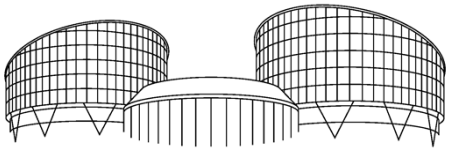

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF BİLGEN v. TURKEY

(Application no. 1571/07)

JUDGMENT

Art 6 § 1 (civil) • Access to court • Inability of judge to have recourse to judicial review of unjustified non-consensual transfer decision to lower ranking judicial district • Need to protect judicial independence and autonomy • Art 6 applicable under its civil head • Existence of a dispute over the "right" of a member of the judiciary to be protected against arbitrary transfer • First condition of the Eskelinen test satisfied • Second condition of the Eskelinen test not met • Exclusion of judiciary members from the protection of Art 6 in matters concerning employment conditions on the basis of special bond of loyalty and trust to the State not justified • Existence of procedural safeguards to ensure that judges' judicial autonomy not jeopardised by undue external or internal influences • Need for weighty reasons exceptionally justifying absence of judicial review • Very essence of right of access to court impaired

STRASBOURG

9 March 2021

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Bilgen v. Turkey,

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

Jon Fridrik Kjølbro, President,
Aleš Pejchal,
Valeriu Griţco,
Egidijus Kūris,
Branko Lubarda,
Carlo Ranzoni,
Saadet Yüksel, judges,

and Stanley Naismith, *Section Registrar,*

Having regard to:

the application against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr Hüseyin Cahit Bilgen ("the applicant"), on 4 December 2006;

the decision to give notice to the Turkish Government ("the Government") of the complaint concerning access to a court and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 26 January 2021,

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

INTRODUCTION

The case concerns the applicant's alleged inability to have recourse to judicial review of the decision to transfer him to a different and lower ranking judicial district.

THE FACTS

I. THE APPLICANT'S CAREER AS A JUDGE AND THE CIRCUMSTANCES LEADING TO HIS TRANSFER

1. The applicant was born in 1952 and lives in Ankara. He was represented by Mr M. Alpaydın, a lawyer practising in Ankara.

2. The Government were represented by their Agent.

3. The facts of the case, as submitted by the parties, may be summarised as follows.

4. On 27 February 1979 the applicant was appointed as an apprentice rapporteur judge at the Supreme Administrative Court, after having successfully completed written and oral examinations.

5. Between 28 February 1980 and 28 February 1981 the applicant worked as a deputy clerk for the Supreme Administrative Court.

6. On 28 February 1981 the applicant took up his duties as a rapporteur judge at the Supreme Administrative Court.

7. Between 1 August 1981 and 30 November 1982 the applicant took leave to complete his military service at the Ministry of Defence as a legal clerk.

8. In February 1983 the applicant was appointed as a judge at the Gaziantep Administrative Court, a court in the second judicial district, where he became the presiding judge in August 1987.

9. In December 1990 the applicant was reappointed to the position of rapporteur judge at the Supreme Administrative Court. For the purposes of that post, he was considered to have served in the third judicial district. After working in that position for a year and three months, he resigned. On 27 September 1993 he returned to the profession and was appointed as a judge in the Sakarya Administrative Court, a court in the second judicial district, where he held judicial office until October 1995. During the course of his term in the Sakarya Administrative Court, he advanced to the first grade.

10. In October 1995 the applicant was assigned to the Ankara Administrative Court and in July 1998 he was promoted to the position of presiding judge in the Eighth Division of the Ankara Administrative Court, a court in the first judicial district. After holding judicial office there for seven years, on 9 July 2005 he was assigned as a judge to the Ankara Regional Administrative Court by a decree of the High Council of Judges and Prosecutors (hereinafter "the HSYK"). He applied for a review of that decision, but his application was rejected by the same body on 15 September 2005.

11. The applicant filed an objection against the decision of 15 September 2005 before the Objections Board (*İtirazlari İnceleme Kurulu*), which rejected the objection on 14 November 2005.

12. By a decree of the HSYK of 15 July 2006, the applicant was assigned to the Sivas Regional Administrative Court, a judicial administrative district of the third category, which was lower in rank than the districts where he had previously held office. No grounds were cited for the nature of the transfers contained in the decree.

13. On 27 July 2006 the applicant applied for a review of the decision of 15 July 2006, arguing that he had been assigned twice to different locations in the previous two years without any justification being given and against his will. He further argued that his assignments did not comply with the guarantees of judicial independence. Moreover, his latter assignment to a lower judicial district had had a negative effect on his professional reputation, especially since the reasons for the assignment had not been disclosed, creating the impression that he had been implicitly punished. He further argued that the decision to assign him to Sivas, a city which was 440 km away from Ankara where his family resided, interfered with his right to

respect for family life. He explained in that connection that neither his daughters, who were attending educational institutions in Ankara, nor his wife, who worked for a private company in Ankara, had been able to relocate with him to Sivas.

14. On 19 September 2006 the applicant was informed by the Ministry of Justice that the HSYK had dismissed his application for a review on the grounds that his assignment had been justified on the basis of the needs of the public service. No further reasons were disclosed.

15. The applicant did not file an objection against that decision.

16. On 20 September 2007 the applicant applied for early retirement. According to his official service record, he had served twenty-three years eleven months and twenty-eight days and, taking into account the year of military service, he was found to qualify for a pension on the basis of twenty-four years eleven months and twenty-eight days of service.

II. APPRAISAL OF APPLICANT'S PERFORMANCE DURING HIS PRESIDENCY OF THE ANKARA ADMINISTRATIVE COURT

17. In their observations, the Government submitted an appraisal of the applicant of 31 May 2005, in which he had been assessed by four justice inspectors. The Government contended that the appraisal in question had played a role in the HSYK's decision to transfer the applicant. The appraisal form contained ten sections in which the applicant was awarded points out of ten. He was appraised on his administration of the case files and backlog; his diligence in rendering injunction measures and in his other responsibilities in the capacity of a single judge; his ability to render sensitive interim decisions and his timely performance of on-site examinations; his knowledge of the rules of procedure and their application to cases; his ability to render decisions in a timely and correct manner; the sufficiency of the reasoning given in decisions; his ability to conduct hearings; his research skills and ability to keep up with legislative and other changes in the field of law; his relationship with the Registry of the court and its library; and his diligence in taking necessary measures for the conduct of proceedings and the work of the court. His overall professional score was 65 and the inspectors inserted the following comment:

> "It would be appropriate to remove him from the post of president and relocate him to a court other than Ankara."

18. In reply to the Government's submissions concerning his appraisal, the applicant submitted the following information and documents. On an unspecified date he submitted a request to the HSYK concerning the incremental raise he should have received on account of his grade (see paragraph 26 below). On 10 October 2006 the HSYK dismissed the applicant's request, stating that he was no longer eligible to stand for election to the position of Supreme Administrative Court judge on account

of his appraisal report of 2005. He applied for a review and filed an objection, which were rejected by the HSYK on 22 May 2007 and 11 September 2007 respectively.

19. In the meantime, that is on 10 May 2007, the applicant applied, on the basis of the Right to Information Act, to the Ministry of Justice requesting disclosure of the reasons for receiving a score of "average" in his appraisal of 2005. He further requested all his appraisal records for the years 1997 to 2005.

20. In its reply of 23 May 2007, the Ministry informed the applicant that he had received an appraisal score of "good" (*iyi*) for the years 1997, 1999, 2001 and 2003, and "average" (*orta*) for 2005. As regards disclosure of the reasons, the Ministry stated that the appraisal forms constituted classified information as part of the applicant's personal administrative file and that it had been decided by the Minister of Justice to keep appraisal records outside the scope of the Right to Information Act, since they were only recommendations and did not result in or directly affect the concerned person's rights.

21. On 31 May 2007 the applicant submitted the same request to the Justice Inspection Board. In its reply of 11 June 2007, reiterating the response of the Ministry, the Board further stated that the result of the applicant's appraisal of 2005 had been notified to him on 4 July 2005, along with a list of recommendations for improvement, and pointed out that he had not objected to those recommendations.

III. DOMESTIC LEGAL FRAMEWORK

A. Provisions of the Constitution

22. The relevant provisions of the Constitution, as in force at the material time, provided as follows:

Article 9

"Judicial power shall be exercised by independent courts on behalf of the Turkish nation."

Article 125

"All acts and decisions of the administration are amenable to judicial review ..."

Article 138 §§ 1 and 2

"In the performance of their duties, judges shall be independent; they shall give judgment, according to their personal conviction, in accordance with the Constitution, statute and the law.

No organ, authority, officer or other person may give orders or instructions to courts or judges in the exercise of their judicial powers, send them circulars or make recommendations or suggestions to them."

Article 139

"Judges and public prosecutors shall not be removed from office or compelled to retire without their consent before the age prescribed by the Constitution; nor shall they be deprived of their salaries, allowances or other rights relating to their status, even as a result of the abolition of a court or post."

Article 140

"... Judges shall discharge their duties in accordance with the principle of independence of the courts and the security of tenure of judges.

The credentials, appointment, rights and duties, salaries and allowances of judges and public prosecutors, their promotion, temporary or permanent change in their posts or places of duty, the initiation of disciplinary proceedings against them and the imposition of disciplinary sanctions, the conduct of investigations concerning them and the subsequent decision to prosecute them on account of offences committed in connection with, or in the course of, their duties, the conviction for offences or instances of incompetence requiring their dismissal from the profession, their in-service training, and other matters relating to their personnel status, shall be regulated by law in accordance with the principles of the independence of the courts and the security of tenure of judges.

..."

Article 159

"The High Council of Judges and Prosecutors shall ... exercise its functions in accordance with the principles of the independence of the courts and the security of tenure of judges.

The President of the Council is the Minister of Justice. The Under-Secretary to the Minister of Justice shall be an *ex officio* member of the Council. Three regular and three substitute members of the Council shall be appointed by the President of the Republic for a term of four years from a list of three candidates nominated for each vacant office by the Plenary Assembly of the Court of Cassation from among its own members and two regular and two substitute members shall be similarly appointed from a list of three candidates nominated for each vacant office by the Plenary Assembly of the Supreme Administrative Court. They may be re-elected at the end of their term of office.

The High Council of Judges and Prosecutors shall decide on the admission of judges and public prosecutors ... into the profession, appointments, transfers, delegation of temporary powers, promotion, including promotion to the first category, the allocation of posts, dismissals from the profession, imposition of disciplinary sanctions and removals from office ...

Decisions of the Council shall not be amenable to judicial review.

..."

23. Following a national referendum held on 12 September 2010, a number of amendments were made to the Constitution including Article 159 whereby decisions of the HSYK concerning dismissal from the judicial profession became amenable to judicial review.

B. Judges and Prosecutors Act (Law no. 2802)

24. The relevant provisions of Law no. 2802, as in force at the time, provided as follows:

Section 15 – Grades and seniority

"There shall be four grades for judges and prosecutors: third grade, second grade, reserved-for-first grade, and first grade.

Those who successfully complete three years in the reserved-for-first grade category, and provided that they have not lost their credentials to advance to first grade, shall advance to first grade.

..."

Section 32 – Conditions for the reserved-for-first grade

"In order to advance to the reserved-for-first grade, the following conditions must be fulfilled:

a) to have advanced to the first [highest] step,

b) to have completed at least ten years of service in the post of a judge or a prosecutor,

c) to have a proven track record in professional and scientific knowledge,

d) not to have received the sanction of disciplinary transfer,

e) not to have received more than once the sanction of reprimand, deferment of advancement to a higher grade or deferment of promotion,

f) not to have been convicted of an offence related to the duties of the office or any other offence that is incompatible with the dignity and reputation of the profession.

..."

Section 35 – Appointment by way of transfer

"Judges and prosecutors are appointed to judicial office in a court of the same level at an equal or higher position [whether] in the same or a different location without prejudice to their salary scale and seniority status.

In the classification of judicial districts, geographical location, economic conditions, opportunities for social and cultural activities and health facilities, the transport system and similar factors are taken into account. The term of office to be served in each judicial district shall be determined by regulation.

In the judicial administrative network, the regional administrative court ranks higher with respect to place of service than the administrative and tax courts in the same judicial district.

...

Provided that it is documented, failure in the exercise of professional duties may result in a transfer to a different judicial district regardless of term of office or seniority.

Personal, family-related or other reasons that are set out in appointment and transfer regulations may be taken into account in a request for transfer."

Section 46 – Special situations of transfer

"...

Where an investigation or a document reveals that a judge or a prosecutor, through no fault of his own, is incapable of exercising his duties with the independence and dignity required for holding judicial office, he will be relocated in the same judicial district.

Where an investigation or a document reveals that a judge or a prosecutor has not performed his duties with the requisite expeditiousness and quality, he will be relocated to any other office or place, without taking into account his seniority and term of office in a judicial district."

Section 62 – Disciplinary sanctions

"The High Council of Judges and Prosecutors shall impose one of the following sanctions on judges and prosecutors for conduct that is incompatible with their duties and with the dignity of the office:

a) a warning,

b) a reduction in salary,

c) a reprimand,

d) deferment of advancement to a higher rank,

e) deferment of promotion,

f) transfer,

g) dismissal from profession.

..."

Section 68 – Sanction of disciplinary transfer

"Disciplinary transfer is a transfer to a judicial district that is at least one degree lower for the period of service that is mandatory for that district.

The following are sanctioned with disciplinary transfer:

a) culpable or inappropriate conduct incompatible with the honour and dignity of judicial office or [leading to] loss of personal dignity and honour,

b) personal or professional conduct which may be perceived such that judicial independence and competence are undermined,

c) conduct which, in the carrying out of duties, gives the impression that personal relationships or convictions are prioritised,

d) culpable behaviour in relationships with colleagues that impairs the exercise of duties,

e) conduct that creates a perception that bribes are accepted or corrupt practices engaged in, even though there might be no evidence,

f) requests for or acceptance of gifts or loans, directly or through an intermediary, for personal gain or advantage."

Section 58 – Personal administrative files

"Judges and prosecutors shall have an employee number, and their records shall be kept in non-classified and classified files.

Section 59 – Classified files

"A classified file ... kept in respect of every judge and prosecutor shall include performance reports, declarations of wealth and other personal administrative files kept by authorised persons."

Section 60 – Non-classified files and records

"The non-classified personal file shall contain records concerning education, academic and professional articles, foreign languages spoken, family history, locations served, promotions, leave, medical certificates, documents relating to entry into the profession, as well as disciplinary and criminal investigation files and their conclusions, military service, pension records and other related files.

..."

Section 73 – Requests for review and objections

"The Minister of Justice or interested parties may request a review of the disciplinary sanction imposed on a judge or prosecutor within ten days of the notification of the decision.

The High Council of Judges and Prosecutors shall render a decision after making the necessary examination.

An objection may be filed against that decision.

The objection shall be examined by the Objections Board (*İtirazları İnceleme Kurulu*).

Its decisions shall be final, without any right of appeal to the authorities.

The judge or prosecutor in respect of whom a sanction of dismissal is imposed may make oral or written defence submissions on his own behalf or by his representative before the Objections Board."

25. Sections 99 to 101 of Law no. 2802, under the heading of "inspection", provide for a Justice Inspection Board composed of the Minister of Justice, a chairperson who is appointed to that post by a joint decision of the Minister, Prime Minister and the President from among judges or prosecutors of the first grade, a vice-chair and justice inspectors. Justice inspectors are appointed from among judges and prosecutors who have completed at least five years of service. They are empowered to assess the way in which judges and prosecutors carry out their duties, to investigate offences in relation to the office they hold, and to assess whether their conduct and behaviour is compatible with the office they hold. Justice inspectors can hear persons under oath. They have search powers and the authority to collect all evidence or other information directly from official bodies.

26. Under section 103 of the same law, judges and prosecutors of the first grade receive an incremental raise of two percent on their gross salary every three years, so long as they retain the credentials to be elected to the Court of Cassation or the Supreme Administrative Court.

C. High Council of Judges and Prosecutors Act (Law no. 2461)

27. The HSYK (renamed the Council of Judges and Prosecutors ("HSK") in 2017) is the central body responsible for organisation of the judiciary, with power to decide on the appointment, transfer, promotion and removal of judges and prosecutors, and to impose disciplinary sanctions against them. It also takes the final decision on proposals from the Ministry of Justice concerning the abolition of a court, or changes in a court's territorial jurisdiction.

At the time of the events giving rise to the application, the High Council of Judges and Prosecutors Act (Law no. 2461) was in force. Accordingly, the HSYK was composed of the following members: (i) the Minister of Justice, who acted as its president; (ii) the Under-secretary of State for Justice; (iii) three regular and three substitute members from the Court of Cassation; and (iv) two regular and two substitute members from the Supreme Administrative Court. Regular and substitute members of the judiciary were selected for membership of the HSYK by the State President from among three candidates nominated by the respective plenaries of the Court of Cassation and the Supreme Administrative Court. The term of office of HSYK members was four years, and members could be re-elected.

28. A quorum of the HSYK was constituted when all members were present. Decisions were taken by a majority vote, abstention counting as a negative vote. The HSYK's meetings took place at the premises of the Ministry of Justice, which also carried out its administrative tasks (section 10). The law provided for the independence of the HSYK (section 3) and contained provisions for the withdrawal of its members when grounds for recusal so warranted (sections 14 and 15). Section 13 provided that in rendering decisions on the imposition of disciplinary sanctions and the examination of objections to its decisions, the HSYK and the Objections Board should decide, according to their conscience, by freely considering all the evidence for and against the defendant and with a view to public interest and the honour and dignity of the profession of a judge. The HSYK was also empowered to decide on its procedures and working methods in carrying out its responsibilities by means of internal regulations. The internal regulations which were applicable at the time of the present dispute, published on 14 July 1981 in the Official Gazette, did not contain any particular rules or guidelines with respect to the procedure to be observed in proceedings before the HSYK, other than those specified above.

29. Section 11 provided that the Minister of Justice or interested parties could request the HSYK to review a decision within ten days of its notification. Section 12 provided that interested parties could object to a decision taken by the HSYK on review within ten days of the date on which the decision was served on them before the Objections Board.

The Objections Board, presided over by the Minister of Justice and composed of regular and substitute members of the HSYK, examined the objection. A minimum of eight members had to be present to examine the objection. The decision of the Objections Board was final. No appeal could be lodged against that final decision with an administrative or judicial authority.

D. Regulations on the Appointment of Judges and Prosecutors to the Administrative Courts, published in the Official Gazette on 19 February 1988

30. The relevant provisions of the Regulations on the Appointment of Judges and Prosecutors ("Regulations on Appointment"), as in force at the time of the events, provided in so far as relevant as follows:

Section 2 – Judicial districts

"There are three administrative judicial districts, as set out in the appendix, created in view of geographical location and economic conditions, opportunities for social and cultural activities, health facilities, transport systems and similar factors.

..."

Section 3 - Term of office in a judicial district

"Save for the exceptions provided for in these regulations, the term of office to be served in the judicial administrative districts shall be as follows: five years in the third judicial district, seven years in the second district and ten years in the first district."

Section 4 – Rules of appointment

"Save for selection by lot from a list of candidates and appointments made for necessary reasons, appointments to courts are made starting with the lower district.

Save for the exceptions set out in these regulations, judges who have not served the mandatory term of office in the relevant judicial district may not request to be appointed or be appointed *ex officio*. At their request, judges who have served two years in any one of the judicial districts may be appointed to a judicial district equal to or lower than the one in which they currently serve or may be appointed *ex officio* to a higher rank in the same judicial district.

Provided that it is documented, a judge who has performed poorly and whose conduct has been incompatible with the requirements of the office may be assigned to an appropriate judicial district, irrespective of seniority or the term he or she has served in a judicial district.

Appointments depend on the availability of posts and the competence and abilities of the candidates. Candidates' preferences may be taken into account in so far as possible."

Section 5 – Appointment to the first judicial district

"Save for the exceptions set out in these regulations, only judges reserved for the first grade can be appointed to a court in the first judicial district. Remaining in that district shall depend on performance and conduct. Those who have served the minimum term in the first judicial district may be reassigned."

Section 7 – Special situations of transfer

"a) Where it is understood that judges and prosecutors, without being culpable, may not be carrying out their duties in accordance with the honour and impartiality required of the office, they shall be assigned to another office in the same judicial district.

b) Where it transpires from an investigation or documents that a judge or prosecutor cannot keep up with the work or show the required competence, they shall be assigned to another office in the same or lower judicial district, irrespective of their grade or seniority.

c) In the case of a disciplinary transfer, the judge or prosecutor in question shall immediately be assigned to an office in a lower judicial district. If no office is available in the lower district, they may be assigned to another duty in the same judicial district.

In the above cases, the persons concerned may not request reassignment for at least two years and, in disciplinary cases, until the minimum term of office has been served in the judicial district to which they have been appointed.

Section 8 – Transfer on justified grounds

"Irrespective of the minimum term to be served in a judicial district, a request for transfer may be made on the following grounds:

a) health

b) marital situation

c) education

d) natural disasters."

Section 13 – Transfer following abolishment of courts or posts

"Where a court or a post has been abolished, the judge or prosecutor concerned shall be offered a post commensurate with his or her seniority and grade in a court of the same rank. The judge or prosecutor may refuse such an offer. However, in the event of refusal of a subsequent offer, he or she shall be deemed to have resigned."

Section 17 – Appointment to the Ministry of Justice or to the position of Rapporteur at the Supreme Administrative Court

"...

For the purposes of a transfer to a [regular] judicial office, the term of office spent in the position of rapporteur judge at the Supreme Administrative Court shall be calculated on the basis of the period which that judge would normally have served in the applicable judicial district."

E. Examples of HSYK decisions

31. The Government submitted examples of decisions rendered by the HSYK between 2014 and 2018 on applications made by judges and prosecutors, requesting a review of the decision to transfer them, or objecting to the rejection of such a request. It appears that the HSYK renders decisions collectively and only indicates whether it upholds or

retracts its decision on transfer, without providing any reasons or referring to legal provisions.

IV. RELEVANT INTERNATIONAL MATERIALS

A. Council of Europe materials

32. The relevant extracts from the European Charter on the Statute for Judges of 8-10 July 1998 read as follows:

> "1.1. The statute for judges aims at ensuring the competence, independence and impartiality which every individual legitimately expects from the courts of law and from every judge to whom is entrusted the protection of his or her rights. It excludes every provision and every procedure liable to impair confidence in such competence, such independence and such impartiality. The present Charter is composed hereafter of the provisions which are best able to guarantee the achievement of those objectives. Its provisions aim at raising the level of guarantees in the various European States. They cannot justify modifications in national statutes tending to decrease the level of guarantees already achieved in the countries concerned.
>
> 1.2. In each European State, the fundamental principles of the statute for judges are set out in internal norms at the highest level, and its rules in norms at least at the legislative level.
>
> 1.3. In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.
>
> 1.4. The statute gives to every judge who considers that his or her rights under the statute, or more generally his or her independence, or that of the legal process, are threatened or ignored in any way whatsoever, the possibility of making a reference to such an independent authority, with effective means available to it of remedying or proposing a remedy.
>
> ...
>
> 3.4. A judge holding office at a court may not in principle be appointed to another judicial office or assigned elsewhere, even by way of promotion, without having freely consented thereto. An exception to this principle is permitted only in the case where transfer is provided for and has been pronounced by way of a disciplinary sanction, in the case of a lawful alteration of the court system, and in the case of a temporary assignment to reinforce a neighbouring court, the maximum duration of such assignment being strictly limited by the statute, without prejudice to the application of the provisions at paragraph 1.4 hereof."

33. The relevant extracts from the appendix to Recommendation CM Rec (2010)12 of the Committee of Ministers of the Council of Europe to member States on judges' independence, efficiency and responsibilities, adopted on 17 November 2010, read:

> "Tenure and irremovability
>
> ...

52. A judge should not receive a new appointment or be moved to another judicial office without consenting to it, except in cases of disciplinary sanctions or reform of the organisation of the judicial system.

..."

34. At its 85th Plenary Session (17-18 December 2010), the European Commission for Democracy through Law (Venice Commission) adopted an interim opinion on the Draft Law on the High Council for Judges and Prosecutors (of 27 September 2010) of Turkey. It reads, in so far as relevant:

"50. It is not uncommon in Europe to have some kind of inspection body that supervises judges and/or prosecutors to some extent, to see if they perform their duties correctly. Some countries have such institutions, others manage without them. However, from a comparative perspective it is clear that the powers of the Turkish HSYK to supervise and control the judges and prosecutors are not only greater than in most other European countries, but they have also been traditionally interpreted and applied in such a manner as to exert great influence on core judicial and prosecutorial powers, in a politicised manner that has been quite controversial.

...

76. In addition, as far as disciplinary deliberations are concerned, one could argue that the HSYK is a superior judicial organ and that therefore the provisions of the draft Law on HSYK are in line with European standards, as set out in Principle VI.3 of Recommendation No. R(94)12. However, in the information the Venice Commission received from the Turkish authorities, the HSYK is frequently defined as an administrative body. The position taken by the Venice Commission is that an appeal to a court has to be provided as an additional safeguard of the independence of the judiciary and as a guarantee for the persons concerned. This should apply not only to disciplinary decisions, but also to other decisions which affect the interests and rights of judges and prosecutors."

35. At its 86th Plenary Session (25-26 March 2011), the Venice Commission adopted a final opinion on the Draft Law on the High Council for Judges and Prosecutors (of 27 September 2010) of Turkey. It reads, in so far as relevant:

"48. Article 35 deals with appointment to different locations. One of the provisions (which is not amended by the draft Law), allows judges and prosecutors, who have been found unsuccessful in one region, to be transferred to another region. Again, one can see the possible potential for using this as a means of exerting pressure on the individual judge or prosecutor. It would be important that the procedural safeguards for any judge or prosecutor who is to be transferred under compulsion should be set out in the law and the criteria for such transfer clearly stated together with the possibility for the judge or prosecutor affected to answer any case which is made against him or her and to have a right of appeal to a court of law against any decision to transfer.

...

51. Article 46 prohibits the appointment of spouses or certain relatives in close degree to the same Chamber of a court. The third paragraph of this Article is rather curious and again may be due to the translation:

"The ones who are decided to be incapable of working in their current place because of the determination that they cannot function with honour and impartiality or their existence in that place breaches the influence and esteem of the profession upon the prosecution or documental facts without their faults, will be appointed without their consent to another place within the region they are in."

It is difficult to understand how a person who cannot function with honour or impartiality or whose function breaches the influence and esteem of the judicial or prosecution profession can be regarded as suitable for transfer to another place rather than meriting dismissal.

...

56. Chapter 5 deals with records and appraisal files and professional identity cards. Article 59 provides for the keeping of a confidential record, which includes performance forms, performance evaluation and development forms, which are to be kept in the confidential record.

57. Rules should be set to deal with the files on the professional functioning of these judicial officers. It seems that if performance forms and performance evaluation and development forms are to be kept in relation to judges and prosecutors, the judges and prosecutors themselves should be entitled to see those forms and be aware of their contents, and should be entitled to comment on them at the time when they are drawn up.

...

75. Article 71 (which will be extensively amended by the draft Law) provides for the right of a judge or prosecutor to defend himself or herself in disciplinary cases. The Article requires that the judge or prosecutor be informed in a way which includes separately and clearly the actions attributed to him or her, the subject matter of the investigation and the place, time and aspects of the actions which are alleged to have occurred. The judge or prosecutor has the right to require the testimony of the witness and the collection of evidence in his or her favour. They have the right to examine the files in person or through their legal representatives and to receive copies and may also defend themselves orally or in writing before the HSYK or *via* their legal representatives. These provisions seem clear and appropriate and the amendment is a considerable improvement to the text. The right of defence will be regulated in a more detailed manner, increasing the protection of the judge concerned. Nevertheless, such procedural safeguards in the disciplinary proceeding are not a sufficient substitute for legal remedies against decisions which interfere with subjective rights of judges and the absence of any right of appeal to a court of law is a serious defect in the draft Law.

76. The need for provisions that introduce an appeal to a court of law should not be limited to disciplinary sanctions, but should also cover other acts that have negative effects on the status or the activities of judges, for instance: denial of a promotion, adding (negative) comments to files, class allocation, changes of location etc. This might be provided for in other regulations of Turkish law. In a state where the rule of law applies, there is a need for provisions on legal remedies to courts of law in such cases."

36. The European Commission for the Efficiency of Justice (CEPEJ) in its Report on "European judicial systems – Edition 2014 (2012 data): efficiency and quality of justice", published on 9 October 2014, noted the following with respect to the practice of transferring judges in member States:

"The principle that a judge should not be transferred to another court without his/her consent follows from the fundamental principle of irremovability from office. However, in certain circumstances and provided certain legal guarantees are in place, this principle must be reconciled with the need for an effective and efficient system of justice and with modern management practices designed to meet this need (for example, the mobility policies implemented in Belgium and Netherlands). The Venice Commission underlines that "procedural safeguards for any judge or prosecutor who is to be transferred under compulsion should be set out in the law and the criteria for such transfer clearly stated together with the possibility for the judge or prosecutor affected to answer any case which is made against him or her and to have a right of appeal to a court of law against any decision to transfer." (CDL-AD(2011)004, 29 March 2011, § 48). Along the same lines, the CCJE recommends the involvement of an authority independent of the executive and legislative powers, in particular a judicial council, at all stages in judges' careers (Opinion No. 1 (2001) § 38).

Under the European Charter on the Statute for Judges (DAJ/DOC (98) 23, 8-10 July 1998), a judge serving within a given court must in principle not be assigned to another court or have his/her duties changed, even entailing a promotion, without his/her free consent. This applies except where transfer is a disciplinary measure, results from a lawful reorganisation of the court system or takes place on a temporary basis with the purpose of assisting a neighbouring court, in which case the duration of the temporary transfer must be strictly limited (point 3.4).

In Andorra, Ireland, Latvia, Norway, Russian Federation and Netherlands, the principle of irremovability is regarded as absolute and no transfer is possible without the consent of the judge concerned. In Monaco, judges cannot be assigned to new duties without their consent.

In certain states a transfer can be decided without the judge's consent for organisational reasons. In this case a transfer safeguard may be provided by law (Austria, Belgium, Bosnia and Herzegovina, Iceland, Montenegro, Slovenia, UK-England and Wales) and/or by the involvement of a judicial council (Albania, Croatia, Iceland, Lithuania, Montenegro, Turkey), or again by the possibility of appealing to a competent court (Estonia, "the former Yugoslav Republic of Macedonia"). In Denmark, only deputy judges can be transferred to another court without their consent for organisational, training or health reasons or because they have proved unsuited to a given post. In Georgia, a transfer without the judge's consent is possible only in the "interests of justice".

A transfer may take place following a disciplinary action. In this case, the safeguard lies in the involvement of the disciplinary authority, more often than not the judicial council (Bosnia and Herzegovina, France, Italy, Monaco, Slovakia, Slovenia, Spain)."

B. United Nations

37. The relevant paragraphs of the Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, Mission to Turkey (UN Human Rights Council A/HRC/20/19/Add.3, May 4, 2012), provide as follows:

"40. Concerns were also raised about the mobility system for prosecutors and judges, based on a rotation between different geographical areas classified in various categories. The Special Rapporteur, for instance, was informed of a case where a prosecutor with more than 15 years of experience in criminal cases was transferred *ex*

officio to work as a family judge in another region. This example, which does not seem to be an isolated one, shows that the transfer and rotation system should be improved and made more effective, fair, transparent and coherent in order to avoid possible misuses in its implementation. A transfer and rotation process that is public, based on objective criteria and, as a general rule, initiated by request would improve trust in the judicial system, especially with regard to those judges and prosecutors dealing with sensitive cases, and would contribute to making them more accountable in their activities.

41. There is also the perception that the appointment and transfer system can be used, depending on the case, as a punishment or reward mechanism. The Special Rapporteur has been informed that during an eight-month period beginning 25 October 2010—the date the new members of the High Council of Judges and Prosecutors took office—a total of 3,049 judges and prosecutors changed duty stations, constituting one third of the judges on duty. It was reported that many were transferred *ex officio*. In this process, judges and prosecutors who were members of judicial professional organizations seem to have been particularly penalized, with little attention being paid to very important issues, such as the right to family integrity.

42. The Special Rapporteur strongly believes that there is an urgent need to rationalize the manner in which judges and prosecutors are moved and to make this process more fair and transparent. A decision on the transfer or assignment of judges and prosecutors to other posts cannot be based merely on considerations relating to the needs of service; rather, it should be guided by objective criteria and adequately take into account the individual's family situation, personal wishes and aspirations as well as the specialization that judges and prosecutors have acquired during their career. Mobility, in particular, cannot be based on arbitrary decisions, and judges and prosecutors should have the right to challenge—including in court—all decisions modifying the status of their conditions of service."

C. European Network of Councils for the Judiciary

38. The European Network of Councils for the Judiciary (ENCJ), in its report of 2012-2013 on minimum standards for the evaluation of professional performance and the irremovability of members of the judiciary, shared the following view:

"...the principle of irremovability extends to the appointment or assignment of a judge to a different office or location without his/her consent (i.e. a judge may not be transferred to a different post or switched to other functions without his/her consent. Nonetheless, there are acceptable exceptions to this general rule when a mandatory transfer of a judge to other duties, court or location has been ordered under specific circumstances as determined by law or otherwise established in a general, abstract manner, including by way of disciplinary sanction or in cases of ascertained inability to perform the judicial functions at the current post in an adequate, independent and impartial manner. This could result, for instance, from disciplinary proceedings that establish improper and unlawful conduct by said judge in that post. It could also result from the presence of objective non-unlawful circumstances that raise questions about the impartiality in the exercise of the judicial function in the office (e.g., personal relationships or kinship with lawyers or other judges who deal with the same cases).

The irremovability rule may therefore be outweighed by important reasons connected to the best functioning of the judicial offices as a public interest. In other

words, judicial irremovability should be understood and applied in accordance with the public interest or the public service of justice, the aims of professional evaluation, and the human resource policy regarding the judiciary. In any case the principle of irremovability renders it imperative that the grounds for transfer of judges be clearly established and that a mandatory transfer be decided by means of transparent proceedings conducted by an independent body or authority without any external influences and whose decisions are subject to challenge or review. This helps prevent the authorities from having the power to transfer a judge against his/her will as a means of threatening judicial autonomy and decision-making independence."

D. International Association of Judges

39. At its meeting on 8 October 2015, held in Barcelona, the International Association of Judges issued a resolution where, among other issues, it considered that the arbitrary transfer of thousands of Turkish judges without their consent violated the international standards of judicial independence.

THE LAW

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

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

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

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

A. Admissibility

1. Applicability ratione materiae

(a) The parties' submissions

(i) The Government's submissions

41. The Government argued that Article 6 § 1 of the Convention could not create, by way of interpretation, a substantive civil right which had no basis in the State concerned. In their view, the relevant domestic law and regulations did not grant judges in Turkey a right to remain in the location of the judicial post to which they were initially or subsequently appointed. In that connection, judges could not rely on a geographical tenure or expect to be transferred to a place of their own choosing, even once they had served their minimum term of office in the three judicial districts. The

Government explained that the rotational system in respect of judges had been set up with a view to addressing geographical inequalities as well as social and cultural barriers that could impair the independence of the profession. In the first place, the rotation system ensured the continuity and quality of the judicial services brought to every part of the country by way of making relevant appointments at particular intervals. Secondly, the system provided for an equitable distribution among the judges. Certain locations which were more desirable than others in terms of social, economic and cultural opportunities could be offered to more judges in a system of rotation than they could in a system without involuntary rotation. Finally, the Government considered that when judges remained in the same place permanently, especially in smaller cities, it became more difficult for them to remain impartial to the local residents on whose disputes they were required to adjudicate and *vice versa*, in that local residents were prone to forming a perception that a judge stationed too long in a particular court of law tended to lose his or her impartiality.

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

43. With regard to the civil nature of the right alleged, relying on *Vilho Eskelinen and Others v. Finland* [GC] (no. 63235/00, ECHR 2007-II), the Government argued that both conditions of the test mentioned in that judgment had been met. Concerning the first condition of the test, the domestic law had expressly excluded the HSYK's decisions from judicial review. In that connection, they referred to the Court's conclusions in the cases of *Apay v. Turkey* ((dec.), no. 3964/05, 11 December 2007) and *Özpınar v. Turkey* (no. 20999/04, § 30, 19 October 2010), in which the Court had held that no judicial remedy existed in respect of the HSYK's decisions. They explained that prior to the constitutional amendment of 2010, the decisions of the HSYK had been excluded from any judicial review, and that after the 2010 amendment, only decisions concerning dismissal from the profession had become amenable to judicial review. They further argued that the HSYK was not a judicial authority and it could

not be considered a "tribunal" for the purposes of that test. According to the Government, that body did not carry out proceedings, it did not hear witnesses and its decision-making procedure was entirely written, except in the case of dismissals, where the defendant judge or prosecutor had a right to submit his observations orally.

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

(ii) The applicant's submissions

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

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

46. The applicant further submitted that the constitutional guarantee of judicial independence did not coincide with the way in which the HSYK decided to transfer judges because of the lack of criteria combined with the lack of transparency in which those decisions were taken. Relying on the Venice Commission's Interim Opinion on the draft law on Judges and Prosecutors of Turkey (see paragraph 34 above) and the Resolution of the International Association of Judges on the Situation of the Judiciary in Turkey (see paragraph 39 above), he argued that the assignment or transfer of judges and prosecutors to less desirable locations was used as a means of exerting political pressure on individual judges. Without the safeguards of a fair hearing and due process, the system was prone to the use of arbitrary power by the State and was therefore contrary to the rule of law.

(b) The Court's assessment

(i) Existence of a right

(1) Recapitulation of the case-law

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

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

49. The Court's traditional approach to determining whether there is a "right" attracting the application of Article 6 is based on the distinction between the substantive content of the right invoked and possible procedural obstacles to obtaining judicial protection thereof (see *Roche*, cited above, § 119). Whether a person has an actionable domestic claim may depend not only on the content, properly speaking, of the relevant civil right as defined under national law, but also on the existence of procedural bars preventing or limiting the possibilities of bringing potential claims to court (see *Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, § 87,

29 November 2016). In the latter kind of case Article 6 § 1 may be applicable (see *Petko Petkov v. Bulgaria*, *no. 2834/06, § 26,* 19 February 2013, with further reference to *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 47, ECHR 2001-XII).

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

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

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

(2) Application of these principles to the present case

53. The Court wishes to make it clear at the outset that it is not its role to determine the question whether the impugned transfer of the applicant was justified at the time. It further reiterates that it is not its role to pronounce on the appropriateness of the rotational system in place for judges and prosecutors in Turkey. In the determination of whether there existed a legal basis for the right relied on by the applicant, the Court needs to ascertain only whether the applicant's arguments were sufficiently tenable, not whether he would necessarily have won had he had access to a court (see, *inter alia*, *Neves e Silva v. Portugal*, 27 April 1989, § 37, Series A no. 153-

A). In so doing, the Court must have regard to the wording of the relevant legal provisions and to their interpretation, if any, by the domestic courts (see *Yanakiev v. Bulgaria*, no. 40476/98, § 58, 10 August 2006). The Court nevertheless reiterates that the concept of "civil rights and obligations" is an autonomous concept deriving from the Convention which cannot be interpreted solely by reference to the respondent State's domestic law (see *König v. Germany*, 28 June 1978, §§ 88-89, Series A no. 27, and *Naït-Liman v. Switzerland* [GC], no. 51357/07, § 106, 15 March 2018). In that connection, in its assessment of whether there existed a "right" that an applicant can rely on arguable grounds, the Court takes domestic provisions as a starting point only (see, among many other authorities, *Denisov*, cited above, § 45) and may rely on international norms to assess or enhance the interpretation of the existence of a right (see, for example, *Enea v Italy* [GC], no. 74912/01, § 101, ECHR 2009; *Boulois*, cited above, §§ 91 and 101-102; and *Naït-Liman*, cited above, § 108).

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

55. The applicant complained before the HSYK that the decision to transfer him to Sivas had been unjustified and did not comply with the guarantee of judicial independence (see paragraph 13 above). He argued that his consecutive transfers within the previous two years had appeared arbitrary, as no pressing reasons or other grounds had been cited by the HSYK. Moreover, he argued that he had a right to remain in Ankara, firstly because, as a first-grade judge serving in the first judicial district and having completed his minimum term of service in the other judicial districts, he had a right not to be removed from the first district against his will. Secondly, he relied on his right to family union. In his submission, he explained that he had been unable to move his entire family with him to Sivas, as his children were enrolled in private schools of their choice and his wife was employed in the private sector. He maintained in that connection that his private and family life had been substantially affected as a consequence of his transfer.

56. The Court reiterates that although there is in principle no right under the Convention to hold a public post entailing the administration of justice (see *Dzhidzheva Trendafilova v. Bulgaria* (dec.), no. 12628/09, § 38, 9 October 2012, and contrast *Zalli*, cited above; and concerning tenured judicial positions, *Baka*, cited above, § 107; *Denisov*, cited above, § 47, and *Kövesi v. Romania*, no. 3594/19, § 113, 5 May 2020), such a right may exist at the domestic level. The Court further notes that the applicant did not claim a right to hold judicial office in a particular court of law, which is

clearly not a right recognised as such in domestic law, but rather complained of the arbitrary nature of his transfer resulting in his removal from the first judicial district without any grounds being disclosed and the prejudice he had suffered in his professional and personal life as a result.

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

58. It should not be forgotten in this regard that the Court has on many occasions emphasised the special role in society of the judiciary which, as the guarantor of justice, a fundamental value in a State governed by the rule of law, must enjoy public confidence if it is to be successful in carrying out its duties (see *Baka*, cited above, § 165, with further references). This consideration, set out in particular in cases concerning the right of judges to freedom of expression (see, as a recent example, *Guz v. Poland*, no. 965/12, § 86, 15 October 2020) has been found to be equally relevant in relation to the adoption of measures affecting the right to liberty of members of the judiciary (see *Alparslan Altan v. Turkey*, no. 12778/17, § 102, 16 April 2019, and *Baş v. Turkey*, no. 66448/17, § 144, 3 March 2020). The Court sees no reason why this consideration should not also be applied in cases concerning the right of access to a court for members of the judiciary in matters concerning their status or career. Since the Convention is first and foremost a system for the protection of human rights, the Court must interpret and apply it in a manner which renders its rights practical and effective, not theoretical and illusory. The Convention must also be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions (see, among other authorities, *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, §§ 47-48, ECHR 2005-X, and *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, § 172, 13 February 2020). Given the prominent place that the judiciary occupies among State organs in a democratic society and the growing importance attached to the separation of powers and to the necessity of safeguarding the independence of the judiciary (see *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 196, 6 November 2018), the Court must be particularly attentive to the protection of members of the judiciary against measures affecting their status or career that can threaten their judicial independence and autonomy.

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

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

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

62. As to whether the principles of international law or common values of the Council of Europe can be relied on to enhance the interpretation of domestic law as to the existence of such a right, the Court reiterates that the consensus emerging from specialised international instruments and the practice of Contracting States may constitute a relevant consideration when it interprets the provisions of the Convention in specific cases (see *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 85, ECHR 2008). The Court further points out that in a number of judgments, it has used, for the purpose of interpreting the Convention, intrinsically non-binding instruments of Council of Europe organs, in particular recommendations and resolutions of the Committee of Ministers and the Parliamentary Assembly, as well as norms emanating from other organs of the Council of Europe, whether supervisory mechanisms or expert bodies which do not have the function of representing States Parties to the Convention (ibid., §§ 74-75, and the cases cited therein). In the case of *Enea* (cited above, §§ 101 and 103), which concerned the applicability of Article 6 § 1 of the Convention under its civil limb to the decision to place the applicant under a special prison regime and the restrictions likely to accompany it, the Court referred to the Recommendation of the Committee of Ministers concerning the European Prison Rules in finding that a "right" could be said to have been recognised under domestic law. In the case of *Boulois* (cited above, § 102), the Court concluded that no right to prison leave existed either in domestic or international law, highlighting the fact that such a right was not recognised under any principle of international law that the applicant had relied on and that no European consensus existed on the matter.

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

qualifications, integrity, ability and efficiency" (ibid., § 221). At the same time, the Grand Chamber considered it necessary for the domestic law to be couched in unequivocal terms, to the extent possible, so as not to allow arbitrary interferences in the appointment process, including by the executive (ibid., § 230). The Court considers these principles of international law on the appointment of judges to be equally valid in the case of their transfers. Furthermore, the European Charter on the Statute for Judges, despite being non-binding on the member States, provides for a right of appeal for any judge who considers that his or her rights under the statute, or more generally independence, or that of the legal process are threatened or infringed. In the specific context of transfers against the will of the judge concerned, the Charter reinforces the principle of irremovability, save for the very limited exceptions mentioned therein, and in any event recognises the general right of appeal before an independent authority, which can investigate the legitimacy of the transfer (see paragraph 32 above and the Recommendation of the Committee of Ministers 2010(12) in paragraph 33 above). Likewise, the European Network of Councils for the Judiciary considers that the principle of irremovability of judges renders it imperative that the grounds for transfer of judges be clearly established and that a mandatory transfer be decided by means of transparent proceedings conducted by an independent body or authority without any external influences and whose decisions are subject to challenge or review (see paragraph 38 above).

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

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

(ii) Civil nature of the right

(1) Recapitulation of the case-law

65. It should be noted that the scope of the "civil" concept in Article 6 is not limited by the immediate subject matter of the dispute. Instead, the Court has developed a wider approach, according to which the "civil" limb has covered cases which might not initially appear to concern a civil right but which may have direct and significant repercussions on a private pecuniary or non-pecuniary right belonging to an individual. Through this approach, the civil limb of Article 6 has been applied to a variety of disputes which may have been classified in domestic law as public-law disputes (see

Denisov v. Ukraine [GC], no. 76639/11, § 51, 25 September 2018). These examples include disciplinary proceedings concerning the right to practise a profession (see *Le Compte, Van Leuven and De Meyere v. Belgium*, 23 June 1981, §§ 47 and 48, Series A no. 43, and *Philis v. Greece* (no. 2), 27 June 1997, § 45, *Reports of Judgments and Decisions* 1997-IV), disputes involving the right to a healthy environment (see *Taşkın and Others v. Turkey*, no. 46117/99, § 133, ECHR 2004‑X), prisoners' detention arrangements (see *Ganci v. Italy*, no. 41576/98, § 25, ECHR 2003-XI, and *Enea v. Italy* (cited above, § 103) as well as the right of a prisoner to confidential face-to-face conversation with a lawyer outside the context of a criminal trial (see *Altay v. Turkey (no. 2)*, no. 11236/09, § 68, 9 April 2019), the right of access to investigation documents (see *Savitskyy v. Ukraine*, no. 38773/05, §§ 143-45, 26 July 2012), disputes regarding the non-inclusion of a conviction in a criminal record (see *Alexandre v. Portugal*, no. 33197/09, §§ 54 and 55, 20 November 2012), proceedings for the application of a non-custodial preventive measure (see *De Tommaso v. Italy* [GC], no. 43395/09, § 154, ECHR 2017 (extracts)), the revocation of a civil servant's security clearance within the Ministry of Defence (see *Regner*, cited above, §§ 113-27).

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

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

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

(2) Application of these principles to the present case

69. As regards the question whether the subject-matter of the dispute qualified as "civil" within the meaning of Article 6 of the Convention, the Court notes firstly that, in contrast to the cases concerning transfer of judges cited above, the applicant's transfer did not entail any direct pecuniary effects such as a reduction in salary or a loss of allowances. Although the applicant maintained in the context of his claim for just satisfaction that he

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

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

71. That being so, it must be borne in mind that since its review of the HSYK in those cases, the Court has developed a more nuanced approach in

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

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

73. The Court reiterates that for the purposes of Article 6 § 1 of the Convention, a tribunal need not be a court of law integrated with the standard judicial machinery (see *Rolf Gustafson v. Sweden*, 1 July 1997, § 45, *Reports* 1997-IV) since a tribunal, within the meaning of Article 6 § 1, is characterised, in the substantive sense of the term, by its judicial function, that is to say, to determine matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner. A power of decision is inherent in the very notion of "tribunal". The procedure before it must ensure the "determination of the matters in dispute" as required by Article 6 § 1 (see *Benthem v. the Netherlands*, 23 October 1985, § 40, Series A no. 97). In addition, only an institution that has full jurisdiction and satisfies a number of requirements, such as independence from the executive and also from the parties, merits the designation "tribunal" within the meaning of Article 6 § 1 (see *Beaumartin v. France*, 24 November 1994, § 38, Series A no. 296‑B; *Di Giovanni v. Italy*, no. 51160/06, § 52, 9 July 2013; and, most recently, *Guðmundur Andri Ástráðsson*, cited above, § 218).

74. Turning to the structure and functioning of the HSYK at the relevant time, it is beyond doubt that it had exclusive jurisdiction and power of decision in matters concerning the organisation of the judiciary, the career of judges and prosecutors, and disciplinary proceedings. Moreover, in respect of its decisions concerning judges and prosecutors, a review and objection mechanism was provided for by law. That being so, the Court observes that the manner in which that body made decisions in review and objection proceedings was not prescribed by a set of procedural rules. The Court observes that neither Law no. 2461 nor the internal regulation of 1988, applicable at the time of the events (see paragraph 28 above), contained specific rules on the procedure to be followed or safeguards to be provided to claimants before the HSYK, or on how evidence was to be admitted and assessed. Secondly, the HSYK did not provide for an

adversarial process as it did not hold hearings, summon or hear witnesses. Thirdly, the decisions delivered by the HSYK after a claimant had applied for a review or filed an objection in respect of his or her transfer contained no reasons, which implies that decisions were not made on the basis of legal principles (see paragraph 31 above). The foregoing constitutes a sufficient basis for finding that the HSYK did not fulfil a judicial function, without it being necessary to examine further whether it complied with the requirements of independence and impartiality.

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

76. The Court must next assess whether the second criterion established in the *Eskelinen* case was met, namely, whether the justification was based on objective grounds for exclusion in the State's interest. The mere fact that the applicant is in a sector or department which participates in the exercise of power conferred by public law is not in itself decisive. In order for the exclusion to be justified, it is not enough for the State to establish that the civil servant in question participates in the exercise of public power or that there exists a "special bond of trust and loyalty" between the civil servant and the State, as employer. It is for the State to show that the subject of the dispute in issue is related to the exercise of State power or that it has called into question the "special bond of trust and loyalty" between the civil servant and the State, as employer (see *Vilho Eskelinen*, cited above, § 62).

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

78. In a case concerning the inability of the applicants to contest the revocation of their security clearance which had resulted in the first applicant's dismissal and the second applicant's transfer to another post, the Court found the second condition of the *Eskelinen* test to have been satisfied (see *Spūlis and Vaškevičs v. Latvia* ((dec.), nos. 2631/10 and 12253/10, 18 November 2014). In coming to that conclusion, the Court attached importance to the fact that the applicants had held high-ranking posts in the administration – the first applicant had been responsible for intelligence and

counter-intelligence, while the second applicant held one of the highest posts in the State Revenue Service and was in charge of the Customs Criminal Investigation Department. The nature of their posts and the duties they were entrusted with demonstrated that they participated directly – and not incidentally – in the exercise of State power and had a special duty of discretion towards the State. In as much as the subject matter of the dispute and the circumstances leading to the revocation of their security clearance concerned the calling into question of their reliability and ability not to disclose State secrets, the Court found the exclusion of their dispute from the guarantees of Article 6 to be reasonably justified.

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

Article 6 of the Convention in matters concerning the conditions of their employment on the basis of the special bond of loyalty and trust to the State.

80. Secondly, at the time when the HSYK decided to transfer the applicant to the Sivas Regional Administrative Court and in its subsequent rejection of his request for a review of the decision to transfer him, no reasons other than a short reference to the "needs of the service" were given. The fact that the HSYK's decision contained no details on how the needs of service had been assessed, what objective criteria had been employed and why, in particular, the applicant's objections were refused, leads to the conclusion that the dispute did not concern any exceptional or compelling reasons that could justify its exclusion from a judicial review. Although the Government argued in retrospect that the applicant's transfer had had to do with his appraisal score of 2005 and the comments made therein, as well as the fact that he had not served his full-term in the third judicial district, the Court is unable to draw any definite conclusions from those arguments, which are merely speculative in the absence of the HSYK's own reasoning. Even if that were the case, it is clear that those grounds involved ordinary aspects of an employment relationship and did not disclose any aspect of the use of sovereign power in particular.

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

2. Exhaustion of remedies

(a) The parties' submissions

(i) The Government's submissions

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

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

(ii) The applicant's submissions

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

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

(b) The Court's assessment

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

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

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

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

Court fails to see how the applicant could have been expected to make a causal link between his impugned transfer and his appraisal report so as to challenge the latter in order to reverse his transfer. The Court therefore rejects the Government's objection on non-exhaustion under this head also.

(c) Conclusion as to admissibility

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

B. Merits

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

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

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

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

95. In the present case, the decision to transfer the applicant was not reviewed, nor was it open to review, by an ordinary tribunal or other body exercising judicial powers. That restriction stemmed from the constitutional prohibition on judicial review of the HSYK's decisions; therefore the

absence of a judicial review was lawful in terms of domestic law. As to the legitimacy of the aim pursued by the restriction, the Government submitted that if each and every compulsory transfer were to be contested in judicial review proceedings, it would place an unsustainable strain on the functioning of the judicial system and would render the compulsory rotational system meaningless.

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

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

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

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

98. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

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

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

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

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

103. As regards non-pecuniary damage, the Court reiterates that its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant, but the overall context in which the breach occurred. Its non-pecuniary awards serve to give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage (see *Varnava and Others v. Turkey* [GC], nos. 16064/90 and 8 others, § 224, ECHR 2009, and the cases cited therein). The Court considers that, in the present case, the applicant must have suffered a certain amount of distress on account of his consecutive transfers against his consent, and without due process of law, which cannot be compensated solely by the Court's finding of a violation. Thus, having regard to the nature of the violation found in the present case and deciding

on an equitable basis, the Court awards the applicant EUR 12,500 in respect of non-pecuniary damage, plus any tax that may be chargeable (see, *mutatis mutandis*, *Ali Rıza and Others v. Turkey*, nos. 30226/10 and 4 others, § 249, 28 January 2020).

B. Costs and expenses

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

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

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

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

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

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Turkish Liras at the rate applicable at the date of settlement:
      (i) EUR 12,500 (twelve thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 8,000 (eight thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

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

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

Done in English, and notified in writing on 9 March 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

{signature_p_1}
{signature_p_2}

Stanley Naismith
Registrar

Jon Fridrik Kjølbro
President