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EUROPEES HOF VOOR DE RECHTEN VAN DE MENS

9 maart 2021, nr. 1571/07

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Art. 6 EVRM

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Toegang tot de rechter. Geschil over overplaatsing van rechter in Turkije. Niet voldaan aan de Vilho Eskelinen-criteria. 'Civil' right. Belang van de onafhankelijke rechterlijke macht en machtenscheiding. Dergelijke geschillen moeten aan de rechter kunnen worden voorgelegd en door de rechter kunnen worden beoordeeld. Artikel 6 lid 1 EVRM is geschonden.

Klager is een Turkse onderdaan. In 1979 ving de rechterlijke loopbaan van klager aan. Hij werd aangesteld als rechter in opleiding bij het hoogste bestuursrechtelijke orgaan in Ankara. In 1998 werd klager de voorzitter van de achtste divisie van de bestuursrechter in Ankara. In 2005 werd hij door de Hoge Raad voor de Rechtspraak (hierna: 'HYSK') zonder zijn instemming benoemd tot rechter bij de (bestuurs)rechtbank in Ankara. Tegen deze benoeming ging hij tevergeefs in bezwaar bij een bezwaarcommissie. In 2006 werd hij benoemd als rechter bij een (bestuurs)rechtbank in Sivas die van lagere rang was dan de rechtbank in Ankara. Deze overplaatsing werd gerechtvaardigd door de 'gemiddelde' beoordeling die klager in 2005 had ontvangen door het ministerie van Justitie. In 2006 verzocht klager de HYSK om het besluit om hem over te plaatsen naar Sivas te herbeoordelen. Hij stelde zich op het standpunt dat de beslissing was genomen zonder zijn toestemming, inbreuk maakte op de rechterlijke onafhankelijkheid en zijn reputatie schaadde. Tevens werd artikel 8 EVRM naar klagers mening geschonden (het recht op respect voor familie- en gezinsleven), nu de rechtbank 440 kilometer verwijderd was van zijn woonplaats. In 2007 heeft de klager het ministerie verzocht om openbaarmaking van zijn beoordeling. Het ministerie honoreerde dit verzoek niet, nu de beoordelingsformulieren geïnclassificeerd waren en niet binnen het toepassingsbereik van de Wet openbaarheid van bestuur vielen. Tegen de beslissing tot overplaatsing naar Sivas kon klager niet in beroep.

Klager stapte naar het Europees Hof en stelt zich op het standpunt dat artikel 6 lid 1 EVRM is geschonden. Nu klager de beslissing tot overplaatsing

niet kon aanvechten bij een rechter zou zijn recht op toegang tot de rechter zijn geschonden. Het Hof herhaalt dat het recht op toegang tot de rechter geen absoluut recht is en er beperkingen mogelijk zijn. Deze beperkingen moeten bij wet voorzien zijn, een legitiem doel dienen en proportioneel zijn. Het Hof benadrukt hierbij het belang van de machtenscheiding en de onafhankelijkheid van de rechterlijke macht. Het Hof merkt op dat de Turkse rechters geen vaste standplaats wordt gegarandeerd. De Turkse Grondwet en andere relevante wetgeving stellen wel specifieke eisen voor de overplaatsingen van rechters. Deze eisen zouden bescherming moeten bieden tegen willekeurige overplaatsing. Klager zou op basis van deze bepalingen dus moeten worden beschermd tegen willekeurige overplaatsing. Het bestaan van dergelijke eisen kan worden begrepen vanuit het oogpunt van een onafhankelijke rechterlijke macht. Tot slot gaat het Hof in op de vraag of het in casu gaat om een 'civil' recht in de zin van artikel 6 lid 1 EVRM. Hierbij merkt het Hof op dat geschillen tussen ambtenaren en de staat in principe binnen de reikwijdte van artikel 6 EVRM vallen. Dit is enkel anders als wordt voldaan aan de Vilho Eskelinen-criteria. Het gaat daarbij om de volgende twee criteria: de wet bepaalt uitdrukkelijk dat bij dit soort geschillen geen toegang tot de rechter mogelijk is en dat deze uitsluiting in het belang van de staat objectief te rechtvaardigen is. Met betrekking tot het eerste criterium overweegt het Hof dat de HYSK geenszins als rechterlijke organisatie kan worden aangemerkt. De uitspraken van de HYSK worden immers niet gemotiveerd en er is geen beroep mogelijk tegen de beslissing. Ten aanzien van het tweede criterium overweegt het Hof dat in de Turkse wetgeving expliciet is bepaald dat er geen toegang tot de rechter is voor dergelijke besluiten. Het Hof benadrukt hier nogmaals het belang van de onafhankelijkheid van de rechterlijke macht en de machtenscheiding. Vanwege dit belang zouden dit soort beslissingen van de overheid altijd moeten kunnen worden beoordeeld door een rechter en zou toegang tot de rechter dus open moeten staan. Hiermee komt het Hof tot het oordeel dat de uitsluiting niet objectief gerechtvaardigd is en zodoende niet aan de Vilho Eskelinen-criteria wordt voldaan. Het Hof komt tot de conclusie dat sprake is van een schending van artikel 6 EVRM. Het Hof overweegt dat Turkije klager € 12.500 dient te vergoeden voor de geleden immateriële schade door de geforceerde overplaatsingen en € 8.000 dient te vergoeden voor kosten die door klager zijn gemaakt. Met de materiële schadeclaim gaat het Hof niet mee.

Bilgen,
tegen
Turkey.

[...]

The Law

I. Alleged violation of Article 6 § 1 of the Convention

40. The applicant complained under Article 6 § 1 of the Convention of his inability to have recourse to a judicial review of the HSYK's decision of 19 September 2006 dismissing his application for a review of its decision to transfer him to the Sivas Regional Administrative Court.

The relevant parts of Article 6 § 1 of the Convention read as follows:

"In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

A. Admissibility

1. Applicability ratione materiae

(a) The parties' submissions

(i) The Government's submissions

41. The Government argued that Article 6 § 1 of the Convention could not create, by way of interpretation, a substantive civil right which had no basis in the State concerned. In their view, the relevant domestic law and regulations did not grant judges in Turkey a right to remain in the location of the judicial post to which they were initially or subsequently appointed. In that connection, judges could not rely on a geographical tenure or expect to be transferred to a place of their own choosing, even once they had served their minimum term of office in the three judicial districts. The Government explained that the rotational system in respect of judges had been set up with a view to addressing geographical inequalities as well as social and cultural barriers that could impair the independence of the profession. In the first place, the rotation system ensured the continuity and quality of the judicial services brought to every part of the country by way of making relevant appointments at particular intervals. Secondly, the system provided for an equitable distribution among the judges. Certain locations which were more desirable than others in terms of social, economic and cultural opportunities could be offered to more judges in a system of rotation than they could in a system without involuntary rotation. Finally, the Government considered that when judges remained in the same place permanently, especially in smaller cities, it became more difficult for them to remain impartial to the local residents on whose disputes

they were required to adjudicate and *vice versa*, in that local residents were prone to forming a perception that a judge stationed too long in a particular court of law tended to lose his or her impartiality.

42. The Government further submitted that the applicant had completed his minimum term of office in the first and second districts, but not in the third judicial district. They seemed to imply that the period during which he had worked as an apprentice judge (see paragraph 4 above) and that of his military service as a legal clerk (see paragraph 7 above) did not count. In that connection, they observed that the amount of time for which the applicant had worked as a rapporteur judge at the Supreme Administrative Court added up to only seven months as opposed to the required amount of five years. However, in any event, they maintained that even if the applicant had completed all three of the minimum terms of office in the respective three districts, he would not have had a right to remain in the location prior to his impugned transfer. The Government further opined that there was no European consensus on the methods of appointment and transfer of judges and prosecutors.

43. With regard to the civil nature of the right alleged, relying on *Vilho Eskelinen and Others v. Finland* GC (no. 63235/00, ECHR 2007-II), the Government argued that both conditions of the test mentioned in that judgment had been met. Concerning the first condition of the test, the domestic law had expressly excluded the HSYK's decisions from judicial review. In that connection, they referred to the Court's conclusions in the cases of *Apay v. Turkey* ((dec.), no. 3964/05, 11 December 2007) and *Özpinar v. Turkey* (no. 20999/04, § 30, 19 October 2010), in which the Court had held that no judicial remedy existed in respect of the HSYK's decisions. They explained that prior to the constitutional amendment of 2010, the decisions of the HSYK had been excluded from any judicial review, and that after the 2010 amendment, only decisions concerning dismissal from the profession had become amenable to judicial review. They further argued that the HSYK was not a judicial authority and it could not be considered a 'tribunal' for the purposes of that test. According to the Government, that body did not carry out proceedings, it did not hear witnesses and its decision-making procedure was entirely written, except in the case of dismissals, where the defendant judge or prosecutor had a right to submit his observations orally.

As regards the second condition of the test, that is the justification of the exclusion from access to a court for the category of staff in question, the Government submitted that the post of judge

was a post of the highest grade in the field of administration of justice. Judges wielded power conferred on them by public law and assumed duties to safeguard the general interests of the State. Relying on the conclusions of the Court in *Apay* (cited above), the Government submitted that the subject matter of the dispute was the exercise of the profession of a judge, which was one of the essential expressions of sovereignty. Therefore, the exclusion of access to a court was justified on objective grounds.

(ii) *The applicant's submissions*

44. The applicant, referring to the cases of *Eskelinen* (cited above) and *Ohneberg v. Austria* (no. 10781/88, 18 September 2012), asserted that Article 6 of the Convention was applicable to his complaint. His case had been an 'ordinary employment dispute', first because transfer to another post directly affected the scope of the employment relationship, and secondly, because the transfer had had apparently more to do with his performance and conduct than the organisation of the judiciary across the country. The purported legal basis for the appointment, which was that his performance had been considered to be 'average' in 2005, had not been disclosed to him at the time of his impugned transfer but had, according to the submissions of the Government, clearly played a role in the HSYK's decision. Had it not been for the Government's observations on the admissibility of his case, he would not have had access to the full disclosure of his appraisal report of 2005 or the legal basis for his transfer.

45. The applicant argued that he had a right to remain in the same judicial district. He based his arguments on section 5 of the Regulation on Appointments and section 32 of Law no. 2802 (see paragraphs 24 and 30 above). In his view, those provisions entitled him to remain in the first judicial district for he had acquired the highest grade and had already been holding office in that district prior to his impugned transfer. The applicant further disputed the Government's arguments that the reason he had been transferred to Sivas had been because he had not completed his minimum term of office in the third judicial district. Giving the initials and registration numbers of his peers with whom he had started his career, he contended that after being appointed to the Ankara administrative, tax and regional courts respectively in 1997, they had all remained there, irrespective of whether they had completed their term of office in the third judicial district or not.

46. The applicant further submitted that the constitutional guarantee of judicial independence did not coincide with the way in which the

HSYK decided to transfer judges because of the lack of criteria combined with the lack of transparency in which those decisions were taken. Relying on the Venice Commission's Interim Opinion on the draft law on Judges and Prosecutors of Turkey (see paragraph 34 above) and the Resolution of the International Association of Judges on the Situation of the Judiciary in Turkey (see paragraph 39 above), he argued that the assignment or transfer of judges and prosecutors to less desirable locations was used as a means of exerting political pressure on individual judges. Without the safeguards of a fair hearing and due process, the system was prone to the use of arbitrary power by the State and was therefore contrary to the rule of law.

(b) *The Court's assessment*

(i) *Existence of a right*

(α) *Recapitulation of the case-Law*

47. The Court reiterates that for the 'civil' limb of Article 6 § 1 to be applicable, there must be a dispute (*contestation* in the French text) over a 'right' which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether that right is protected under the Convention. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, lastly, the result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play (see, among many other authorities, *Baka v. Hungary* GC, no. 20261/12, § 100, ECHR 2016).

48. Article 6 § 1 does not guarantee any particular content for (civil) 'rights and obligations' in the substantive law of the Contracting States: the Court may not create by way of interpretation of Article 6 § 1 a substantive right which has no legal basis in the State concerned (see, for example, *Fayed v. the United Kingdom*, 21 September 1994, § 65, Series A no. 294-B; *Roche v. the United Kingdom* GC, no. 32555/96, § 119, ECHR 2005-X; and *Boulois v. Luxembourg* GC, no. 37575/04, § 91, ECHR 2012).

49. The Court's traditional approach to determining whether there is a 'right' attracting the application of Article 6 is based on the distinction between the substantive content of the right invoked and possible procedural obstacles to obtaining judicial protection thereof (see *Roche*, cited above, § 119). Whether a person has an actionable domestic claim may depend not only on the content, properly speaking, of the relevant civil right as defined under national law, but also on the ex-

istence of procedural bars preventing or limiting the possibilities of bringing potential claims to court (see *Lupeni Greek Catholic Parish and Others v. Romania* GC, no. 76943/11, § 87, 29 November 2016). In the latter kind of case Article 6 § 1 may be applicable (see *Petko Petkov v. Bulgaria*, no. 2834/06, § 26, 19 February 2013, with further reference to *Al-Adsani v. the United Kingdom* GC, no. 35763/97, § 47, ECHR 2001–XII).

50. By implication, Article 6 remains inapplicable where it is clear beyond argument that no right exists in domestic law (see *Sultana v. Malta* (dec.), no. 970/04, 11 December 2007). Such is the case where a person's rights under the domestic legislation are limited to a mere hope of being granted a right, with the actual grant of that right depending on an entirely discretionary and unreasoned decision of the authorities (see *Regner v. the Czech Republic* GC, no. 35289/11, § 103, 19 September 2017).

51. However, there are also situations where the national law, while not necessarily recognising that an individual has a subjective right, does confer the right to a lawful procedure for examination of his or her claim, involving matters such as ruling whether a decision was arbitrary or *ultra vires* or whether there were procedural irregularities (see *Regner*, cited above, § 105, with further reference to *Van Marle and Others v. the Netherlands*, 26 June 1986, § 35, Series A no. 101, and, *mutatis mutandis*, *Kök v. Turkey*, no. 1855/02, § 36, 19 October 2006). This is the case as regards certain decisions where the authorities have a purely discretionary power to grant or refuse an advantage or privilege, with the law conferring on the person concerned the right to apply to the courts, which, where they find that the decision was unlawful, may set it aside. In such a case Article 6 § 1 of the Convention is applicable, on condition that the advantage or privilege, once granted, gives rise to a civil right (see *Regner*, cited above, § 105).

52. Lastly, it would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 § 1 – namely that civil claims must be capable of being submitted to a judge for adjudication – if, for example, a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons (see *Fayed*, § 65, and *Al-Adsani*, § 47, both cited above).

(β;) *Application of these principles to the present case*

53. The Court wishes to make it clear at the outset that it is not its role to determine the ques-

tion whether the impugned transfer of the applicant was justified at the time. It further reiterates that it is not its role to pronounce on the appropriateness of the rotational system in place for judges and prosecutors in Turkey. In the determination of whether there existed a legal basis for the right relied on by the applicant, the Court needs to ascertain only whether the applicant's arguments were sufficiently tenable, not whether he would necessarily have won had he had access to a court (see, *inter alia*, *Neves e Silva v. Portugal*, 27 April 1989, § 37, Series A no. 153–A). In so doing, the Court must have regard to the wording of the relevant legal provisions and to their interpretation, if any, by the domestic courts (see *Yanakiyev v. Bulgaria*, no. 40476/98, § 58, 10 August 2006). The Court nevertheless reiterates that the concept of 'civil rights and obligations' is an autonomous concept deriving from the Convention which cannot be interpreted solely by reference to the respondent State's domestic law (see *König v. Germany*, 28 June 1978, §§ 88–89, Series A no. 27, and *Nait-Liman v. Switzerland* GC, no. 51357/07, § 106, 15 March 2018). In that connection, in its assessment of whether there existed a 'right' that an applicant can rely on arguable grounds, the Court takes domestic provisions as a starting point only (see, among many other authorities, *Denisov*, cited above, § 45) and may rely on international norms to assess or enhance the interpretation of the existence of a right (see, for example, *Enea v Italy* GC, no. 74912/01, § 101, ECHR 2009; *Boulois*, cited above, §§ 91 and 101–102; and *Nait-Liman*, cited above, § 108).

54. In order to determine whether the applicant had a right in the present case, the Court must first analyse the actual nature of his complaint before the domestic authorities. In that connection, the Court reiterates that it is the right as asserted by the claimant in the domestic proceedings that must be taken into account in order to assess whether Article 6 § 1 is applicable (see *Stichting Mothers of Srebrenica and Others v. the Netherlands* (dec.), no. 65542/12, § 120, ECHR 2013 (extracts)).

55. The applicant complained before the HSYK that the decision to transfer him to Sivas had been unjustified and did not comply with the guarantee of judicial independence (see paragraph 13 above). He argued that his consecutive transfers within the previous two years had appeared arbitrary, as no pressing reasons or other grounds had been cited by the HSYK. Moreover, he argued that he had a right to remain in Ankara, firstly because, as a first-grade judge serving in the first judicial district and having completed his minimum term of service in the other judicial districts, he had a right not to be removed from

the first district against his will. Secondly, he relied on his right to family union. In his submission, he explained that he had been unable to move his entire family with him to Sivas, as his children were enrolled in private schools of their choice and his wife was employed in the private sector. He maintained in that connection that his private and family life had been substantially affected as a consequence of his transfer.

56. The Court reiterates that although there is in principle no right under the Convention to hold a public post entailing the administration of justice (see *Dzhidzheva Trendafilova v. Bulgaria* (dec.), no. 12628/09, § 38, 9 October 2012, and contrast *Zalli*, cited above; and concerning tenured judicial positions, *Baka*, cited above, § 107; *Denisov*, cited above, § 47, and *Kövesi v. Romania*, no. 3594/19, § 113, 5 May 2020), such a right may exist at the domestic level. The Court further notes that the applicant did not claim a right to hold judicial office in a particular court of law, which is clearly not a right recognised as such in domestic law, but rather complained of the arbitrary nature of his transfer resulting in his removal from the first judicial district without any grounds being disclosed and the prejudice he had suffered in his professional and personal life as a result.

57. The case therefore concerns, from the standpoint of Article 6 § 1 of the Convention, a member of the judiciary's right of access to a court and his right to a fair procedure in order to complain about the legitimacy of his non-consensual transfer, which undoubtedly affected the conditions of his employment and had an impact on his family life. Thus, in the determination of whether the applicant could arguably rely on a 'right' so as to bring into play the applicability of Article 6 of the Convention, the issue is not whether in a judicial system, such as that at issue in the present case, the right to a geographical guarantee can be demanded, but whether there is an arguable basis on which the right to be protected against an arbitrary transfer can be claimed.

58. It should not be forgotten in this regard that the Court has on many occasions emphasised the special role in society of the judiciary which, as the guarantor of justice, a fundamental value in a State governed by the rule of law, must enjoy public confidence if it is to be successful in carrying out its duties (see *Baka*, cited above, § 165, with further references). This consideration, set out in particular in cases concerning the right of judges to freedom of expression (see, as a recent example, *Guz v. Poland*, no. 965/12, § 86, 15 October 2020) has been found to be equally relevant in relation to the adoption of measures af-

fecting the right to liberty of members of the judiciary (see *Alparslan Altan v. Turkey*, no. 12778/17, § 102, 16 April 2019, and *Baş v. Turkey*, no. 66448/17, § 144, 3 March 2020). The Court sees no reason why this consideration should not also be applied in cases concerning the right of access to a court for members of the judiciary in matters concerning their status or career. Since the Convention is first and foremost a system for the protection of human rights, the Court must interpret and apply it in a manner which renders its rights practical and effective, not theoretical and illusory. The Convention must also be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions (see, among other authorities, *Stec and Others v. the United Kingdom* (dec.) GC, nos. 65731/01 and 65900/01, §§ 47–48, ECHR 2005-X, and *N.D. and N.T. v. Spain* GC, nos. 8675/15 and 8697/15, § 172, 13 February 2020). Given the prominent place that the judiciary occupies among State organs in a democratic society and the growing importance attached to the separation of powers and to the necessity of safeguarding the independence of the judiciary (see *Ramos Nunes de Carvalho e Sá v. Portugal* GC, nos. 55391/13 and 2 others, § 196, 6 November 2018), the Court must be particularly attentive to the protection of members of the judiciary against measures affecting their status or career that can threaten their judicial independence and autonomy.

59. It is with these considerations in mind that the Court will examine the specific circumstances of the present case.

60. As regards the provisions of domestic law, the Court notes that Article 140 of the Turkish Constitution provides for a safeguard in that matters relating to the status of judges, including changes in their posts or places of duty, should be regulated by legislation in accordance with the principles of independence of the courts and the security of tenure of judges. There can therefore be no doubt that judges may claim, on the basis of the constitutional protection afforded to them, that the principles of independence of the judiciary and the security of tenure of judges should be fully complied with in measures affecting their status or career, including those concerning transfers, and that the legal provisions emanating from Parliament and providing for the specific criteria to be respected in deciding on transfers act as an additional safeguard against arbitrariness or the improper use of discretion.

61. In that connection, the Court observes that there are only three types of non-consensual transfer providing for redeployment in a lower district, which are set out in the Judges and Prose-

cutors Act. These are: firstly, appointment by way of transfer to a lower district, linked to the condition of failure in the performance of duties on the basis of documents (section 35); secondly, particular situations of transfer linked to an investigation or a report revealing a failure in the performance of duties with the requisite expeditiousness (section 46); thirdly, transfer to a lower district as a disciplinary sanction (section 68). The first two types of transfer cannot be imposed unless the inadequate performance is substantiated by a report or an investigation, whereas the third type of transfer can only be imposed as a disciplinary penalty following a disciplinary process. When these provisions are read in the light of the constitutional guarantee mentioned above, it cannot be argued that the domestic framework gave the HSYK unfettered discretion in respect of the transfer of judges so as to allow it to step outside of the limited situations for which a transfer may be called for. In addition, in the specific case of the applicant, who was a first-grade judge and serving in the highest (first) judicial district prior to his impugned transfer, section 5 of the Regulations on Appointment could be said to have created a legitimate expectation to remain in the first judicial district contingent on performance and conduct. On this basis also, the applicant, whose performance and conduct were not called into question, and who in any case was not duly apprised of the reasons for his transfer, could argue that his transfer was not in compliance with the provisions of domestic law. In these circumstances, and in so far as the factual or legal basis for the applicant's transfer was not disclosed to him, the applicant could legitimately suspect an element of arbitrariness in his transfer and this provided an arguable basis on which the right to be protected against arbitrary transfer could be claimed.

62. As to whether the principles of international law or common values of the Council of Europe can be relied on to enhance the interpretation of domestic law as to the existence of such a right, the Court reiterates that the consensus emerging from specialised international instruments and the practice of Contracting States may constitute a relevant consideration when it interprets the provisions of the Convention in specific cases (see *Demir and Baykara v. Turkey* GC, no. 34503/97, § 85, ECHR 2008). The Court further points out that in a number of judgments, it has used, for the purpose of interpreting the Convention, intrinsically non-binding instruments of Council of Europe organs, in particular recommendations and resolutions of the Committee of Ministers and the Parliamentary Assembly, as well as norms emanating from other organs of the Council of Europe, whether supervisory

mechanisms or expert bodies which do not have the function of representing States Parties to the Convention (*ibid.*, §§ 74–75, and the cases cited therein). In the case of *Enea* (cited above, §§ 101 and 103), which concerned the applicability of Article 6 § 1 of the Convention under its civil limb to the decision to place the applicant under a special prison regime and the restrictions likely to accompany it, the Court referred to the Recommendation of the Committee of Ministers concerning the European Prison Rules in finding that a 'right' could be said to have been recognised under domestic law. In the case of *Boulois* (cited above, § 102), the Court concluded that no right to prison leave existed either in domestic or international law, highlighting the fact that such a right was not recognised under any principle of international law that the applicant had relied on and that no European consensus existed on the matter.

63. Turning to the circumstances of the instant case and having regard to the international materials cited in paragraphs 32–38 above in a non-exhaustive manner, the Court observes at the outset that objective criteria accompanied by a transparent process are regarded as the standard in the selection, appointment and promotion of judges as a safeguard of judicial independence and autonomy, so as to avoid arbitrary interference or the improper use of discretion. The Court also considers relevant the principles established in its recent judgment in *Guðmundur Andri Ástráðsson v. Iceland* GC (no. 26374/18, §§ 218–234, 1 December 2020) concerning the consequences of an irregular appointment of a judge on the scope of the right to a 'tribunal established by law'. The Court considered that judges should be selected on the basis of merit and objective criteria not only to ensure public confidence in judiciary but also to supplement the guarantee of the personal independence of judges (*ibid.*, § 222). In that connection it referred to paragraph 25 of Opinion. No. 1 (2001) of the CCJE, which recommends that 'the authorities responsible in member States for making and advising on appointments and promotions should now introduce, publish and give effect to objective criteria, with the aim of ensuring that the selection and career of judges are based on merit, having regard to qualifications, integrity, ability and efficiency' (*ibid.*, § 221). At the same time, the Grand Chamber considered it necessary for the domestic law to be couched in unequivocal terms, to the extent possible, so as not to allow arbitrary interferences in the appointment process, including by the executive (*ibid.*, § 230). The Court considers these principles of international law on the appointment of judges to be equally valid in the case of

their transfers. Furthermore, the European Charter on the Statute for Judges, despite being non-binding on the member States, provides for a right of appeal for any judge who considers that his or her rights under the statute, or more generally independence, or that of the legal process are threatened or infringed. In the specific context of transfers against the will of the judge concerned, the Charter reinforces the principle of irremovability, save for the very limited exceptions mentioned therein, and in any event recognises the general right of appeal before an independent authority, which can investigate the legitimacy of the transfer (see paragraph 32 above and the Recommendation of the Committee of Ministers 2010(12) in paragraph 33 above). Likewise, the European Network of Councils for the Judiciary considers that the principle of irremovability of judges renders it imperative that the grounds for transfer of judges be clearly established and that a mandatory transfer be decided by means of transparent proceedings conducted by an independent body or authority without any external influences and whose decisions are subject to challenge or review (see paragraph 38 above).

Against this background and without calling into question the legitimacy of existing systems for the appointment and transfer of judges in the member States, the Court can observe that the right of a member of the judiciary to protection against an arbitrary transfer or appointment is supported by international norms as a corollary of judicial independence.

64. In the light of the above considerations, it follows that a dispute (*contestation*) over a 'right' for the purposes of Article 6 § 1 can be said to have existed in the instant case. It remains to be determined whether the nature of the right in question was civil.

(ii) *Civil nature of the right*

(α) *Recapitulation of the case-Law*

65. It should be noted that the scope of the 'civil' concept in Article 6 is not limited by the immediate subject matter of the dispute. Instead, the Court has developed a wider approach, according to which the 'civil' limb has covered cases which might not initially appear to concern a civil right but which may have direct and significant repercussions on a private pecuniary or non-pecuniary right belonging to an individual. Through this approach, the civil limb of Article 6 has been applied to a variety of disputes which may have been classified in domestic law as public-law disputes (see *Denisov v. Ukraine* GC, no. 76639/11, § 51, 25 September 2018). These examples include disciplinary proceedings concerning the

right to practise a profession (see *Le Compte, Van Leuven and De Meyere v. Belgium*, 23 June 1981, §§ 47 and 48, Series A no. 43, and *Philis v. Greece* (no. 2), 27 June 1997, § 45, *Reports of Judgments and Decisions* 1997-IV), disputes involving the right to a healthy environment (see *Taşkın and Others v. Turkey*, no. 46117/99, § 133, ECHR 2004-X), prisoners' detention arrangements (see *Ganci v. Italy*, no. 41576/98, § 25, ECHR 2003-XI, and *Enea v. Italy* (cited above, § 103) as well as the right of a prisoner to confidential face-to-face conversation with a lawyer outside the context of a criminal trial (see *Altay v. Turkey* (no. 2), no. 11236/09, § 68, 9 April 2019), the right of access to investigation documents (see *Savitskiy v. Ukraine*, no. 38773/05, §§ 143-45, 26 July 2012), disputes regarding the non-inclusion of a conviction in a criminal record (see *Alexandre v. Portugal*, no. 33197/09, §§ 54 and 55, 20 November 2012), proceedings for the application of a non-custodial preventive measure (see *De Tommaso v. Italy* GC, no. 43395/09, § 154, ECHR 2017 (extracts)), the revocation of a civil servant's security clearance within the Ministry of Defence (see *Regner*, cited above, §§ 113-27).

66. In cases of employment disputes concerning civil servants, the Court applies a two-tier test, which it established in its Grand Chamber judgment in *Vilho Eskelinen* (cited above – hereinafter referred to as the '*Eskelinen* test'). In order for the respondent State to be able to rely before the Court on the applicant's status as a civil servant in excluding the protection embodied in Article 6, two conditions must be fulfilled. First, the State in its national law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the State's interest. In order for the exclusion to be justified, it is not enough for the State to establish that the civil servant in question participates in the exercise of public power or that there exists a 'special bond of trust and loyalty' between the civil servant and the State, as employer. It is also for the State to show that the subject matter of the dispute in issue is related to the exercise of State power or that it has called into question the special bond (*ibid.*, §§ 102-03). Thus, there can in principle be no justification for the exclusion from the guarantees of Article 6 of ordinary labour disputes, such as those relating to salaries, allowances or similar entitlements, on the basis of the special nature of the relationship between the particular civil servant and the State in question (*ibid.*, § 103). There will, in effect, be a presumption that Article 6 applies. It will be for the respondent Government to demonstrate, firstly, that a civil servant applicant does not have a right of access to a court under

national law and, secondly, that the exclusion of the rights under Article 6 for the civil servant is justified (*ibid.*, § 103).

67. The Court reiterates that an applicant may not be excluded from the protection of Article 6 of the Convention solely on account of his or her status as a judge. It recalls that in its Grand Chamber judgment in the case of *Baka* (cited above), it confirmed the approach taken in a number of Chamber judgments that the *Eskelinen* test applied to disputes concerning judges, as the judiciary, albeit not part of the ordinary civil service, is considered part of typical public service (*ibid.*, § 104). This covered all types of disputes, including those relating to recruitment/appointment, career/promotion, transfer and termination of service/dismissal (*ibid.*, § 105).

68. On the basis of the principles set out in *Vilho Eskelinen and Others*, Article 6 has been applied to employment disputes involving judges who were dismissed from judicial office (see, for example, *Oleksandr Volkov v. Ukraine*, no. 21722/11, §§ 91 and 96, ECHR 2013; *Kulykov and Others v. Ukraine*, nos. 5114/09 and 17 others, §§ 118 and 132, 19 January 2017; *Sturua v. Georgia*, no. 45729/05, § 27, 28 March 2017; and *Kamenos v. Cyprus*, no. 147/07, § 88, 31 October 2017), removed from an administrative position without the termination of their duties as a judge (see *Baka*, §§ 34 and 107–11, and *Denisov*, §§ 25, 47–48 and 54, both cited above) or suspended from judicial office (see *Paluda v. Slovakia*, no. 33392/12, § 34, 23 May 2017) or otherwise subjected to a disciplinary sanction (see *Ramos Nunes de Carvalho e Sá*, cited above, §§ 119–20). It has also been applied to employment disputes involving civil servants who had lost a remote-area allowance which had been added to their salaries as a bonus (see *Vilho Eskelinen*, cited above, §§ 40 and 41) or who had been transferred to another office or post against their will, resulting in a decrease in salary (see *Zalli v. Albania* (dec.), no. 52531/07, 8 February 2011, and *Ohneberg*, cited above). Furthermore, in *Bayer v. Germany* (no. 8453/04, 16 July 2009), which concerned the removal from office of a State-employed bailiff following disciplinary proceedings, the Court held that disputes about ‘salaries, allowances or similar entitlements’ were only non-exhaustive examples of ‘ordinary labour disputes’ to which Article 6 should in principle apply under the *Vilho Eskelinen* test (*ibid.*, § 38; see also *Regner*, cited above, § 108). Therefore, it is clear that the criteria set out in under the *Eskelinen* test do not exclude the applicability of Article 6 § 1 to ‘ordinary labour disputes’ involving members of the judiciary.

(β;) *Application of these principles to the present case*

69. As regards the question whether the subject-matter of the dispute qualified as ‘civil’ within the meaning of Article 6 of the Convention, the Court notes firstly that, in contrast to the cases concerning transfer of judges cited above, the applicant’s transfer did not entail any direct pecuniary effects such as a reduction in salary or a loss of allowances. Although the applicant maintained in the context of his claim for just satisfaction that he had incurred additional expenses on account of having been transferred to another district (see paragraph 99 below), these were indirect and incidental consequences of the very fact of having to move to a different location, and the Court does not consider that they gave rise to a civil right or obligation as such. Secondly, while civil rights and obligations are not necessarily dependent on pecuniary consequences and may arise, for example, when the measure affects private or family life, the Court recalls that the applicant’s complaint under Article 8 of the Convention was declared inadmissible by the President of the Section acting as a single judge. Consequently, the alleged effects of the transfer on the applicant’s private and family life cannot constitute a basis for finding that the transfer affected his civil rights and obligations in that respect either. Nevertheless, the Court reiterates that disputes about ‘salaries, allowances or similar entitlements’ are only non-exhaustive examples of ‘ordinary labour disputes’ to which Article 6 should in principle apply (see paragraph 68 above) and that a public-law dispute may bring the civil limb into play if the private-law aspects predominate over the public law ones in view of the direct consequences for a civil pecuniary or *non-pecuniary* right (see *Denisov*, cited above, § 53, emphasis added). Thus, bearing in mind the presumption that Article 6 applies to ‘ordinary labour disputes’ and taking into account that the applicant’s transfer had considerable effects on his professional life and career and that it was a unilateral measure relating to the employment relationship which was neither insignificant nor a mere formality, the Court considers that it would be artificial to exclude the dispute at issue from the protection of Article 6 on the basis that it did not relate either to direct pecuniary consequences or to private and family life matters.

70. The Court will next examine whether the dispute over the transfer could nevertheless be excluded from the protection of Article 6 of the Convention on the basis of the conditions set out in the *Eskelinen* test. In the majority of those cases where the Court applied the *Eskelinen* test, the Court 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, had not been fulfilled and that Article 6 was thus applicable to the proceedings in question (see *Kamenos*, cited above, § 73). By contrast, only in a minority of cases did the Court consider that the first condition had been fulfilled. Those cases concerned disciplinary action taken against judges and prosecutors before the HSYK. The Court ruled that the first condition had been fulfilled because domestic law had expressly excluded access to a court and therefore Article 6 did not apply (see *Nazsiz v. Turkey* (dec.), no. 22412/05, 26 May 2009, concerning the disciplinary dismissal of a public prosecutor, and *Özpinar*, cited above, § 30, concerning a judge's removal from office on disciplinary grounds).

71. That being so, it must be borne in mind that since its review of the HSYK in those cases, the Court has developed a more nuanced approach in determining whether a particular domestic body, outside the domestic judiciary, could be regarded as a 'court' for the purposes of the *Eskelinen* test. For example, it has noted that the mere fact that a further judicial review of a body's decision was not permitted in domestic law did not necessarily mean that the national law excluded access to a court. Therefore, in the light of developments in its case-law with respect to the criteria as to what constitutes a 'court' for the purposes of the *Eskelinen* test (see *Kamenos*, cited above, §§ 75–79), the Court must carry out a fresh examination as to whether the HSYK can be considered to be a 'tribunal' fulfilling a judicial function.

72. The Court will examine the structure and functioning of the HSYK as it was regulated in domestic law at the time of the events. It will therefore not take into account the subsequent developments in the Constitution or successive legal instruments.

73. The Court reiterates that for the purposes of Article 6 § 1 of the Convention, a tribunal need not be a court of law integrated with the standard judicial machinery (see *Rolf Gustafson v. Sweden*, 1 July 1997, § 45, *Reports 1997–IV*) since a tribunal, within the meaning of Article 6 § 1, is characterised, in the substantive sense of the term, by its judicial function, that is to say, to determine matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner. A power of decision is inherent in the very notion of 'tribunal'. The procedure before it must ensure the 'determination of the matters in dispute' as required by Article 6 § 1 (see *Benthem v. the Netherlands*, 23 October 1985, § 40, Series A no. 97). In addition, only an institution that has full jurisdiction and satisfies a num-

ber of requirements, such as independence from the executive and also from the parties, merits the designation 'tribunal' within the meaning of Article 6 § 1 (see *Beaumartin v. France*, 24 November 1994, § 38, Series A no. 296-B; *Di Giovanni v. Italy*, no. 51160/06, § 52, 9 July 2013; and, most recently, *Guðmundur Andri Ástráðsson*, cited above, § 218).

74. Turning to the structure and functioning of the HSYK at the relevant time, it is beyond doubt that it had exclusive jurisdiction and power of decision in matters concerning the organisation of the judiciary, the career of judges and prosecutors, and disciplinary proceedings. Moreover, in respect of its decisions concerning judges and prosecutors, a review and objection mechanism was provided for by law. That being so, the Court observes that the manner in which that body made decisions in review and objection proceedings was not prescribed by a set of procedural rules. The Court observes that neither Law no. 2461 nor the internal regulation of 1988, applicable at the time of the events (see paragraph 28 above), contained specific rules on the procedure to be followed or safeguards to be provided to claimants before the HSYK, or on how evidence was to be admitted and assessed. Secondly, the HSYK did not provide for an adversarial process as it did not hold hearings, summon or hear witnesses. Thirdly, the decisions delivered by the HSYK after a claimant had applied for a review or filed an objection in respect of his or her transfer contained no reasons, which implies that decisions were not made on the basis of legal principles (see paragraph 31 above). The foregoing constitutes a sufficient basis for finding that the HSYK did not fulfil a judicial function, without it being necessary to examine further whether it complied with the requirements of independence and impartiality.

75. It therefore follows that at the time of the events the HSYK did not qualify as a 'court' within the meaning of Article 6 § 1 of the Convention, and that domestic law expressly excluded the possibility of an appeal against the HSYK's decision to a 'court'. The first condition of the *Eskelinen* test, exclusion of access to a court for the category of post in question, is therefore satisfied.

76. The Court must next assess whether the second criterion established in the *Eskelinen* case was met, namely, whether the justification was based on objective grounds for exclusion in the State's interest. The mere fact that the applicant is in a sector or department which participates in the exercise of power conferred by public law is not in itself decisive. In order for the exclusion to be justified, it is not enough for the State to establish that the civil servant in question participates

in the exercise of public power or that there exists a 'special bond of trust and loyalty' between the civil servant and the State, as employer. It is for the State to show that the subject of the dispute in issue is related to the exercise of State power or that it has called into question the 'special bond of trust and loyalty' between the civil servant and the State, as employer (see *Vilho Eskelinen*, cited above, § 62).

77. The Court has only had a few cases where it has been required to examine the applicability of Article 6 § 1 under the second criterion of the *Eskelinen* test. In *Sukiit v. Turkey* ((dec.), no. 59773/00, 11 September 2007), which concerned the early retirement of an army officer on disciplinary grounds, the Court held that the exclusion had been justified because the subject matter of the dispute concerned the applicant's discharge from the army for his failure to comply with military discipline and the principle of secularism. The Court thus held that calling into question the 'special bond of trust and loyalty' between the applicant and the State, as his employer, had been central to the dispute.

78. In a case concerning the inability of the applicants to contest the revocation of their security clearance which had resulted in the first applicant's dismissal and the second applicant's transfer to another post, the Court found the second condition of the *Eskelinen* test to have been satisfied (see *Spūlis and Vaškevičs v. Latvia* ((dec.), nos. 2631/10 and 12253/10, 18 November 2014). In coming to that conclusion, the Court attached importance to the fact that the applicants had held high-ranking posts in the administration — the first applicant had been responsible for intelligence and counter-intelligence, while the second applicant held one of the highest posts in the State Revenue Service and was in charge of the Customs Criminal Investigation Department. The nature of their posts and the duties they were entrusted with demonstrated that they participated directly — and not incidentally — in the exercise of State power and had a special duty of discretion towards the State. In as much as the subject matter of the dispute and the circumstances leading to the revocation of their security clearance concerned the calling into question of their reliability and ability not to disclose State secrets, the Court found the exclusion of their dispute from the guarantees of Article 6 to be reasonably justified.

79. The Court notes that the above line of case-law, which concerned an army officer and high-ranking civil servants, all of whom were hierarchically attached to the executive branch of the State, cannot be transposed to the circumstances of the present case, which concerns a

member of the judiciary. In the Court's view, the criterion that the subject matter of the dispute has to be related to the calling into question of the special bond of trust and loyalty must be read in the light of the guarantees for the independence of the judiciary. In the opinion of the Court, those two notions, namely the special bond of trust and loyalty required from civil servants and the independence of the judiciary, cannot be easily reconciled. While the employment relationship between a civil servant and the State can traditionally be defined as one based on trust and loyalty to the executive branch in so far as employees of the State are required to implement government policies, the same does not hold true for the members of the judiciary, who play a different and more independent role because of their duty to provide checks on government wrong-doing and abuse of power. Their employment relationship with the State must therefore be understood in the light of the specific guarantees essential for judicial independence. Thus when referring to the special trust and loyalty that they must observe, it is loyalty to the rule of law and democracy and not to holders of State power. This complex aspect of the employment relationship between a judge and the State makes it necessary for members of the judiciary to be sufficiently distanced from other branches of the State in the performance of their duties, so that they can render decisions *a fortiori* based on the requirements of law and justice, without fear or favour. It would be a fallacy to assume that judges can uphold the rule of law and give effect to the Convention if domestic law deprives them of the guarantees of the Articles of the Convention on matters directly touching their individual independence and impartiality. Senior members of the judiciary should enjoy — as other citizens — protection from arbitrariness from the executive power and only oversight by an independent judicial body of the legality of such a removal decision is able to render such a right effective (see *Kövesi*, cited above, § 124). For these reasons, the Court does not consider it justified to exclude members of the judiciary from the protection of Article 6 of the Convention in matters concerning the conditions of their employment on the basis of the special bond of loyalty and trust to the State.

80. Secondly, at the time when the HSYK decided to transfer the applicant to the Sivas Regional Administrative Court and in its subsequent rejection of his request for a review of the decision to transfer him, no reasons other than a short reference to the 'needs of the service' were given. The fact that the HSYK's decision contained no details on how the needs of service had been as-

essed, what objective criteria had been employed and why, in particular, the applicant's objections were refused, leads to the conclusion that the dispute did not concern any exceptional or compelling reasons that could justify its exclusion from a judicial review. Although the Government argued in retrospect that the applicant's transfer had had to do with his appraisal score of 2005 and the comments made therein, as well as the fact that he had not served his full-term in the third judicial district, the Court is unable to draw any definite conclusions from those arguments, which are merely speculative in the absence of the HSYK's own reasoning. Even if that were the case, it is clear that those grounds involved ordinary aspects of an employment relationship and did not disclose any aspect of the use of sovereign power in particular.

81. The Court therefore does not accept the Government's plea that the exclusion of a judicial review of the decision on the applicant's transfer can be justified on the basis of the exercise of State sovereignty. It therefore follows that Article 6 is applicable *ratione materiae* to the present case.

2. Exhaustion of remedies

(a) The parties' submissions

(i) The Government's submissions

82. The Government argued that the applicant had failed to exhaust relevant domestic remedies as he had not filed an objection with the Objections Board against the decision of the HSYK to dismiss his request for a review of the decision to transfer him to Sivas. They explained that the Objections Board had carried out its examination in accordance with the Constitution and the law, the general principles of law, and the principles of independence of the courts and tenure of judges. In their view, an objection filed with that body could not be dismissed as irrelevant, because a different rapporteur would be assigned to the case. Moreover, the composition of the Objections Board was not the same as that of the original body deciding on the request for a review in so far as the former included substitute members. The Government also submitted certain decisions where the Objections Board had reversed the decision on transfer; they therefore considered that the remedy offered reasonable prospects of success.

83. The Government further argued that the applicant could have contested his appraisal score for the year 2005 by bringing an action for annulment before the administrative courts, but that he had failed to do so.

(ii) The applicant's submissions

84. The applicant argued that an application to the Objections Board could not be considered an effective remedy because the original HSYK members who had decided on his request for a review had sat on the Objections Board and had constituted the majority. He had not therefore had to exhaust that remedy in respect of his impugned transfer. In any event, the Court had considered that remedy to be ineffective in the cases of *Özpinar* (cited above, §§ 85–86) and *Kayasu v. Turkey* (nos. 64119/00 and 76292/01, § 121, 13 November 2008).

85. As regards his appraisal record, the applicant did not comment on whether an action before the administrative courts could have been an effective remedy in respect of his transfer.

(b) The Court's assessment

86. The Court refers, first of all, to the general principles concerning the exhaustion of domestic remedies as summarised in *Vučković and Others v. Serbia* ((preliminary objection) GC, nos. 17153/11 and 29 others, §§ 69–77, 25 March 2014). In particular, Article 35 § 1 of the Convention only requires the exhaustion of remedies which are relevant to the impugned violations, available and adequate.

87. In the present case, the Court has found that the HSYK could not be considered a tribunal, in particular because of the absence of a specific set of procedural rules to be employed in the proceedings before it. Furthermore, the Court has found, in the context of a complaint under Articles 8 and 10 in conjunction with Article 13 of the Convention, that an objection before the Objections Board could not be considered an effective remedy, in particular because those who had rendered the original decision which was the subject of the objection sat on the Objections Board (see *Kayasu* and *Özpinar*, both cited above).

88. In the light of the above considerations and having regard to the fact that the applicant's complaint relates to his inability to seek a judicial review of the HSYK's decision of 16 September 2006, the Government's objection of non-exhaustion under this head must be dismissed.

89. As regards the Government's remaining objection of non-exhaustion of remedies, the Court notes that neither the applicant's transfer nor the HSYK's decision to dismiss his request for a review was officially linked to the applicant's appraisal of 2005. Furthermore, the contents of the appraisal had not been disclosed to the applicant and were classified by operation of the law (see paragraphs 12, 14, 19, 21 and 24). In these circumstances the Court fails to see how the applicant could have been expected to make a causal

link between his impugned transfer and his appraisal report so as to challenge the latter in order to reverse his transfer. The Court therefore rejects the Government's objection on non-exhaustion under this head also.

(c) *Conclusion as to admissibility*

90. The Court notes that the application 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*

91. The parties have not made any separate observations other than those summarised above.

92. The Court reiterates that the right of access to a court – that is, the right to institute proceedings before the courts in civil matters – constitutes an element which is inherent in the right set out in Article 6 § 1 of the Convention, which lays down the guarantees applicable as regards both the organisation and composition of the court, and the conduct of the proceedings. All of those elements make up the right to a fair trial secured by Article 6 § 1 (see *Baka*, cited above, § 120).

93. The right to a fair hearing, as guaranteed by Article 6 § 1 of the Convention, must be construed in the light of the rule of law, which requires that all litigants should have an effective judicial remedy enabling them to assert their civil rights (see, among other authorities, *Eşim v. Turkey*, no. 59601/09, § 18, 17 September 2013, and *Al-Dulimi and Montana Management Inc. v. Switzerland* GC, no. 5809/08, § 126, ECHR 2016). Everyone has the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way, Article 6 § 1 embodies the 'right to a court', of which the right of access, that is, the right to institute proceedings before courts in civil matters, is one particular aspect (see, *inter alia*, *Naït-Liman v. Switzerland*, cited above, § 113).

94. In that regard, the Court reiterates that the right of access to a court is not absolute. Where the individual's access is limited either by operation of law or in fact, the Court will examine whether the limitation imposed impaired the essence of the right and, in particular, whether it pursued a legitimate aim and whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. If the restriction is compatible with these principles, no violation of Article 6 will arise (see *Baka*, cited above, § 120).

95. In the present case, the decision to transfer the applicant was not reviewed, nor was it

open to review, by an ordinary tribunal or other body exercising judicial powers. That restriction stemmed from the constitutional prohibition on judicial review of the HSYK's decisions; therefore the absence of a judicial review was lawful in terms of domestic law. As to the legitimacy of the aim pursued by the restriction, the Government submitted that if each and every compulsory transfer were to be contested in judicial review proceedings, it would place an unsustainable strain on the functioning of the judicial system and would render the compulsory rotational system meaningless.

96. The question before the Court is not whether a particular system or method of transfer or appointment of judges is to be preferred over another one, but is limited to whether the complete absence of a judicial review of the non-voluntary transfer of a judge is compatible with the rule of law and Article 6 § 1 of the Convention. The Court stresses the growing importance attached to the separation of powers and to the necessity of safeguarding the independence of the judiciary (see *Ramos Nunes de Carvalho e Sá*, cited above, § 196). It further notes the existing consensus on the necessity to have in place procedural safeguards and the possibility of appeal against decisions affecting the career, including the status, of a judge (see paragraphs 32, 36, 38 and 63 above). Furthermore, various international reports express concern about the improper use of the transfer mechanism in Turkey against judges, which is exacerbated further by the fact that no judicial remedy is available for such measures (see paragraphs 34–35, 37 and 39 above). Lastly, the potential inconvenience of having numerous claimants contesting their transfer cannot outweigh their right to have the courts determine their civil rights and obligations. In view of the important role that judges play in securing Convention rights, it is imperative that there exist procedural safeguards in order to ensure that their judicial autonomy is not jeopardised by undue external or internal influences. What is also at stake is public trust in the functioning of the judiciary. In matters concerning their career, as in the present case where a unilateral decision was taken against a judge calling for his transfer, there should be weighty reasons exceptionally justifying the absence of a judicial review, which have not been provided to the Court in this case.

97. In view of the foregoing considerations, the Court concludes that the applicant's lack of access to a court did not pursue any legitimate aim and that, accordingly, the very essence of that right was impaired (see, *mutatis mutandis*, *Baka*, cited above, § 121).

There has accordingly been a violation of Article 6 § 1 of the Convention.

II. Application of Article 41 of the Convention

98. 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

99. The applicant claimed 98,000 euros (EUR) in respect of pecuniary damage. He argued that as a result of the impugned transfer, he had reluctantly retired prematurely from his post. However, had the decision to transfer him been revoked, he would have continued to work in the Ankara Regional Court for another ten years. The amount of pecuniary damage claimed by the applicant corresponded to the salary and benefits he would have allegedly received. That amount also included the cost of maintaining two residences and travel expenses during the fifteen-month period when he had worked at the Sivas Regional Court.

100. The applicant also claimed € 75,000 in respect of non-pecuniary damage sustained on account of the emotional distress that he and his family had suffered. He argued in that connection that as a result of his impugned transfer, his professional career and reputation had suffered.

101. The Government considered that there was no causal link between the damage claimed by the applicant and the violation alleged. In any event, they considered that the sums claimed were unsubstantiated and excessive.

102. The Court has found a violation of Article 6 § 1 of the Convention on account of the absence of a judicial review of the HSYK's decision of 16 September 2006 on the applicant's request for a review of their decision to transfer him. It reiterates that it cannot speculate as to what the outcome of the proceedings complained of would have been had the violation of Article 6 § 1 of the Convention not occurred (see, *mutatis mutandis*, *Ohneberg*, cited above, § 38). Therefore, it rejects the applicant's claim in respect of pecuniary damage.

103. As regards non-pecuniary damage, the Court reiterates that its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant, but the overall context in which the breach occurred. Its

non-pecuniary awards serve to give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage (see *Varmava and Others v. Turkey* GC, nos. 16064/90 and 8 others, § 224, ECHR 2009, and the cases cited therein). The Court considers that, in the present case, the applicant must have suffered a certain amount of distress on account of his consecutive transfers against his consent, and without due process of law, which cannot be compensated solely by the Court's finding of a violation. Thus, having regard to the nature of the violation found in the present case and deciding on an equitable basis, the Court awards the applicant € 12,500 in respect of non-pecuniary damage, plus any tax that may be chargeable (see, *mutatis mutandis*, *Ali Rıza and Others v. Turkey*, nos. 30226/10 and 4 others, § 249, 28 January 2020).

B. Costs and expenses

104. The applicant also claimed € 8,000 for the costs and expenses incurred before the Court, including the cost of representation and postal fees. He attached a contract concluded with his lawyer and postal receipts.

105. The Government urged the Court to reject those claims, arguing that the applicant had failed to submit relevant supporting documents. They argued that in any event, the amount claimed in respect of lawyer's fees was excessive.

106. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the full sum claimed, covering costs under all heads.

C. Default interest

107. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

For these reasons, the Court, unanimously,

1. Declares the application admissible;
2. Holds that there has been a violation of Article 6 § 1 of the Convention;
3. Holds
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the follow-

ing amounts, to be converted into Turkish Liras at the rate applicable at the date of settlement:

(i) € 12,500 (twelve thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) € 8,000 (eight thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement, simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points;

4 Dismisses the remainder of the applicant's claim for just satisfaction.

Noot

1. Helaas proberen regeringen in de nodige staten die partij zijn bij het EVRM de rechterlijke macht min of meer naar hun hand te zetten (vgl. het eind 2020 verschenen factsheet on the independence and impartiality of the judicial system (samengesteld door het Department for the Execution of Judgments of the European Court of Human Rights, te vinden via www.coe.int)). Denk daarbij aan Polen, Hongarije, Roemenië, Bulgarije en niet in de laatste plaats Turkije. Op laatstgenoemd land ziet de hier opgenomen uitspraak. Aan de orde is een veel gebruikt instrument om kritische rechters te beïnvloeden, namelijk de gedwongen overplaatsing.

2. De hier opgenomen uitspraak maakt, op basis van uitgebreid onderzoek van verschillende (vaak niet bindende) internationale instrumenten met betrekking tot overplaatsingen van rechters, duidelijk dat sprake is van een recht van de leden van de rechterlijke macht op bescherming tegen willekeurige overplaatsing. Dit als uitvloeisel van de rechterlijke onafhankelijkheid, zoals gewaarborgd door artikel 6 EVRM. In dit verband wijst het EHRM vooral op het belang van procedurele waarborgen en van de mogelijkheid om beroep in rechte in te stellen tegen besluiten die van invloed zijn op de loopbaan van rechters en hun statuut, in het bijzonder besluiten tot onvrijwillige overplaatsing van rechters. Dit om te waarborgen dat hun onafhankelijkheid niet in het gedrang wordt gebracht door onbehoorlijke invloed van buitenaf.

3. Welke eisen gelden dan als het gaat om die noodzakelijke procedurele bescherming? Omdat het EHRM in deze zaak aanneemt dat de civiele poot van artikel 6 EVRM van toepassing is, moet de tegen zijn zin overgeplaatste rechter toegang krijgen tot een onafhankelijke en onpartijdige rechter zoals bedoeld in dit verdragsartikel,

aan welk vereiste niet werd voldaan. Een uitsluiting van toegang tot de rechter kan naar het oordeel van het EHRM niet objectief worden gerechtvaardigd met een beroep op de bijzondere status van rechters. Daarmee gaat het beroep van Turkije op de Eskelinen-uitzondering niet op (vgl. EHRM 19 april 2007, AB 2007/317, m.nt. Barkhuyzen & Van Emmerik).

4. Aldus worden – in ieder geval rechs – de duimschroeven verder aangedraaid richting regeringen die lastige rechters willen straffen. In een recente Poolse zaak neemt het Hof van Justitie de hier ontwikkelde procedurele EVRM-eisen bij overplaatsing één op één over in het kader van de uitleg van de toepasselijke EU-rechtsnormen en komt tot de conclusie dat Polen daaraan niet voldoet (HvJ EU 6 oktober 2021, AB 2021/329, m.nt. Bovend'Eert). Ondanks dergelijke Europese terechtwijzingen lijkt de praktijk in Turkije en Polen echter helaas nog niet te verbeteren (vgl. Buruma, *NJB* 2021/3172).

5. Met betrekking tot de procedure voor de benoeming van rechters stelde het EHRM eerder vast dat die procedure, gelet op de fundamentele gevolgen ervan voor de goede werking en de legitimiteit van de rechterlijke macht in een democratische rechtsstaat, noodzakelijkerwijs inherent is aan het begrip “gerecht dat bij de wet is ingesteld” in de zin van artikel 6 EVRM. Daarbij overwoog het EHRM dat de onafhankelijkheid van een gerecht, in de zin van deze bepaling, met name wordt afgemeten aan de wijze waarop de leden ervan zijn benoemd (vgl. ook EHRM 1 december 2020, *Ástráðsson/IJsland*, CE:ECHR:2020:1201JUD002637418, AB 2021/199, m.nt. Bovend'Eert). Ook deze EHRM-jurisprudentie vormde een kritische leidraad voor het Hof van Justitie in een Poolse zaak over de benoeming van leden in een nieuwe tuchtkamer voor rechters in Polen (HvJ EU 15 juli 2021, AB 2021/324, m.nt. Bovend'Eert). Vergelijkbare eisen gelden ook bij ontslag van rechters zoals aan de orde in een Bulgaarse zaak. Daar werd wel aan de procedurele vereisten van artikel 6 EVRM voldaan maar werd wel een schending aangenomen van artikel 10 (vrijheid van meningsuiting) en 18 (misbruik van de beperkingsclausules) EVRM. De zaak betrof het ontslag van een kritische rechter vanwege uitingen die zij had gedaan in haar hoedanigheid van vertegenwoordiger van een vakbond voor rechters (EHRM 19 oktober 2021, ECLI:CE:ECHR:2021:1019JUD004007213, *NJB* 2021/3264 (*Todorova t. Bulgarije*)).

6. In Nederland lijkt met de regeling in de Wet RO en de Wet rechtspositie rechterlijke ambtenaren (Wrra) althans voor leden van de rechterlijke macht aan de hier geschetste EVRM-eisen te worden voldaan (vgl. ook Bovend'Eert in zijn noot

onder AB 2021/329). Op basis daarvan bepaalt het gerechtshof de verdeling van werkzaamheden (artikel 41 Wvra) en de samenstelling van de rechtsprekende kamers van het gerecht (artikel 6 Wet RO). Als het daarbij gaat om een overplaatsing binnen een gerecht, heeft de rechter in kwestie de mogelijkheid daartegen beroep in te stellen bij de Centrale Raad van Beroep (artikel 8:6 Awb juncto artikel 3 Bevoegdheidsregeling bestuursrechtspreek). Verder beslist de Hoge Raad op vordering van de P-G over een onvrijwillige overplaatsing naar een ander gerecht die mogelijk is in geval van ziekte (artikel 46k Wvra) of bij wijze van ordemaatregel (artikel 46kb Wvra). T. Barkhuysen en M.L. van Emmerik

AB 2022/2

HOF VAN JUSTITIE VAN DE EUROPESE UNIE

15 juni 2021, nr. C-645/19

(K. Lenaerts, R. Silva de Lapuerta, A. Arabadjev, A. Prechal, M. Vilaras, M. Ilešič, N. Wahl, E. Juhász, D. Šváby, S. Rodin, F. Biltgen, K. Jürimäe, C. Lycourgos, P. G. Xuereb, L. S. Rossi)
m.nt. S.R.P. Bastiaans en F. Buskermolen*

Art. 55 lid 1, art. 56 t/m 58, art. 60 t/m 66 AVG jo. art. 7, 8, 47 Handvest Grondrechten EU

NJB 2021/2164

ECLI:EU:C:2021:5

ECLI:EU:C:2021:483

Eerste arrest Hof van Justitie van de EU over competentieverdeling van nationale AVG-toezichthouders onder het one-stop-shop-mechanisme.

Artikel 55, lid 1, en de artikelen 56 tot en met 58 en 60 tot en met 66 van Verordening (EU) 2016/679 [...], gelezen in samenhang met de artikelen 7, 8 en 47 van het Handvest van de grondrechten van de Europese Unie, moeten aldus worden uitgelegd dat een toezichthoudende autoriteit van een lidstaat die krachtens de ter uitvoering van artikel 58, lid 5, van die verordening vastgestelde nationale wettelijke regeling bevoegd is om elke vermeende inbreuk op die verordening ter kennis te brengen van een rechterlijke instantie van die lidstaat en, waar passend, in rechte op te treden, die bevoegdheid kan uitoefenen met betrekking tot een grensoverschrijdende gegevensverwerking, ook al is zij ten aanzien van die gegevensverwerking niet de "leidende toe-

zichhoudende autoriteit" in de zin van artikel 56, lid 1, van die verordening, voor zover er sprake is van een van de situaties waarin Verordening 2016/679 aan die toezichthoudende autoriteit de competentie toekent om een besluit te nemen waarbij wordt vastgesteld dat de betreffende verwerking inbreuk maakt op de in de verordening vervatte regels, en de in die verordening vastgelegde samenwerkingsprocedure en het coherentiemechanisme in acht worden genomen.

Artikel 58, lid 5, van Verordening 2016/679 moet aldus worden uitgelegd dat in geval van grensoverschrijdende verwerking van gegevens, de uitoefening van de bevoegdheid van een toezichthoudende autoriteit van een lidstaat die niet de leidende toezichthoudende autoriteit is om een rechtsvordering in de zin van die bepaling in te stellen, niet vereist dat de in rechte gedaagde verwerkingsverantwoordelijke of de verwerker die de grensoverschrijdende verwerking van persoonsgegevens verricht, over een hoofdvestiging of een andere vestiging op het grondgebied van die lidstaat beschikt.

Artikel 58, lid 5, van Verordening 2016/679 moet aldus worden uitgelegd dat de bevoegdheid van een toezichthoudende autoriteit van een lidstaat die niet de leidende toezichthoudende autoriteit is om elke vermeende inbreuk op deze verordening ter kennis te brengen van een rechterlijke instantie van die staat en, waar passend, in rechte op te treden in de zin van die bepaling, zowel kan worden uitgeoefend ten aanzien van de hoofdvestiging van de verwerkingsverantwoordelijke in de lidstaat van deze autoriteit, als ten aanzien van een andere vestiging van die verantwoordelijke, mits de rechtsvordering betrekking heeft op gegevensverwerking die plaatsvindt in het kader van de activiteiten van die vestiging en die autoriteit competent is om die bevoegdheid uit te oefenen, overeenkomstig hetgeen in antwoord op de eerste prejudiciële vraag is uiteengezet.

Verzoek om een prejudiciële beslissing krachtens artikel 267 VWEU, ingediend door het hof van beroep Brussel (België) bij beslissing van 8 mei 2019, ingekomen bij het Hof op 30 augustus 2019, in de procedure tussen:

1. Facebook Ireland Ltd,
2. Facebook Inc.,
3. Facebook Belgium BVBA,

en

Gegevensbeschermingsautoriteit.

Arrest

1. Het verzoek om een prejudiciële beslissing betreft de uitlegging van artikel 55, lid 1, en de artikelen 56 tot en met 58 en 60 tot en met 66 van verordening (EU) 2016/679 van het Europees

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