21 June 2016, *Tato Marinho dos Santos Costa Alves dos Santos and Figueiredo v. Portugal* (nos. 9023/13 and 78077/13).
68. ECtHR, judgments of 28 March 2017, *Sturua v. Georgia* (no. 45729/05) and 12 October 2017, *Gabaidze v. Georgia* (no. 13723/06).
69. ECtHR, judgment of 31 October 2017, *Kamenos v. Cyprus* (no. 147/07).

70. See esp. *Kamenos,* §§ 73-88. Admittedly in *Baka,* § 113, the Grand Chamber cited, without further comment, some earlier decisions in which it had found that Article 6 ECHR did not apply "because the exclusion from access to a court for the post in question was clear and 'express'". The Court did not explain, however, if this approach is still valid in the light of later case law, notably *Volkov.*
71. See e.g. three ECtHR judgments of 16 February 2000: *Fitt v. UK* (no. 29777/96), *Rowe and Davis v. UK* (no. 228901/95), and *Jasper v. UK* (no. 27052/95), and see also ECtHR, judgment of 19 February 2009, *A. a.o. v. UK* (no. 3455/05), § 206 and following.
72. See B. Koleka & M. Robinson, "Albania judges its judges in pursuit of EU milestone", 23 June 2017, at www.reuters.com.
73. See e.g. ECtHR, judgment of 14 February 2006, *Turek v. Slovakia* (no. 57986/00), § 115; judgment of 24 April 2007, *Matyjek v. Poland* (no. 38184/03), § 62. See also ECtHR, judgment 27 July 2004, *Sidabras and Džiautas v. Lithuania* (nos. 55480/00 and 59330/00).
74. ECtHR, judgment of 19 September 2017, *Regner v. Czech Republic* (no. 35289/11).
75. See esp. the Joint partly dissenting opinion of Judges Raimondi, Sicilianos, Spano, Ravarani and Pastor Vilanova (i.e. a group that includes the President of the Court, its Vice-President and a Section President!): the total lack of communication to the interested party, throughout the entire proceedings, of the reasons leading to the decision to withdraw security clearance, added to denial of access to the case-file materials, appears unnecessary in fact and problematical in law.
76. ECtHR, judgment of 9 October 1979, *Airey v. Ireland* (no. 6289/73), § 24.
77. ECtHR, judgment of 22 November 2016, *Erményi v. Hungary* (no. 22254/14), §§ 3 and 17.
78. See already ECtHR, judgment of 6 May 1981, *Buchholz v. FRG* (no. 7759/77), § 52.
79. On 4 December 2014 the Committee of Ministers adopted Interim Resolution CM/ResDH(2014)275 in the *Volkov* case, in which it expressed "grave concern that despite the efforts deployed by the Ukrainian authorities to ensure, by way of a parliamentary resolution, the applicant's reinstatement as required by the Convention, such a resolution has still not been adopted". In *Supervision of the execution of judgments and decisions of the ECHR – Annual Report 2017* it is stated that Mr Volkov was "reintegrated" in the Supreme Court (p. 201). It would seem, however, that the situation still has not been fully solved, and the Committee of Ministers did not close its examination of this case yet.
80 P.H. Teitgen, in *Travaux préparatoires de la CEDH* vol. I (1949), p. 292; official translation into English.