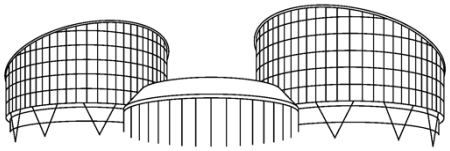

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF OKTAY ALKAN v. TÜRKİYE

(Application no. 24492/21)

JUDGMENT

Art 6 § 1 (civil) • Access to court • Inability of candidate judge after completion of training to seek judicial review of decision refusing to appoint him to judicial office • Art 6 applicable • "Right" of candidates-in-training in domestic law and practice against arbitrary appointment or rejection • First condition of the *Eskelinen* test satisfied • Second condition of the *Eskelinen* test not met • Exclusion of the applicant, who met statutory eligibility requirements, from final stage of appointment process, without judicial review, not in the interest of a State governed by the rule of law • Link between integrity of judicial appointment process and requirement of judicial independence • Importance of procedural fairness in cases involving selection, appointment and career of judges • No exceptional and compelling reasons justifying absence of judicial review

STRASBOURG

20 June 2023

FINAL

20/09/2023

This judgment has become final under Article 44 § 2 of the Convention.
It may be subject to editorial revision.

In the case of Oktay Alkan v. Türkiye,

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

Arnfinn Bårdsen*, President*,
Egidijus Kūris,
Pauliine Koskelo,
Saadet Yüksel,
Frédéric Krenc,
Diana Sârcu,
Davor Derenčinović*, judges*,
and Hasan Bakırcı, *Section Registrar,*

Having regard to:

the application (no. 24492/21) against the Republic of Türkiye lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr Oktay Alkan ("the applicant"), on 5 May 2021;

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

the parties' observations;

Having deliberated in private on 30 May 2023,

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

INTRODUCTION

1. The application concerns the refusal of the Council of Judges and Prosecutors ("the HSK") to confirm the appointment of the applicant, a candidate judge who had completed his training at the relevant time, to judicial office and the applicant's alleged lack of access to a court regarding this decision. The applicant complains of a violation of his rights under Articles 6, 8 and 13 of the Convention.

THE FACTS

2. The applicant was born in 1992 and lives in Ankara. He was represented by Mr O. Şahin, a lawyer practising in Istanbul.

3. The Government were represented by their Agent, Mr Hacı Ali Açıkgül, Head of the Department of Human Rights of the Ministry of Justice of the Republic of Türkiye.

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

5. The applicant is a graduate of a Turkish law faculty. On 24 December 2016 he passed the written examination for candidacy to become a judge, organised by the Centre for Selection and Placement of Students ("the ÖSYM"). He also passed the oral examination held subsequently by the

Ministry of Justice ("the Ministry"). After being found physically and mentally fit to perform the profession of a judge by a medical board of a State hospital, he started his training to become an administrative judge on 28 July 2017.

6. At the end of his training, the applicant sat the mandatory written examination on 26 June 2018 and passed it with a score of 88 out of 100.

7. On 11 September 2018 it was announced that the applicant had not passed his training to become an administrative judge following his oral interview held on 13 July 2018 by the Ministry. No reasons were disclosed.

8. The applicant lodged a written objection on the same day with the Ministry of Justice. He lodged a supplementary brief on 22February 2019. He stated that he suspected that the reason he had not passed the interview was because of the hostility between him and a classmate from his law school, M.Y., who had campaigned and made a number of complaints against him. He gave background information about the hostility between him and that individual. He also mentioned that he had been subject to bullying by the FETÖ (an organisation described by the Turkish authorities as FETÖ/PDY - "Fetullahist Terror Organisation/Parallel State Structure"-) during his military high school years, which had led him to leave that school early.

9. On 30 April 2019 the Ministry requested information from the military high school the applicant had attended as to the reasons for his early departure.

10. The military high school responded that the applicant had been released for health reasons and that he did not have a disciplinary record. The relevant health certificate of 30 November 2011 was provided to the Ministry.

11. On 15 April 2020 the Ministry accepted the applicant's objection and changed his status to having passed the oral interview of 13 July 2018. It sent the applicant's file to the HSK for confirmation of his appointment to judicial office.

12. On 13 May 2020 the HSK declined to do so on the basis of the information before it, that is to say the applicant's personnel record and his classified and non-classified files, noting that he did not fulfil the requirements to be a judge set out in sections 7 and 8 of Law no. 2802. However, it did not specify which of the requirements the applicant had failed to meet.

13. The applicant then lodged a request with the HSK for review of its decision. In it he gave an account of the reasons for the hostility between him and M.Y. and also recounted how he had resisted the pressure tactics of the FETÖ in the military school and had been forced to change schools. Giving an account of his academic successes during law school and his equally successful internship period, he requested the HSK to confirm his appointment to office.

14. According to the applicant's version of events, the HSK summoned him on 3 June 2020 for a meeting. There are no records of this meeting, and the Government disputed this allegation.

15. The applicant alleged that during the meeting of 3 June 2020 the HSK had informed him that the reason his appointment to office had not been confirmed was related to his health condition at military high school in 2011. The Government disputed this element in the applicant's version of events and submitted that the HSK had decided not to appoint him to office on the basis of his candidate file as a whole.

16. The applicant lodged a supplementary written brief on the same day. In it he explained that he had suffered health problems while he was attending military school on account of the ill-treatment he had suffered by the FETÖ. He went on to explain that he had recovered and moved on from that experience and that for the subsequent ten years he had not suffered any health related issues of the kind he had at the military school. He added that the complete health-check report submitted before he had been admitted into training to become a judge showed that he did not have any health impediments for the requirements of the profession. He submitted that he had graduated third from his law faculty and that he had scored in the top 8% in the country-wide civil service examination. He had also started a doctorate degree after completing his graduate studies in law.

17. On 30 June 2020 the HSK rejected the applicant's request for review without giving any reasons.

18. The applicant objected against this decision before the plenary assembly of the HSK.

19. On 13 January 2021 the plenary assembly of the HSK rejected the applicant's further objection without disclosing any reasons.

20. On 19 January 2021 the applicant's candidate-judge status was terminated.

21. The applicant lodged an individual appeal with the Constitutional Court, invoking his right to a fair trial in respect of the HSK's denial to confirm his appointment to judicial office and the use of confidential medical data by the HSK. The Constitutional Court rejected the application as incompatible *ratione materiae* on account of its lack of competence for examining decisions of the HSK.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW

A. Constitutional provisions

1. The HSK

22. The HSK is the authority responsible for the recruitment, promotion, discipline and dismissal of judges and prosecutors. Its decisions, other than those relating to dismissal from office, are not amenable to judicial review.

23. The HSK has been the subject of a number of amendments since its creation as HSYK in 1982. The latest amendment, which is relevant for the present case, was part of the constitutional reform of 2017, reshaping the powers of the President and containing significant amendments on the composition and appointment of members to the HSK. Following this reform, in May 2017, HSK members were appointed by the President of the Republic and the Grand National Assembly in accordance with Article 159, which reads as follows:

> "The Council of Judges and Prosecutors shall be established and shall exercise its functions in accordance with the principles of the independence of the courts and the security of the tenure of judges.
>
> The Council of Judges and Prosecutors shall be composed of thirteen members; it shall comprise two chambers.
>
> The chair of the Council is the Minister of Justice. The Under Secretary to the Ministry of Justice shall be an *ex officio* member of the Council. Three members of the Council shall be appointed by the President of the Republic from among civil judges and public prosecutors, who are first-grade judges or prosecutors and who have not lost the qualifications required for being a first-grade judge or prosecutor, and one member from among administrative judges and public prosecutors who are first-grade judges or prosecutors and who have not lost the qualifications required for being a first-grade judge or prosecutor. [The remaining members shall be elected] by the Grand National Assembly of Turkey, three of whom shall be selected from among members of the Court of Cassation, one from among members of the Supreme Administrative Court and three, the qualifications of whom are defined by law, from among academic staff in the field of law at higher-education institutions and/or from among practising lawyers with at least one member from academia and one member from among lawyers. The applications for the members to be elected by the Grand National Assembly of Turkey shall be made to the Office of the Speaker of the Assembly. The Office of the Speaker conveys the applications to the Joint Committee composed of members of the Committee on Justice and the Committee on the Constitution. The Joint Committee shall elect three candidates for each vacancy; a two-thirds majority of the total number of members is required. If the procedure of electing candidates cannot be concluded in the first round, a three-fifths majority of the total number of members shall be required in the second round. In the event that the candidates cannot be elected in this round, the procedure of electing candidates shall be completed by choosing a candidate by lot from the two candidates who have received the highest number of votes.

The Grand National Assembly of Turkey shall hold a secret ballot election for each candidate the Committee has identified. In the first round a two-thirds majority of the total number of members shall be required; in the event the election cannot be concluded in this round, in the second round a three-fifths majority of the total number of members shall be required. Where the member cannot be elected in the second round either, the election shall be completed by choosing a candidate by lot from the two candidates who have received the highest number of votes.

...

Members shall be elected for a four-year term and may be re-elected on the expiry of their term of office.

...

The Council shall take decisions regarding the appointment of judges and public prosecutors of civil and administrative courts to office, appointments, transfers to other posts, the delegation of temporary powers, promotions, admission to the first grade, decisions concerning those who no longer fulfil the requirements of office, the imposition of disciplinary sanctions and removal from office; it shall take final decisions on proposals by the Ministry of Justice concerning the abolition of a court, or changes in the territorial jurisdiction of a court; it shall also exercise the other functions vested in it by the Constitution and legislation.

...

The decisions of the Council, other than those relating to dismissal from office, shall not be subject to judicial review.

..."

2. Access to the civil service

24. The right of equal access to the civil service is a constitutional right set out in Article 70 of the Constitution, where it is also stated that no criteria other than the qualifications for the office concerned are to be taken into consideration for such recruitment.

B. Law no. 6087 of 11 December 2010 on the Council of Judges and Prosecutors, as amended by legislative decree no. 708 of 2 July 2018

25. The Minister of Justice is the chair of the HSK and in that capacity, he or she presides over the plenary assembly meetings, draws up the agenda of the HSK, appoints its secretary general, and approves proposals to bring disciplinary proceedings made by the competent chamber of the HSK. The plenary assembly is the organ of the HSK competent to decide, *inter alia*, on objections against decisions of the chambers, the ethical rules to be followed by judges and prosecutors, the abolition of courts or changes in their territorial jurisdiction, and the appointment of Court of Cassation and Supreme Administrative Court judges. The Minister of Justice is not entitled to attend meetings of the plenary assembly concerning disciplinary proceedings or to sit in any of the chambers or participate in proceedings before them.

C. Law no. 2802 of 24 February 2002 on Judges and Prosecutors

26. In their observations the Government provided information about the legal framework and process for becoming a judge or prosecutor in Türkiye, in accordance with which the prospective applicants fulfilling the legal requirements have to pass written and oral examinations, following which they must go through a training and internship process. After their training and internship, they must participate in additional written and oral examinations in order to be shortlisted. As part of the process, candidates and those shortlisted for confirmation of appointment have to submit to background checks.

The Ministry is responsible for managing the applications, the written and oral examinations, candidates' files and forwarding shortlisted candidates' files to the HSK for the latter to confirm candidates' appointment to the judicial professions. In the course of this process, candidates may bring proceedings against the Ministry in respect of the latter's administrative acts before the administrative courts. The Government submitted case-law examples from the Supreme Administrative Court where the latter had conducted a judicial review of written and/or oral examinations of candidate judges/prosecutors. On the other hand, the Government noted that there was no legal provision that set out the way in which the HSK determined whether to confirm the appointment of successful and shortlisted candidates to the judicial professions. Neither was there a procedure that regulated whether and to what extent the HSK interviewed candidates before it confirmed their appointment. The Government argued that the fact that the Ministry considered a candidate successful and fulfilling the criteria for the judicial professions was not binding on the HSK itself, which had a wide discretion in confirming the appointment of candidates to the judicial professions.

27. The relevant provisions concerning the candidacy of judges and prosecutors at the relevant time were worded as follows:

Section 7

"Only those who have completed the training period and proven their competency in accordance with the conditions set out below may be appointed to the judicial professions:

...

Candidate judges and prosecutors shall belong to the general administrative service grade as civil servants and not to the grade and class of judges and prosecutors. All provisions of the Civil Servants Acts that are not contrary to the present Law shall be applicable to them."

Section 8 – requirements for candidacy

"Candidates must fulfil the following requirements:

(a) be a national of the Republic of Turkey;

(b) be under 35 years of age on the first day of January of the year in which the admission examination is held;

(c) as regards civil-jurisdiction candidates, be a graduate of a law faculty or have completed a law degree abroad and taken the mandatory courses missing from the programmes of the foreign faculty as compared to Turkish law faculties and pass the examinations of those missing courses. As regards administrative-jurisdiction candidates, be either a graduate of a law faculty or have completed a law degree abroad and taken the mandatory courses missing from the programmes of the foreign faculty as compared to Turkish law faculties and pass the examinations of those missing courses, or be a graduate of a four-year programme at a faculty in the field of political science, administrative sciences, economics or finance, which adequately include legal knowledge in their programmes, or of a foreign education institution which is considered to be equivalent to the faculties listed herein, provided that the number of those to be appointed to the judicial profession from among graduates other than law-faculty graduates do not exceed twenty percent of the total number of candidates to be appointed in each period;

(d) not to have been prohibited from [exercising] public functions or rights;

(e) have passed the examination for admission to the legal professions or the preliminary examination for admission to the profession of administrative judge;

(f) [to be exempt from] military service or to have completed or postponed military service or to have been included on the reserve list;

(g) not to have a physical or mental illness or disability which could hinder the continuous discharge of the duties of judges or prosecutors in any part of the country;

(h) with the exception of offences committed out of negligence, not to have been convicted of an offence punishable by more than three months of imprisonment, even if pardoned, against the State, or dishonourable offences such as embezzlement, defalcation, bribery, theft, fraud, forgery, abuse of faith and fraudulent bankruptcy, or of a degrading or humiliating offence such as smuggling, corruption, manipulation of a public tender, exposure of State secrets or to be under investigation or prosecution of such offences, or any other offence which is punishable by imprisonment of more than three months;

(i) to pass the written examination and the interview;

(j) not to have a history of conduct incompatible with judicial office;

(k) for those who are transitioning from the profession of lawyer to that of judge or prosecutor, in addition to the conditions above, to have at least three years of experience in the profession and to be under 45 years of age on the first day of January of the year in which the admission examination is held and to pass the written examination and interview among peers."

Section 9 – Appointment as candidate

"The number of candidates to be recruited each year is determined by the Ministry of Justice on the basis of the number of open posts and needs [of the service].

Those who fulfil the requirements set out [in section 8 of this Law] and who have passed the written examination and the interview shall be ranked by how well they did and appointed by the Ministry of Justice as candidates in accordance with the number of vacancies determined on the basis of the above provision. Their initial grades shall be determined by taking into account their previous rank, salary and position and in any

event shall not be lower than that of the grade and step of an entry-level civil servant corresponding to the education level of bachelor's, master's or doctoral degree. Only two-thirds of the experience in years shall be considered relevant for those who are transitioning from the profession of lawyer to judge or prosecutor. No rights can be claimed if appointment is not realised on account of the limited number of vacancies.

Those who hold doctoral degrees shall only be subject to an interview."

Section 9/A – Appointment as candidate

"The written competitive examination shall be administered by the Centre for Selection and Placement of Students (ÖSYM) in accordance with the protocol signed with the Ministry of Justice. An advertisement including the number, title, grade and step of the vacancies to be filled, the requirements sought in candidates, and information regarding the application and examination process shall be published in one of the five national newspapers with the highest daily circulation and on the Internet site of the Ministry of Justice.

The written examination shall include general ability and culture questions about the Turkish language, mathematics, Turkish culture and history, citizenship, Atatürk principles and reforms, and questions that assess:

(a) for civil-jurisdiction candidates: constitutional law, civil law, law of obligations, civil procedure, commercial law, enforcement and bankruptcy law, criminal law and procedure, and administrative procedure and law;

(b) for administrative-jurisdiction candidates: constitutional law, administrative law, administrative procedure, civil procedure, law of obligations (general provisions), civil law, criminal law (general provisions), law of taxation, taxation procedure law and finance and economics.

In the written examination the weight of assessment accorded to the general ability and culture questions should be twenty percent, and the rest eighty percent.

The passing score shall be seventy out of one hundred. Starting with those who have scored the highest points, twice the number of applicants than vacancies that were announced shall be summoned to interview. Only those who have passed the examination may be admitted to the interview.

The Interview Board shall consist of seven members headed by the deputy appointed by the Ministry of Justice, the president of the Inspection Board, one manager each from the criminal affairs, legal affairs and staffing units and the secretary general of the HSK and one member from the advisory board of the Justice Academy.

...

The interview is to be used as a method to assess the applicants by scoring the following qualities:

(a) analytical and judgmental capacity;

(b) the ability to comprehend, summarise and express [views on] a topic;

(c) the compatibility of the applicants' general and physical appearance, conduct and manners with the requirements of the profession;

(d) flair and learnedness;

(e) receptiveness to scientific and technological advancements.

Each of the qualities above shall be scored out of twenty. The scores given by each member of the Interview Board shall be recorded in the minutes separately. To succeed at the interview, the average of the scores given by the members shall be at least seventy out of one hundred.

The list of successful applicants shall be ranked on the basis of their scores and signed by the Interview Board.

...

The final list of successful applicants shall be drawn up in the order of who scored highest after the total score of each applicant has been calculated; the weight of scoring in calculating the total score shall be seventy percent for the written competitive examination plus thirty percent for the interview. In the event of applicants scoring the same in the ranking, the applicant with the higher written examination score shall be given priority. In the event of the applicants having scored the same in the written examination, the ranking of the applicants shall be determined by the drawing of lots and this fact shall be indicated in the minutes.

Those with a doctoral degree shall be subject to the interview only. For those applicants, a separate shortlist shall be drawn up on the basis of their interview scores.

The secretarial services for the written competitive examination and the interview shall be carried out by the Directorate General for Personnel Affairs of the Ministry of Justice.

...

The appointment of successful applicants who fail to take up their duties within the period of time prescribed by section 62 of Law no. 657 on Civil Service without compelling reasons, which require documentary proof, shall be annulled. They shall not be appointed if they apply for reappointment."

Section 10 – Candidacy period and training

"The duration of candidacy is governed by the provisions of Law no. 4951 on the Justice Academy of Turkey of 23 July 2003. The period in training and internship shall be two years. For candidates recruited from among lawyers, this period shall be one year.

The Justice Academy shall provide the training. At the end of the candidacy period, the candidates shall be required to sit written and oral examinations, which will be marked out of one hundred points. Those who score seventy and above in the written examination shall be allowed to attend the oral examination. Those who fail the written examination may take it again within two months. The Written Examination Board shall consist of a chairperson to be selected by the Justice Academy from among those who teach the candidates, and four regular and two substitute members. The oral examination shall be held by the Oral Examination Board which consists of the president of the Justice Academy acting as the chairperson, the head of the Inspection Board, the director general for Personnel Affairs and two regular members and one substitute member to be selected by the relevant deputy minister from among those who teach the candidates. In order to pass the training, the candidates' total score (weighted sixty percent for the written examination plus forty percent for the oral examination) shall be at least seventy points. Those who fail the examination held at the end of the training may, upon their request, be appointed by the Ministry of Justice to another position within the general administrative services class at the central or provincial

organisations of the Ministry. Otherwise, the candidate status of these persons shall be terminated by the Ministry.

...

The principles for implementation of training and matters concerning the written and oral examinations shall be regulated by the Justice Academy.

..."

Section 11 – Documents prepared in respect of candidates

"Information regarding the capability, success, loyalty to the profession and moral characteristics of each candidate shall be prepared by the relevant member of the chamber the candidate has served at the end of the training period and sent to the Ministry of Justice along with the documents and opinion of the justice commission and reports of the judicial inspectors. The reports concerning the candidates who carry out their training at the Court of Cassation or Supreme Administrative Court shall be drawn up by the relevant member of the chamber and submitted either to the First Presidency Board of the Court of Cassation or the Supreme Administrative Court and sent to the Ministry of Justice."

Section 13 – Appointment to the judicial professions

"The Council of Judges and Prosecutors shall decide on the confirmation of the appointment of a candidate to the judicial professions of those who pass the written and oral examinations carried out at the end of their training and who have no other impediments and, in so far as male candidates are concerned, those who have completed their military service or who are not obliged to perform military service.

Once the candidates have been appointed to the judicial professions, the Council of Judges and Prosecutors shall determine by lot the place of duty of the candidates by taking into account the needs of the service and the spousal status and other relevant circumstances of the candidates.

The appointments shall be made by the Council of Judges and Prosecutors by adding one point to the grade and step that each candidate had at the time of appointment as a candidate. All decisions relating to appointments by the Council of Judges and Prosecutors shall be announced in the Official Gazette.

In addition, the total period served as a candidate shall be taken into account when calculating advancement and progress.

..."

Additional section 1

"Candidate judges and prosecutors in training and those to be appointed to the judicial professions ... shall be subject to background checks as regulated by section 1 of Law no. 4502."

II. COUNCIL OF EUROPE MATERIALS

28. The relevant extracts from the appendix to Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe to

member States on judges' independence, efficiency and responsibilities, adopted on 17 November 2010, read as follows:

> "Chapter VI – Status of the judge
>
> Selection and career
>
> 44. Decisions concerning the selection and career of judges should be based on objective criteria pre-established by law or by the competent authorities. Such decisions should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity.
>
> 45. There should be no discrimination against judges or candidates for judicial office on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, disability, birth, sexual orientation or other status. A requirement that a judge or a candidate for judicial office must be a national of the state concerned should not be considered discriminatory.
>
> 46. The authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers. With a view to guaranteeing its independence, at least half of the members of the authority should be judges chosen by their peers.
>
> ...
>
> 48. The membership of the independent authorities referred to in paragraphs 46 and 47 should ensure the widest possible representation. Their procedures should be transparent with reasons for decisions being made available to applicants on request. An unsuccessful candidate should have the right to challenge the decision, or at least the procedure under which the decision was made."

29. In Opinion no. 24 (2021) of 5 November 2021 on the evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems, the Consultative Council of European Judges (CCJE) made the following relevant observations (footnotes omitted):

> "15. Like other bodies of state, no Council for the Judiciary is above the law. Certain decisions of a Council affect rights protected by the ECHR; for example when decisions in relation to judges' careers are made, decisions must be reasoned and judges must have a right to judicial review ...
>
> 20. The ECtHR and the CJEU have decided that the appointment of judges is of great importance for an independent judiciary. The CCJE has always taken that view. Consequently, the selection or recommendation of new judges for appointment and promotion based on merit is a crucial task. Where this is a responsibility for the Council for the Judiciary, it must be exercised independently and accountably. Decisions with respect to the career of judges must not be taken because of loyalty to politicians or other judges. Through the selection and promotion of judges or the composition of a court, these decisions have great influence on future court decisions. Therefore, the majority of those who make decisions or recommendations should be judges. However, the CCJE welcomes that lay members are involved in such decisions as a safeguard against cronyism and cloning among judges.
>
> 21. Unfortunately, many judges in Europe consider that decisions regarding the selection and promotion of judges are not based on merit alone. Therefore, it is crucial that Councils work on the basis of ethical rules and, so far as possible, specific objective criteria for appointments and promotions and evaluate each candidate in a transparent

procedure concluding with a reasoned decision. Judges who think that their rights have been disregarded must have a right to judicial review."

30. The European Commission for Democracy through Law (the Venice Commission), in its opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a national referendum on 16 April 2017, which it adopted at its 110th Plenary Session (Venice, 10-11 March 2017, CDL-AD(2017)005, observed, in so far as relevant, as follows:

"**1. The Council of Judges and Prosecutors**

114. Under the current constitution, the President only appoints 3 out of 22 members of the HCJP. Pursuant to the amendments, the President will have the right to appoint 4 members, that is almost a third of the members of the Council of Judges and Prosecutors (CJP), whose number is also to be decreased, from 22 regular (+ 12 substitute) to 13 regular members. Two other members of the CJP, the minister of justice and his/her undersecretary, would also now be appointed by the President (minister and undersecretary as a high official). This President will therefore appoint almost half of the members of the CJP. The remaining 7 members would be appointed by the Grand National Assembly.

...

116. The Venice Commission recalls that according to European standards, at least a substantive part of the members of a High Judicial Council should be judges appointed by their peers. ...

...

119. The Commission finds that the proposed composition of the CJP is extremely problematic. Almost half of its members (4+2=6 out of 13) will be appointed by the President. It is important to stress once again in this respect that the President will no more be a *pouvoir neutre*, but will be engaged in party politics: his choice of the members of the CJP will not have to be politically neutral. The remaining 7 members would be appointed by the Grand National Assembly. If the party of the President has a three-fifths majority in the Assembly, it will be able to fill all positions in the Council. If it has, as is almost guaranteed under the system of simultaneous elections, at least two-fifths of the seats, it will be able to obtain several seats, forming a majority together with the presidential appointees. That would place the independence of the judiciary in serious jeopardy, because the CJP is the main self-governing body overseeing appointment, promotion, transfer, disciplining and dismissal of judges and public prosecutors. Getting control over this body thus means getting control over judges and public prosecutors, especially in a country where the dismissal of judges has become frequent and where transfers of judges are a common practice. In this context it seems significant that the draft amendments provide for elections to the CJP within 30 days following the entry into force of the amendments [footnote omitted] and that the political forces supporting the amendments control more than three-fifths of the seats in the TGNA, enabling them to fill all seats in the CJP.

...

128. In a presidential regime, a strong, independent judiciary is essential to settle the conflicts between the executive and the legislative powers. However, the proposed amendments weaken, instead of strengthen the Turkish judiciary. The Council of Judges and Prosecutors, whose current composition largely meets international standards,

would be immediately reformed by providing that six of the thirteen members are appointed by the President, who would no more be a *pouvoir neutre*, while seven members would be chosen by the Grand National Assembly, over which the President would have influence and which, due to the synchronization of elections, would very probably represent the same political forces as the President. No member of the Council would be elected by peer judges anymore. On account of the Council's important functions of overseeing appointment, promotion, transfer, disciplining and dismissal of judges and public prosecutors, the President's control over the Council would extend to all the judiciary. Control over the Council of Judges and Prosecutors would also indirectly enhance the President's control over the Constitutional Court."

31. At its 90th Plenary Meeting held in Strasbourg from 21 to 25 March 2022, the Council of Europe Group of States Against Corruption (GRECO) adopted a 3rd Interim Compliance Report in respect of Türkiye, within the Fourth Evaluation Round, concerning corruption prevention in respect of members of parliament, judges and prosecutors (GrecoRC4(2022)5). The report published on 23 June 2022 made the following remarks on the HSK:

"Recommendation viii.

36. GRECO recommended that determined measures be taken to strengthen the independence of the High Council of Judges and Prosecutors (HCJP) in respect of potential threats to its independence from the executive authorities and political influence.

37. GRECO refers to its previous conclusions according to which this recommendation was not implemented. GRECO recalls that the replacement of the High Council of Judges and Prosecutors (HCJP) by the Council of Judges and Prosecutors (CJP) in 2017 and the selection of all of CJP's members by the executive and legislative powers gave rise to serious concerns that the CJP appeared to be even less independent as a body than the defunct HCJP. This development resulted in the CJP clearly not being in line with the international standard calling for at least half of the members of self-governing judicial bodies to be elected by their peers, as enshrined in the Council of Europe Committee of Ministers' Recommendation CM/Rec(2010)12. Furthermore, GRECO noted that the CJP was still chaired by the Minister of Justice and the Deputy Minister of Justice was also a member.

38. The Turkish authorities reiterate their position that the CJP is independent, as provided for in the Constitution and domestic statute. In their view, the organisation and functioning of the CJP reflects the needs of the country and does not lend itself to any external political influence. It is composed of two chambers, each of which takes decisions by a simple majority. Decisions against judges/prosecutors can be challenged against before the CJP's General Assembly.

39. GRECO repeats its previous findings that the composition of the CJP is in direct contradiction with the standards of the Council of Europe as referred to in GRECO's previous compliance reports (see paragraph 37 above) as well as GRECO's practice, which require that at least half of the members of such self-governing bodies dealing notably with the career of judges should be judges elected by their peers. As it stands, the CJP is still chaired by the Minister of Justice and the Deputy Minister of Justice is also a member, whilst none of the other members is elected by judges amongst peers.

40. GRECO concludes that recommendation viii remains not implemented.

Recommendation ix.

41. GRECO recommended that the involvement and the responsibility of the judiciary in respect of the process of selecting and recruiting candidates to become judges/prosecutors be considerably strengthened.

42. GRECO refers to its conclusions in the previous compliance reports finding that this recommendation was not implemented. GRECO noted that the situation had not changed more than the HCJP being replaced by the CJP in the final phase of admission of new candidates. The situation that was described in the Evaluation Report, whereby the Ministry of Justice played a leading and decisive role throughout the recruitment process remained unchanged. In particular, apart from two members of the interview committee, namely the Secretary General of the CJP and one member selected from the advisory board of the Justice Academy, the remaining five members were representatives of the Ministry of Justice. The CJP, including the Deputy Minister of Justice, led the recruitment of candidate judges and prosecutors. In this respect, given the misgivings expressed concerning the composition of the CJP, which had no members elected by judges, GRECO was concerned that the process of selecting and recruiting judges was even more under the control of the executive.

43. The Turkish authorities have provided no new information in respect of this recommendation.

44. In the absence of any new developments, GRECO concludes that recommendation ix remains not implemented."

III. OTHER INTERNATIONAL MATERIALS

32. On 2 May 2018 the UN Special Rapporteur on the independence of judges and lawyers, Mr Diego García-Sayán, submitted his second Report on the independence of judges and lawyers to the Human Rights Council (UN doc. A/HRC/38/38). He made the following recommendations:

"97. Decisions on the appointment and promotion of judges should be taken through a transparent process by a judicial council or an equivalent body independent of the legislative and executive branches of powers.

...

106. All the appointment processes for the councils should be transparent and participative so to avoid and prevent corporatism and appropriation of the process by the de facto powers.

...

111. When members of the executive branch, for example the Minister of Justice, participate in the work of a council as *ex officio* members, appropriate measures should be developed to ensure their independence from any potential interference.

112. The Chair of a council should be held by an impartial person who does not have any political affiliation. In parliamentary systems in which the President or Head of State has only formal powers, it is permissible to appoint him or her as the Chair of the council. In all other cases, the Chair should be elected by the council itself among its judge members. Neither the Chief Justice, the President of the Supreme Court nor the Minister of Justice should be appointed as the Chair of a judicial council."

33. In May 2012 the General Assembly of the European Network of Councils for the Judiciary adopted a declaration (the "Dublin Declaration"),

setting minimum standards regarding the recruitment, selection, appointment and promotion of members of the judiciary. The relevant extracts of the declaration read as follows:

> "1. Judicial appointments should only be based on merit and capability.
>
> ...
>
> 6. Where the appointment process includes assessment based on reports and comments from legal professionals (such as practising judges, Bar Associations, Law Societies etc) any such consultation must remain wholly open, fair and transparent, adding that the views of any serving judge or Bar Association should be based on the relevant competencies, should be recorded in writing, available for scrutiny and not based on personal prejudice.
>
> ...
>
> 10. An unsuccessful candidate is entitled to know why he or she failed to secure an appointment; and there is a need for an independent complaints or challenge process to which any unsuccessful applicant may turn if he or she believes that he/she was unfairly treated in the appointment process."

34. The relevant parts of the Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia: Judicial Administration, Selection and Accountability, 2010, of the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe provide as follows:

> "*Judicial Selection*
>
> 3. Unless there is another independent body entrusted with this task, a separate expert commission should be established to conduct written and oral examinations in the process of judicial selection ... In this case the competence of the Judicial Council should be restricted to verifying that the correct procedures have been followed and to either appoint the candidates selected by the commission or recommend them to the appointing authority ...
>
> 4. Alternatively, Judicial Councils or Qualification Commissions or Qualification Collegia may be responsible directly for the selection and training of judges. In this case it is vital that these bodies are not under executive control and that they operate independently from regional governments ...
>
> ...
>
> *Recruitment Process*
>
> 21. In order to ensure transparency in the selection process, the procedure and criteria for judicial selection must be clearly defined by law. The vacancy note, as well as the terms and conditions, should be publicly announced and widely disseminated. A list of all candidates applying (or at least a short list) should be publicly available. The selection body should be independent, representative and responsible towards the public (see paras 3-4). It should conduct an interview at least with the candidates who have reached the final round, provided that both the topic of the interview and its weight in the process of selection is predetermined.
>
> 22. If there are background checks, they should be handled with utmost care and strictly on the basis of the rule of law. The selecting authority can request a standard check for a criminal record and any other disqualifying grounds from the police. The

results from this check should be made available to the applicant, who should be entitled to appeal them in court. No other background checks should be performed by any security services. The decision to refuse a candidate based on background checks needs to be reasoned.

23. Where the final appointment of a judge is with the State President, the discretion to appoint should be limited to the candidates nominated by the selection body (e.g. Judicial Council, Qualification Commission or Expert Commission; see paras 3-4). Refusal to appoint such a candidate may be based on procedural grounds only and must be reasoned. In this case the selection body should re-examine its decision. One option would be to give the selection body the power to overrule a presidential veto by a qualified majority vote. All decisions have to be taken within short time limits as defined by law."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

35. The applicant complained that he had had no access to a court to challenge the decision of the HSK of 13 May 2020 refusing to confirm his appointment to judicial office. He relied on Article 6 § 1 of the Convention, which reads 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

36. 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 fact that a candidate had successfully completed training to become a judge did not create a right to be appointed to the profession. The HSK, as the sole body empowered to determine whether to confirm the appointment of judges, exercised a discretion in this respect which was not amenable to judicial review. The Government further considered that the circumstances of the present case differed from those in *Bilgen v. Turkey* (no. 1571/07, 9 March 2021) in which the Court had found that the HSK could not exercise unfettered discretion in the appointment of a judge, who enjoyed security of tenure on account of the fact the constitutional provisions providing for the principle of the independence of the judiciary had to be taken into account in any measure affecting the status and career of judges, whereas in the present case the applicant, who did not have the status of a judge, could not claim a similar right even on an arguable basis.

37. 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 set out in that judgment had been met. Concerning the first condition, the domestic law had expressly excluded the HSK's decisions – except for dismissal from office – from judicial review. The *Bilgen* judgment had also confirmed this finding (cited above, § 75).

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 again considered the circumstances of the present case differed from those in *Bilgen*, which had been about the guarantees that judges must enjoy in matters that directly concern their individual independence and impartiality. The present case, however, was about initial appointment to the judicial profession and, given that the applicant did not enjoy the status of a judge, an argument regarding the necessity to have judicial remedies in order to preserve and safeguard the independence and impartiality of judges was not relevant here.

38. The applicant contested the Government's position. In his view, the selection of judges and appointment to the judicial profession were equally crucial for the independence of the judiciary, and on the basis of the Court's findings in *Bilgen*, the second condition of the *Vilho Eskelinen* test had not been fulfilled.

(b) The Court's assessment

(i) Existence of a right

39. The Court reiterates that for Article 6 § 1 in its civil limb to be applicable, there must be a "dispute" ("*contestation"* in French) regarding a "right" which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether it 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, finally, 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 *Denisov v. Ukraine* [GC], no. 76639/11, § 44, 25 September 2018, with further references, and *Grzęda v. Poland* [GC], no. 43572/18, § 257, 15 March 2022, with further references). Lastly, the right must be a "civil" right (see *Grzęda*, cited above, § 257).

40. There has been an evolution in the Court's case-law towards applying the civil limb of Article 6 also to cases which might not initially appear to concern a civil right but which may have direct and significant repercussions on a private right (see *De Tommaso v. Italy* [GC], no. 43395/09, § 151,

23 February 2017, with further references; see also *Denisov*, cited above, §§ 51-52, with further references).

41. Turning to the present case, the Court notes that under Turkish law the right to equal access to public service is a constitutional right and that no considerations other than the requirements of the post may be taken into consideration in recruitment to public service. It is clearly apparent from the domestic case-law examples submitted by the Government that candidates-in-training who have applied for the position of a judge or prosecutor have access to administrative courts in respect of the recruitment procedures and the interviews conducted by the Ministry. It thus follows that the domestic law and practice considered candidates-in-training, who have applied for the position of a judge, to have a right against arbitrary appointment or rejection. In the Court's view, neither the fact that the HSK exercises discretion in respect of the final step of confirming the appointment to the judicial professions nor the fact that that discretion itself may not be reviewed by the courts negate the arguability of the applicant's claim that he fulfilled all the statutory requirements to be appointed to the post for which he was shortlisted.

42. Having regard to the right of equal access to civil service in Article 70 of the Constitution, and the fact that the applicant passed the written and oral examinations, and was considered to fulfil the statutory conditions for becoming a judge until the HSK decided otherwise, the Court considers that the applicant had a right which could arguably be said to be recognised in Turkish law (see, *mutatis mutandis*, *Juričić v. Croatia*, no. 58222/09, § 52, 26 July 2011 and *Gloveli v. Georgia*, no. 18952/18, §§ 38-41, 7 April 2022).

(ii) Civil nature of the right

(α) General Principles

43. As regards officials employed in the civil service, according to the criteria established in *Vilho Eskelinen and Others* (cited above) the respondent State cannot rely before the Court on an applicant's status as a civil servant to exclude the protection embodied in Article 6 unless two conditions are fulfilled. First, the State in its national law must have excluded access to a court for the post or category of staff in question. This condition is satisfied where domestic law contains an explicit exclusion from access to a court. However, the same condition may also be satisfied where the exclusion in question is of an implicit nature, in particular where it stems from a systemic interpretation of the applicable legal framework or the whole body of legal regulation (see *Grzęda*, cited above, § 292). 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 respondent State to establish that the civil servant in question participated in the exercise of public power or that there existed a special bond of trust and loyalty between the civil

servant and the State, as employer. It is also for the respondent State to show that the subject matter of the dispute in issue was related to the exercise of State power or that it had called into question the special bond. Thus, there can in principle be no justification for the exclusion from the Article 6 guarantees 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. There will, in practice, be a presumption that Article 6 applies. It will be for the respondent State to demonstrate, first, that a civil servant applicant did not have a right of access to a court under national law and, secondly, that the exclusion of the Article 6 rights was justified in the case of that civil servant (see *Grzęda*, cited above § 261, with further references; see also §§ 291-92, 296 and 299).

44. The Court has explained that disputes about "salaries, allowances or similar entitlements" are merely non-exhaustive examples of "ordinary labour disputes" to which Article 6 should in principle apply under the *Vilho Eskelinen* test (see *Denisov*, cited above, § 52, with further references).

45. Furthermore, in order for national legislation excluding access to a court to have any effect under Article 6 § 1 in a particular case, it should be compatible with the rule of law. This concept, which is not only expressly mentioned in the Preamble but is also inherent in all the Articles of the Convention, requires, *inter alia*, that any interference must in principle be based on an instrument of general application (see *Grzęda*, cited above, § 299, with further references).

46. In *Vilho Eskelinen and Others* (cited above, § 61), the Court stated that its reasoning in that case was limited to the situation of civil servants. However, in its subsequent case-law it has extended the application of the criteria established therein to various disputes regarding judges. It has noted in that connection that although the judiciary is not part of the ordinary civil service, it is considered part of typical public service (see *Baka v. Hungary* [GC], no. 20261/12, § 104, 23 June 2016).

47. In that connection, the Court has applied the *Vilho Eskelinen* criteria to all types of disputes concerning judges, including those relating to recruitment/appointment (see *Juričić*, §§ 52-57 and *Gloveli*, §§ 43-47, both cited above), career/promotion (see *Dzhidzheva-Trendafilova v. Bulgaria* (dec.), no. 12628/09, 9 October 2012, and *Tsanova-Gecheva v. Bulgaria*, no. 43800/12, §§ 85-87, 15 September 2015), transfer (see *Tosti v. Italy* (dec.). no. 27791/06, 12 May 2009, and *Bilgen*, cited above, § 79), suspension (see *Paluda v. Slovakia*, no. 33392/12, §§ 33-34, 23 May 2017, and *Camelia Bogdan v. Romania*, no. 36889/18, § 70, 20 October 2020), disciplinary proceedings (see *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 120, 6 November 2018; *Di Giovanni v. Italy*, no. 51160/06, §§ 36-37, 9 July 2013; and *Eminağaoğlu v. Turkey*, no. 76521/12, § 80, 9 March 2021), dismissal (see *Olujić*

v. Croatia, no. 22330/05, §§ 31-43, 5 February 2009; *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; *Kamenos v. Cyprus*, no. 147/07, §§ 82-88, 31 October 2017; and *Mnatsakanyan v. Armenia*, no. 2463/12, §§ 49-59, 6 December 2022), reduction in salary following conviction for a serious disciplinary offence (see *Harabin v. Slovakia*, no. 58688/11, §§ 118-23, 20 November 2012), removal from post (for example, President of the Supreme Court, President of the Court of Appeal or Vice-President of the Regional Court) while remaining a judge (see *Baka*, cited above, §§ 34 and 107-11; *Denisov*, cited above, § 54; and *Broda and Bojara v. Poland*, nos. 26691/18 and 27367/18, §§ 121-23, 29 June 2021), functions other than the principal activity of a judge (premature termination of the term of office of a judge elected to serve in the judicial council) while remaining a judge (see *Grzęda*, cited above, §§ 289-327) or judges being prevented from exercising their judicial functions after legislative reform (see *Gumenyuk and Others v. Ukraine*, no. 11423/19, §§ 61 and 65-67, 22 July 2021). It has also applied the *Vilho Eskelinen* criteria to a dispute regarding the premature termination of the term of office of a chief prosecutor (see *Kövesi v. Romania*, no. 3594/19, §§ 124-25, 5 May 2020).

48. Furthermore, the employment relationship of judges with the State must 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 deliver 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 deprived them of the guarantees of the Articles of the Convention on matters directly touching upon their individual independence and impartiality (see *Bilgen*, § 79, and *Broda and Bojara*, § 120, both cited above).

(β) Application of those principles to the present case

49. The Court would begin by noting that the applicant's status at the time of the events was that of a civil servant and that him being a candidate judge in training did not grant him any of the constitutional guarantees that were available to judges and prosecutors whose appointment had been confirmed in accordance with the national legal framework. In this respect, the circumstances of the present case do not fit squarely within the line of case-law cited in paragraph 47 above, and more specifically with the *Bilgen* and *Eminağaoğlu* cases (both cited above) where the Court applied the

conditions of the *Vilho Eskelinen* test in the light of the guarantees of judicial independence and to applicants who were actual members of the judiciary. At the same time, there is a strong correlation between judges' appointment to office, on the one hand, and judicial independence in general and the public's trust in the judiciary, on the other. In that connection, in its previous case-law the Court has 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" and highlighted the importance of a rigorous process for the appointment of ordinary judges to ensure that the most qualified candidates – both in terms of technical competence and moral integrity – are appointed to judicial posts (see *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, §§ 221-22, 1 December 2020, and also the other international standards referred to in paragraphs 28-29 and 32-34 above). The Court has also stated that domestic law needs 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 (see *Guðmundur Andri Ástráðsson*, cited above, § 230).

50. On the basis of the foregoing, and having regard also to the fact that the applicant was found to have fulfilled the statutory requirements, had passed the relevant examinations and had successfully completed his judicial training, the Court will examine the case on the basis of its case-law relevant to judicial careers.

51. As regards the first condition of the *Vilho Eskelinen* test, the Court held in its judgments in *Bilgen and Eminağaoğlu* (both cited above) that except for dismissal from the judicial professions, decisions made by the HSK ("HSYK" as it was then called) concerning judges and prosecutors were not amenable to judicial review and that moreover the HSK itself could not be regarded as a "tribunal" for the purposes of the *Vilho Eskelinen* test on account of, *inter alia*, the shortcomings in the procedure before it, such as the absence of (a) a code of procedure; (b) hearings; (c) rules of evidence, including summoning and hearing witnesses; (d) adversarial proceedings; and (e) reasoning (see *Bilgen*, § 74, and *Eminağaoğlu*, §§ 99-100, both cited above).

52. That being said, the Court notes that the HSK was one of the constitutional institutions that underwent amendments following the 2017 referendum (see paragraph 23 above) and that those amendments were already in force during the time frame relevant to the present application; that it was the HSK, newly composed as per the constitutional amendment, that took the impugned decision in the applicant's case; and that the constitutional amendment in question concerned strictly the composition and manner of appointment of HSK members and did not bring any changes to the

decision-making process of that body (see paragraph 23 above). In this latter respect, the shortcomings identified by the Court in the judgments in *Bilgen* and *Eminagaoğlu* (both cited above) have remained the same, which therefore makes it unnecessary for the Court to conduct a fresh examination of whether the HSK can be regarded as a tribunal within the meaning of Article 6 § 1 of the Convention.

53. It therefore follows that the first condition of the *Vilho Eskelinen* test is fulfilled. Having also regard to the fact that the exclusion from access to a court is explicit, it is not necessary for the Court to further examine whether this exclusion stemmed from the systemic interpretation of the applicable legal framework (see *Grzęda*, cited above, § 292).

54. The Court must next assess whether the second criterion established in the *Vilho 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 and Others*, cited above, § 62).

55. The Government argued that the subject matter of the dispute related to the exercise of judicial power and in particular to the initial appointment to judicial office, an area in which there was no common practice among the member States and in which the latter enjoyed a wide discretion in organising procedures on how to appoint candidates to the judicial professions, including oral interviews.

56. The Court notes that it is not called upon to review the judicial appointment systems that are in place in the various Council of Europe member States, but whether the exclusion from judicial review of disputes relating to the selection and recruitment of candidates for judicial office are justified under the *Vilho Eskelinen* test. As already noted in its case-law, there are a variety of different systems in Europe for the selection and appointment of judges and what is decisive is that appointees be free from influence or pressure when carrying out their adjudicatory role (see *Guðmundur Andri Ástráðsson*, cited above, § 207, with further references). The question is always whether, in a given case, the requirements of the Convention are met (see *Kleyn and Others v. the Netherlands* [GC], nos. 39343/98 and 3 others, § 193, ECHR 2003-VI, and *Henryk Urban and Ryszard Urban v. Poland*, no. 23614/08, § 46, 30 November 2010).

57. In this connection, the Court reiterates that when it comes to disputes involving the judiciary, the second criterion of the *Vilho Eskelinen* test, according to which the applicability of Article 6 § 1 is only excluded where it is established that the subject matter of the dispute is such as to call into question the special bond of trust and loyalty, must be read in the light of the guarantees for the independence of the judiciary (see *Bilgen*, cited above, § 79). Likewise, the Government cannot rely on the notion of the exercise of State power to exclude disputes from judicial review where doing so would produce results that are incompatible with the guarantees of judicial independence. In this respect, the Court has noted a clear link between the integrity of the judicial appointment process and the requirement of judicial independence (see *Thiam v. France*, no. 80018/12, §§ 81-82, 18 October 2018). The Court also refers to the principle that judges should be selected on the basis of merit and objective criteria, not only to ensure public confidence in the judiciary but also to supplement the guarantee of the personal independence of judges (see *Bilgen*, cited above, § 63, with further references, and the principles enunciated in paragraph 49 above).

58. Against this background, the Court considers that, in view of the particular circumstances of the present case, the exclusion of the applicant, a judicial candidate who met the statutory eligibility requirements, from the final stage of the appointment process in the absence of any judicial review of this decision, cannot be regarded, in view of the importance of the protection of judicial independence, as being in the interest of a State governed by the rule of law (see *Gloveli*, cited above, § 51, for a similar conclusion regarding the exclusion of judicial review with respect to a judicial candidate fulfilling the statutory requirements). It underlines in this respect that objective criteria based on merit (see *Guðmundur Andri Ástráðsson*, § 221 and § 234, *Grzęda*, § 308, both cited above) and transparent procedure (see paragraph 28 above) are recognised both in the Court's case-law and in the Council of Europe instruments as key to ensuring a recruitment process capable of maintaining public confidence in the judiciary and safeguarding judicial independence. The Court therefore finds that the Government has not put forward grounds on which it could be justified to hold that the second criterion of the *Vilho Eskelinen* test was satisfied in the present context.

It therefore follows that Article 6 § 1 of the Convention under its civil head is applicable.

2. Non-exhaustion of domestic remedies

59. The Government submitted that the applicant had not brought an administrative law action against the Ministry during his candidacy period. Without specifying the nature of either the action or administrative act the applicant had failed to challenge before the administrative courts, the

Government argued that the applicant had not raised his Convention complaints before the domestic courts.

60. The Court notes that the applicant successfully objected to the results of his oral interview and as a result the Ministry forwarded his file to the HSK for the latter to confirm his appointment to judicial office. Therefore, the Government's argument in this respect is not relevant. Having regard to the fact that the applicant's complaint relates to his inability to seek judicial review of the HSK's decision of 13 May 2020, the Government's objection of non-exhaustion under this head must be dismissed.

3. Conclusion on admissibility

61. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

62. The applicant submitted that the impugned restriction regarding the impossibility of seeking judicial review of the HSK's decision had not fulfilled the Convention requirements of pursuing a legitimate aim and being necessary in a democratic society. In the first place, he disagreed with the Government's argument that it was necessary for the HSK to retain its unfettered discretion in deciding whom to appoint to the judicial professions because allowing this discretion to be reviewed by courts would mean that the State would be forced to accept by means of a judicial decision persons who had been found unsuitable to exercise judicial power at first hand, with security of tenure. According to the applicant, the HSK was not an independent institution and therefore an independent judicial review was necessary and would be able to examine whether a candidate judge should be appointed to office with reference to the admission requirements. In this connection, the applicant argued that the fact that the Minister of Justice chaired the HSK was a strong sign that the HSK could be influenced by the executive power. Moreover, the fact that neither the initial decision of the HSK declining to confirm his appointment nor the decision on re-examination had provided him with proper reasoning, which further demonstrated that the impugned restriction was in any event disproportionate.

63. The Government maintained that the impugned restriction stemmed from the Constitution itself, which demonstrated that the State wanted to maintain its discretion in the recruitment procedures of candidates and that the method of interviewing or observing candidates over a certain period of time was used commonly in European States such as France, Germany, Austria and Italy. The Government further argued that there was no common

European practice on appointing candidates to the judicial professions. Even at the level of the Council of Europe institutions, high-level appointments such as those to the Court were not amenable to judicial review.

As regards the proportionality of the measure, the Government submitted that the HSK itself was an independent and impartial body, given that the majority of its members were senior judges and prosecutors. They referred in this connection to provisions of the Constitution which ensured the independence of the members of the HSK in terms of their appointment and working procedures. In their view, the fact that the majority of the composition of the HSK was made up of judges was a strong sign of impartiality. Furthermore, HSK members enjoyed security of tenure and performed their functions in accordance with the principle of judicial independence. Moreover, HSK, in itself provided for internal review mechanisms, namely objection before the relevant chamber and if that was not successful a request for review before the Plenary Assembly, which had been effective in terms of other candidates in similar situations. They submitted examples of such decisions where certain candidates, deemed unsuccessful by the HSK were eventually admitted into profession as a result of their objection.

2. The Court's assessment

(a) General Principles

64. The Court reiterates that the right to a fair hearing 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. Everyone has the right to have any claim relating to his or her 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 *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, § 192, 25 June 2019, with further references).

65. The right of access to a court under Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which declares the rule of law to be part of the common heritage of the Contracting States (see *Grzęda*, cited above, § 298, with further references).

66. The right of access to a court is not absolute, but may be subject to limitations; these are permitted by implication since the right of access, by its very nature, calls for regulation by the State, which enjoys a certain margin of appreciation in this regard. That being stated, those limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired. In addition, such limitations will not be compatible with Article 6 § 1 if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means

employed and the aim sought to be achieved (see *Nicolae Virgiliu Tănase*, cited above, § 195, with further references; see also *Grzęda*, cited above, § 343, with further references).

(b) Application of these principles to the circumstances of the present case

67. The Court would begin by noting that its conclusion concerning the applicability of Article 6 under the Eskelinen test is without prejudice to the question of how the various guarantees of that Article (including access to a court) should be applied in disputes concerning civil servants (see *Vilho Eskelinen*, § 64 and *Tsanova-Gecheva*, § 87 both cited above). In other words, a breach of the right of access to a court does not automatically follow from the finding that the second condition of the *Vilho Eskelinen* test has not been met. In similar disputes before it, the Court has had regard to whether any weighty reasons justifying absence of judicial review has been adduced by the Government (see, for example, *Bilgen*, § 96 and *Mnatsakanyan* § 65 both cited above).

68. In this respect, the parties agree that the HSK is not a "court" and its decision of 13 May 2020 declining to confirm the appointment of the applicant to judicial office was not reviewed, nor was it open to review, by an ordinary tribunal or other body exercising judicial powers. However, the Government argued that exclusion of judicial review had nevertheless been proportionate in the present circumstances of the case given that the HSK, following the Constitutional amendment of 2017, was a body composed mostly of judges and performing its functions in line with the principle of judicial independence and that a separate judicial review in decisions involving initial appointments into judiciary was not called for.

69. The Court is not convinced by this argument. It refers to its findings in *Bilgen* and *Eminağaoğlu* with respect to the fact that the HSK did not fulfil a judicial function in the substantive sense of this term on account of the fundamental shortcomings before it (see paragraphs 51-52 above). It also reiterates that the HSK's internal review mechanisms do not constitute an effective remedy (see *Bilgen*, § 87 and *Eminağaoğlu*, §§ 101-102, both cited above) and therefore are not sufficient to justify the absence of judicial review. The Court further notes that the current composition of the HSK is different from that it assessed in the previous cases. However, the arguments submitted by the parties concerning the HSK's current composition and the concerns expressed by the Council of Europe bodies in respect of the composition and independence of the HSK under the current constitutional rules (see paragraphs 30-31 above) may not be addressed in the present judgment because the applicant's initial application form does not contain such a complaint. This aspect therefore falls outside the scope of the case. In any event, the Court recalls the importance which international and Council of Europe instruments, as well as the case-law of international courts and practice of other international bodies are attaching to procedural fairness in

cases involving the selection, appointment and career of judges (see paragraphs 28-29 and 32-34 above; see also *Guðmundur Andri Ástráðsson*, §§ 207, 215 and §§ 226-27 and *Baka*, § 165, both cited above). The Court notes in this connection that when declining to confirm the appointment of the applicant to judicial office, the HSK did not provide reasons as to how the applicant had failed to fulfil the requirements of office other than reproducing the provisions of the law for appointment to the judicial professions. Even though the Government implied in their observations that the applicant's background check could have played a role in the HSK's assessment, neither the HSK's rudimentary reasoning nor the version of section 7 which it cited in its decision pointed to the requirement of passing the background check. In any event, the Government have not produced any evidence before the Court that the applicant failed such a check. In these circumstances there is no basis for the Court to find that the dispute concerned any exceptional or compelling reasons that could justify its exclusion from a judicial review (see, *mutatis mutandis*, *Mnatsakanyan*, cited above, § 58).

70. Accordingly, the Court finds that there has been a violation of the applicant's right of access to a court, as guaranteed by Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 8 AND ARTICLE 13 OF THE CONVENTION IN CONJUNCTION WITH ARTICLE 8

71. Relying on Articles 8 and 13 of the Convention, the applicant also complained that he had been asked a number of personal questions regarding himself, his wife and other family members, including his religious beliefs, student clubs he had frequented while attending a military high school, the dispute with M.Y., and issues relating to his health dating back ten years, which the applicant claimed should have been treated as confidential medical data and not been made available to the Interview Board.

72. The Government contested those complaints, submitting that the applicant had not complained in his application form of having been asked about those issues in the interview of 13 July 2018. In his observations, the applicant noted that the questions in issue regarding his medical data dating back to military school had been put to him by the HSK when the latter had convened him for a meeting on 3 June 2020, which he had explicitly mentioned in his application form.

73. Having regard to the content of the complaint raised in the application form lodged with the Court, the Court observes that it covered the questions he was allegedly asked by the HSK regarding his medical data at the time when he attended military school. However, having regard to its conclusions under Article 6 concerning the structural and procedural shortcomings before the HSK, which are strongly related to the decision-making process involved in the alleged interference with Article 8 of the Convention, the Court

considers that it is not necessary to examine separately the admissibility and merits of the applicant's complaints under Articles 8 and 13 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

74. 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."

75. The applicant did not submit a claim for just satisfaction. Accordingly, the Court considers that there is no call to award him any sum on that account.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint concerning the absence of judicial review against the HSK's decision admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds* that there is no need to examine separately the admissibility and merits of the complaints under Articles 8 and 13 of the Convention.

Done in English, and notified in writing on 20 June 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı Registrar	Arnfinn Bårdsen President