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

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Appointment of judges to the new Icelandic Court of Appeal contravened the principle of a tribunal established by law

In today's **Chamber** judgment[1] in the case of **Guðmundur Andri Ástráðsson v. Iceland** (application no. 26374/18) the European Court of Human Rights held, by a majority, that there had been:

a violation of Article 6 § 1 (right to a tribunal established by law) of the European Convention on Human Rights.

It further held, unanimously, that there was no need to examine the remaining complaints under **Article 6 § 1 (right to an independent and impartial tribunal)**.

The case concerned the applicant's allegation that the new Icelandic Court of Appeal (*Landsréttur*) was not established by law.

The Court found in particular that the process by which a judge was appointed to the Court of Appeal had amounted to a flagrant breach of the applicable rules at the material time. It had been to the detriment of the confidence that the judiciary in a democratic society must inspire in the public and had contravened the very essence of the principle that a tribunal must be established by law.

Principal facts

The applicant, Guðmundur Andri Ástráðsson, is an Icelandic national who was born in 1985 and lives in Kópavogur (Iceland).

The Court of Appeal (*Landsréttur*) was established as a new court on 1 January 2018.

According to the new Judiciary Act, an Evaluation Committee of experts was mandated to assess the candidates for the posts of the initial fifteen judges to the court. In total, 37 persons applied for the posts, including A.E. In May 2017, the Chairman of the Committee delivered to the Minister of Justice ("Minister") its assessment report with a list of fifteen named candidates who were considered the most qualified. A.E. was ranked number 18 and was therefore not included by the Committee in the top fifteen. By letter of 29 May 2017, the Minister presented her proposal of the fifteen candidates to be appointed judges of the Court of Appeal to the Speaker of Parliament. The proposal contained only eleven of the fifteen candidates whom the Committee had chosen. The Minister proposed that four other candidates, ranked numbers 17, 18, 23 and 30 on the Committee's evaluation table, including A.E., be appointed. The Minister presented arguments for the changes she had decided to make from the Committee's findings.

On 1 June 2017 Parliament approved, by a majority, the Minister's proposal to nominate the fifteen named individuals as judges of the Court of Appeal. On 8 June 2017 the President of Iceland signed the appointment letters for these candidates, including A.E.

Still in June 2017 two candidates, who were among the fifteen candidates that the Committee considered most qualified, but had been removed from the final list of nominees, brought judicial proceedings in a District Court against the Icelandic State challenging the legality of the appointment

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

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procedure. By final judgments of 19 December 2017, the Supreme Court lastly rejected both their claims for compensation for pecuniary damage. However, they were each granted 700,000 ISK (approximately 5,700 EUR) as compensation for personal injury. The Supreme Court found that the Minister had violated administrative law for failing to substantiate her proposal to Parliament with an independent investigation shedding light on elements necessary to assess the merits of the new candidates she had proposed. The procedure in Parliament had also been flawed as Parliament had approved the amended list en bloc without voting on each candidate separately, as required by law.

Mr Ástráðsson was convicted in March 2017 of driving without holding a valid driver's licence and while under the influence of narcotics. He appealed the judgment to the Supreme Court. As the case was not heard before the end of 2017, the case was, in accordance with Icelandic law, transferred to the Court of Appeal. In January 2018 the Court of Appeal notified Mr Ástráðsson and the prosecution of the names of the three judges who would sit in the panel for the case, including A.E., who had not been one of the 15 judges considered best qualified judges by the Evaluation Committee.

Mr Ástráðsson requested that A.E. withdraw from the case due to irregularities in the procedure when she had been appointed as judge to the Court of Appeal, but his motion was rejected.

By a judgment of 23 March 2018 the Court of Appeal upheld the District Court's judgment on the merits. In April 2018 Mr Ástráðsson appealed the judgment to the Supreme Court. He mainly claimed that A.E.'s appointment had not been in accordance with the law and that he had not enjoyed a fair trial before an independent and impartial tribunal. By a judgment of 24 May 2018, the Supreme Court rejected his claims. It found that A.E.'s appointment to the Court of Appeal was valid and that there had not been a sufficient reason to doubt that Mr Ástráðsson enjoyed a fair trial before independent and impartial judges, in spite of the flaws in the procedure.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right to an independent and impartial tribunal established by law), the applicant complained that the appointment of A.E. had not been in accordance with domestic law. Therefore, his criminal charge had not been determined by a tribunal established by law.

He also complained that the Supreme Court's judgment of 24 May 2018 had violated his right to be heard by an independent and impartial tribunal as provided for in Article 6 § 1.

The application was lodged with the European Court of Human Rights on 31 May 2018.

Judgment was given by a Chamber of seven judges, composed as follows:

Paul **Lemmens** (Belgium), *President*,
Robert **Spano** (Iceland),
Işıl **Karakaş** (Turkey),
Valeriu **Griţco** (the Republic of Moldova),
Ivana **Jelić** (Montenegro),
Arnfinn **Bårdsen** (Norway),
Darian **Pavli** (Albania),

and also Hasan **Bakırcı**, *Deputy Section Registrar.*

Decision of the Court

Article 6 § 1 (right to an independent and impartial tribunal established by law)

Firstly, the Court noted that the Supreme Court of Iceland had found, in its judgment of 19 December 2017, that both the Minister of Justice and Parliament had violated the applicable rules in

the appointment of judges to the Court of Appeal. The criteria for assessment of whether these rendered the applicant's trial a violation of Article 6 § 1 was, in accordance with the Court's case-law, whether the violations amounted to a "flagrant breach of national law".

Secondly, the Court noted that the mere fact that a judge, whose position was not established by law within the meaning of Article 6 § 1, had determined a criminal charge, would suffice for a finding of a violation of that provision.

Thirdly, and crucially, the Court noted the Supreme Court's findings that the Minister had proposed her own list without an independent examination of the merits of the four candidates in question and without any further collection of evidence or other material to substantiate her conclusions. There had therefore been fundamental procedural breaches of national law. Moreover, she had failed to engage in a detailed comparison of the competences of the four candidates with the 15 candidates considered the most qualified, as was required by general principles of administrative law. Such violations had constituted a defect of a fundamental nature in the overall process of appointing the four judges.

Fourthly, the Court observed that the Minister was considered by the Supreme Court to have acted in complete disregard of the obvious danger to the reputational interests of two of the four candidates, who had instituted judicial proceedings. She had not provided a sufficient justification for her decision, although she had received expert advice from lawyers within the administration to that effect. Her reliance on prior judicial experience had not been based on an independent assessment or newly obtained information or other documentation. Thus, these breaches of national law also demonstrated her manifest disregard for the applicable rules at the time.

Fifthly, the domestic legal framework had been set up explicitly to limit the discretion of the executive in the appointment procedure by requiring that the candidates be assessed by the specially constituted Evaluation Committee. The Supreme Court had interpreted the relevant provisions in the applicant's case to require that Parliament itself was to vote on each and every candidate in a separate vote. By failing to do so, Parliament had also departed from the applicable rule in the appointment procedure set by itself in primary legislation.

It had not played a decisive role for the Court's assessment of the gravity of this procedural breach that the Supreme Court found that it was not "significant". Its reasoning had demonstrated that the assessment was made within the context of determining whether the breach resulted in the appointment of A.E. being considered a "nullity", her rulings thus constituting a "dead letter", and also whether this breach rendered Mr Ástráðsson's trial unfair. The Supreme Court had thus not assessed the case against the standard of whether the overall process of A.E.'s appointment as a judge had constituted a flagrant breach by the Minister and Parliament of the applicable rules in the light of Article 6 § 1.

Viewing it through the lens of Article 6 § 1, however, the Court observed that the statutory scheme, requiring the active participation of Parliament, was meant to serve the important public interest of safeguarding judicial independence vis-à-vis the executive branch. This legislative framework had been intended to minimise the risk of party political interests unduly influencing the process by which the qualifications of each candidate were to be evaluated and confirmed by the legislative branch. The Court emphasised the importance in a democratic society governed by the rule of law of securing compliance with the national law in the light of the principle of the separation of powers. Therefore, the Court found that the failure of Parliament to adhere to the national rule of separate voting on each candidate had also amounted to a serious defect in the appointment procedure.

The Court concluded that the process by which A.E. was appointed a judge of the Court of Appeal, taking account of the procedural violations of domestic law as confirmed by the Supreme Court of Iceland, had amounted to a flagrant breach of the applicable rules at the time.

The executive had exercised undue discretion in the choice of the four judges, including A.E., which had been coupled with Parliament failing to adhere to the legislative scheme enacted to secure an adequate balance between the executive and legislative branches in the appointment process.

Furthermore, the Minister of Justice had acted in manifest disregard of the applicable rules in deciding to replace four of the 15 candidates by another four applicants, who were assessed as being less qualified by the Committee. The process had therefore contravened the very essence of the principle that a tribunal must be established by law, one of the fundamental principles of the rule of law. The Court emphasised that a contrary finding on the facts of the case would be tantamount to holding that this fundamental guarantee provided for by Article 6 § 1 would be devoid of meaningful protection. Accordingly, there had been a violation of Article 6 § 1.

Article 6 § 1 (right to an independent and impartial tribunal)

Having regard to the conclusions reached under the first limb of the applicant's complaint based on the same provision, the Court considered that it was not necessary to examine this complaint separately.

Just satisfaction (Article 41)

The Court held that Iceland was to pay the applicant 15,000 euros (EUR) in respect of costs and expenses.

Separate opinions

Judges Lemmens and Griţco expressed a joint dissenting opinion.

The judgment is available only in English.

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