

REFLECTION OF DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS ON IMPARTIALITY AND INDEPENDENCE OF NATIONAL COURTS IN CONTEXT OF THE RIGHT TO A FAIR TRIAL / Alla Demyda

Alla Demyda
PhD. student
Department of International Law
on the Faculty of Law
Comenius University in Bratislava
Šafárikovo nám. č. 6
810 00 Bratislava; Slovakia
demidaalla@mail.ru
ORCID: 0000-0002-7941-2838

Abstract: *The article focuses on the principle of impartiality and independence of judiciary as a part of the right to a fair trial according to Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. In particular, an account will be taken of the case law of the European Court of Human Rights in matters of applications from national judges. The article considers the reflection of the decision of the European Court of Human Rights on the amendment of national legislations and the amendment of the provisions of the national constitutions regarding the principles of justice.*

Key words: *Council of Europe; European Court of Human Rights; case law; fair trial; impartiality; independence; legislative change; constitutional change; principles of justice; reform; disciplinary proceedings.*

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1. INTRODUCTION

Article 6, paragraph 1 of the European Convention on Human Rights¹ (hereinafter referred to as "Convention") claims that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law when deciding on civil rights or obligations or on any criminal offence the person is accused. Key aspects of Article 6 of the Convention are the rule of law and the proper administration of justice. As well, these principles are essential elements of the right to a fair trial.

The European Court of Human Rights (hereinafter referred to as "ECHR") has always been prominent and ensured the right to a fair trial. This guarantee is one of the fundamental principles of any democratic state under the Convention.

¹ Convention for the Protection of Human Rights and Fundamental Freedoms is available at the Council of Europe portal. See more in the Council of Europe. *Details of Treaty No.005: Convention for the Protection of Human Rights and Fundamental Freedoms*. Available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005> (accessed on 15.05.2021).

According to the interpretation of Article 6, paragraph 1 of the Convention we can assume that it enshrines the following elements of the right to judicial protection: a right to be heard; a fair trial; a public hearing and a statement of decision; hearing the case within a reasonable time; hearing the case by a court established by law; independence and impartiality of the judiciary.

Entin distinguishes among fundamental (the right of access to a court and the right to enforcement), institutional (independence and impartiality of the judicial power), procedural (adversarial process, equality of arms, reasonable time for legal proceedings) and special (criminal procedural safeguards provided for in Article 6, paragraph 2 and 3 of the Convention) elements of the right to a fair trial (2003, p. 86).

In this article, the study is being carried out in the context of the independence and impartiality of the court as an institutional aspect of the right to a fair trial, which is demonstrated by the existence of legally created judicial authorities entrusted by law to tasks of the administration of justice in the frame of its jurisdiction. At the same time, there is no correct "formula" for organizing a fair trial, this system can be completely different kind in different states and legal systems, which does not otherwise have a negative impact on the conducting of justice. The institutional aspect also regulates the relationship of courts with other public authorities, its independence, the status of judges, etc.

Berezhnyskiy claims that the institutional aspect is closely linked to the legitimacy of the judiciary branch as part of the organization of state authorities. The legitimacy of judicial power is demonstrated by the recognition of the jurisdiction of the court by public opinion, recognition by the international community and the readiness of society to recognize and implement decisions (2017, pp. 191-196).

The independence and impartiality of the court in its decision-making is therefore, on the one hand, a structural element of the right to a fair trial in the administration of justice for each individual and, on the other, it guarantees the further recognition and enforcement of judicial decisions, what is a guarantee of the functioning of the mechanism of the judicial system.

The purpose of the article is to determine the reflection of the case-law of the ECHR on the impartiality and independence of the courts. In other words, the purpose of the study is to answer the following questions. What view of the impartiality and independence of the courts has the Council of Europe and the ECHR? Are the decisions of the ECHR an effective way of protecting the rights of judges of national courts? Do the decisions of the ECHR have an impact on increasing the level of fairness in the decision-making of national court judges? Does the case-law of the ECHR reflect the reform of the judicial power at the national level? Therefore, the article will aim at confirming or refuting the hypothesis that the decisions made by the ECHR guarantee the right to a fair trial, in particular, to proceedings by an impartial and independent court.

The research is carried out by a method of qualitative research, in particular through a text analysis tool. To determine the substance of research issues, research is carried out in this article on the basis of an analysis of the doctrinal literature, the Council of Europe legislation and selected ECHR decisions on complaints from national court judges. Special attention is paid to the decisions of the ECHR in the cases of *Volkov v. Ukraine* and *Harabin v. Slovakia*, due to the fact that these decisions brought significant legislative changes at the national level until the amendment of the Constitution of the defendant states, thus significantly emphasizing for a fair trial at the national level.

2. IMPARTIALITY AND INDEPENDENCE OF THE JUDICIAL POWER FROM THE POINT OF VIEW OF THE COUNCIL OF EUROPE

Attention to the issue of ensuring and promoting the independence of the judicial power at transnational level arose back in 1985 at the United Nations Congress on crime prevention and criminal justice in Milan, where the UN Resolution approved The Basic Principles on the Independence of the Judiciary,² which constituted recommending material on a minimum level of legitimate and independent justice in the Member States.

Among the most important documents related to the principles of judicial independence in Europe, it is worth mentioning the Magna Carta of Judges.³ The final version of the document was adopted by the Consultative Council of European Judges (hereinafter referred to as "CCJE") in Strasbourg on November 17, 2010. This is one of the last codifications that introduces new aspects of the independence of the judiciary. According to Article 1 of the Magna Carta of Judges, its mission is to guarantee the existence of the rule of law and, at least, to ensure the proper application of the law in an impartial, fair, real and effective manner. Judicial independence must result from the law, be functional and financial. It must be guaranteed to other power authorities of the state, which are looking for justice, to other judges and society in general, through national legislation at the highest level (paragraph 3). While conducting their functions aimed at the application of justice, judges may not be subject to any regulations or instructions or any hierarchical pressure and must be bound only by law (paragraph 10).

In addition to the Convention and the Magna Carta, among important documents of the Council of Europe (hereinafter referred to as "CoE") on the independence and impartiality of the judiciary are the European Charter on the Statute of Judges (1998), the recommendations of the Committee of Ministers of the Council of Europe and the statements of the Advisory Council of European Judges.

The European Charter of the Statute for Judges⁴ was adopted on July 8-10, 1998 at a multilateral meeting on the status of judges in Europe organized by the Council of Europe, having regard to Article 6 of the Convention and the Fundamental Principles of Judicial Independence. The adoption of this document aims to increase the effectiveness of strengthening judicial independence, which is necessary to protect individual freedoms within democratic states; enshrining provisions aimed at ensuring guarantees of professional competence, independence and impartiality of judges in an official document written for all European states.

Among the available recommendations of the Committee of Ministers of the Council of Europe on this issue, it is necessary to highlight Recommendation No. R (94) 12 on the independence, competence and status of judges⁵ adopted on 13.10.1994 at the 518th session and Recommendation No. CM/Rec (2010) 12 on judges:

² UN (1985). *The basic principles of judicial power independence*. UN document no. A/COF.121/22/Rev. 1 59 (1985). Available at: <http://www.sudcovia.sk/sk/dokumenty/legislativa/326-osn-rez-o-nezsud85> (accessed on 15.05.2021).

³ Magna Carta of Judges (Fundamental Principles) of November 17, 2010. Available at: <https://rm.coe.int/magna-carta-slovakia/168063e446> (accessed on 15.05.2021).

⁴ European Charter of the Statute of Judges of 08.-10. December 1998. Available at: https://zdruzenie.sk/wp-content/uploads/2016/10/1_europaska_charta_statutu_sudcov_a_dovodova_sprava.pdf (accessed on 15.05.2021).

⁵ Recommendation No. (94) 12 of the Committee of Ministers of the Council of Europe of October 13, 1994 on the independence, competence and status of judges. Available at: https://zdruzenie.sk/wp-content/uploads/2016/10/odporucanie_re_o_nezavislosti_sudcov_94_12.pdf (accessed on 15.05.2021).

independence, efficiency and accountability⁶ adopted on November 17, 2010 during the 1098th session.

The above recommendations concern the preventive measures that are necessary to ensure the independence of judges. As the most important measures, the Council of Europe states the following: (i) the independence of judges should be guaranteed in accordance with the provisions of the Convention at the level of national legislation (e.g. express provisions on it laid down in the Constitution or other legal texts); (ii) the executive and legislative powers are to ensure the independence of judges and not to take steps to threaten their independence; (iii) any decision relating to the service of judges must be based on objective criteria; (iv) the selection of judges must be made on merit with regard to their qualifications, integrity, ability and competence. The body deciding on the selection and career progression of judges must be independent of the government and state administration; (v) in the decision-making process, judges should be independent and act without any restriction, undue influence, coercion, threats or inappropriate interference, whether direct or indirect, by anyone or for any reason whatsoever.

These principles are broadly defined in the statements of the Consultative Council of European Judges (hereinafter referred to as "CCJE") adopted to the attention of the Committee of Ministers of the Council of Europe, namely: Statement No. 1 (2001) (CCJE) on standards relating to the independence of justice and the non-transferability of judges;⁷ Statement No. 3 (2002) (CCJE) on the principles and rules governing judicial professional conduct, in particular in the fields of ethics, incompatible behaviour and impartiality;⁸ Statement No. 17 (2014) on the evaluation of the work of judges, the quality of justice and respect for judicial independence;⁹ Statement No. 18 (2015) on the status of the judiciary and its relationship with other state powers in a modern democracy.¹⁰

On April 13, 2016, the Committee of Ministers of the Council of Europe adopted the Action Plan of CoE No. CM (2016) 36 on strengthening the independence and impartiality of the judiciary.¹¹ It aims to identify ways in which the Council of Europe will

⁶ Recommendation No. CM/Rec(2010) 12 of the Committee of Ministers of the Council of Europe of November 17, 2010 on judges: independence, efficiency and accountability. Available at: https://zdruzenie.sk/wp-content/uploads/2016/10/4_odporucanie_rady_ministrov_12_2010.pdf (accessed on 15.05.2021).

⁷ Statement No. 1 (2001) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on standards relating to the independence of justice and the non-transferability of judges. Available at: <https://rm.coe.int/stanovisko-c-1-2001-poradnej-rady-europskych-sudcov-ccje-do-pozornosti/168044ba5b> (accessed on 15.05.2021).

⁸ Statement No. 3 (2002) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judicial professional conduct, in particular in the fields of ethics, incompatible behaviour and impartiality. Available at: <https://rm.coe.int/stanovisko-c-3-poradnej-rady-europskych-sudcov-ccje-do-pozornosti-vybo/168044baa5> (accessed on 15.05.2021).

⁹ Statement No. 17 (2014) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the evaluation of the work of judges, the quality of justice and respect for judicial independence. Available at: <https://rm.coe.int/ccje-2014-opinion-no17-sk/16809ec9cd> (accessed on 15.05.2021).

¹⁰ Opinion No. 18 (2015) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the position of the judiciary and its relation with the other powers of state in a modern democracy. Available at: <https://rm.coe.int/16807481a1> (accessed on 15.05.2021).

¹¹ Action Plan No. CM (2016) 36 of the Committee of Ministers of the Council of Europe of April 13, 2016 on strengthening judicial independence and impartiality. Available at:

guide and support its Member States in implementing concrete measures necessary to strengthen the independence and impartiality of the judiciary. As such, the Action Plan represents a commitment by the Secretary-General and the Council of Europe as a whole to give the highest priority to cooperation with the Member States in order to further strengthen the independence and impartiality of the judiciary in Europe. The corrective measures that Member States may plan to address the problems identified are set out in the Appendix to the Action Plan. The Action Plan recognizes the diversity of legal systems and approaches to the division of competences in the Member States of the Council of Europe and the implementation of the measures listed in the Annex should take full account of this diversity. The urgency of these actions lies in the need to strengthen the independence and impartiality of the judiciary in cases where existing structures have been found not to guarantee the rule of law and democratic certainty. The Action Plan indicates the steps to be taken, on the one hand, to identify where formal legal guarantees of the independence and impartiality of the judiciary are lacking, while introducing or presenting the necessary structures, policies and practices to ensure that these guarantees are respected in practice and contribute to the proper functioning of the judiciary, as one of the three branches of power in a democratic society based on human rights and the rule of law.

It is a long-term objective to establish and ensure the proper functioning of effective mechanisms and other measures for complex fulfilment of obligations under the Convention, in particular as regards the guarantees referred to in Article 6 of the Convention relating to the right to a fair trial. These guarantees are elaborating with society and include not only formal legal guarantees of the independence and impartiality of the judiciary but also the establishment of the necessary structures, policies and procedures to ensure that these guarantees are respected and their contribution to the proper functioning of the judiciary in a democratic society based on human rights and the rule of law. Protection of the independence of individual judges and ensuring their impartiality is another key factor that needs to be addressed in the fight to guarantee the right to a fair trial. It is of great importance to build public confidence in the judiciary and to recognize more broadly the value of its independence and impartiality, for example by ensuring the transparency of the functioning of the judiciary and its relations with the executive and legislative power, by adopting active access by the judiciary or the courts to the media and by disseminating general information which must respect both the right of defence and the dignity of the victims.

3. INDEPENDENCE AND IMPARTIALITY OF JUDGES FROM THE POINT OF VIEW OF THE ECHR

The ECHR points out that the obligation on the state to ensure the decision-making process by an independent and impartial court pursuant to Article 6 paragraph 1 of the Convention is not limited to the application to the courts. This principle also requires the executive and legislative authorities, as well as any other body, regardless of their status, to respect and implement judicial decisions, even if they do not agree with those decisions. State respect for the authority of the courts is therefore an integral prerequisite for public trust in the judiciary and, more broadly, a prerequisite for the existence of the rule of law. The constitutional guarantees of an independent and

impartial court are therefore not sufficient. They must be effectively combined with day-to-day administrative processes and procedures.

The term "independent" refers to the independence of the courts from other authorities (*Beaumartin v. France*, paragraph 38) as well as from the parties to the hearing (*Sramek v. Austria*, paragraph 42). The concept of judicial independence presupposes the existence of procedural guarantees that separate the judiciary from other bodies. In determining the independence of the body, the ECHR will consider the following criteria: the procedure for appointing judges and the length of their term of office; the existence of guarantees against external pressure (*Langborger v. Sweden*, paragraph 32; *Kleyn and others v. Netherlands*, paragraph 190). Judicial independence requires that individual judges be deprived of undue external influences or internal influences. The internal independence of judges requires the absence of instructions or pressure from other judges or persons performing administrative functions in court (*Parlov-Tkalchic v. Croatia*, paragraph 86; *Agrokompleks v. Ukraine*, paragraph 137).¹²

In Article 6 paragraph 1 of the Convention it is said that the court must be impartial within the limits of its powers. Impartiality usually implies the absence of prejudice or subjective approach. The existence of impartiality is determined on the basis of a subjective test which examines the personal beliefs and the conduct of a particular judge and on the basis of an objective test to check that the court has provided reasonable assurances for the exclusion of legitimate doubts of impartiality (*Micallef v. Malta*, paragraph 93). However, there is no significant difference between subjective and objective impartiality, since the conduct of a judge may not only lead to an objective suspicion by an independent observer of an impartiality mistake (objective test) but may also relate to the judge's own convictions (subjective test).¹³

These principles have found their real picture in the case of *Guthmundur Andri Astrathsson v. Iceland* (December 1, 2020, application No. 26374/18),¹⁴ which concerns the denial of the complainant's right to a court established by law on the grounds of manifest and serious infringements of national rules in the procedure for appointing one of the judges of the newly established Court of Appeal. The complainant noted down that his conviction for an offence in the appeal proceedings was upheld by a court that was not "established by law" and which was not independent and impartial, thereby proving a violation of Article 6, paragraph 1 of the Convention. The complainant according to Article 6 paragraph 1 of the Convention argued that one of the three judges in the composition of the Court of Appeal had not been appointed in accordance with the relevant national law and, therefore, the prosecution brought against it was not determined by a "court established by law" within the meaning of that provision. In particular, the ECHR noted that there had been a breach of the legal framework for the appointment of judges, in particular by the Minister for Justice, when four new judges of the Court of Appeal were appointed. The Minister of Justice removed four candidates from the list of the most qualified candidates proposed by the independent evaluation committee and replaced them with four other persons, including the accused judge, without justifying such nominations. Valid legal guarantees that could have remedied a minister's breach, such as parliamentary procedures for voting on judges, have proved ineffective. The infringement concerns the unlimited influence of the executive and the thwarting of the

¹² Council of Europe/European Court of Human Rights (2013). *Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (civil limb)*, pp. 27-29. Available at: <https://rm.coe.int/1680700aaf> (66) (accessed on 15.05.2021).

¹³ *Ibid.*, pp. 29-30.

¹⁴ ECtHR, *Guthmundur Andri Astrathsson v. Iceland*, app. No. 26374/18, 12 March 2019.

independence of the judiciary, thereby violating the very essence of the complainant's right to a fair trial.

The ECHR emphasizes that according to Article 6 paragraph 1 of the Convention, the court must always be "established by law". This expression reflects the rule of law, which is inherent in the system of protection introduced by the Convention and its protocols. A court, which is not set up in accordance with the intention of the legislature, will inevitably lack the legitimacy required by a democratic society to resolve legal disputes. The ECHR further reminds that "law" within the meaning of Article 6 paragraph 1 of the Convention does not include only legislative acts that establish the system and scope of authority of judicial authorities. This includes, in particular, provisions concerning the independence of the members of the court, the duration of their term of office and their impartiality. In other words, the expression "established by law" covers not only the legal basis for the whole existence of a court but also the compliance of that court with the specific rules governing it (paragraph 211-214).

In the case of *Guthmundur Andri Astrathsson v. Iceland* (paragraph 217), the ECHR summarized that compliance with the requirement for a court "established by law" had been examined in various contexts of Article 6 paragraph 1 of the Convention in particular: a court acting outside its jurisdiction; a referral to a particular judge or court; the change of judge without giving the appropriate reason required by national law; the tacit renewal of the term of office of judges for an indefinite period after the expiry of their term of office and their reappointment; a court hearing when some judges were disqualified; the participation of lay judges in hearings in contravention of the relevant national legislation.

Although the right to a "court established by law" is a separate right under Article 6 paragraph 1 of the Convention, the case law of the ECHR established a very close relationship between the particular right and the guarantees of "independence" and "impartiality". In that regard, the ECHR has held that a judicial authority, which does not fulfil the requirements of independence (in particular from the executive power) and impartiality, cannot be designated as a court for the purposes of Article 6 paragraph 1 of the Convention. The ECHR notes that the need to maintain public confidence in the judiciary and ensure its independence from other powers is the basis for each of these requirements. According to ECHR, the recognition of this close context and common purpose does not lead to the obscuration of their specific functions or their duplication, but only serves to strengthen their subjects and efficiency. In that regard, the ECHR points out that a review on the basis of a requirement of a 'court established by law' must not lose that common purpose. In this context, independence refers to the necessary personal and institutional independence, which is necessary for impartial decision-making and is therefore a prerequisite for impartiality. It characterizes, on the one hand, (i) the state of mind which indicates a judge's impermeability to external pressure as a question of moral integrity and (ii) a set of institutional and operational measures involving, on the one hand, a procedure by which judges may be appointed in a way that ensures their independence and the selection criteria are based on merits which must provide guarantees against undue influence and/or unlimited decision-making by other state powers, both at an early stage of the appointment of a judge and during the performance of his duties.

The issue of the court that is "established by law", especially in the context of the ECHR decision in the case of *Guthmundur Andri Astrathsson v. Iceland*, was also analysed by Ján Svák, who emphasizes that the Grand Chamber of the ECHR adopted a special three-step test based on the rule of law. The first step of the test identifies an objective and real breach of national courts in the selection and appointment of judges. In the

second step, the infringement in question is assessed in terms of the nature and purpose of "court established by law", thus ensuring the ability of the judiciary to exercise its powers without outside interference and thus protect the rule of law and the division of powers. The third step considers the principle of subsidiarity, which imposes a joint responsibility between the Member States and the ECHR, where national authorities and courts must interpret and apply national law in the manner provided for in the Convention (2021).

Jurisdiction and trust in any judicial institution depend on the independence and impartiality of its judges. Unfortunately, there are a large number of problems in the judiciary in Europe. This is evidenced by the wide range of applications lodged by judges of the Member States of the Council of Europe concerning infringement of the provisions of the Convention relating to the guarantee of independence, inviolability and impartiality. In this context, we propose to examine some of the decisions of the ECHR to the subject of a breach of the independence and impartiality of the judiciary.

4. CASE-LAW OF THE ECHR ON APPLICATIONS FROM JUDGES OF NATIONAL COURTS

Cases considered by the ECHR after applications by judges of national courts can be conditionally divided into two groups. The first group mainly includes applications lodged by judges whose rights have been infringed. These include, in particular, a violation of the right to freedom of expression, the inviolability of judges and a violation of the presumption of innocence. Although these cases are not directly related to the violation of Article 6 of the Convention, the implementation of the protection of the rights of judges is of great importance for a fair trial. Moreover, in the course of the decision-making process, the ECHR has identified fundamental problems which occur in the practice of judges in the exercise of their competence and which directly affect the independence of the judiciary. The second group consists of cases, which have been the subject of a demonstrable breach of the independence and impartiality of the judiciary pursuant to Article 6, paragraph 1 of the Convention. Most of the infringements occurred in the course of disciplinary proceedings against judges.

In the first group of judicial cases of the ECHR, it is necessary to classify cases of *Pop Blaga v. Romania*, *Shuvalov v. Estonia*, *Corneliu Birsan and Gabriela Victoria Birsan v. Romania*, *Kudeshkina v. Russia*.

In the cases of *Pop Blaga v. Romania* (November 27, 2012, application No. 37379/02) and *Shuvalov v. Estonia* (May 29, 2012, applications No. 39820/08 and 14942/09) judges were accused of abuse of justice and even committing a crime. In those cases, however, the ECHR had to decide on the procedural aspects of the hearing against those judges, such as the illegally obtained evidence, the violation of the presumption of innocence, but also the conditions of detention of the accused judges.

The case of *Pop Blaga v. Romania* (November 27, 2012, application No. 37379/02)¹⁵ concerned the preliminary examination procedure in criminal proceedings against a judge of the District Court of Bihorel concerning the acceptance of a bribe by a judge in commercial proceedings. Referring to Articles 3 and 8 of the Convention, the complainant complained about the poor conditions of detention at the police department and the unlawful recording of her conversations, both by phone and in person. The ECHR has acknowledged infringements of Article 3 and Article 8 of the

¹⁵ ECtHR, *Pop Blaga v. Romania*, app. No. 37379/02, 27 November 2012.

Convention. As regards the unfavourable conditions of detention, the ECHR noted that there was clearly no intention to humiliate the complainant during her one-month detention at the Oradea Police Department, but the absence of such an objective cannot rule out a breach of Article 3 of the Convention. The conditions of detention at issue, which the complainant had to endure for approximately one month, were subjected to tests of an intensity, which exceeded the necessary level of distress associated with detention. As regards the unlawful recording of interviews by an ECHR judge, it was pointed out that the recording of the complainant's telephone calls amounted to "interference by a public authority" in the exercise of the right guaranteed by Article 8 of the Convention. In order to comply with Article 8, paragraph 2 of the Convention, this intervention must comply with national law. As regards the secret supervision of public authorities, national law must provide protection against arbitrary interference with the rights guaranteed by Article 8 of the Convention.

In the case of *Shuvalov v. Estonia* (May 29, 2012, application No. 39820/08 and 14942/09)¹⁶ there is a judge at the Harju Regional Court who was declared a suspect of accepting a bribe in the exercise of his jurisdiction in a criminal decision. The complainant, referring to Article 6, paragraph 1 and 2 of the Convention argued that the media coverage of the case in several television programmes and several newspaper articles, as well as the prosecutor's public statements, violated his presumption of innocence and caused the injustice of criminal proceedings against him. In the present case, the ECHR found that the information disclosed by the public prosecutor was a brief summary of the facts relating to a matter of general interest and that the complainant's right to respect for private life had not been infringed. This finding was also important in terms of the presumption of innocence. The court also considered the complainant's claim of a virulent media campaign initiated by the prosecutor and acknowledged that in certain cases the media campaign may adversely affect the fairness of the trial and give rise to state accountability. At the same time, the court stated that the media coverage of this case, in particular, did not constitute a virulent press campaign aimed at perverting the course of justice of the proceedings, nor found there was any indication that the interest of the media in the matter was generated by the prosecutor. According to the point of view of the court, the media coverage of this case did not go beyond what can be considered as informing the public about the judge's serious allegations and the state of the criminal proceedings. In the light of the above mentioned, the ECHR found that the complainant's right to the presumption of innocence had not been infringed and that there had been no breach of Article 6 paragraph 1 and 2 of the Convention.

As regards the principle of the inviolability of judges, a model example is the case of the partial waiver of the immunity of the Judge of the ECHR Cornelia Birsan and the subsequent decision of the ECHR in the case of the application of the case of *Cornelia Birsan and Gabriela Victoria Birsan v. Romania* (December 13, 2013, application No. 79917/13).¹⁷ The wife of Judge Cornelia Birsan, a judge at the Romanian Court of Appeal, Gabriela, was suspected of committing crimes of corruption, in particular accepting bribes. Following a domiciliary visit of the complainant as part of a pre-examination of a criminal case, the issue of violation of the immunity of an ECHR judge occurred. The President of the ECHR has issued a statement where emphasized that immunity is also guaranteed to family members of judges of the ECHR and expressed concern that Romania had not requested the waiver of immunity from the ECHR. Upon receipt of a request from Romania, the ECHR decided during the plenary session to waive

¹⁶ ECtHR, *Shuvalov v. Estonia*, app. No. 39820/08 and 14942/09, 29 May 2012.

¹⁷ ECtHR, *Cornelia Birsan and Gabriela Victoria Birsan v. Romania*, app. No. 79917/13, 2 February 2016.

the immunity of only Gabriela Birsan, to the extent directly necessary for the investigation. However, the ECHR decided that its decision was not retroactive, so that previous inspections were not in accordance with the provisions of Protocol No. 6 to the General Agreement on the Privileges and Immunities of the Council of Europe, since only the plenary session of the Court deprives judges of their immunity.

Corneliu and Gabriela Birsan lodged an application with the ECHR, referring to Article 6, paragraph 1, Article 8, 13 and 51 of the Convention. In particular, the complainants objected to domiciliary visit and interception of telephone calls, which resulted in an interference with their right to respect for their correspondence and their private and family life and home and the violation of immunity under Article 51 of the Convention. The ECHR noted that, in the context of criminal proceedings, the national courts have ruled that that house search and those interceptions are unlawful because they were carried out irrespective of the immunity provided for in Article 51 of the Convention. Furthermore, by judgment of the Supreme Court of Romania of October 20, 2014, the Court ruled that the immunity had been violated, annulled the eavesdropping of complainants and concluded that, following the cancellation of the results of the search, they had been deprived of any legal value and declared that the records collected through eavesdropping and searches could not be used as evidence. The ECHR thus concluded that the national courts had thus ruled on the substance of the application, while the complainants had succeeded in their national protection arrangements. It follows that, in case when an infringement of Article 51 of the Convention could give rise to liability of the State concerned before the ECHR, it is not possible in this case to rule on an infringement of the Convention.

The case of *Kudeshkina v. Russia* (February 26, 2009, application No. 29492/05)¹⁸ concerns a violation of the complainant's right to freedom of expression as a result of the disciplinary proceedings that led to her being removed from judicial office in 2004 for critical statements about the judiciary in media interviews during her election campaign in 2003. The essence of the contentious statements was to criticize the role of the chief of the courts, including the chief of the Moscow City Court, for interference in the decision-making of individual cases under external pressure and the accusations that pressure on Moscow judges is a common issue. In the contested interviews, the ECHR peddling did not find anything to substantiate the claims made by the Russian state authorities to disclose confidential information. The ECHR found that the complainant indicated a very important matter of public interest, which had to be open to free debate in a democratic society. The ECHR stated that the complainant's arguments had been convincingly refuted in the context of the national proceedings and that its statements should be regarded as a fair statement on a question of major public importance. The ECHR also found that the disciplinary proceedings against the complainant did not respect important procedural guarantees, in particular as regards the impartiality of the Moscow City Court, which considered its appeal against its disciplinary sanction imposed, despite the fact that the appeal was decided by the same court. Its criticism gave rise to the imposition of a disciplinary sanction. The ECHR concluded that the way in which a disciplinary sanction was imposed was not ensured by important procedural guarantees. It also found that the sanction at dispute was disproportionately high and could have had a "chilling effect" on judges who wished to take part in a public debate on the effectiveness of judicial institutions. On the basis of those two conclusions, the ECHR noted that the State failed to strike the right balance between, on the one hand, the need to protect the reputation of the judiciary and, on the

¹⁸ ECtHR, *Kudeshkina v. Russia*, app. No. 29492/05, 26 February 2009.

other, the need to protect the complainant's jurisdiction and the complainant's right to freedom of expression, thereby breaching Article 10 of the Convention. This case has revealed very important problems in the Russian judicial system affecting the independence and impartiality of the judiciary, even if the issue of independence and impartiality was not the subject of decision-making by the ECHR in this case.

The independence of the judiciary from the point of view of the case law of the ECHR in matters of applications of judges whose rights were violated has been examined in detail by the Czech researcher Kmec, who defined the groups of rights of judges whose violation most affects their independence. These are the right to respect for private and family life (Article 8 of the Convention), the right to freedom of expression (Article 10 of the Convention), the right to freedom of religion (Article 9 of the Convention), the right to freedom of association (Article 11 of the Convention) and the right to protection of property (Article 1 of Protocol 1 to the Convention). Jiří Kmec therefore noted that not only Article 6 of the Convention guarantees the protection of the independence of the judiciary, but other provisions of the Convention also contribute to this protection (2020, pp. 65-71).

To the second group it is necessary to classify cases of *Baka v. Hungary*, *Ermenyi v. Hungary*, *Ramos Nunes de Carvalho e Sa v. Portugal*, *Mitrinovski v. former Yugoslav Republic of Macedonia*, *Volkov v. Ukraine*, *Harabin v. Slovakia*.

Decision on the case of *Baka v. Hungary* (June 23, 2016, application No. 20261/12) and decision on the case of *Ermenyi v. Hungary* (March 22, 2016, application No. 22254/14) was adopted by the ECHR in similar cases concerning the undue and early termination of the mandates of complainants such as the Chief (case of *Baka*) and Vice-Chief (case of *Ermenyi*) of the Hungarian Supreme Court through legislative measures *ad hominem* adopted as part of a major judicial reform. The ECHR identified violation of Article 6 of the Convention, combined with an infringement of the complainant's right of access to the court and freedom of expression in the first case and a violation of the complainant's right to respect for private life in the second case (Articles 6, 8 and 10 of the Convention).

In case of *Baka v. Hungary* (June 23, 2016, application No. 20261/12)¹⁹ was identified an early termination of the applicant's term of office from January 1, 2012 through legislative measures, thereby breaching his right of access to the court guaranteed by Article 6, paragraph 1 in the absence of legal measures for bringing the relevant action. The Court found that these measures were imposed because of the complainant's criticism of issues of public interest (planned major reform of the judicial system), thereby breaching Article 10 of the Convention, since no legitimate objective linked to judicial reform was pursued. The ECHR noted that the measures in question were not subject to review and could be difficult to reconcile with the independence and irrevocability of judges. Moreover, the ECHR found that the contested measures had a "chilling effect" which deterred not only the complainant but also other judges and presidents of the courts from participating in a public debate on issues relating to the independence of the judiciary (paragraph 173).

The case of *Ermenyi v. Hungary* (November 22, 2016, application No. 22254/14)²⁰ concerned early termination (i.e. three years and 10 months before the scheduled expiry of the term of office) of the complainant's mandate as Vice-Chief of the Hungarian Supreme Court at the same time as the President of that court, examined case *Baka* in Hungary. The ECHR found that the complainant's right to respect for her private

¹⁹ ECtHR, *Baka* against Hungary, app. No. 20261/12, 23 June 2016.

²⁰ ECtHR, *Ermenyi v. Hungary*, app. No. 22254/14, 22 November 2016.

life was violated (Article 8 of the Convention). Referring to its conclusions in the Baka case against Hungary, the ECHR reaffirmed that the alleged changes in the competences of the Supreme Judicial Authority could not or should not have led to the early termination of the mandate of its Chief. The same applies to the case of Ermenyi, whose appeal was the result of an appeal by the President of the Supreme Court. The ECHR concluded that, within the framework of the Convention, the contested measure did not pursue any of the required legitimate objectives referred to in Article 8, paragraph 2 of the Convention.

In these two cases, the case law of the ECHR focused on several aspects of the principle of the independence of the judiciary: independence from the parties to individuals of proceedings, independence from the executive and the legislative power, and the internal independence of the judiciary. However, all these aspects of the independence of the judiciary have been considered from the point of view of an individual right to a fair and public hearing by an independent and impartial court established by law. In other words, the wording of Article 6, paragraph 1 of the Convention leads to the ECHR to provide analysis of the question of the principle of independence of the judiciary in the framework of the rights of individuals involved in legal proceedings and not of the subjective right of judges to have their own right of independence guaranteed and respected by the state. The principle of judicial independence is not just a matter of its relations with the executive and legislative powers. This also applies to the independence of the judiciary in the system of the administration of justice itself. Judges must be exempted, according to their individual powers, not only from external influences but also from any internal influences. This internal independence of the judiciary means that judges do not receive instructions and are not subject to pressure from their colleagues or persons performing administrative duties in court, such as the chief of the court. The absence of sufficient guarantees ensuring the independence of judges within the judiciary, in particular against their superiors within the judicial hierarchy, makes it possible to consider the complainants' objections to the independence and impartiality of the court to be objectively justified.

The case of *Ramos Nunes de Carvalho e Sa v. Portugal* (March 21, 2016, applications No. 57728/13 and 74041/13)²¹ arose from three applications against the Portuguese Republic brought by a Portuguese judge, Mrs Paula Cristina Ramos Nunes de Carvalho e Sa, who at the time served as a judge at the Court of First Instance in Vila Nova de Famalicao. The complainant objected under Article 6 paragraph 1 of the Convention. Particularly it considered the fact that it is not possible to establish its right of access to an independent and impartial court. This was a disciplinary procedure against the complainant carried out by the High Judicial Council. The proceedings concerned the complainant's offensive statements against the judicial inspector in connection with his assessment of the complainant's service. As the complainant was due to take maternity leave at the end of June 2010, she asked the Council to carry out an evaluation before her departure in order to be able to apply for vacancies in 2010. The High Judicial Council initiated three disciplinary proceedings against the complainant for insulting the judicial inspector for over-stretching the performance of the complainant's evaluation, thereby admitting breaches of the ethical standards of conduct of judges. Disciplinary sanctions were imposed on the complainant in disciplinary proceedings, in particular, the suspension of the service for 180 days for breach of duty of decency. On appeal to the Supreme Court, the complainant lost in court.

²¹ ECtHR, *Ramos Nunes de Carvalho e Sa v. Portugal*, app. No. 55391/13, 57728/13 and 74041/13, 21 June 2016.

In examining the present case, the ECHR unanimously held that there had been no infringement of Article 6 paragraph 1 of the Convention, as regards the application alleging a lack of independence and impartiality on the part of the Supreme Court. At the same time, the ECHR decided that Article 6, paragraph 1 of the Convention was violated due to shortcomings in the proceedings against the complainant. The ECHR concluded that, in the circumstances of the case, taking into account the specific context of the disciplinary proceedings against the judge, the severity of the sanction (punishment) and the fact that procedural guarantees towards the High Council of Justice were limited, and taking into account a combination of two factors, namely: insufficient judicial investigation conducted by the Supreme Court and lack of consideration at the stage of disciplinary proceedings led to the fact that the complainant's case was not considered to be in accordance with the requirements of Article 6 paragraph 1 of the Convention.

The case of *Mitrinovski v. the former Yugoslav Republic of Macedonia* (April, 30, 2015, application No. 6899/12)²² arose following an application lodged by judge Jordan Mitrinovski against Macedonia (the former Yugoslav Republic). The complainant argued that the chief of the Supreme Court, who initiated disciplinary proceedings against the complainant about his dismissal as a judge, was ultimately involved in the decision of the Supreme Judicial Council on his appeal. This led to the situation when the same member of the Supreme Judicial Council both filed charges against the judge and dismissed him. Such a dual role has led to the accumulation and conflict of powers incompatible with the principle of fair trial. Despite the fact that the above-mentioned considerations concerned only one member of the Supreme Judicial Council, his participation in the decision contaminated the whole procedure.

The ECHR recalled that impartiality generally indicates the absence of prejudice or bias. According to the settled case-law of the ECHR, the existence of impartiality within the meaning of Article 6 paragraph 1 of the Convention indicated according to: (i) a subjective test which must take into account the personal beliefs and conduct of a particular judge i.e. whether the judge in the case had any personal prejudice or bias; and (ii) an objective test, i.e. determining whether the court itself and its composition provided sufficient safeguards to rule out any legitimate doubts as to its impartiality. However, there is no division between subjective and objective impartiality, since the judge's actions may not only lead to objective doubts as to his impartiality from the point of view of an external observer (objective test), but may also raise questions about his personal beliefs (subjective test). In other words, justice must not only be proclaimed, it must also be done. This is a trust that the courts in a democratic society must inspire in the public eye. Thus, the ECHR claimed that the Supreme Judicial Council was not an independent and impartial court and that the complainant did not have access to a fair trial and thus the Article 6, paragraph 1 of the Convention was violated. The complainant's case has not been examined by an impartial court.

The case of *Volkov v. Ukraine* (January 1, 2013, application No. 21722/11) is very similar to the case of *Mitrinovski*. It differs from the case by the fact that the decision taken by the ECHR provoked significant legislative changes at the national level up to the amendment of the Constitution. Like the case of *Volkov v. Ukraine*, the decision in the case of *Harabin v. Slovakia* also provoked a constitutional change. In this context, it is appropriate to analyse these cases in more detail.

²² ECtHR, *Mitrinovski v. the former Yugoslav Republic of Macedonia*, app. no. 6899/12, 30 April 2015.

5. FAIR TRIAL IN THE CONTEXT OF THE ECHR DECISION IN THE CASE OF HARABIN V. SLOVAKIA

The case of *Harabin v. Slovakia* (November 20, 2012, application No. 58688/11)²³ arose on the basis of an application lodged by the President of the Supreme Court, Štefan Harabin. In particular, the complainant argued that his right to hear the case before an impartial court had been infringed in proceedings before the Constitutional Court leading to the imposition of a disciplinary sanction. Disciplinary proceedings against the complainant were initiated on the grounds that the complainant did not allow auditors to carry out financial control of the management of public funds in the Supreme Court. On June 29, 2011, the Constitutional Court found the complainant guilty of serious disciplinary wrongdoing and imposed a disciplinary sanction consisting of a 70% reduction of his annual salary in his term of office for a period of one year. The ECHR has held that there had been an infringement of Article 6 paragraph 1 of the Convention in provision for a disciplinary application against the complainant to be decided by an impartial court.

The ECHR emphasized that, in relation to the application in question, it was not its function to adopt any position as to whether the complainant was entitled to prevent auditors from the Ministry of Finance from carrying out audit. The role of the ECHR in the present case is solely to decide whether the complainant's rights under the Convention have been respected in proceedings before the Constitutional Court in which he was prosecuted for a disciplinary offence.

The ECHR is of the opinion that it is appropriate to deal first with the objection of the alleged lack of impartiality of the judges of the Constitutional Court. Impartiality means the absence of prejudice or bias. Its existence or absence may be established by a subjective and objective test. The position of the party concerned is important but not decisive; whether that concern can be regarded as objectively justified. In this respect, the impression may also have some meaning. It is about trust, which must rise in the eyes of the public. In a democratic society, this is the role of the courts. Thus, any judge who has a legal reason to fear a lack of impartiality must resign. Internal organization issues must also be considered. A relevant factor is the existence of national mechanisms to ensure impartiality, namely the rules governing the exclusion of judges. Such rules show the legislator's interest in removing any reasonable doubt as to the impartiality of the court concerned and constitute an attempt to ensure impartiality by eliminating the causes of such interests. Furthermore, they are aimed at eliminating any indication of bias in order to ensure the absence of genuine bias, thus serving to promote the trust that the courts must invoke in the public. The ECHR therefore considers it a matter of substantial importance if, as in the present case, the Government initiates disciplinary proceedings against a judge in his capacity as President of the Supreme Court. Finally, public confidence in the functioning of the judiciary at the highest national level is at stake in such proceedings. It is therefore particularly important that the guarantees of Article 6 of the Convention apply to such proceedings.

According to the Action Report of the Committee of Ministers of the Council of Europe No. DH-DD (2015) 754 of July 2, 2015²⁴ concerning the state of enforceability of the decision in the case of *Harabin v. Slovakia* in the part of the implementation of individual measures, it is noted that the original request of the complainant of February 18, 2013 for resumption of proceedings, in the matter of disciplinary proceedings against

²³ ECtHR, *Harabin v. Slovakia*, app. No. 58688/11, 20 November 2012.

²⁴ Action report No. DH-DD (2015) 754 of 02. 07. 2015 concerning the case of *Harabin v. Slovakia* (Application No. 58688/11). Available at: [http://hudoc.exec.coe.int/eng?i=DH-DD\(2015\)754E](http://hudoc.exec.coe.int/eng?i=DH-DD(2015)754E) (accessed on 15.05.2021).

him by the Constitutional Court, was rejected for procedural reasons in accordance with at that time valid provisions of Article 131 of the Constitution of the Slovak Republic. Following the legislative changes of 2014, the possibility for the complainant to request a retrial in accordance with this judgment of the European Court of Justice (paragraph 178) was created. In this context, the Committee of Ministers of the CoE decided that no separate individual measures were needed.

In part of the general adopted measures, the Committee of Ministers of CoE noted that the relevant decision of the ECHR was published in the journal *Judicial Review* No. 2/2013 and a letter was sent to the President of the Constitutional Court asking all judges of the Constitutional Court to be informed of the above decision. In addition, legislative changes were adopted consisting in the amendment of paragraph 131 of the Constitution of the Slovak Republic by constitutional Act No. 161/2014,²⁵ adopted on June, 4, 2014 and effective from September 1, 2014. Following the amendment to the Constitution, amendments to Section 75, Section 75a, Section 75b of the Constitutional Court Act²⁶ were also adopted. The Committee of Ministers of CoE concluded that the Slovak Republic had thus fulfilled its obligations under Article 46 of the Convention and that all general and individual measures necessary for the implementation of the ECHR decision in the case of *Harabin v. Slovakia* had been taken.

The case of *Harabin v. Slovakia* has an effect on democratization by changing the wording of Article 133 of the Constitution of Slovakia. This amendment contains a number of other amendments, but in relation to that decision, the most significant addition is to the provisions on the right of appeal against the decision of the Constitutional Court. The ECHR granted to Štefan Harabin and acknowledged that the changes in staffing of the decision-making board were not in line with the need for the impartiality of the court that ruled in Harabin's disciplinary proceedings. In this context, the ECHR provided that the complainant should be allowed to apply for a retrial which would be impartial. However, this, as amended by Article 133 of the Constitution of Slovakia effective until August 31, 2014 was not possible. With regard to the decision of the ECHR, the legislator extended Article 133 of the Constitution of Slovakia and made it possible to re-examine the decision of the Constitutional Court if such an obligation arises in Slovakia by a decision of an international body by which it is bound. This, therefore, represents an additional possibility for complainants who, by reference to the case-law of the ECHR according to Article 46 the Convention will be able to initiate the opening of proceedings already concluded, which is, in other words, the introduction of effective means.

6. PROBLEMS OF THE JUDICIAL SYSTEM AS A DECISION OF THE ECHR IN THE CASE OF VOLKOV V. UKRAINE

In the case of *Volkov v. Ukraine* (January 9, 2013, application No. 21722/11)²⁷, the complainant complained of a violation of his rights under the Convention during the procedure for his demission from office as a judge of the Supreme Court. According to the ECHR the Volkov case revealed systemic problems in the functioning of the Ukrainian

²⁵ Constitutional Act No. 161/2014 of 04. 06. 2014 amending the Constitution of Slovakia No. 460/1992 as amended. Available at: <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2014/161> (accessed on 15.05.2021).

²⁶ Act No. 314/2018 of 24. 10. 2018 on the Constitutional Court of Slovakia and on amendments to certain acts. Available at: <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2018/314/20210101> (accessed on 15.05.2021).

²⁷ ECHR, *Volkov v. Ukraine*, app. No. 21722/11, 9 January 2013.

judicial system. In particular, the infringements found in the case indicate that the system of disciplinary proceedings against judges in Ukraine is not properly organized because it does not ensure sufficient separation of the judiciary from other branches of state power. Furthermore, it does not guarantee the misuse of disciplinary measures to the detriment of the independence of the judiciary, the latter being one of the most important values underlying the effective functioning of democracy. The ECHR admitted that, following the nature of the infringements found, Ukraine must take a number of general measures aimed at reforming the system of disciplinary proceedings against judges, in order to properly implement that decision.

Several points are important in terms of determining the legal mechanism for the return of Volkov to post. Firstly, in the case of Volkov, the ECHR took the decision, for the first time in the history of the organization, to restore the person against whom a violation of the Convention has been established. Secondly, the ECHR stressed that, in many cases, it was decided to restore the infringed right by repeatedly assessing the case at the national level. However, in the particular case, the ECHR does not see any sense of the establishment of such a measure, since it doubts the possibility of re-examination of the complainant's case in the near future and in accordance with the principles of the Convention. At the same time, the ECHR stated that it could not allow the complainant to remain in a state of uncertainty as to how to restore his right. The ECHR concluded that the situation at issue in the main proceedings did not, by its very nature, leave a genuine choice of individual measures necessary to remedy the infringed rights of the complainant guaranteed by the Convention.

This decision of the ECHR is not limited to addressing an individual's personal issue, but concerns the principles of the functioning of state power in Ukraine. The ECHR stated that this case reveals serious systemic shortcomings in the functioning of the Ukrainian judicial system. According to its decision, the following problems are the next: the absence of a real division of state power into legislative, executive and judicial, which causes political and other dependence of courts and judges; politicization of judiciary mechanism, which has significant political influence and its "manual" management; the dominance of subjective criteria in disciplinary proceedings against judges for oath-breaking, as evidenced by the work of the High Judicial Council, whose members combine four different functions in deciding on the demission of a judge for oath-breaking (initiation of appeal; verification in the submission of the stated circumstances of the activity of a judge; submission an opinion on the existence of grounds for demission by a judge; deciding on the merits of the application); legal uncertainty regarding the demission of judges for oath-breaking. In Ukraine, there is no limitation period for the demission of a judge on the grounds of breach of oath and the grounds for appeal are vague and ambiguous; the absolute defencelessness of judges against unjustified disciplinary action, in particular allegations of breach of a promise. Combined with the other circumstances mentioned above, this creates an atmosphere of fear in the judicial environment and leads to the complete dependence of judges.

The case of *Volkov v. Ukraine* was not the only one on this subject. On January 19, 2017 the ECHR took a decision in a similar case of *Kulikov and others v. Ukraine* (application No. 5114/09 and 17 other applications)²⁸, which arose from eighteen applications against Ukraine lodged by former judges for demission, in violation of their rights under Articles 6 and 8 of the Convention. On September 25, 2018, the ECHR took a decision in the case of *Denisov v. Ukraine* (application No. 76639/11)²⁹ following an

²⁸ ECtHR, *Kulykov and others v. Ukraine*, app. No. 5114/09 and 17 others, 19 January 2017.

²⁹ ECtHR, *Denisov v. Ukraine*, app. No. 76639/11, 25 September 2018.

application by judge Anatoly Denisov, where the complainant argued, in particular, that his demission from his position as President of the Court of Appeal had not been carried out in accordance with Article 6 paragraph 1 of the Convention and constitutes an unlawful and disproportionate interference with his private life. In both cases, the ECHR concluded that it was a violation of Article 6 paragraph 1 of the Convention in relation to all complainants as regards a breach of the principles of independence and impartiality.

The ECHR has stated that, as regards the objections under Article 6 paragraph 1 of the Convention, there was a lack of independence and impartiality while state authorities took decision in case of the applicant. The ECHR referred to its conclusions in the case of *Volkov v. Ukraine* and hereby concluded that the proceedings before the High Judicial Council and parliament revealed a number of structural and general shortcomings, which call into question the principles of independence and impartiality. The ECHR has decided that these findings are equally relevant to those applications.

The Committee of Ministers of the CoE added control of the implementation of the ECHR decisions in the cases of *Volkov v. Ukraine*, *Kulikov and others v. Ukraine* and *Denisov v. Ukraine*, into one group of cases concerning the injustice of the disciplinary system against judges who, regardless of the permanent period after the decisions have been taken, are still under supervision.

These cases have triggered significant reforms in the area of disciplinary accountability of judges, from constitutional and legislative changes to the practice of disciplinary proceedings. In the group of cases of *Volkov v. Ukraine*, the ECHR indicated a number of issues relating to the independence of judges that require legislative solutions on the part of Ukraine. In August 2020, the Ukrainian Centre for Legal Reform Policy carried out an analysis of the implementation of the decisions of the ECHR in the case group of *Volkov v. Ukraine* for the period of 2014-2020.³⁰ According to the analysis, Ukraine has significantly improved its legislation since 2014 to address the problems identified by the ECHR.

The first legislative change was the adoption in 2014 of an act restoring confidence in the judiciary in Ukraine,³¹ which gave the court more powers to restore the violated rights of an unlawfully dismissed judge. Another amendment in 2015 was the adoption of the Act on ensuring the right to a fair trial,³² which significantly increased the guarantees of independence and impartiality of members of the Higher Judicial Council and modified a fairer procedure for the demission of a judge on the grounds of breach of promise and introduced more disciplinary sanctions alternative to appeal.

The Act of Ukraine amending the Constitution of Ukraine (concerning justice) of June 2, 2016³³ adopted amendments to Articles 124-131, 147-149, 151, 153 of the Constitution of Ukraine on the regulation of the judiciary in Ukraine. The constitutional changes eventually aligned the composition of the Higher Judicial Council with the requirements for independence of this body (effective from 2019), the political authorities were removed from the decision-making of questions of disciplinary responsibility of judges (in particular, the demission of a judge). Although the adoption of constitutional

³⁰ Centre of Policy and Legal Reforms (2020). *Analysis of the progress of Ukraine in implementing the Volkov group of judgments of the European Court of Human Rights for the period of 2014-2020*. Available at: <https://rm.coe.int/analysis-of-the-execution-volkov-group-cases-ukr/1680a06971> (accessed on 15.05.2021).

³¹ Act No. 1188-VII of Ukraine of 8 April 2014 on restoring confidence in the judiciary in Ukraine, as amended. Available at: <https://zakon.rada.gov.ua/laws/show/1188-18#Text> (accessed on 15.05.2021).

³² Act No. 192-VIII of Ukraine of 12 December 2015 on ensuring the right to a fair trial, as amended. Available at: <https://zakon.rada.gov.ua/laws/show/192-19#Text> (accessed on 15.05.2021).

³³ Act No. 1401-VIII of Ukraine of 2 June 2016 amending the Constitution of Ukraine (concerning justice). Available at: <https://zakon.rada.gov.ua/laws/show/1401-19#Text> (accessed on 15.05.2021).

reform is generally a positive measure aimed at ensuring guarantees of the functioning of the judiciary, it has serious shortcomings, in particular the new Article 126, paragraph 3 of the Constitution of Ukraine provides for the commission of serious disciplinary infringements as grounds for the demission of a judge. At the same time, there is no legal definition of the concept of "serious disciplinary offence" in the national law, thus creating scope for illegal influence on judges. That legislative provision is contrary to the case-law of the ECHR.

In 2006, a new act on the judiciary and the status of judges³⁴ was adopted, which preserved and strengthened previous achievements in strengthening the system of disciplinary accountability of judges, in particular, to consolidate the procedure for appealing against a decision in disciplinary proceedings against judges of different levels. In 2016, the Act on the High Council for Justice³⁵ was adopted, which replaced the previous Act on the High Judicial Council and implemented a number of constitutional changes, in particular, the composition of the Justice Council and its disciplinary chambers, aligned with the requirements of the independence of this body and the impartiality of its powers, determined the possibility of revoking the council's decision by the court and resolved the further course of disciplinary proceedings after the annulment of such a decision.

In 2019, the Act amending the Act of Ukraine on the Judiciary and the Status of Judges and certain laws of Ukraine on the activities of judicial self-government bodies³⁶ was adopted. The adoption was initiated by the new President of Ukraine. The act was intended to change the composition of the newly created Supreme Court, the High Council for Justice and the Higher Qualifications Committee of Judges, as well as to change disciplinary procedures. However, some of its provisions do not comply with the provisions of the Convention, as pointed out by the Venice Commission. In particular, the Venice Commission noted that the Government appears to be open to further changes to the judicial system in order to eliminate the shortcomings of this act, which was adopted by an accelerated procedure without sufficient examination of the views of all the parties concerned. However, the Commission is deeply concerned that the act may lead to major changes in the composition of the Supreme Court following a change in the political majority. The Supreme Court has been comprehensively reformed on the basis of legislation adopted by a previous amendment to the legislation. Under the new act, it depends on the will of the respective majority in parliament whether or not the Supreme Court judges can remain in office. This is a clear threat to their independence and to the role of the judiciary under Article 6 of the ECHR.³⁷

By decision of the Constitutional Court of Ukraine on March 11, 2001, in the case No. 1-304/2019 (7155/19) on the constitutionality of certain provisions of the Act on the Judiciary and the Status of Judges, the Act on Amendments to the Act of Ukraine on the Judiciary and the Status of Judges and certain Acts of Ukraine on the Activities of The

³⁴ Act No. 1402-VIII of Ukraine of 2 June 2016 on the judiciary and the status of judges, as amended. Available at: <https://zakon.rada.gov.ua/laws/show/1402-19#Text> (accessed on 15.05.2021).

³⁵ Act No. 1798-VIII of Ukraine of 21 December 2016 on the High Council for Justice, as amended. Available at: <https://zakon.rada.gov.ua/laws/show/1798-19#Text> (accessed on 15.05.2021).

³⁶ Act No. 193-IX of Ukraine of 16. October 2019 on amendments to the Act of Ukraine on the Judiciary and the Status of Judges and certain Acts of Ukraine on the Activities of Judicial Self-Government Bodies. Available at: <https://zakon.rada.gov.ua/laws/show/193-20#Text> (accessed on 15.05.2021).

³⁷ European Commission for Democracy through Law (Venice Commission) (2019). *Opinion CDL-AD (2019) 027-e on the Legal Framework in Ukraine Governing the Supreme Court and Judicial Self-Governing Bodies, adopted by the Venice Commission at its 121st Plenary Session (Venice, 6-7 December 2019)*. Available at: [https://venice.coe.int/webforms/documents/?pdf=CDL-AD\(2019\)027-e](https://venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)027-e) (accessed on 15.05.2021).

Bodies of Judicial Self-Government, the Act on the High Council for Justice,³⁸ taking into account the conclusions of the Venice Commission, a number of legislative amendments that have been done were declared as unconstitutional. The Constitutional Court of Ukraine relied on the premise that regulated issues of disciplinary action and disciplinary liability of a judge must comply with the constitutional principle of the independence of judges.

According to the resolution of the Committee of Ministers of the CoE No. CM/Del/Dec (2020) 1383/H46-26 of September 29 - October 1, 2020³⁹ in supervising the implementation of the ECHR decisions in the Volk against Ukraine group of cases the Committee of Ministers of the CoE positively assessed the adoption of general measures related to judicial reform, especially in the area of judicial discipline through amendments to the Constitution of Ukraine, new laws and practical and organizational measures. At the same time, it assessed various measures in this group of cases with concern and expressed disappointment at the slow progress made in the proceedings towards the various authorities; urged the public authorities to close the proceedings without further delay by full reinstatement in the office of complainants, while considering the principles of legal certainty and ensuring compliance with the application of time limits in disciplinary proceedings. As regards general measures, the Committee pointed out that the fundamental principles of power-sharing, the structural independence of the judiciary and the irrevocability of judges are fundamental entities of judicial independence; reiterated that these principles should be strictly respected when adopting or amending legislation on the judiciary in order to ensure their compliance with the Convention and the case law of the ECHR. In this context, the Committee welcomed the decision of the Constitutional Court concerning the Act amending the Act of Ukraine on the Judiciary and the Status of Judges and certain laws of Ukraine on the activities of judicial self-government bodies; to call on the state, in response, to develop and adopt a legislative framework that takes full account of the relevant Council of Europe standards; noted with interest the parliamentary request to the Venice Commission for an opinion on the relevant draft law; called on the Ukrainian authorities to consult all stakeholders using the expertise of the Venice Commission in order to include its future recommendations in the legislative process.

As we can see, as compared to the Slovak Republic, where the solution to the problem of independence and impartiality of legal proceedings according to the case of *Harabin v. Slovakia* was actually implemented by adopting one amendment to the Constitution of Slovakia, regardless of the permanent (seven-year) period of implementation of the decision of the ECHR in the case of *Volkov v. Ukraine* and the adoption of several new acts, as well as several amendments to the Constitution of Ukraine, Ukraine has still not been able to provide legal guarantees at the national level for the independent and impartial functioning of the judicial system.

7. CONCLUSION

The issue of the impartiality and independence of the judiciary is topical from the point of view of the Council of Europe, as evidenced by the large number of pieces of

³⁸ Ukraine, Constitutional Court of Ukraine, Case No. 1-304/2019 (7155/19) (11 March 2020). Available at: <https://zakon.rada.gov.ua/laws/show/v004p710-20#Text> (accessed on 15.05.2021).

³⁹ Decision No. CM/Del/Dec (2020) 1383/H46-26 of 29. 09. – 01. 10. 2020 concerning Oleksandr Volkov group v. Ukraine (Application No. 21722/11). Available at: [http://hudoc.exec.coe.int/eng?i=CM/Del/Dec\(2020\)1383/H46-26E](http://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2020)1383/H46-26E) (accessed on 15.05.2021).

legislation that pay close attention to this issue. From the point of view of the Council of Europe, an impartial and fair trial is a guarantee of the rule of law. Although the Member States are entitled to choose independently national measures to ensure the right to a fair trial at the national level, the Council of Europe sets out in its legislation the basic principles of judicial independence, which concern both judges' independence from external influences and any internal influences on them.

The ECHR supports and extends this view of the Council of Europe by the need to carry out a subjective and objective test in assessing the impact on judges in each specific situation. This means that the perception of the judge of the degree of influence (subjective test) is as important as the manifestation of such influence (objective test). In the context of its decisions, the ECHR emphasizes that the independence and impartiality of courts are directly related to the requirement of Art. 6 of the Convention to a "court established by law". It follows that the independence of courts means their independence from other bodies as well as from the parties to the hearing and presupposes the existence of procedural guarantees and fulfils the objective aspect of the right to a fair trial.

The analysis carried out showed the fact that there was a large number of judges' complaints to the ECHR. This fact in itself shows that judges of national courts consider this way of protecting their (especially professional) rights to be effective. At the same time, as we can see, most of the ECHR's decisions were taken in favour of the judges, so the ECHR upheld their complaint. Moreover, the independence and impartiality of judges is a guarantee of a fair trial, which is directly enshrined in Art. 6 of the Convention, that is, it can be directly applied in decision-making. For this reason, we contribute to the conclusion that ECHR decisions are an effective way of protecting the rights of national judges.

The existence of the possibility for judges of national courts to lodge a complaint with the ECHR against a state which does not guarantee their independence and impartiality increases judges' conviction that they can act without fear or prejudice in their power independently of objective influence degree of fairness in the decision-making of judges of national courts.

The case law of the ECHR has a significant impact on the reform of the judiciary at the national level, in particular through general measures, the adoption of which leads to the adoption of legislative changes at the national level. The higher level of such a reflection is the constitutional reform, which is not only a theoretical possibility of solving the problem but has been demonstrated in practice in some Council of Europe states (for example in Slovakia and Ukraine in Harabin and Volkov cases).

The research carried out in this way showed that the issue of the independence and impartiality of the judiciary is given great attention by the Council of Europe itself in its documents and to the ECHR in its decisions. The guarantees of the personal rights of judges and their rights connected with the exercise of the duties of a judge is a guarantee of the judge's sense of security in decision-making. The existence of positive (in favour of judges) decisions of the ECHR guarantees judges a certain kind of freedom from pressure from other state authorities, in particular, through disciplinary, administrative or criminal proceedings. Thus, the judges ensure, on the one hand, that a fair trial is exercised and, on the other hand, they themselves are persons in need of guarantees of a fair judiciary. It can therefore be clearly stated that a judge who is guaranteed his own (personal and professional) rights and freedoms of decision is able to ensure a higher degree of justice for the parties. Therefore, when deciding on the independence and impartiality of judges, the ECHR pays considerable attention to the existence of systemic deficiencies at the national level, and the general measures taken in its decisions bring

about significant changes in national legislation up to changes in the Constitution. It can, therefore, be made clear that the hypothesis that the decisions of the ECHR is a guarantee of the right to a fair trial, in particular, that of an impartial and independent court, has been confirmed.

However, granting judges full freedom without the possibility of prosecuting them may result in impunity and, consequently, arbitrary conduct in the performance of their duties. It is therefore of the utmost importance to ensure a balance between an effective mechanism for implementing guarantees of independence and impartiality of judges and a mechanism for their accountability (particularly, disciplinary proceedings). In its decisions, the ECHR shows the direction of implementation of these mechanisms, but their implementation itself falls within the jurisdiction of the contracting states. Thus, only time is an indicator of whether these mechanisms have been effective and effectively implemented at the national level.

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