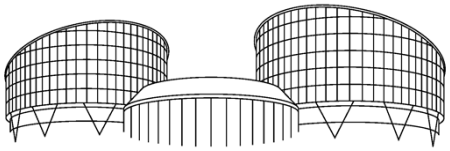

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF GUÐMUNDUR ANDRI ÁSTRÁÐSSON v. ICELAND

(Application no. 26374/18)

JUDGMENT

STRASBOURG

12 March 2019

Referral to the Grand Chamber

09/09/2019

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 Guðmundur Andri Ástráðsson v. Iceland,

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

Paul Lemmens, *President,*
Robert Spano,
Işıl Karakaş,
Valeriu Griţco,
Ivana Jelić,
Arnfinn Bårdsen,
Darian Pavli, *judges,*
and Hasan Bakirci, Deputy
Section Registrar,

Having deliberated in private on 5 February 2019,

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

PROCEDURE

1. The case originated in an application (no. 26374/18) against the Republic of Iceland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Icelandic national, Mr Guðmundur Andri Ástráðsson ("the applicant"), on 31 May 2018.

2. The applicant was represented by Mr Vilhjálmur H. Vilhjálmsson, a lawyer practising in Reykjavík. The Icelandic Government ("the Government") were represented by their Agent, Mr Einar Karl Hallvarðsson, the State Attorney General.

3. The applicant complained that his criminal charge was determined by a court which was lacking in independence and impartiality and was not established by law, in violation of Article 6 § 1 of the Convention.

4. On 19 June 2018 notice of the application was given to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Establishment of the new Court of Appeal and the appointment of judges to the court

5. A new court within the Icelandic judicial system, the Court of Appeal (*Landsréttur*), was established on 1 January 2018 and became operational on the same day. Specific temporary provisions on the appointment of judges to the court, including temporary provision IV of the new Judiciary Act No. 50/2016, entered into force on 14 June 2016. These provisions stipulated that the appointment of the fifteen judges of the Court of Appeal should be completed no later than 1 July 2017 and their appointment take effect as from 1 January 2018.

6. Temporary provision IV of the new Judiciary Act regulated the selection procedure and the appointment of the initial fifteen judges to the court (see paragraph 57 below). In accordance with paragraph 1 of temporary provision IV of the Act, a committee of experts, the Evaluation Committee ("the Committee"), already set up on the basis of Section 4 (a) of the prior Judiciary Act No. 15/1998, was statutorily mandated to assess the candidates for the vacant posts and deliver its assessment report on their competences to the Minister of Justice. The Committee was composed in total of five experts: one nominated by the Judicial Council (*Dómstólaráð*), one nominated by the Icelandic Bar Association, one elected by Althingi ("Parliament") and two nominated by the Supreme Court, one of whom acted as Chairman. According to temporary provision IV of the new Judiciary Act, as amended by Act No. 10/2017, which entered into force on 28 February 2017, the Minister could not appoint a candidate as a judge who had not been considered the most qualified by the Committee, either alone or among others. However, an exception to this rule was made if Parliament accepted the Minister's proposal to appoint such a candidate on the condition that he or she fulfilled the minimum requirements under domestic law for the appointment to a judicial post. The second paragraph of temporary provision IV then stated that when the "Minister [proposed] for the first time appointments to the office of judge of the Court of Appeal, she [should] submit her proposal regarding every appointment to Althingi for its acceptance. If Althingi [accepted] the Minister's proposals, she [should] send them to the President of Iceland, who [would] formally [appoint] the judges".

7. On 10 February 2017 a call for applications for the posts of fifteen judges in the Court of Appeal was published. The application deadline was 28 February 2017. In total, 37 persons applied for the posts, including A.E.

Later, in April and May 2017, three persons withdrew their applications and one candidate did not fulfil the legal requirements for the post. Thus, 33 candidates were assessed by the Committee.

8. At a meeting on 2 March 2017, the Chairman of the Committee delivered the applications to the Minister of Justice (then the Minister of the Interior, hereinafter the "Minister" or the "Minister of Justice"). At the meeting, the Minister suggested to the Chairman that the Committee give her a list of, for example, 20 qualified candidates for her to choose from and appoint as judges to the Court of Appeal. At a meeting on 11 May 2017, the Chairman delivered to the Minister the Committee's draft assessment report with a list of fifteen named candidates who were considered the most qualified. During the meeting, the Minister again inquired whether the Committee could deliver an assessment of more than fifteen qualified candidates. The Chairman then presented the Minister with an evaluation table (see paragraph 12 below) upon which the Committee had relied in its assessment of the candidates for the vacant judicial posts. On the same day, the Committee sent the draft assessment report to the candidates for their comment.

9. By email of 12 May 2017, the Secretary-General of the Parliament sent a memorandum on the appointment of judges to the Court of Appeal and the role of Parliament in the process, to the Minister of Justice and the Speaker. The memorandum stated that the procedure before Parliament would be in accordance with Section 45 (5) of the Parliamentary Procedures Act No. 55/1991 (see paragraph 61 below) and a proposed procedure was set out in more detail. It was noted *inter alia* that the Minister had to submit one proposal for each appointment, that the matter would be sent to the Constitutional and Supervisory Committee of Parliament (hereinafter "the CSC") and that the CSC would give its opinion on the Minister's proposals and set it out in such a way that Parliament could decide on each proposed candidate. Furthermore, it stated that no changes could be made to the proposals by Parliament and if it did not accept one of the Minister's proposals, and thus the required number of judges was not approved, the procedure had to be repeated.

10. By email of 16 May 2017, the Permanent Secretary of the Prime Minister's Office informed lawyers in the Prime Minister's office, and the Ministry of Justice working on the matter, that the Minister of Justice had approved the proposed procedure set out in the memorandum of the Secretary-General of the Parliament.

11. On 19 May 2017 the Committee submitted to the Minister of Justice its assessment report on its evaluation of the candidates. It covered 117 pages and was divided into 6 chapters, including, *inter alia*, biographical information on the candidates, the assessment criteria, the procedure adopted by the Committee and the Committee's conclusions on the competences of the candidates. The Committee found that all 33

candidates qualified to serve as court of appeal judges. However, in the Committee's operative part, only the fifteen most qualified candidates were named. The assessment report did not contain an internal formal ranking of the fifteen candidates, but the Committee stated explicitly that the fifteen named candidates were all more qualified than the remaining applicants.

12. In judicial proceedings instigated later by two candidates for the vacant posts (see paragraphs 27-35 below), it transpired that the Committee had worked in accordance with an evaluation table, in which each candidate had been given points on the basis of twelve specific assessment criteria. The overall points of each candidate then determined their ranking. The Minister received the detailed information of the points of each candidate. A.E. was ranked number 18 of the 33 candidates and was therefore not included by the Committee in the top fifteen of the most qualified candidates in its final assessment report to the Minister.

13. By email of 26 May 2017, the Minister asked two lawyers working for the administration to provide her with feedback on possible reasoning in her letter to Parliament. By email of the same day, the lawyers informed the Minister that they had inserted comments and suggestions in the letter. Furthermore, they stated, *inter alia*, that the main comment was that if the Minister intended to change the Committee's list of proposed candidates, such a change had to be specifically reasoned on the basis of their qualifications. Furthermore, it was noted that perhaps the candidates should be informed about the changes, at the latest before it was sent to Parliament or processed by it. On 28 May 2017 these views were reiterated by one of the lawyers in an email to the Permanent Secretary of the Prime Minister's Office. He stated *inter alia* that if the Minister of Justice considered that there were flaws in the Committee's procedure or in its opinion, the Minister had two options. Firstly, the matter could be referred back to the Committee. Secondly, the Minister could herself remedy the flaws, which meant that the Minister had to evaluate all the candidates in the light of the Minister's objective and on the basis of lawful criteria. However, the lawyer suggested that the standard thing to do was to request the Committee to conduct a new evaluation. Furthermore, the lawyer noted that the Minister's decision to appoint judges was an administrative act and therefore it had to be performed in accordance with the Administrative Procedures Act No. 37/1993 (see paragraph 62 below). Lastly, he proposed that it might be wise to inform the candidates about the changed emphasis and give them an opportunity to present new information that could be relevant for the evaluation.

14. By letter of 27 May 2017 to the Chairman of the Committee, the Minister of Justice requested further information and documents on the Committee's evaluation and the fact that the Committee only made reference to the fifteen most qualified candidates and not others who had

applied for the positions in the Court of Appeal, *inter alia*, with regard to the Equality Act No. 10/2008.

15. By a letter of 28 May 2017, the Chairman of the Committee informed the Minister on the manner in which the Committee had given weight to each evaluation criterion, which had been part of its overall assessment, and explained that the same approach had been followed during his four years as Chairman of the Committee. Every candidate's points for each criterion had been registered in an evaluation table and the candidates had been ranked in accordance with their overall score. The Committee's conclusion had been to apply the same weight as had previously been applied for each criterion. As regards the second question, the Chairman explained that the Committee had not found that there had been numerous equally qualified candidates or that it had been impossible to name one more qualified than another. In this instance, fifteen positions had been advertised and the Committee had concluded that fifteen specific candidates had been more qualified than others for the positions. Therefore it had not been necessary to list more candidates. The Committee's evaluation table had clearly showed the ranking of the candidates. However, the Minister's idea had been that she be able to choose from among, for example, 20 candidates for the fifteen vacant posts. According to this idea, the candidate ranked 20th in the Committee's assessment could thus be chosen over candidates ranked 5th, 10th or in any position whatsoever. The Chairman stated that this idea would not have been in conformity with the purpose behind the prior Judiciary Act as it had been described in the preparatory works to the Act. The Chairman furthermore stated that the intention behind the legislative framework requiring a separate expert committee to assess candidates for judicial posts, and not the Minister himself or herself, was to safeguard judicial independence in the light of the developments in other European countries.

16. By letter of 29 May 2017, the Minister of Justice presented her proposal of the fifteen candidates to be appointed judges of the Court of Appeal by the President of Iceland to the Speaker of Parliament. The proposal contained only 11 names of candidates whom the Committee had found the most qualified. The remaining four, ranked numbers 7, 11, 12 and 14 in the Committee's evaluation table, were not included on the Minister's list. Instead the Minister proposed that four other candidates, ranked numbers 17, 18, 23 and 30 on the Committee's evaluation table, including A.E., who had been ranked number 18, be appointed. In a separate letter, the Minister presented arguments for her proposals and the changes she had decided to make from the Committee's findings. The Minister stated, *inter alia*, that the Committee had not given adequate weight to judicial experience in accordance with the applicable regulations. After reviewing the assessment report, the candidates' objections to it and the working documents presented to her, the Minister had concluded that a higher

number of candidates should have been considered than those listed in the Committee's report, all fifteen candidates named by the Committee as well as others having many years of judicial experience, in total 24 candidates.

17. On the same day, the Minister's proposals were referred to the CSC. The CSC invited the Minister to its meeting, as well as the Permanent Secretary of the Ministry of Justice, a number of experts, a representative of the Icelandic Bar Association and the Icelandic Judges' Association, the Parliamentary Ombudsman, and the Chairman of the Committee.

18. On 30 May 2017, the Minister presented a memorandum to the CSC, further substantiating her proposal. She reiterated her view that more weight should be given to judicial experience in the assessment of the candidates. The Minister referred also to the Equality Act No. 10/2008 in support of her proposal to include the four candidates and remove the four considered more qualified by the Committee. The Minister's conclusion was the following:

> "In this instance, the Minister is of the opinion that the aforementioned four candidates are moreover the most qualified for the post of judge of the Court of Appeal. This opinion by the Minister is based on a thorough examination of the documents of the case, including the applications, the comments by the Evaluation Committee, the candidates' objections, the working documents of the Committee, and with these objective views in mind, as stated before.
>
> The Minister has not raised any objections regarding the preparation of this case by the Evaluation Committee. The Minister believes that the Evaluation Committee has shed sufficient light on the matter and that a satisfactory investigation has been performed for the assessment of the factors that constitute the grounds for the conclusion. The Minister considers it appropriate that more weight be given to judicial experience than assessed by the Evaluation Committee. The Committee has already considered this factor and all information about the judicial experience of the candidates is found in the file. No new information or data form the basis of the Minister's proposal."

19. On 31 May 2017 the majority of the CSC, divided along party lines, found that the Minister had presented arguments for her proposals and agreed with those arguments. It further found that if the Minister wanted to depart from the Committee's list of candidates she had to present arguments for the change, and the choice had to be objective and the most qualified person had to be selected for the position.

20. The CSC proposed a parliamentary resolution, recommending that Parliament approve the Minister's proposals. The candidates were listed in alphabetical order and numbered from 1-15. The minority recommended that the proposal be dismissed as it considered the Minister's reasoning to be insufficient, especially as regarded the departure from the Committee's proposal. Moreover, the minority expressed serious reservations regarding the Minister's compliance with principles of administrative law, including the requirement of sufficient investigation and the rule of national law that only the most qualified candidates should be selected.

21. Before the vote in Parliament, the Speaker stated that a proposal from the CSC had been tabled in Parliament to approve the Minister's fifteen candidates for the office of judge of the Court of Appeal. He further noted that the proposal in 15 numbered items would be voted up or down in a single vote, if no one opposed. No Member of Parliament objected to that arrangement.

22. On 1 June 2017, Parliament voted on and rejected the CSC minority's proposal of dismissal by 31 votes to 30, strictly along party-political lines. This was followed by a vote on the majority's proposal, which was also passed along party-political lines with 31 votes of MPs in favour, who all were members of the political parties composing the majority in the coalition Government, and 22 MPs voting against, composed of members of parties in opposition. A total of 8 MPs abstained, none of whom were members of Government parties.

23. By letter of 2 June 2017, the Minister of Justice was informed that at its meeting on 1 June 2017, Parliament had approved the Minister's proposal to nominate fifteen named individuals as judges of the Court of Appeal. The letter was signed by the Speaker and the Secretary-General of Parliament. The same day, the Minister of Justice sent a letter to the Permanent Secretary of the Prime Minister's Office, who holds the position of Secretary to the Council of State. In the letter the Minister requested that letters of appointment be issued for fifteen named individuals for the office of judges of the Court of Appeal in a specific order. The appointees were then listed in order based on how long they had been qualified to hold the office of a judge in the court.

24. By letter of 6 June 2017, the Secretary to the President of Iceland asked for information on the procedures adopted in Parliament in the matter. By letter of 7 June 2017, the Secretary-General of Parliament gave an account of the procedure in Parliament and concluded that the voting had been lawful and in conformity with Parliament's statutory and traditional procedures. The letter also stated the following:

> "It has to be emphasised that the provision [temporary provision IV] does not contain further instructions on the procedures before Parliament. Therefore, the Parliamentary Procedures Act applies and the normal application of those provisions. However, it is clear from the temporary provision that Parliament shall, or can, take a stand on each proposed candidate for the position of judge if it so wishes.
>
> ...
>
> It is a normal practice and an old one that many issues are taken together during a vote if it is clear that everyone will vote in the same manner or when there is no proposal for amendments on individual matters, e.g. during the second discussions about a bill of law or on parliamentary resolutions. This is referred to as the sections being "taken together" and the voting applies, or its conclusion, to each section.

25. On 8 June 2017, in accordance with the Minister of Justice's proposal and Parliament's acceptance of the list presented by the Minister, the President of Iceland signed the appointment letters for the fifteen nominated candidates, including A.E. A.E.'s letter of appointment stated the following:

> "The President of Iceland makes known: that in accordance with the Judiciary Act, I hereby appoint [A.E.] to the position of judge of the Court of Appeal, effective as of 1 January 2018. She shall respect the State's constitutional law and Icelandic laws in general, all in accordance with a solemn declaration by her.
>
> [...]"

26. On the same day, the President of Iceland issued a statement addressing the correspondence between Parliament and the Secretary to the President. The President concluded that no mistakes had been made in the preparation and arrangement of the voting on 1 June 2017 and that the procedure had been in conformity with the law, parliamentary conventions and procedures.

B. Proceedings before the national courts challenging the legality of the appointment procedure

27. In June 2017, two candidates, J.R.J. and Á.H., who were among the fifteen candidates that the Committee considered most qualified, but had been removed from the final list of nominees proposed to Parliament by the Minister of Justice, brought judicial proceedings in the District Court of Reykjavík against the Icelandic State. Their primary claim was that the Minister's decision of 29 May 2017, by which she had not included them among the fifteen candidates proposed to Parliament to be judges of the Court of Appeal, should be annulled. Furthermore, the plaintiffs requested the annulment of the decision not to include them on the list of fifteen candidates proposed to the President of Iceland for appointment after the vote in Parliament. In addition they claimed compensation for pecuniary damage and 1,000,000 Icelandic *krónur* (ISK, approximately 9,000 euros (EUR) at the time) for personal injury (non-pecuniary damage).

28. In both cases, the Icelandic State requested the District Court of Reykjavík to reject their claims as inadmissible. By decisions on 7 July 2017, the District Court in both cases upheld the inadmissibility requests of the State as regards the plaintiffs' annulment claims and their claims for pecuniary damage.

29. The plaintiffs both appealed the decisions of the District Court to the Supreme Court on 10 July 2017. By two judgments of 31 July 2017, the Supreme Court upheld the District Court decisions in dismissing their claims for annulment of the Minister's decision not to include them in her proposal to Parliament and in her list of judges to be appointed by the

President after the vote in Parliament. Its reasoning stated that a judgment to that effect could have no effect on the appointment of the 15 judges already appointed to the Court of Appeal. However, the Supreme Court annulled the District Court decisions to dismiss the plaintiffs' claims for pecuniary damage and remitted their claims to that effect for further proceedings on the merits in the District Court.

30. By judgments on the merits of 15 September 2017, the District Court found in favour of the Icelandic State and dismissed the plaintiffs' claims for pecuniary and non-pecuniary damage.

31. The plaintiffs appealed to the Supreme Court on 19 September 2017. By judgments of 19 December 2017, the Supreme Court rejected, with identical reasoning in both judgments, their claims for compensation for pecuniary damage. However, the applicants were each granted ISK 700,000 (approximately EUR 5,700 at the time) as compensation for personal injury (non-pecuniary damage).

32. In its judgments, the Supreme Court recalled the general principle of Icelandic administrative law that the executive, in appointing persons to office, was bound by the rule that only the most qualified candidates should be selected. The court then stated that when the Minister decided to propose to Parliament to depart from the Committee's opinion, as the law permits, the Minister's proposal had to be based on an independent investigation of all the elements necessary to substantiate her proposal in accordance with Section 10 of the Administrative Procedures Act (see paragraph 62 below). Thus, the Minister had to ensure that her own investigation and assessment were based on similar expertise as members of the Evaluation Committee had in their work and that the Minister followed the Rules No. 620/2010, set by the Ministry itself (see paragraph 58 below) on the elements to be taken into account in such an assessment. The Supreme Court then emphasised that this was even more important when the law stipulates that the assessment report of the Committee limits the powers of the Minister and prohibits him or her from appointing a candidate to the post of judge that the Committee has considered not to be the most qualified, unless the Minister receives the consent of Parliament. The court stressed that in appointing judges, the Minister was not appointing persons to offices that are accountable to the Minister, but rather members of another branch of government which has a monitoring role vis-à-vis the other branches and is guaranteed independence by Article 61 of the Constitution and Section 24 of the prior Judiciary Act.

33. On this basis, the Supreme Court held that in the light of her obligation to independently investigate the facts under Section 10 of the Administrative Procedures Act, the Minister should, at a minimum, have compared the competences of the four candidates she decided to include in her proposal to Parliament and the fifteen candidates considered most qualified by the Committee. On the basis of such a comparison, the Minister

should then have reasoned her decision to seek the approval of Parliament for her proposal to depart from the Committee's conclusions. Only in this manner could Parliament have sufficiently served its role in the process and taken a position on the Minister's assessment which departed from the assessment of the Committee. On this basis, and in accordance with temporary provision IV of the Judiciary Act No. 50/2016, the Minister had been bound to present an independent proposal for each of the four candidates she proposed and who had not been in the group of fifteen candidates considered most qualified by the Committee.

34. The Supreme Court thus found, on the basis of the file and the facts before it, that the Minister of Justice had violated Section 10 of the Administrative Procedures Act for failing to substantiate her proposal to Parliament with an independent investigation shedding light on elements necessary to assess the merits of the four candidates she had proposed, in comparison to the fifteen candidates considered by the Committee as the most qualified. Her proposal to include the four candidates had not been based on any new documents or an independent investigation of the facts on her part. The procedure adopted by the Minister had thus also resulted in a flaw in the procedure in Parliament when it assessed the Minister's proposal as the Minister had not rectified the procedural breach when the issue came to a vote in Parliament.

35. As to the plaintiffs' claims for damages for personal injury (non-pecuniary damage), under Section 26 of the Tort Act No. 50/1993 (see paragraph 63), the Supreme Court stated that although nothing suggested that the Minister had acted specifically with the intention of causing injury to their reputation and personal honour, her actions had nevertheless had the consequence of serving the interests of some of the four candidates that the Committee had ranked less qualified than the plaintiffs. Although the Minister had not expressed herself in a manner directed at the reputation or personal honour of the plaintiffs, the Supreme Court concluded that it could not be disregarded that she should have been aware of the fact that her actions had unjustifiably been to the detriment of the reputation of the plaintiffs and thus caused them injury. Nevertheless, the court found that the Minister had acted "in complete disregard of this obvious danger" *("Þrátt fyrir þetta gekk ráðherrann fram án þess að skeyta nokkuð um þessa augljósu hættu").*

C. The applicant's conviction in the Court of Appeal

36. The applicant was born in 1985 and lives in Kópavogur.

37. On 31 January 2017 the applicant was indicted for a violation of the Traffic Act No. 50/1987, for driving without holding a valid driver's licence and under the influence of narcotics.

38. By a judgment of 23 March 2017, the District Court of Reykjaness convicted the applicant of the charges against him. The case was processed summarily as the applicant pleaded guilty and thus accepted the charges. The applicant was sentenced to 17 months' imprisonment and his driver's licence was revoked for life.

39. On 6 April 2017, the applicant appealed the judgment to the Supreme Court and requested that his sentence be reduced. As the case was not heard by the Supreme Court before the end of 2017, the case was transferred to the Court of Appeal in accordance with Section 78 (1) of Act No. 49/2016 on Amendments to the Criminal Procedures Act and Civil Procedures Act, as it had been amended by Section 4 of Act No. 53/2017.

40. By letter of 29 January 2018, the Court of Appeal notified the applicant and the prosecution that the trial would take place on 6 February 2018 and also of the names of the three judges who would sit in the panel for the case. The panel of judges included A.E., who was one of the four judges appointed by the President of Iceland on the basis of the proposal of the Minister of Justice, departing from the assessment report of the Committee, and the vote in Parliament (see paragraphs 5-26 above).

41. By letter of 2 February 2018, the applicant's defence counsel requested that A.E. withdraw from the case due to the irregularities in the procedure when she and the other three candidates had been appointed as judges to the Court of Appeal and because they had not been appointed in accordance with the law.

42. On 6 February 2018, at a preliminary hearing before the Court of Appeal, the applicant formally lodged a procedural motion to the effect that A.E. withdraw from the case. The applicant claimed that according to Article 59 and 70 (1) of the Icelandic Constitution and Article 6 § 1 of the Convention, he would not enjoy a fair trial before an impartial and independent tribunal established by law if she were to participate, due to the irregularities in the procedure leading up to her appointment as a judge of the court. The applicant referred in support of his claim to the decision of the EFTA Court (Court of Justice of the European Free Trade Association (EFTA)) of 14 February 2017 in case E-21/16 and the judgment of the General Court of the European Union of 23 January 2018 in case no. T-639/16 P (see paragraphs 64-69 below). He argued that according to these rulings, when an appointment of a judge is not in accordance with the law, the judge is not fully vested with judicial powers and his or her judgments will be invalid. In accordance with the Supreme Court judgments of 19 December 2017 and of 31 July 2017 (see paragraphs 27-35 above) the same would apply in the applicant's case if his request were rejected.

43. By a decision of 22 February 2018, the Court of Appeal rejected the applicant's motion for A.E. to withdraw from the case.

44. On 24 February 2018 the applicant appealed the decision to reject the motion to the Supreme Court. By a judgment of 8 March 2018, the

Supreme Court dismissed the appeal on the ground that the conditions for appeal had not been fulfilled. The court held that as the applicant's motion for A.E. to withdraw was in fact based on A.E.'s judicial position not being established in accordance with the law, such a motion could not be appealed to the Supreme Court on the basis of a procedural decision by the Court of Appeal, but had to be examined on the basis of an appeal on the merits of a judgment rendered by the Court of Appeal in the applicant's criminal case.

45. Following the Supreme Court's dismissal of the applicant's appeal as to the motion for A.E. to withdraw, the trial continued with A.E as one of the three judges on the bench.

46. By letter of 13 March 2018, the applicant changed his pleadings before the Court of Appeal. His primary claim was that he be acquitted. His secondary claim was for his sentence to be reduced on the ground that the appointment of judges to the Court of Appeal had been in violation of Article 59 and 70 of the Constitution and Article 6 § 1 of the Convention.

47. By a judgment of 23 March 2018, the Court of Appeal upheld the District Court's judgment on the merits.

48. On 17 April 2018 the Supreme Court granted leave to appeal and on 20 April 2018 the applicant appealed the judgment to the Supreme Court by way of an appeal lodged by the prosecutor at his request.

49. The applicant's main claim before the Supreme Court was that the Court of Appeal's judgment be quashed and the case be remitted for retrial. His secondary claims were for the court to acquit him or to reduce his sentence. His claims were based on the ground that the procedure leading up to the appointment of A.E., one of the judges in his case before the Court of Appeal, had violated the new Judiciary Act and the Administrative Procedures Act. Furthermore, he argued that the Minister of Justice's proposal to Parliament, for the appointment of A.E., had violated the general principle of domestic law that authorities should appoint the most qualified candidate for office. Therefore, A.E.'s appointment had not been in accordance with the law as required by Article 59 of the Constitution and Article 6 § 1 of the Convention. This had also resulted in him not enjoying a fair trial before an independent and impartial tribunal as stipulated in Article 70 (1) of the Constitution and Article 6 § 1 of the Convention. In his observations before the Supreme Court, the applicant alleged, *inter alia,* that A.E.'s husband, B.N., a Member of Parliament and of the same political party as the Minister of Justice, had given up the first place on the party's constituency list in Reykjavík in the parliamentary elections held in October 2017 in favour of the Minister after her decision to include his wife in her proposal to Parliament. B.N.'s decision had effectively excluded him from serving as a Minister after the parliamentary election when the party had formed a new coalition Government.

50. By a judgment of 24 May 2018, the Supreme Court rejected the applicant's claims and upheld the judgment of the Court of Appeal. As to

the complaint concerning the appointment of A.E., the Supreme Court set out the procedure leading up to the appointment of judges in the Court of Appeal and referred principally in this respect to its judgments of 19 December 2017 in the related judicial proceedings (see paragraphs 27-35 above). The judgment then contained the following reasoning:

> "[The applicant's] arguments for his primary and secondary claims before the Supreme Court are *inter alia* that according to Article 59 of the Constitution and Article 6 of [the Convention] an appointment of a judge has in all respects to be in accordance with the law. In case that fails and the appointment is thus unlawful "the judge in question is not a lawful holder of judicial power and a court's judicial rulings in which he has participated constitute a dead letter", as is argued in [the applicant's] observations before the Supreme Court. The conclusion drawn from the cited words cannot be sustained unless it would be considered that a person's appointment as a judge under these circumstances would be a nullity ("*markleysa*"), thus not only that flaws in the appointment process would result in its annulment. It must be taken into account that in the aforementioned assessment report of the Evaluation Committee of 19 May 2017 it was concluded that all the 33 candidates fulfilled all the requirements provided for by law to hold the office of a judge in the Court of Appeal, a fact that has not been challenged. The appointment of the judges was conducted in accordance with the formal procedural rules of Chapter III of Act No. 50/2016, as well as temporary provision IV of the same Act, however with the exception that during the Parliamentary procedure on the Minister of Justice's proposals on the appointment of the judges, the requirements of the second paragraph of the temporary provision were not followed in that the Parliament should have voted on each and every judge separately, but not all the judges at the same time, as was in fact done. This issue, however, has already been addressed in the aforementioned judgment of the Supreme Court [of 19 December 2017], where it was concluded that this was a defect which did not have significance. Taking this into account, as well as the fact that all the fifteen judges were appointed to office by letters signed by the President of Iceland on 8 June 2017, co-signed by the Minister of Justice, it cannot be concluded that the appointment of [A.E.] was a nullity nor is it accepted that judicial rulings of the Court of Appeal, which she delivers along with others, are for that reason a "dead letter".
>
> When it is assessed whether the accused, due to [A.E.'s] participation, did not enjoy the right to a fair trial before an independent and impartial tribunal in accordance with the first paragraph of Article 70 of the Constitution, cf. Article 6 of the European Convention on Human Rights, it must be recalled that in the aforementioned judgments of the Supreme Court [of 19 December 2017] it was concluded that such flaws were in the procedure of the Minister of Justice preceding the appointment of the fifteen Court of Appeal judges that the State was liable in damages. In this case, this finding has in no way been challenged and these judgments have, therefore, evidentiary value in this respect in accordance with Section 116 (4) of the Civil Procedure Act. In this regard, it must also, in particular, be emphasised that it cannot be accepted, as was argued in the aforementioned memorandum of the Minister of Justice of 30 May 2017, that by only increasing the weight ascribed to judicial experience from that which such experience was ascribed by the Evaluation Committee in its internal table, relied upon in its assessment report of the 19th of the same month, but relying in other respects on the 'sufficient investigation' of the Committee as to each assessment factor, the finding could be made that four named candidates for the post of judge in the Court of Appeal, but not others, would be removed from the group of the fifteen most qualified, and four specific named candidates would be moved up into that group rather than others. When assessing the

consequences of the said flaws in the Minister of Justice's procedure, account must be taken of the fact that the appointment of all the fifteen judges of the Court of Appeal for an indefinite term, which in no way has been annulled by a court, became a reality upon the signing of their letters of appointment, dated 8 June 2017. As stated above, all of them fulfilled the requirements of Section 21 (2) of Act No. 50/2016, for being appointed to the office of judge, including the requirement of item 8 of the said paragraph, that is being considered to be qualified to hold these offices in the light of their professional experience and legal knowledge. From that time, the judges have held positions, cf. Article 61 of the Constitution, which preclude them from being discharged from office except by a judicial decision. From the time the appointment of these judges took effect, they have, according to the same provision of the Constitution, cf. Section 43 (1) of Act No. 50/2016, been under the main obligation in the performance of their official duty to follow only the law. They have also been afforded, in accordance with the last mentioned provision of law, independence in their judicial work but also the duty to perform it under their own responsibility and never follow instructions from others in their work. With reference to all of the above, there is not a sufficient reason to justifiably doubt that [the applicant] enjoyed a fair trial before independent and impartial judges, in spite of the flaws in the procedure by the Minister of Justice."

D. Further developments

51. On 5 March 2018 a motion of no-confidence was lodged in Parliament against the Minister of Justice by several members of two parties in the opposition. The reason for the motion was the Minister's violations of domestic law in the process of appointing judges to the Court of Appeal. On 6 March 2018 Parliament rejected the motion by a vote of 33 MPs voting against the motion with 29 in favour, with one MP abstaining. The 33 MPs rejecting the motion were all members of parties composing the majority in the coalition Government. However, two other members of those parties voted in favour of the proposal.

52. In February and March 2017, the two other candidates, E.J. and J.H., who were among the fifteen candidates that the Committee considered most qualified, but had been removed from the final list of nominees proposed to Parliament by the Minister of Justice, brought judicial proceedings in the District Court of Reykjavík against the Icelandic State. E.J. requested a declaratory judgment to the effect that the State was obliged to pay him pecuniary damage for not being appointed one of the judges to the Court of Appeal due to an unlawful decision by the Minister of Justice. J.H. claimed compensation for pecuniary damage and non-pecuniary damage for not being appointed one of the judges to the Court of Appeal by an unlawful decision of the Minister of Justice.

53. By two separate judgments of 25 October 2018, the District Court of Reykjavík found for the plaintiffs. In the first judgment the District Court acknowledged E.J.'s right to compensation for pecuniary damage due to him not being appointed a judge of the Court of Appeal. The District Court concluded, *inter alia*, that the candidate had sufficiently established that had

the procedure been conducted in a lawful manner with a reasonable assessment being made of his application and a comparison performed of his merits in relation to other candidates, the result would have been that he would have been appointed a judge of the Court of Appeal. In the latter judgment the District Court referred to the Supreme Court judgments of 19 December 2017 (see paragraphs 32-34 above) and awarded the plaintiff, J.H., ISK 1,100,000 (approximately EUR 7,300 at the material time) as compensation for personal injury (non-pecuniary damage). As for the right to compensation for pecuniary damage the District Court awarded him ISK 4,000,000 (approximately EUR 29,200 at the material time). The District Court concluded that the candidate had also sufficiently established that had the procedure been conducted in a lawful manner with a reasonable assessment being made of his application and a comparison performed of his merits in relation to other candidates, the result would have been that he would have been appointed a judge of the Court of Appeal.

54. The Icelandic State has appealed both judgments. They are currently pending before the Court of Appeal after leave to appeal directly to the Supreme Court was refused on 13 December 2018.

II. RELEVANT DOMESTIC LAW

55. The relevant provisions of the Icelandic Constitution (*Stjórnarskrá lýðveldisins Íslands)* read as follows:

Article 2

"Althingi and the President of Iceland jointly exercise legislative power. The President and other governmental authorities referred to in this Constitution and elsewhere in the law exercise executive power. Judges exercise judicial power."

Article 59

"The organization of the judiciary can only be established by law."

Article 60

"Judges settle all disputes regarding the competence of the authorities. No one seeking a ruling thereon can, however, temporarily evade obeying an order from the authorities by submitting the matter for judicial decision."

Article 70

"Everyone shall, for the determination of his rights and obligations or in the event of criminal charge against him, be entitled, following a fair trial and within a reasonable time, to the resolution of an independent and impartial court of law. A hearing by a court of law shall take place in public, except if the judge decides otherwise as provided for by law in the interest of morals, public order, the security of the State or the interests of the parties.

Everyone charged with criminal conduct shall be presumed innocent until proven guilty."

56. The relevant provisions of the prior Judiciary Act No. 15/1998 (*Lög um dómstóla*) read as follows:

Section 4a

"The Minister shall appoint an Evaluation Committee of five members to examine the qualifications of candidates for the office of Supreme Court judge or district court judge. Two members shall be nominated by the Supreme Court, of whom one shall serve as chairman; at least one of the two shall not be in active service as a judge. The third member shall be appointed by the Judicial Council and the fourth by the Icelandic Bar Association. The fifth member shall be elected by Althingi. ...

The Evaluation Committee shall provide the Minister with a written and reasoned report concerning candidates for the office of Supreme Court judge. The report of the Evaluation Committee shall state the board's view regarding which candidate is best qualified for the post; the board may rank two or more candidates equally. In other respects, the Minister shall establish further rules on the functions of the Board.

No candidate may be appointed to the office of judge whom the Evaluation Committee has not designated as the most qualified of the candidates, whether alone or equally ranked with others. However, derogation from this condition is permitted if Althingi adopts a motion of the Minister to appoint another named candidate who, in the opinion of the Evaluation Committee, meets all the requirements laid down in the second and third paragraphs of Section 4. The Minister shall in such circumstances place the motion before Althingi within two weeks from the time of submission of the Evaluation Committee's opinion or within two weeks from the time that Althingi is next convened following submission of the opinion; the motion must be approved within one month from the time that it is placed before Althingi or the Minister will be bound by the opinion of the Evaluation Committee."

57. The relevant provisions of the new Judiciary Act No. 50/2016 (*Lög um dómstóla*) read as follows:

Section 21

"The Court of Appeal shall be composed of 15 judges, appointed for an indefinite period of time by the President of Iceland as proposed by the Minister.

Only a person who fulfils the following conditions may be appointed to the office of a Court of Appeal judge:

1. Has attained the age of 35 years.

2. Is an Icelandic national.

3. Has the necessary mental and physical capacity.

4. Is legally competent to manage his or her personal and financial affairs, and has never been deprived of the control of his or her finances.

5. Has not committed any criminal act considered to be infamous in public opinion, or evinced any conduct detrimental to the trust that persons holding judicial office generally must enjoy.

6. Has completed can.jur. exam or B.A. exam in law together with Master's degree.

7. Has for a term of no less than three years been a district court judge, attorney before the Supreme Court, full professor or associate professor of law, commissioner of police, district commissioner, Public Prosecutor, permanent secretary of a ministry, director general of a department of the Minister or Althingi's Ombudsman, or has for such period discharged a similar function providing similar legal experience.

8. Is deemed capable of holding the office in the light of his or her career and knowledge of law.

A person who is, or has been, married to an Appeal Court Judge already in office, or a person related to such judge by blood or marriage by ascent or descent, or in the second sideline, may not be commissioned to the office of the Court of Appeal."

Section IV (temporary provision)

"Nominating judges of the Court of Appeal shall be completed no later than 1 July 2017 and the judges shall be appointed to office effective as of 1 January 2018. As provided for in Section 4a of Act No. 15/1998 on the Judiciary, a committee shall be established to investigate the qualifications for the first time of candidates for the office of judge of the Court of Appeal. The committee shall provide the Minister with its opinion about the candidates in conformity with the second paragraph of the same Section and of the regulation that applies to the committee. The Minister is not authorized to appoint an individual to the office of judge whom the Evaluation Committee had not deemed as being the most qualified amongst the candidates, either one or among others. This provision may be departed from, however, if Althingi accepts a proposal by the Minister on an authorization to appoint to the office of judge another named candidate who, in the opinion of the Evaluation Committee, meets all the conditions of Section 21 (2) and (3) of this Act.

When the Minister proposes for the first time appointments to the office of judge of the Court of Appeal, she shall submit her proposal regarding every appointment to Althingi for acceptance. If Althingi accepts the Minister's proposals, she shall send them to the President of Iceland, who formally appoints the judges, cf. Section 21. If Althingi does not accept the Minister's proposals regarding a particular appointment, the minister shall present a new proposal to Althingi for acceptance.

..."

58. The relevant provisions of the Minister of Justice's Rules No. 620/2010 on the work of the Evaluation Committee which assesses the competences of applicants for judicial posts (*Reglur um störf dómnefndar sem fjallar um hæfni umsækjenda um dómaraembætti*) are as follows:

Section 3

"When the application deadline has expired the Minister examines whether the candidates fulfil all the general conditions of qualification for the judicial office which was published in accordance with the Judiciary Act No 15/1998. Then the applications fulfilling the conditions are sent to the Evaluation Committee for assessment."

Section 4

"In its opinion the Committee shall decide who is/are the most qualified candidate/s to be appointed to the judicial office. The Committee shall make sure that in its evaluation equality is respected. The conclusion shall be based on an overall assessment based on objective considerations and based on the candidates' merits taking account of the candidates' education, experience, integrity, competence and professional efficiency, as described, *inter alia*, in more detail below:

1. *Education, career, theoretical knowledge*. When evaluating the education, career and theoretical knowledge, the Committee shall place emphasis on the candidate having a varied background in the fields of law such as experience as a judge, litigation or other type of legal practice work, working in administration or scholarly work. The candidate should have general and comprehensive legal knowledge and education. It should also be considered whether the candidate has a further education.

2. *Secondary activities and social activities*. The Committee shall also take into account the candidate's secondary activities, such as activities in appeals committees or other activities which could be useful for a judge. The Committee can also take into account extensive participation in social activities.

3. *General competence*. The Committee shall take into account whether the candidate has shown independence, impartiality, initiative and efficiency in his or her work and whether the candidate can easily extrapolate the key issues. It is optimal that the candidate has management experience. The candidate shall have good knowledge of the Icelandic language and ability to communicate easily both verbally and in writing.

4. *Special competence*. It is important that the candidate has good knowledge of civil and criminal procedures and can follow the provisions of law when drafting judgments and can draft them in good language. The candidate has to be able to conduct hearings firmly and fairly and process the cases he/she is assigned quickly and with confidence.

5. *Mental capabilities*. The candidate has to be able to communicate easily, both with colleagues and other people he/she encounters at work. It is a requirement that the candidate has a good reputation both from his or her previous work and outside work and that he/she is dependable."

Section 5

"The candidate's application for the judicial office advertised along with the rules that apply for it shall be the basis upon which the Committee bases its evaluation.

The Committee shall make sure that the matter is in all other aspects sufficiently investigated before giving its opinion on the candidate's qualifications.

In its evaluation in accordance with Section 4, the Committee can take into account all published works of the candidates, such as scholarly writing, judgments, decisions and alike, even though they have not been submitted with the application. The candidate does not need to be specifically notified in advance.

The Committee can invite the candidates for an interview and request necessary documents in addition to those submitted with their application and the Committee can base its evaluation, under Section 4, on the documents.

The Committee can obtain knowledge on the candidate's career from his/her former employer or others who have been in professional contact with him/her. The candidate shall have seven days to comment on the information that is collected."

Section 6

"The Committee shall submit a written and reasoned report on the candidates including the following:

a. reasoned opinion on each candidate's qualification

b. reasoned opinion as to which candidate/s the Committee considers the most qualified for the judicial office."

Section 7

"The Committee shall share its draft assessment report with the candidates and give them seven days to comment thereon. The candidates are bound by confidentiality about the content of the draft report."

Section 8

"After the Committee has reviewed the candidates' comments and amended the report, as appropriate, it finalises the report, signs it and sends it to the Minister along with the case documents. Furthermore, the Committee sends its report to the candidates.

Three days after the Minister and the candidates have been sent a copy of the report it shall be published on the Ministry of Justice's website."

Section 9

"The Committee shall submit a report on the candidates within six weeks of receiving the applications. This deadline can be extended under special circumstances such as, due to the amount of candidates etc.

..."

59. The relevant provisions of the Criminal Procedures Act No. 88/2008 (*Lög um meðferð* sakamála) read as follows:

Section 6

"A judge, including a lay judge, is incompetent to serve as a judge in a case if:

a. He is an accused person, victim or representing them,

b. He has safeguarded the interests of an accused person or the victim in the case,

c. He has testified or been subpoenaed as a witness in the case for legitimate reasons or been an assessor or examiner in the case,

d. He is or has been the spouse of the accused or the victim, related or connected to them, directly or in the second line of descendants connected directly to them by the same token though adoption,

e. He is related or has been connected to the representative of the accused or the victim, or counsel in the manner stipulated in item d,

f. He is connected or has been connected to a witness in the case by the same token as stipulated in item d, or to an assessor or examiner, or

g. There exist other circumstances or conditions that may justifiably raise questions about his impartiality."

60. According to the Criminal Procedures Act, judicial proceedings can be reopened under certain conditions. Section 228 of the Act states that when a District Court judgment has not been appealed or the time limit to appeal has passed, the Committee on Reopening of Judicial Proceedings (*Endurupptökunefnd*) can approve a request of a person who considers that he or she has been wrongly convicted or convicted of a more serious offence than he or she committed, to reopen the judicial proceedings before the District Court, if certain conditions are fulfilled. The conditions are, *inter alia*, that new evidence has come to light which could have had great significance for the conclusion of the case if it had been available before the judgment was announced (item a) or that there were serious defects in the processing of the case which affected its conclusion (item d). The State Prosecutor can request a reopening to the advantage of the convicted person if he considers that the conditions in paragraph 1 of Section 228 of the Act are fulfilled. In accordance with Section 229 of the Act, the request for reopening shall be in writing and sent to the Committee on Reopening of Judicial Proceedings. It shall include detailed reasoning on how the conditions for reopening are considered to be fulfilled. According to Section 231 of the Act, the Committee on Reopening of Judicial Proceedings decides whether proceedings will be reopened. If a request for reopening is approved the first judgment remains in force until a new judgment is delivered in the case. Section 232 of the Act states that the Committee on Reopening of Judicial Proceedings can accept a request for the reopening of a case which has been finally decided in the Court of Appeal or the Supreme Court and a new judgment be delivered if the conditions of Section 228 are fulfilled. A case will not be reopened in the Court of Appeal unless the time limit to request leave to appeal to the Supreme Court has expired or the Supreme Court has rejected leave to appeal.

61. The relevant provisions of the Parliamentary Procedures Act No. 55/1991 (*Lög um þingsköp Alþingis*) read as follows:

Section 45

"Motions for parliamentary resolutions shall have the form of resolutions. They shall be printed and distributed to Members at a sitting of Althingi. As a rule, motions for resolutions shall be accompanied by an explanation of their substance. Deliberations may not take place until at least two nights after the distribution of the motion.

A resolution cannot pass until it has received two readings. However, motions of no confidence in the Government or a minister, motions on the appointment of committees according to Article 39 of the Constitution and motions from committees submitted pursuant to Section 26 (2) shall be debated and brought to a conclusion in a single debate in accordance with the rules on second readings of parliamentary resolutions. The same applies to motions for adjournment of sittings of Althingi pursuant to the second sentence of Article 23 (1) of the Constitution.

At the end of the first reading the motion will pass to the second reading and the committee proposed by the Speaker. However, a vote shall be taken at the request of any Member, and also if another motion is made regarding the committee to which the matter should be submitted.

The second reading shall not take place until one night after the first reading or distribution of a committee report. At this reading, individual articles of the proposal shall be debated along with amendments to such articles. At the close of this reading a vote shall be taken on each article of the proposal and amendments to them, and finally on the proposal in its entirety. However, if there are no motions of amendments, the proposal may be put to the vote in its entirety.

If Althingi receives a submission relating to a matter on which Althingi is required to take a position under the Constitution or by law, but the submission does not constitute parliamentary business pursuant to Chapter III, the Speaker shall report the submission at a sitting. The matter is then submitted without debate to a committee at the recommendation of the Speaker. When the committee has completed its examination of the matter, the committee shall express its opinion in a report, which shall be distributed at a sitting, together with a motion for a resolution, which shall be debated and brought to a conclusion in a single sitting pursuant to the rules on second readings of parliamentary resolutions.

Parliamentary resolutions which are distributed after the end of November may not be placed on the agenda before Christmas recess except with the consent of Althingi, obtained in compliance with Section 74. Furthermore, parliamentary resolutions which are distributed later than 1 April may not be placed on the agenda before summer recess except with the consent of Althingi, obtained in compliance with Section 27. However, this consent can only be sought when five days have passed from the distribution of the resolution; derogation from this requirement is permitted with the support of three fifths of the Members voting on the resolution.

Constitutional requirements pursuant to Article 103 of the Agreement on the European Economic Area shall be derogated from by a parliamentary resolution, whose presentation shall comply with rules established by the Speaker.

The Prime Minister shall in October of each year submit to Althingi a report on the implementation of resolutions passed by the Althingi in the preceding year and requiring action by a Minister or the government, unless a different form of reporting to Althingi is provided for by law. The report shall furthermore address the process of matters referred by Althingi to the Government or a Minister. When the report has been submitted, it shall be referred to the Constitutional and Supervisory Committee for discussion. The committee may submit to Althingi its opinion regarding the Minister's report at its discretion and submit proposals to Althingi regarding individual matters in the report."

62. The relevant provision of the Administrative Procedures Act No. 37/1993 (*Stjórnsýslulög*) reads as follows:

Section 10

"*Rule of investigation*

An authority shall ensure that a case is sufficiently investigated before a decision thereon is reached."

63. Section 26 (1) of the Tort Act No. 50/1993 (*Skaðabótalög*) reads:

"A person who

a. deliberately or through gross negligence causes physical injury or

b. is responsible for an unlawful injury against the freedom, peace, honour or person of another party

may be ordered to pay non-pecuniary damages to the injured party."

III. RELEVANT CASE-LAW OF THE EFTA COURT AND THE GENERAL COURT OF THE EUROPEAN UNION

A. Case E-21/16 of the Court of Justice of the European Free Trade Association (EFTA Court), Decision of 14 February 2017

64. An advisory opinion was requested in the EFTA Court from the Princely Court of Appeal of the Principality of Liechtenstein concerning the Agreement on the European Economic Area (EEA Agreement) and the Solvency II Directive 2009/138/EC. The Court of Appeal referred three questions to the EFTA Court. The third question was put forth in case the first two questions would be addressed by the EFTA Court after 16 January 2017. The third question concerned the principle of loyalty laid down in Article 3 of the EEA Agreement and the possibility for the EFTA States to question the validity of the decisions of the EFTA Court. In essence the question raised the issue whether, from 17 January 2017, the EFTA Court would be lawfully composed in a manner that ensures its independence and impartiality. The reason for the question was that by an ESA/Court Committee Decision of 1 December 2016, the regular judge of the EFTA Court in respect of Norway had been reappointed for a three-year term of office as of 17 January 2017. However, Article 30(1) of the Agreement between the EFTA States, on the Establishment of a Surveillance Authority and Court of Justice (SCA), provided that the judges of the EFTA Court were appointed by common accord of the Governments of the EFTA States for a term of six years.

65. The EFTA Court replied to the third question before responding to the first two questions sent by the Court of Appeal. Before the EFTA Court answered the third question, the court received a new ESA/Court

Committee Decision of 13 January 2017 reappointing the judge in respect of Norway for a term of six years and repealing the first decision. By decision of 14 February 2017 the EFTA Court replied to the third question, the decision stating, *inter alia,* as follows:

> "16. Any assessment of the lawfulness of the Court's composition, particularly concerning its independence and impartiality, requires that due account is taken of several important factors. First, the principle of judicial independence is one of the fundamental values of the administration of justice. This principle is reflected, *inter alia*, in Articles 2 and 15 of the Statute of the Court and Article 3 RoP. Second, it is vital not only that judges are independent and fair, they must also appear to be so. Third, maintaining judicial independence requires that the relevant rules for judicial appointment, as set out in Article 30 SCA, must be strictly observed. Any other approach could lead to the erosion of public confidence in the Court and thereby undermine its appearance of independence and impartiality."

66. The EFTA Court concluded that it had to take into account the new decision repealing the previous decision and re-appointing the judge in respect of Norway for a term of six years. The new decision was unambiguous and provided for a term that was in accordance with Article 30 of the SCA. Therefore, there could be no doubt as to the lawfulness of the court's composition from 17 January 2017 and the substantive part of the present proceedings would thus be addressed by the EFTA Court's three regular judges.

B. Judgment of the General Court of the European Union in Case No. T-639/16 P of 23 January 2018

67. The case concerned an appeal against a judgment of the Civil Service Tribunal of the European Union of 28 June 2016, requesting that the judgment be set aside, by which the Tribunal dismissed the appellants' action seeking annulment of her appraisal report for the period 1 January to 31 December 2013. Furthermore, the appellant claimed that the contested appraisal report should be annulled and the Council should be ordered to pay costs.

68. The appellant claimed, *inter alia,* that the judgment under appeal had been delivered by a chamber which had been improperly constituted, because the procedure for the appointment of one of the judges who sat in the chamber had been flawed.

69. The court concluded, firstly, that the judge in question had sat in the chamber delivering the judgment under appeal; secondly, that the procedure for the appointment of the judge in question had been improper, not only because the Council had not complied with the legal framework laid down in the public call for applications of 3 December 2013 but also because the Council's approach had not been consistent with the rules governing the appointments of judges to the Civil Service Tribunal. Furthermore, the judgment contained the following reasoning:

"65. Third, it is therefore necessary to examine whether the flaws in the procedure for the appointment of the judge at issue are such as to affect the proper composition of the Second Chamber of the Civil Service Tribunal which delivered the judgment under appeal.

66. In that context, it must be borne in mind that, according to the case-law of the Court, when the proper constitution of the court which delivered the judgment at first instance is contested and the challenge is not manifestly devoid of merit, the appeal court is required to verify that the court was properly constituted. A ground alleging the irregular constitution of the panel of judges is a ground involving a question of public policy, which must be examined by the appeal court of its own motion, even if this irregularity was not invoked at first instance (see, to that effect, judgments of 1 July 2008, *Chronopost and La Poste* v *UFEX and Others*, C-341/06 P and C-342/06 P, EU:C:2008:375, paragraphs 44 to 50).

67. As is apparent from the first sentence of the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, one of the requirements concerning the composition of the Chamber is that courts must be independent, impartial and previously established by law.

68. The principle of the lawful judge, the objective of which is to guarantee the independence of judicial power with respect to the executive, stems from that requirement, which must be interpreted as meaning that the composition of the court and its jurisdiction must be regulated beforehand by legal provisions (see, to that effect, judgment of 13 December 2012, *Strack* v *Commission*, T-199/11 P, EU:T:2012:691, paragraph 22).

69. In that context, it should be recalled that, under the first sentence of Article 52(3) of the Charter of Fundamental Rights, in so far as the Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), their meaning and scope are to be the same as those laid down by that convention.

70. It should also be recalled that, under the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter of Fundamental Rights, when interpreting the rights set out in that charter, the explanations drawn up as a way of providing guidance in its interpretation (OJ 2007 C 303, p. 17) are to be given due regard by the European Union judicature. As regards the interpretation of Article 47 of the Charter of Fundamental Rights, those explanations state:

'In Union law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations. That is one of the consequences of the fact that the Union is a community based on the rule of law as stated by the Court in Case 294/83, '*Les Verts*' v *European Parliament* (judgment of 23 April 1986 [1986] ECR 1339). Nevertheless, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union.'

71. It follows that, as regards the interpretation of the first sentence of the second paragraph of Article 47 of the Charter of Fundamental Rights, account should be taken of the guarantee afforded by the first sentence of Article 6(1) of the ECHR, which also lays down the principle of the lawful judge.

72. According to the case-law of the European Court of Human Rights ('the ECtHR'), the principle of the lawful judge enshrined in the first sentence of Article 6(1) of the ECHR reflects the principle of the rule of law, from which it follows that a judicial body must be set up in accordance with the intention of the

legislature (see, to that effect, ECtHR, 27 October 2009, *Pandjikidzé and Others v. Georgia*, ..., paragraph 103, and 20 October 2009, *Gorguiladzé v. Georgia*, ..., Paragraph 67).

73. According to the ECtHR, a court must thus be established in accordance with the legal provisions on the establishment and competence of judicial bodies and with any other provision of national law that would render, if it is not complied with, the involvement of one or more judges in the examination of the case improper. This includes in particular provisions relating to the mandates, incompatibilities and disqualification of judges (see, to that effect, ECtHR, 27 October 2009, *Pandjikidzé and Others v.* Georgia, ..., paragraph 104, and 20 October 2009, *Gorguiladzé v. Georgia*, ..., paragraph 68).

74. As it is apparent from the case-law of the ECtHR, the principle of the lawful judge requires compliance with the provisions governing the procedure for the appointment of judges (see, to that effect, ECtHR, 9 July 2009, *Ilatovskiy v. Russia*, ..., paragraphs 40 and 41).

75. Indeed, it is not only essential that judges are independent and impartial, but also that the procedure for their appointment appears to be so. It is for that reason that the rules for the appointment of a judge must be strictly adhered to. Otherwise, the confidence of litigants and the public in the independence and impartiality of the courts might be eroded (see, to that effect, decision of the EFTA Court of 14 February 2017, *Pascal Nobile* v *DAS Rechtsschutz-Versicherungs*, E-21/16, paragraph 16).

76. The question whether the flaws in the procedure for the appointment of the judge at issue are such as to affect the proper composition of the Second Chamber of the Civil Service Tribunal which delivered the judgment under appeal must be considered in the light of those principles.

77. In that regard, it must be stated that it is apparent from Recitals 1 to 6 of Decision 2016/454, which are reproduced in paragraph 11 above, that the Council was fully aware that the list of candidates at issue had not been established with a view to appointing a judge to the post held by Ms [R.P.]. It nevertheless decided to use the list for that purpose. It therefore follows from the appointment itself that the Council deliberately disregarded the legal framework laid down by the public call for applications of 3 December 2013 and the rules governing the appointment of judges to the Civil Service Tribunal.

78. Accordingly, having regard to the importance of compliance with the rules governing the appointment of a judge for the confidence of litigants and the public in the independence and impartiality of the courts, the judge at issue cannot be regarded as a lawful judge within the meaning of the first sentence of the second paragraph of Article 47 of the Charter of Fundamental Rights.

79. Consequently, the first ground of appeal, alleging that the constitution of the Second Chamber of the Civil Service Tribunal, which delivered the judgment under appeal, was improper must be upheld.

80. In the light of those considerations, the judgment under appeal must be set aside in its entirety, without there being any need to examine the second and third grounds of appeal."

IV. RELEVANT COUNCIL OF EUROPE MATERIALS

70. Opinion no. 18/2015 of 16 October 2015 of the Consultative Council of European Judges (CCJE) on the 'position of the judiciary and its relation with the other powers of state in a modern democracy'.

"B. Different elements of legitimacy of judicial power

(1) The judicial power as a whole

13. The judicial power is created as a part of the constitutional framework of democratic states that are subject to the rule of law. By definition, therefore, if the constitutional framework of such a state is legitimate, then the basis of judicial power as a part of that constitution is just as legitimate and just as necessary a part of the democratic state as the other two component powers. All member states have some form of a constitution which, by differing means, (e.g. by long custom or a popular vote) is accepted as being the legitimate foundation of the state. The constitutions of all member states recognise and create (whether explicitly or implicitly) the role of a judiciary which is there to uphold the rule of law and to decide cases by applying the law in accordance with legislation and case law. Thus, the fact that a constitution creates a judiciary to carry out this role must itself thereby confer legitimacy upon the judiciary as a whole. When deciding cases, each individual judge exercises his or her authority as a part of the judiciary. Accordingly, the very fact that the judiciary is a part of a state's constitution provides legitimacy not only for the judiciary as a whole but each individual judge.

(2) Constitutional or formal legitimacy of individual judges

14. In order to perform the judicial functions legitimised by the constitution, each judge needs to be appointed and thus become part of the judiciary. Each individual judge who is appointed in accordance with the constitution and other applicable rules thereby obtains his or her constitutional authority and legitimacy. It is implicit in this appointment in accordance with constitutional and legal rules that individual judges are thereby given the authority and appropriate powers to apply the law as created by the legislature or as formulated by other judges. The legitimacy conferred on an individual judge by his appointment in accordance with the constitution and other legal rules of a particular state constitutes an individual judge's "constitutional or formal legitimacy".

15. The CCJE has noted the different methods of appointment of judges in the member states of the Council of Europe. These include, for example: appointment by a council for the judiciary or another independent body, election by parliament and appointment by the executive. As the CCJE has pointed out, each system has advantages and disadvantages. It can be argued that appointment by vote of Parliament and, to a lesser degree, by the executive can be seen to give additional democratic legitimacy, although those methods of appointment carry with them a risk of politicisation and a dependence on those other powers. To counter those risks, the CCJE has recommended that every decision relating to a judge's appointment or career should be based on objective criteria and be either taken by an independent authority or subject to guarantees to ensure that it is not taken other than on the basis of such criteria. The CCJE has also recommended the participation of an independent authority with substantial representation chosen democratically by other judges in decisions concerning the appointment or promotion of judges. The constitutional legitimacy of individual judges who have security of tenure must not be undermined

by legislative or executive measures brought about as a result of changes in political power."

71. Recommendation CM/Rec(2010)12 of the Committee of Ministers to member States on judges: independence, efficiency and responsibilities (adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies)

"Chapter VI - Status of the judge

Selection and career

44. Decisions concerning the selection and career of judges should be based on objective criteria pre-established by law or by the competent authorities. Such decisions should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity.

45. There should be no discrimination against judges or candidates for judicial office on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, disability, birth, sexual orientation or other status. A requirement that a judge or a candidate for judicial office must be a national of the state concerned should not be considered discriminatory.

46. The authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers. With a view to guaranteeing its independence, at least half of the members of the authority should be judges chosen by their peers.

47. However, where the constitutional or other legal provisions prescribe that the head of state, the government or the legislative power take decisions concerning the selection and career of judges, an independent and competent authority drawn in substantial part from the judiciary (without prejudice to the rules applicable to councils for the judiciary contained in Chapter IV) should be authorised to make recommendations or express opinions which the relevant appointing authority follows in practice.

48. The membership of the independent authorities referred to in paragraphs 46 and 47 should ensure the widest possible representation. Their procedures should be transparent with reasons for decisions being made available to applicants on request. An unsuccessful candidate should have the right to challenge the decision, or at least the procedure under which the decision was made.

..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION AS REGARDS THE RIGHT TO "A TRIBUNAL ESTABLISHED BY LAW"

72. The applicant complained that the appointment of one of the judges in the Court of Appeal that decided his criminal case, A.E., had not been in accordance with domestic law. Therefore, his criminal charge had not been determined by a "tribunal established by law" as provided for by Article 6 § 1 of the Convention, the first sentence of which reads as follows:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

73. The Government contested this argument.

A. Admissibility

74. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

75. The applicant alleged that the requirement that a tribunal be established by law entailed, firstly, that general rules on the establishment of tribunals should be clearly stipulated in legislation and, secondly, that each individual appointment of a judge should be in accordance with the law.

76. The applicant maintained that the appointment of A.E. had not been in accordance with domestic law and had thus been in violation of Article 6 § 1 of the Convention. The Supreme Court's reasoning in its judgment of 24 May 2018 in the applicant's case, assessing the consequences of the Minister's unlawful appointment, had not been in accordance with the Convention and had not addressed the relevant criteria laid down in the Court's case-law. It had been important that legal procedures were followed to the full extent when the judges were appointed. This had not been done when A.E. and three other candidates, whom the Minister had included in the place of others on the Committee's list, had been appointed to the Court of Appeal. In this regard, the applicant further alleged that political views

and connections had been the reasons for the appointment. He submitted in this respect that a few months after A.E. had been appointed, her husband, B.N., an MP and fellow party member of the Minister of Justice, had done the Minister "a huge political favour" which had secured her political future and her place in the new Government by not opposing her for the top seat on the party's Reykjavík district list for the parliamentary elections held in October 2017. Furthermore, the applicant claimed that one of the other four candidates proposed by the Minister of Justice had been her friend's husband.

77. The applicant relied on Supreme Court judgments of 19 December 2017 in related judicial proceedings (see paragraphs 27-35 above), in which the Supreme Court had found that the appointment of the four judges, including A.E., who were not among the 15 most qualified candidates according to the Committee, had not been in accordance with the law. The court had, firstly, concluded that the appointments had been unlawful because the Minister of Justice had not made an individual proposal for each candidate to be appointed in accordance with the law and, secondly, because the procedure evaluating their competence was insufficient and violated Section 10 of the Administrative Procedures Act (see paragraph 62 above).

78. Furthermore, the appointment had violated the unwritten rule of Icelandic law that administrative authorities should appoint the most competent candidate. This had been reaffirmed in the Supreme Court's judgment of 24 May 2018 in the applicant's case and the court had stated that its judgments of 19 December 2017 had had full evidentiary value in his case before the Supreme Court. It was therefore established that domestic laws had been violated in the appointment of A.E. as a judge of the Court of Appeal.

79. The applicant further argued that since the application had been lodged, two other candidates out of the four who were among the fifteen most qualified in the view of the Committee had also been awarded damages or had their damages claims acknowledged by the District Court of Reykjavík in judgments of 25 October 2018. These had been appealed against and were now pending before the Court of Appeal (see paragraphs 52-54 above).

80. The applicant objected to the Government's submission that the Supreme Court judgment of 24 May 2018 indicated that the deficiencies in the process identified in the judgment of 19 December 2017 had not carried weight for the conclusion of whether the appointment of A.E. had been lawful. Moreover, the applicant argued that the Government's interpretation of the judgment was incorrect as to the consequences that should be derived from the defects in the lawfulness of A.E.'s appointment and also in their conclusion that these defects had had no consequences for her position as a judge. That was nowhere to be found in the judgment.

81. The applicant also rejected the Government's submission that the Minister of Justice had submitted 15 separate proposals for each candidate. The applicant argued that it had been "a take it or leave it" vote and the MPs had not been given an opportunity to vote on each and every candidate proposed by the Minister. Temporary provision IV of the new Judiciary Act was clear on this procedure. Therefore, the proposal, the voting and the appointment of A.E. had been in clear violation of this provision, as explicitly confirmed by the Supreme Court in the applicant's case.

82. The applicant also rejected the Government's argument that the flaws in the appointment procedure of A.E. had not amounted to a flagrant breach of domestic law and thus the Supreme Court's interpretation of domestic law should not be questioned by the Court. The applicant submitted, firstly, that the Supreme Court's judgments of 19 December 2017 had confirmed that there had been a flagrant breach of domestic law when A.E. had been appointed as a judge of the Court of Appeal. It had been so flagrant that she would not have been appointed if the Minister of Justice had followed the applicable legal procedure. Secondly, the Supreme Court had concluded that there had been a flagrant breach of domestic law in its previous judgments. Therefore, the court should not have been interpreting domestic law in its judgment against the applicant but rather Article 6 § 1 of the Convention. The Court's case-law required that judges be appointed according to foreseeable and lawful procedures and not arbitrarily. When it had been demonstrated that A.E.'s appointment had indeed been unlawful and arbitrary and in breach of Article 6 § 1, such an appointment should always be considered a flagrant breach of any domestic law. Alternatively, domestic law that did not provide remedies against unlawful or arbitrary judicial appointments should not qualify as "law" under the autonomous meaning of that term under Article 6 of the Convention.

(b) The Government

83. The Government maintained that under domestic law, as interpreted by the Supreme Court, A.E. was legally a judge of the Court of Appeal, and fully vested with all the judicial powers bestowed upon her by her appointment, including the powers to participate in the decisions in the applicant's criminal case. The Government referred, first and foremost, to the findings of the Supreme Court in its judgment of 24 May 2018, where the applicant's claims had been rejected.

84. The Government argued that even though it was for the Court to examine whether national law had been complied with, regard had to be had to the principles of subsidiarity and the margin of appreciation afforded to the national courts, as it was firstly for the domestic courts to interpret domestic law. According to the Court's case-law this interpretation would not be questioned unless there had been a flagrant violation of domestic law.

85. The Government submitted that the question before the Court was whether the findings of the Supreme Court, as regards the legal effects of the flaws in the appointment procedure for A.E.'s status as a judge in the judgment against the applicant, represented a flagrant breach of domestic law.

86. The Government stated that the Supreme Court had acknowledged, with reference to its judgments of 19 December 2017, that there had been flaws in the procedure in the appointment of A.E. However, the essence of the Supreme Court's reasoning had been that, in spite of these irregularities, A.E. had been appointed as a judge of the Court of Appeal and was invested with the judicial competences just as any other appointed judge of the Court of Appeal. This meant that under domestic law, as interpreted and applied by the Supreme Court, the irregularities established by the court's judgment of 19 December 2017 had not meant that A.E. had not been legally appointed as a judge. The applicant had therefore enjoyed a fair trial before a tribunal established by law within the meaning of Article 6 § 1 of the Convention. The Government argued that reasonable grounds existed for the Supreme Court's findings and its conclusion had not amounted to a flagrant breach of national law.

87. Furthermore, the Government pointed out that the evaluation table, referred to by the applicant, depicting the ranking of the candidates, had not been an integral part of the Committee's report or findings as such. It had been a working document apparently created to facilitate the work of the Committee. The only "official" ranking had been the Committee conclusion that the fifteen named candidates had been the most qualified. However, the Minister of Justice had been of the view that judicial experience had not been given sufficient weight in the Committee's assessment, which had been an objective and reasonable consideration. The Minister's decision had been in conformity with this consideration because the four candidates that she replaced on the list had had less working experience within the judiciary than the four she chose to replace them with.

88. The Government further argued that according to the applicable domestic rules, the Minister of Justice had been allowed to depart from the Committee's findings although she then had had to seek approval from Parliament. This had to be founded on legitimate grounds, for example the objective assessment of the candidates' qualifications.

89. The Minister had proposed a list of candidates she found to be the most qualified, also taking account of gender equality considerations. The assessment of candidates for judicial posts could never be a precise science or a purely mathematical exercise.

90. The Government rejected the applicant's argument as pure speculation that A.E. would not have been nominated as a judge if each one of the candidates had been voted on separately. It had not been up to the Minister of Justice to decide how the voting took place in Parliament. This

had been decided after detailed and professional considerations by the Secretary-General of Parliament and the Director of its Legal Division. A.E.'s appointment had been voted on like all the other candidates and every MP had been able to request a separate vote on each candidate.

91. The Government rejected the applicant's allegations to the effect that the Minister of Justice had handpicked candidates on her list proposed to Parliament on grounds of friendship and political ties. The applicant's allegations were general and vague and had limited value as legal arguments that could assist the Court in making a decision in his case. They had been intended to create the illusion that the whole process had been seriously flawed and corrupted, which was firmly rejected by the Government. In particular, the Government opposed the applicant's argument that A.E.'s appointment had been part of some kind of "political horse-trading". When A.E. had been appointed as a judge of the Court of Appeal, it had not been known that parliamentary elections would be held in October 2017 as it was not until September 2017 that the Government of Iceland was dissolved and new parliamentary elections called. The nomination and appointment of judges of the Court of Appeal had already been made at that time.

92. The Government thus submitted that the appointment of the judges of the Court of Appeal had been taken after a thorough and detailed process as provided for by the applicable law. It had been characterised by all the checks and balances appropriate for judicial appointments, designed to exclude any handpicking, and was without any doubt fully legitimate from the point of view of the Convention and the Council of Europe's standards. The appointments had been based on a thorough examination of all candidates on objective grounds and the change made by the Minister of Justice had been motivated by objective and legitimate aims.

93. Finally, the Government submitted that the developments in national legislation on the appointment of judges were relevant to the case before the Court. These developments demonstrated the way in which gradual changes had been made with the aim of creating a balance between the involvement of experts in the evaluation of candidates for judicial posts, the involvement of the judiciary and finally the involvement of the political branches. Prior legislation had been criticised for giving too much discretion and power to a political minister in judicial appointments. The findings of the Evaluation Committee had been made binding, although with an option for the Minister to deviate from its findings and bring the matter before Parliament. Neither the law nor its explanatory note contained instructions on how the Minister of Justice should prepare a proposal for Parliament when deviating from the opinion of the Evaluation Committee.

2. The Court's assessment

(a) Preliminary remarks and applicability of Article 6 of the Convention

94. In the present case, the applicant alleges that a judge, A.E., in the newly constituted Court of Appeal in Iceland, which convicted him of a criminal offence, along with two other members of a judicial panel of the court, was not appointed in accordance with domestic law. Therefore, the applicant argues, his criminal charge was not determined by a "tribunal established by law" as is required by Article 6 § 1 of the Convention.

95. As will be further explained below, the Court is called upon to assess this complaint on the basis of the Supreme Court judgment of 24 May 2018 in the applicant's case which, referring to its previous judgments of 19 December 2017 in related judicial proceedings, confirmed that certain aspects of the procedure in the appointment of the judge in question had not been in accordance with domestic law. However, the Supreme Court dismissed the applicant's request for the quashing of the judgment in his case in the Court of Appeal and for his case to be remitted for a retrial.

96. The Court notes that the parties do not dispute the applicability of the criminal limb of Article 6 of the Convention. The applicant was indicted and convicted of a violation of the Traffic Act for driving without holding a valid driver's licence and under the influence of narcotics. He was sentenced to 17 months' imprisonment and his driver's licence was revoked for life (see paragraphs 38 and 47 above). The Court therefore concludes that Article 6 § 1 of the Convention is applicable in the present case under its criminal limb (*Beuze v. Belgium* [GC], no. 71409/10, 9 November 2018, § 119).

(b) General principles

97. Under Article 6 § 1 of the Convention a tribunal must always be "established by law." This expression reflects the principle of the rule of law which is inherent in the system of protection established by the Convention and its Protocols (see, for example, *Jorgic v. Germany*, no. 74613/01, § 64, ECHR 2007-III (extracts)). As the Court has previously held, a tribunal that is not established in conformity with the intentions of the legislator will, necessarily, lack the legitimacy required in a democratic society to resolve legal disputes (*Lavents v. Latvia*, no. 58442/00, § 114, 28 November 2002,).

98. "Law", within the meaning of Article 6 § 1 of the Convention, comprises legislation providing for the establishment and competence of judicial organs (see, *inter alia*, *Lavents v. Latvia*, cited above, § 114), and any other provision of domestic law which, if breached, would render the participation of one or more judges in the examination of a case irregular (see *Gorguiladzé v. Georgia*, no. 4313/04, § 68, 20 October 2009, and

Pandjikidzé and Others v. Georgia, no. 30323/02, § 104, 27 October 2009). The phrase "established by law" thus includes the legal basis for the very existence of a "tribunal" (see *DMD Group, A.S. v. Slovakia*, no. 19334/03, § 59, 5 October 2010). Moreover, the concept of "establishment" in the first sentence of Article 6 § 1 of the Convention encompasses, by its very nature, the process of appointing judges within the domestic judicial system which must, in accordance with the principle of the rule of law, be conducted in compliance with the applicable rules of national law in force at the material time (compare and contrast the *Decision of the EFTA Court* in Case E-21/16 of 14 February 2017, § 16, and the *Judgment of the General Court of the European Union* in Case No. T-639/16 P of 23 January 2018, §§ 75 and 78 (see paragraphs 64-69 above)).

99. The Court further observes that, according to its settled case-law, the object of the term "established by law" in Article 6 § 1 of the Convention is to ensure "that the judicial organisation in a democratic society does not depend on the discretion of the executive, but that it is regulated by law emanating from Parliament" (*Zand v. Austria*, no. 7360/76, Commission report of 12 October 1978, Decisions and Reports (DR) 15, pp. 70 and 80). Also, in countries where the law is codified, the organisation of the judicial system cannot be left to the discretion of the judicial authorities, although this does not mean that the courts do not have some latitude to interpret relevant domestic legislation (*Coëme and Others*, cited above, § 98, and *Savino and Others v. Italy*, nos. 17214/05, 20329/05 and 42113/04, § 94, 28 April 2009). In this regard, the Court emphasises that the requirement that a tribunal be established by law is closely connected to the other general requirements of Article 6 § 1, on the independence and impartiality of the judiciary, both also being an integral part of the fundamental principle of the rule of law in a democratic society. In short, "what is at stake is the confidence which the courts in a democratic society must inspire in the public" (*Morice v France* [GC], no. 29369/10, § 78, 23 April 2015).

100. In principle, a violation by a tribunal of domestic legal provisions relating to the establishment and competence of judicial organs gives rise to a violation of Article 6 § 1 (*DMD Group, A.S*, cited above, § 61). It follows that a violation of this principle, like the principles under the same provision that a tribunal shall be independent and impartial, does not require a separate examination of whether the breach of the principle that a tribunal be established by law rendered a trial unfair. Furthermore, in the light of the requirement that a tribunal shall be established in accordance with national law, the Court is called upon to examine whether the domestic law has been complied with in this respect. The findings by the national courts are therefore subject to European supervision. However, having regard to the general principle that it is for the national courts themselves to interpret in the first place the provisions of domestic law, the Court may not question their interpretation unless there has been a flagrant violation of domestic

law (see, *mutatis mutandis*, *Coëme and Others*, cited above, § 98 *in fine*, *Lavents*, cited above, § 114, *DMD Group, A.S*, cited above, § 61).

101. The Court considers that the same test of a flagrant breach of domestic law should apply where, as in the present case, the breach is attributable to another branch of Government and has been acknowledged by the domestic courts. In this regard, the Court will consider whether the national courts took account of the general principles in the Court's case-law in their examination of a claim that the appointment of a judge, by the other branches of Government, was not in accordance with the applicable domestic law, and in particular whether the courts took sufficient account of the flagrant nature of the breach in determining whether the tribunal in question was "established by law".

102. The Court notes in this connection that it flows from the criteria in the Court's case-law that a violation of national law be "flagrant" that only those breaches of applicable national rules in the establishment of a tribunal that are of a fundamental nature, and form an integral part of the establishment and functioning of the judicial system, can be considered to fulfil this criterion. In this context, the concept of a "flagrant" breach of domestic law therefore relates to the nature and gravity of the alleged breach. Furthermore, in the Court's examination of whether the establishment of a tribunal was based on a "flagrant" violation of domestic law, the Court will take into account whether the facts before it demonstrate that a breach of the domestic rules on the appointment of judges was deliberate or, at a minimum, constituted a manifest disregard of the applicable national law (see also in this context, *Judgment of the General Court of the European Union,* cited above, § 77 (see paragraph 69 above)).

103. Finally, the Court recalls that "the notion of the separation of powers between the executive and the judiciary has assumed growing importance in its case-law" (*Ramos Nunes de Carvalho E SÁ v Portugal* [GC], nos. 55391/13, 57728/13 and 74041/13, § 144, 8 November 2018). The same applies to the "importance of safeguarding the independence of the judiciary" (*Baka v. Hungary* [GC], no. 20216/12, § 165, 23 June 2016). Therefore, on the basis of the above-mentioned principles, and taking account of the object and purpose of the requirement that a tribunal be always established by law, and its close connection to the fundamental principle of the rule of law, the Court must look behind appearances and ascertain whether a breach of the applicable national rules on the appointment of judges created a real risk that the other organs of Government, in particular the executive, exercised undue discretion undermining the integrity of the appointment process to an extent not envisaged by the national rules in force at the material time.

(c) The application of these principles to the present case

104. The applicant was convicted and sentenced at first instance by the District Court of Reykjaness. On appeal the judgment was upheld by a panel of three judges in the newly established Court of Appeal, including A.E. Having been given leave to appeal to the Supreme Court, the applicant's request for the judgment of the Court of Appeal to be quashed and the case remitted for retrial was rejected by the Supreme Court. The applicant alleges that A.E.'s appointment as a judge of the Court of Appeal was not in accordance with domestic law.

105. It transpires from the facts of the case that the Supreme Court had already held in two judgments of 19 December 2017, in closely related judicial proceedings (see paragraphs 27-35 above), that the Minister of Justice had violated the Administrative Procedures Act No. 37/1993 when she decided to remove four candidates from the list presented to her by the Evaluation Committee and include four other candidates, among them A.E., in her proposal to Parliament. Two candidates who had been removed from the list instituted annulment and compensation proceedings before the national courts and were granted damages for personal injury inflicted on them by the Minister of Justice by the above-mentioned Supreme Court judgments of 19 December 2017.

106. Furthermore, in the Supreme Court judgment in the applicant's case, which made a direct reference to its two judgments of 19 December 2017, the court found that the procedure in Parliament had also violated temporary provision IV of the new Judiciary Act No. 50/2016, as Parliament had not followed the procedure stipulated by that provision by voting separately on each of the fifteen candidates proposed by the Minister of Justice, but had decided rather to vote on the proposal as a whole.

107. It follows that in its examination of the applicant's complaint, the Court must attach significant weight to the fact that the Supreme Court, the highest judicial organ in the national judicial system, has already found in three judgments, one of which was rendered in the applicant's case, that the above-mentioned rules of domestic law were violated in the process of appointing four particular judges to the Court of Appeal, including A.E. The Court has no basis to call into question the Supreme Court's findings as regards its interpretation of domestic law and must therefore also conclude that the appointment of A.E. was based on a process which violated the applicable rules of national law in force at the material time. Although not of direct relevance for the examination of the present case, the Court further notes that by two District Court judgments of 25 October 2018, currently pending before the Court of Appeal, the two remaining candidates excluded from the list by the Minister of Justice, J.H. and E.J., have also secured judgments in their favour, once again confirming that the Minister of Justice violated domestic law in the appointment process to the Court of Appeal, J.H. receiving both pecuniary and non-pecuniary damage, and E.J. receiving

a declaratory judgment confirming the State's tort liability in his case (see paragraphs 52-54 above).

108. In accordance with the general principles in the Court's case-law, (see paragraphs 97-103 above), it now remains for the Court to determine whether these already established violations of domestic law in the appointment of A.E., as a judge of the Court of Appeal, were, viewed as a whole, "flagrant" and therefore had the result, as alleged by the applicant, that A.E.'s participation in the panel which determined the applicant's criminal charge constituted a violation of Article 6 § 1, her appointment thus not being "established by law" under the Convention.

109. In the present case, the Supreme Court has already made clear that both the Minister of Justice and Parliament violated the applicable laws in the appointment of judges, including A.E., to the Court of Appeal which decided the applicant's case. However, it has a bearing on the Court's analysis that, as argued by the applicant (see paragraph 76 above), no explicit position was taken in the Supreme Court judgment of 24 May 2018 on whether these violations were "flagrant" within the meaning of the Court's case-law, as they flow from the requirements under Article 6 § 1 of the Convention.

110. The Supreme Court rejected the applicant's claim for the quashing of the Court of Appeal judgment, which the applicant based on there having been a violation of Article 59 of the Constitution and Article 6 § 1 of the Convention in the appointment of A.E. to the Court of Appeal. Although recognising that the actions of the Minister of Justice culminating in the appointment of A.E. were not in accordance with national law, the court held, nevertheless, that her appointment could not be considered a "nullity", her judicial rulings therefore not constituting a "dead letter" (see paragraph 50 above). Furthermore, the Supreme Court found, as previously mentioned, that the procedure in Parliament, whereby separate votes were not held for each of the fifteen candidates, had not been in conformity with the law, as stipulated by temporary provision IV of the new Judiciary Act. However, the Supreme Court found that this breach was not "significant", the court referring in this regard to its two judgments of 19 December 2017 in the compensation proceedings brought by two of the four candidates removed from the list by the Minister of Justice.

111. The Government submitted (paragraph 86 above) that the essence of the Supreme Court's reasoning had been that, in spite of these irregularities, A.E. had been legally appointed a judge of the Court of Appeal and was invested with the judicial competences just as any other appointed judge of the appellate tribunal. This meant that under domestic law, as interpreted and applied by the Supreme Court, these irregularities, established in the court's judgments of 19 December 2017, had not resulted in A.E. not being legally appointed as a judge. The applicant had therefore enjoyed a fair trial before a tribunal established by law within the meaning

of Article 6 § 1 of the Convention. The Government argued that reasonable grounds existed for the Supreme Court's findings and its conclusion had not amounted to a flagrant breach of national law.

112. The Court does not accept these arguments of the Government for the following five reasons.

113. Firstly, as already found by the Supreme Court, both the Minister of Justice and Parliament violated the applicable rules in the appointment of judges to the Court of Appeal, in particular as regards the procedure adopted in selecting four named candidates, including A.E., who were added by the Minister to her proposal to Parliament. Therefore, the Convention question before the Supreme Court was whether these violations of national law, viewed as a whole, were such that the participation of A.E., as a judge in the case of the applicant before the Court of Appeal, had had the result that his criminal charge was not determined by a tribunal established by law. In other words, the issue to be examined by the Supreme Court was not whether A.E.'s appointment was, as such, a "nullity" under Icelandic administrative law, or whether her judgments would thus constitute a "dead letter", but rather whether, assessed objectively, the overall process of her appointment as a judge had constituted a flagrant breach by the Minister of Justice and Parliament of the applicable rules in force at the material time in light of the Court's case-law flowing from Article 6 § 1 of the Convention.

114. Secondly, as the Court has explained above (see paragraph 100 above), in principle a violation by a tribunal of domestic legal provisions relating to the establishment and competence of judicial organs gives rise to a violation of Article 6 § 1 of the Convention. It follows that a violation of this principle, like the principles under the same provision that a tribunal shall be independent and impartial, does not require a separate examination of whether the breach of the principle that a tribunal be established by law rendered a trial unfair. Therefore, it is immaterial in the Court's assessment whether the violations adduced by the Supreme Court of the applicable rules in the appointment process had an impact on the fairness of the applicant's trial, as is argued by the Government. The mere fact that a judge, whose position is not established by law within the meaning of Article 6 § 1 of the Convention, determines a criminal charge, suffices for a finding of a violation of that provision in conformity with the fundamental principle of the rule of law.

115. Thirdly, and crucially, the Court recalls the findings of the Supreme Court in the applicant's case on 24 May 2018, and the two judgments of 19 December 2017, referred to by the court in the judgment in the applicant's case. The Minister of Justice removed from the list of fifteen candidates, assessed as the most qualified by the Committee, four candidates ranked numbers 7, 11, 12 and 14 in the Committee's internal ranking, and placed four other candidates on her own list who were ranked lower at numbers 17, 18, 23 and 30 respectively. Although the Minister of

Justice was statutorily authorised under domestic law to propose different candidates than those proposed by the Committee, provided that her choices were approved by Parliament, the Supreme Court found that the Minister had proceeded in this manner without an independent examination of the merits of the candidates in question and without any further collection of evidence or other materials to substantiate her conclusions. Therefore the breaches of national law by the Minister of Justice in the process of appointing the four judges in question, including A.E., were fundamental and formed an integral part of the appointment process in the assessment and selection of these judges to the newly established appellate court.

116. Moreover, the Minister of Justice failed, as established by the Supreme Court in its judgments of 19 December 2017 (see paragraphs 33-34 above), to engage in a detailed comparison of the competences of the four candidates, ranked lower by the Committee, with the fifteen candidates considered the most qualified, as was required by general principles of administrative law and the general principle of domestic law that in the appointment of persons for office, only the most qualified should be selected. This finding was once again confirmed by the Supreme Court in the applicant's case (see paragraph 50 above), the court finding that it could not accept, as had been argued by the Minister of Justice in her memorandum to Parliament of 30 May 2017 (see paragraph 18 above), "that by only increasing the weight ascribed to judicial experience from that which such experience was ascribed by the Evaluation Committee in its internal table, relied upon in its assessment report ..., but relying in other respects on the 'sufficient investigation' of the Committee as to each assessment factor, the finding could be made that four named candidates for the post of judge in the Court of Appeal, but not others, would be removed from the group of the fifteen most qualified, and four specific named candidates would be moved up into that group rather than others". It follows in the Court's view that these violations of national law by the Minister, as confirmed by the Supreme Court, lay at the core of the process of selecting the candidates for the vacant posts in the new Court of Appeal, thus constituting a defect of a fundamental nature in the overall process of appointment of the four judges.

117. Fourthly, as flows directly from the Supreme Court judgments of 19 December 2017, in the cases brought by two of the four candidates removed from the list by the Minister of Justice, the court's conclusion that the State was to pay them an award for personal injury was based on the nature of the Minister's failure to adequately prepare and investigate the competences of the four candidates in relation to the fifteen considered most qualified by the Committee. In fact, it transpires from the documents before the Court, and the factual findings by the Supreme Court in its judgments of 19 December 2017, that the Minister of Justice had received expert advice

from lawyers within the administration to that effect before submitting her proposal to Parliament (see paragraph 13 above).

118. The Court recalls in this regard that the Minister was considered by the Supreme Court to have acted "in complete disregard of [the] obvious danger" (see paragraph 35 above) to the reputational interests of two of the four candidates, who had instituted judicial proceedings, and had thus rather served the interests of some of the other four she favoured in the process. As also found by the Supreme Court, the Minister did not provide a sufficient justification for her decision to remove the candidates placed numbers 7, 11, 12 and 14, respectively, in the opinion of the Committee and include rather candidates placed lower in the Committee's ranking at numbers 17, 18, 23 and 30. The Minister's reliance on prior judicial experience was, once again as found by the Supreme Court in the applicant's case, not based on an independent assessment by the Minister or newly obtained information or other documentation. Therefore, in the light of the factual findings of the Supreme Court, the breaches of national law by the Minister seem not only to have constituted, objectively, a fundamental defect in the process, viewed as a whole, but also to have demonstrated her manifest disregard for the applicable rules in force at the material time.

119. Fifthly, the Court places emphasis on the findings of the Supreme Court in its two judgments of 19 December 2017 that the domestic legal framework was set up explicitly to limit the discretion of the executive in the appointment of judges by requiring that the competences of the candidates to the fifteen vacant judicial posts in the newly established Court of Appeal be assessed by a specially constituted Evaluation Committee composed of experts nominated by the Supreme Court, the Judicial Council, the Bar Association and Parliament. Moreover, deviating from the general rules in the appointment of judges in Iceland as a new Court of Appeal was to be established, Parliament had decided that with the enactment of the new Judiciary Act, and in particular temporary provision IV, the Minister of Justice would not solely be vested with the nominating authority to the President of Iceland. Therefore, in accordance with temporary provision IV to the new Judiciary Act, the Supreme Court interpreted the provision in the applicant's case to require that Parliament itself was to vote on each and every candidate in a separate vote. By failing to do so, Parliament, by a divided vote along party-political lines (see paragraph 22 above), also departed from the applicable rule for the appointment of fifteen judges to the new Court of Appeal set by itself in primary legislation.

120. It is not dispositive for the Court's assessment of the gravity of this procedural breach by Parliament that the Supreme Court found, in the judgment of 24 May 2018, that this breach was not "significant", referring to its two previous judgments of 19 December 2017. Firstly, the Court notes that no such reasoning is to be found in the earlier judgments. Secondly, the reasoning of the Supreme Court in the applicant's case does not demonstrate

that this assessment was made within the context of determining whether the violation of the applicable rule by Parliament amounted to a "flagrant" breach within the context of Article 6 § 1 of the Convention, but rather whether the breach, as such, resulted in the appointment of A.E. being considered a "nullity" within the meaning of Icelandic administrative law, her rulings thus constituting a "dead letter", and also whether this breach rendered the applicant's trial unfair, his criminal charge thus having been determined by a court lacking in independence and impartiality (see paragraph 50 above).

121. Viewing this procedural breach through the lens of Article 6 § 1 of the Convention, as was required under the Court's case-law, the Court observes that, as explicitly found by the Supreme Court in its judgments of 19 December 2017 (see paragraph 32 above), the statutory scheme under temporary provision IV, requiring the active participation of Parliament in voting on the candidates to the new Court of Appeal, a transformative change in the Icelandic judicial system, was meant to serve the important public interest of safeguarding judicial independence *vis-à-vis* the executive branch. Taking account of the Supreme Court's judgment in the applicant's case, which found a breach of this provision as regards the requirement of separate voting by Parliament on each judicial candidate, it must therefore be concluded that this legislative framework was intended to minimise the risk of party-political interests unduly influencing the process by which the qualifications of each candidate to the newly established Court of Appeal were to be evaluated and ultimately confirmed by the legislative branch, the Parliament.

122. As explained above (see paragraphs 98, 99 and 103), the Court places emphasis on the importance in a democratic society governed by the rule of law of securing the compliance with the applicable rules of national law in the light of the principle of the separation of powers (see also Opinion 18/2015 of 16 October 2015 of the Consultative Council of European Judges (CCJE), see paragraph 70 above). Therefore, the Court finds that the failure of Parliament to adhere to the national rule of separate voting on each candidate, as confirmed by the Supreme Court, also amounted to a serious defect in the appointment procedure, having an impact on the integrity of the process as a whole, in particular as regards the four candidates selected by the Minister of Justice whereby she departed from the assessment of the Committee. This defect was furthermore compounded by the fact, as confirmed by the Supreme Court, that in the preparation of the proposals submitted to Parliament, the Minister had herself violated the Administrative Procedures Act in failing to sufficiently substantiate her decision to depart from the assessment made by the Evaluation Committee as regards the four particular candidates. The Court recalls that the Supreme Court held in its judgments of 19 December 2017 (paragraph 34 above) that only by the Minister fulfilling her statutory duties

under the Administrative Procedures Act and the general principle of domestic law that only the most qualified candidate should be selected for office could Parliament have sufficiently served its role in the process and taken a position on the Minister's assessment which departed from the opinion of the Committee as regards the four candidates in question.

123. In the light of all of these elements, the Court cannot but conclude that the process by which A.E. was appointed a judge of the Court of Appeal, taking account of the nature of the procedural violations of domestic law as confirmed by the Supreme Court of Iceland, amounted to a flagrant breach of the applicable rules at the material time. Indeed, the Court finds that the process was one in which the executive branch exerted undue discretion, not envisaged by the legislation in force, on the choice of four judges to the new Court of Appeal, including A.E., coupled with Parliament failing to adhere to the legislative scheme previously enacted to secure an adequate balance between the executive and legislative branches in the appointment process. Furthermore, the Minister of Justice acted, as found by the Supreme Court, in manifest disregard of the applicable rules in deciding to replace four of the fifteen candidates, considered among the most qualified by the Committee, by other four applicants, assessed less qualified, including A.E. The process was therefore to the detriment of the confidence that the judiciary in a democratic society must inspire in the public and contravened the very essence of the principle that a tribunal must be established by law, one of the fundamental principles of the rule of law. The Court emphasises that a contrary finding on the facts of the present case would be tantamount to holding that this fundamental guarantee provided for by Article 6 § 1 of the Convention would be devoid of meaningful protection. Therefore, the Court concludes that there has been a violation of Article 6 § 1 of the Convention in the present case.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION AS REGARDS THE RIGHT TO AN INDEPENDENT AND IMPARTIAL TRIBUNAL

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

125. The Government contested this argument.

126. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible. However, having regard to the conclusions reached above under the first limb of the applicant's complaint based on the same provision, the Court considers that it is not necessary to examine this complaint separately.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

127. 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

128. The applicant claimed 5,000 euros (EUR) in respect of non-pecuniary damage. The applicant did not claim an award for pecuniary damage.

129. The Government objected to the claim for non-pecuniary damage as excessively high. The Government argued that the finding of a violation would in itself constitute just satisfaction for any non-pecuniary damages claimed.

130. Taking account of the particular circumstances of the present case, the Court agrees with the Government that the finding of a violation of Article 6 § 1 of the Convention constitutes in itself sufficient just satisfaction.

131. The Court further notes that it is for the respondent State to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation or violations found by the Court and to redress as far as possible the effects. In this regard, the Court observes that Sections 228 and 232 of the Criminal Procedures Act provide that the Committee on Reopening of Judicial Proceedings can, when certain conditions are fulfilled, order the reopening of criminal proceedings that have been terminated by a final judgment rendered in the Court of Appeal or the Supreme Court (see paragraph 60 above) (see, *mutatis mutandis*, *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08, 50571/08, 50573/08 and 40351/09, § 315, 13 September 2016, and *Ramos Nunes de Carvalho E SÁ v. Portugal* [GC], nos. 55391/13, 57728/13 and 74041/13, § 222, 6 November 2018). In this regard, the Court emphasises the importance of ensuring that domestic procedures are in place whereby a case may be re-examined in the light of a finding that Article 6 of the Convention has been violated. As the Court has previously stressed, such procedures may be regarded as an important aspect of the execution of its judgments and their availability demonstrates a Contracting State's commitment to the Convention and to the Court's case-law (*Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, § 99, 11 July 2017).

B. Costs and expenses

132. The applicant also claimed EUR 26,795 for the costs and expenses incurred before the domestic courts and EUR 20,150 for those incurred before the Court.

133. The Government submitted that the applicant's lawyer's fees were paid by the Treasury in accordance with the Criminal Procedures Act. They further alleged that the applicant had not submitted any invoice demonstrating that he had reimbursed the Treasury. The Government further asserted that the costs claimed before the domestic courts and the Court were excessively high.

134. 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 have been 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 sum of EUR 15,000 covering costs under all heads.

C. Default interest

135. 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

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by five votes to two, that there has been a violation of Article 6 § 1 of the Convention as regards the right to a tribunal established by law;

3. *Holds*, unanimously, that there is no need to examine the remaining complaints under Article 6 § 1 of the Convention;

4. *Holds*, by five votes to two,
   (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 amount plus any tax that may be chargeable to the applicant, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 15,000 (fifteen thousand euros) 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 amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

Done in English, and notified in writing on 12 March 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı	Paul Lemmens
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following joint dissenting opinion of Judges Lemmens and Griţco are annexed to this judgment.

P.L.
H.B.

JOINT DISSENTING OPINION OF JUDGES LEMMENS AND GRIŢCO

1. At the outset of this separate opinion, we would like to stress that we strongly believe in the fundamental importance of the independence of the judiciary for the rule of law. With respect to the crucial issue of the appointment of judges, we think that objective selection criteria and a fair selection process are indispensable. The aim should be to guarantee equal treatment of the candidates, to arrive at a selection based on the merits of the candidates, and to avoid undue political influences.

The present judgment is obviously in line with those principles.

We nevertheless respectfully disagree with the majority. In our opinion, they disregard the principle of subsidiarity, by setting aside the assessment by the highest domestic court of the scope of the relevant rules of domestic law. That assessment took place in the context of an appointment process which, while undeniably tainted by flaws, was substantially in compliance with the applicable rules. We are aware of the fact that the process was the object of a hard-fought political dispute (see for instance the motion of no-confidence against the Minister of Justice, tabled after the parliamentary elections and the formation of a new government – in which the Minister of Justice kept her position – mentioned in paragraph 51 of the judgment). We are afraid that the big commotion that accompanied the appointment of the fifteen judges of the newly constituted Court of Appeal of Iceland not only found an echo in the paragraphs of this judgment but also managed to deviate the rationale of the majority away from the established principles of this Court's case law.

The majority open a Pandora's box, by offering to convicted persons an argument, indefinitely available, to challenge their conviction on the basis of grounds (as in the case at hand) that have nothing to do with the fairness of the trial.

The judgment is in our opinion an example of "overkill". The pilot in this case (the Minister of Justice, followed by Parliament) made a navigation mistake, but that is not a reason to shoot down the plane (the Court of Appeal).

2. What is this case about? The applicant argues that he was convicted by a tribunal that does not satisfy one of the requirements of Article 6 § 1 of the Convention, namely the requirement to be "established by law". His complaint is more specifically directed at the fact that the Court of Appeal counted among its members one judge, A.E., whose appointment allegedly

had not been "in accordance with domestic law" (see paragraph 72 of the judgment; we note the difference between "established by law" and "in accordance with the law", a difference to which the majority do not seem to attach any importance).

This case is not about the independence of the judiciary as such. Neither is it about the right of candidates for a post in the judiciary to a fair and equal assessment and comparison of their applications. Finally, it is not about the remedies to be offered to candidates who have not been appointed and who contest the legality of the appointment process.

The complaint now before this Court was already put before the Supreme Court. That court rejected it by judgment of 24 May 2018 (see paragraph 50 of the present judgment).

The majority base their reasoning on the findings of the Supreme Court in two judgments of 19 December 2017 (see paragraphs 31-35 of the present judgment). However, these judgments were not delivered in the case of the applicant, and did not concern the question whether the Court of Appeal was a tribunal "established by law". Moreover, the Supreme Court in its judgment of 24 May 2018 explicitly held that, notwithstanding its findings in the judgments of 19 December 2017, the applicant's complaint had to be dismissed. The reasons why the majority nevertheless prefer to develop a reasoning based on the judgments of 19 December 2017 and to disassociate themselves from the Supreme Court's dealing with these judgments – its own judgments – in the specific context of the applicant's complaint, are, in our view, far from convincing.

3. Before examining the applicant's complaint, it is useful to briefly describe what the Supreme Court found in its various relevant judgments.

By two judgments of 31 July 2017, in proceedings initiated by two candidates who had been ranked favourably by the Evaluation Committee, but not included on the list of candidates submitted by the Minister of Justice to Parliament and approved by the latter, the Supreme Court decided that the District Court had lawfully dismissed the petitioners' claims for annulment (see paragraph 29 of the present judgment). These judgments had the effect of rendering the appointments of the fifteen judges of the Court of Appeal final.

By the two above-mentioned judgments of 19 December 2017, delivered in the same proceedings, the Supreme Court awarded each of the petitioners compensation for personal injury. It found that, by submitting to Parliament a list of candidates without providing sufficient reasons as to why it

departed from the list of the Evaluation Committee with respect to four candidates, the Minister of Justice had violated Section 10 of the Administrative Procedures Act. It also found that since this procedural breach had not been rectified in Parliament, the procedure in Parliament had likewise been flawed (see paragraphs 33-34 of the present judgment). Since the Minister had unjustifiably caused injury to the plaintiffs, the latter were awarded damages (see paragraph 35 of the present judgment). Those judgments thus established that the Minister, followed by Parliament, had violated a procedural rule contained in the Administrative Procedures Act. No other illegalities were established.

It should be emphasised that the Supreme Court did not criticise the Minister for having departed from the Evaluation Committee's selection. On the contrary, it acknowledged that the Minister could lawfully do so (see paragraph 32 of the present judgment). There is not even any indication that the Minister had violated the general principle of law that only the most qualified candidates should be selected (ibid.). The irregularity committed by the Minister was of a procedural nature: she had not sufficiently shown that she had indeed proposed candidates who, on the basis of her policy decision to give more weight to the criterion of professional experience (see paragraph 16 of the present judgment), were the most qualified.

Then comes the judgment of 24 May 2018 in the applicant's case. This is the judgment that is the most relevant for us. The Supreme Court first notes the applicant's argument: since A.E.'s appointment was unlawful, she allegedly "is not a lawful holder of judicial power and [the] court's judicial rulings in which [she] has participated constitute a dead letter" (see paragraph 50 of the present judgment). This argument is dismissed on the grounds that the flaws in the appointment process were not such that the appointment of A.E., while susceptible of being annulled, would constitute a "nullity".[1] This conclusion is based on three grounds: first, all 33 candidates fulfilled the requirements to hold the office of judge in the Court of Appeal, as was concluded by the Evaluation Committee and not contested by the applicant; secondly, the appointment of the judges was generally conducted in accordance with the "formal procedural rules" (which we understand to be the rules providing for examination of the

1. The word "nullity" is the English translation for "*markleysa*". We wonder whether the distinction made by the Supreme Court between the possibility of annulment, on the one hand, and a "nullity", on the other hand, does not essentially correspond to the distinction in the administrative law of a number of member States of the Council of Europe between two categories of illegalities: those that can lead to an annulment of the act concerned (when requested within the applicable time-limit) and those that are so serious that the act concerned must be deemed to be non-existent, that is, unable to produce any legal consequences at all.

qualifications of the candidates and an opinion on the candidates by the Evaluation Committee, for a proposed list of candidates by the Minister of Justice, for approval by Parliament of the candidates proposed by the Minister, and for appointment by the President) – there was one irregularity, namely the fact that Parliament voted on all fifteen candidates together and not on each candidate separately, but this was a defect "which did not have significance"; thirdly, all fifteen candidates selected by the Minister and approved by Parliament were formally appointed by the President (ibid.).

The Supreme Court thus decided that, notwithstanding the flaws affecting the appointment process, the resulting appointment of A.E. was not a "nullity" and rulings by judge A.E. were not a "dead letter". In other words: the flaws in the appointment process did not affect the legitimacy of the position of A.E. as a Court of Appeal judge.

Turning to the applicant's additional argument that, because of A.E.'s participation, he had not enjoyed a fair trial before an independent and impartial tribunal, the Supreme Court again assessed the consequences of the flaws in the procedure followed by the Minister of Justice. It noted that the appointment of all fifteen judges had become a reality upon the signing of their letters of appointment by the President. From that time, those judges had held positions which precluded them from being discharged from office except by a judicial decision. Once appointed, they were under the obligation to follow only the law in the performance of their official duty, and they were afforded independence in their judicial work. In conclusion, "there [was] not a sufficient reason to justifiably doubt that [the applicant] enjoyed a fair trial before independent and impartial judges, in spite of the flaws in the procedure by the Minister of Justice" (ibid).

We would like to emphasise that it was not the Supreme Court's task to examine in its judgment of 24 May 2018 each and every aspect of the appointment process. It limited itself to highlighting those aspects that led to the conclusion that the Court of Appeal, comprising A.E., was a tribunal "established by law". Unlike the majority, we do not see any need to go further. As mentioned above, this case is not about the appointment of A.E. as such, but (only) about the effects of her appointment on the legal basis of the Court of Appeal in the applicant's case. This is a narrow issue, and we consider that the analysis by the Supreme Court was sufficient for the purposes of the examination of that issue. It is clear from the judgment in question that "the essential issues of the case have been addressed" by the Supreme Court (see, *mutatis mutandis*, *Taxquet v. Belgium* [GC], no. 926/05, § 91, ECHR 2010, and the authorities cited therein).

4. The present case raises the question of principle of what should be understood by the requirement that a tribunal must be "established by law".

As is rightly recalled by the majority, the object of the term "established by law" is to ensure that the judicial organisation does not depend (too much) on the discretion of the executive or of the judicial authorities themselves, but rather that it is regulated by law emanating from Parliament (see paragraph 99 of the judgment, with further references). The majority also rightly emphasise that a tribunal that is not established in conformity with the intentions of the legislature will necessarily lack the "legitimacy" required to resolve legal disputes (see paragraph 97 of the judgment, with a further reference to the Court's case law).

The phrase "established by law" covers not only the legal basis for the very existence of a tribunal, but also the composition of the bench in each case (see *Buscarini v. San Marino* (dec.), no. 31657/96, 4 May 2000; *Raita and Jali Raita Consulting Oy* (dec.), no. 37901/97, 15 November 2001; and *Lavents v. Latvia*, no. 58442/00, § 114, 28 November 2002). We agree with the majority that the "law", within the meaning of Article 6 § 1 of the Convention, comprises not only legislation providing for the establishment and competence of judicial organs, but also "any other provision of domestic law which, if breached, would render the participation of one or more judges in the examination of a case irregular" (see paragraph 98 of the judgment, with further references).

5. The majority extend the scope of the concept of "establishment" to the process of appointing judges, and hold that in order to be in accordance with the principle of the rule of law, that process must "be conducted in compliance with the applicable rules of national law in force at the material time" (see paragraph 98 of the judgment, referring to judgments of the EFTA Court and the General Court of the European Union).

To our regret, we consider that such an unqualified statement is too broad. While certain illegalities affecting the appointment process may at the same time affect the "legality" of the establishment of the court in which a candidate later sits as a judge, they must in our opinion be clearly circumscribed and in any event linked to the overall purpose of the requirement that the tribunal be "established by law", namely that of ensuring that the court has the "legitimacy" to decide cases.

6. What, in the context of the present case, would be our test for finding that a tribunal is not "established by law"?

Generally speaking, as long as an official's appointment is not annulled, that person is fully vested with the powers attached to his or her function. This is a principle of administrative law that serves legal certainty. Decisions taken by an official are not unlawful (and judgments adopted by a judge are not in violation of the "established by law" requirement) merely because that person has not been appointed according to the rules, in particular those rules that are intended to ensure an equal opportunity for all candidates to be selected for the position. This is what the Supreme Court was referring to, when it held in its judgment of 24 May 2018 that the appointment of all fifteen judges of the Court of Appeal had become a reality and that all of these judges enjoyed the rights and were subject to the obligations attached to their office (see paragraph 50 of the present judgment). The presumption therefore is that the Court of Appeal, composed of judges who have been appointed by the competent authority, is in each case brought before it a tribunal "established by law".

We admit that there may be instances where the violation of the applicable rules is of such a nature that the basis itself for the composition of the tribunal in a given case is insufficient, from the point of view of Article 6 § 1 of the Convention.

In particular, and without being exhaustive, we think that there may be a problem under Article 6 § 1 where disregard of the rules of domestic law on the appointment of judges has the consequence of having a bench including a person:

(i) who *does not* (or who *does no longer*) have the status of judge (see *Posokhov v. Russia*, no. 63486/00, § 43, ECHR 2003-IV; *Fedotova v. Russia*, no. 73225/01, §§ 40-41, 13 April 2006; *Ilatovskiy v. Russia*, no. 6945/04, §§ 39-41, 9 July 2009; *Gorguiladzé v. Georgia*, no. 4313/04, §§ 72-74, 20 October 2009; *Pandjikidzé and Others v. Georgia*, no. 30323/02, §§ 108-110, 27 October 2009; and *Zakharkin v. Russia*, no. 1555/04, §§ 149-151, 10 June 2010), or

(ii) who *could not* have been appointed to the position of judge (see *Ilatovskiy*, cited above, § 40).

In the present case, the violations that occurred during the appointment process are of a very different nature. The Supreme Court found, referring to the Evaluation Committee's report, that all 33 candidates fulfilled all the requirements to hold the office of judge of the Court of Appeal. In this context it is important to note that the requirements to which the Supreme Court was referring were requirements of a substantive nature. Such requirements are crucial parts of the rules on the selection of judges (compare *Fedotova*, cited above, § 42, and *Ilatovskiy*, cited above, § 40). As a result of fulfilling the substantive requirements, any of the candidates,

once appointed, would have the legitimacy to serve as a judge and decide cases (see opinion no. 18/2015 of the Consultative Council of European Judges of 16 October 2015, point 14, quoted in paragraph 70 of the present judgment). Moreover, all candidates were assessed by the Evaluation Committee. However, the conclusions of that Committee were not binding on the Minister. The fact that some candidates were preferred above others, was a matter of assessment of their respective qualities. On this issue, the Evaluation Committee and the Minister could legitimately have different opinions. It is true that, as established by the Supreme Court, the Minister did not perform her assessment in accordance with the relevant rules. In the relationship between the candidates and the State, not only have the flaws in the selection process been established, but also the consequences thereof have been repaired (see the Supreme Court judgments of 19 September 2017 ordering the State to pay compensation for non-pecuniary damage to two disappointed candidates; see paragraphs 31-35 of the present judgment), or are in the process of being repaired (proceedings instituted by two other disappointed candidates, currently pending before the Court of Appeal; see paragraphs 52-54 of the present judgment).

Under domestic law, the consequences following from the flaws in the appointment process went no further than that. According to the conclusion of the Supreme Court judgment of 24 May 2018, the flaws in the appointment process are not such that the members of the Court of Appeal, or at least the four members who were not proposed by the Evaluation Committee, lack the legitimacy to serve as judges of the Court of Appeal, or that the Court of Appeal cannot be considered a tribunal "established by law".

7. The majority use the test of a "flagrant breach of domestic law" (see paragraph 101 of the judgment).

We cannot but note that this test is applied in a context that was not the one for originally introducing such a test. Indeed, the "flagrant breach of domestic law" test, in its common understanding, applies to very different situations from the one at hand. In a number of cases the Court held that it could not question the interpretation of domestic law by a domestic court unless there had been a "flagrant violation" or a "flagrant breach" of domestic law (see, specifically with respect to the requirement that a tribunal must be established "by law", *Lavents*, cited above, § 114; *Accardi and Others v. Italy* (dec.), no. 30598/02, ECHR 2005-II; *Jorgic v. Germany*, no. 74613/01, § 65, ECHR 2007-III; *DMD GROUP, a.s., v. Slovakia*, no. 19334/03, § 61, 5 October 2010; *Kontalexis v. Greece*, no. 59000/08, § 39, 31 May 2011; *Šorgić v. Serbia*, no. 34973/06, § 63, 3 November 2011; *Biagioli v. San Marino* (dec.), no. 8162/13, § 75, 8 July 2014; and *Miracle*

Europe Kft v. Hungary, no. 57774/13, § 50, 12 January 2016; see also paragraph 100 of the present judgment). The Court nowadays uses a somewhat different test, that of an "arbitrary or manifestly unreasonable" interpretation by the domestic court (see, among others, *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 149, 20 March 2018; *S., V. and A. v. Denmark* [GC], nos. 35553/12 and 2 others, § 148, 22 October 2018; and *Molla Sali v. Greece* [GC], no. 20452/14, § 149, 19 December 2018). The present case has nothing to do with an erroneous interpretation of domestic law. In any event, the majority do not question the interpretation of domestic law by the Supreme Court; they rather rely on its findings in this respect (see paragraphs 107, 113, 115 and 118 of the judgment).

The term "flagrant" has appeared in some other contexts as well. One such context is that of the risk of a "flagrant denial of a fair trial" or a "flagrant denial of justice" in cases of the granting of an extradition request or the ordering of an expulsion. In that context, the term refers to a trial "which is manifestly contrary to the provisions of Article 6 or the principles embodied therein" (see *Ahorugeze v. Sweden*, no. 37075/09, § 114, 27 October 2011; *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, § 259, ECHR 2012 (extracts); *Al Nashiri v Poland*, no. 28761/11, § 562, 24 July 2014; *Husayn (Abu Zubaydah) v. Poland*, no. 7511/13, § 552, 24 July 2014; and *Harkins v. the United Kingdom* (dec.) [GC], no. 71537/14, § 62, 15 June 2017).

Another context is that of a "flagrant denial of justice" leading to the conclusion that the resulting conviction cannot justify a deprivation of liberty under Article 5 § 1 a) of the Convention (see, among others, *Drozd and Janousek v. France and Spain*, 26 June 1992, § 110, Series A no. 240; *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 461, ECHR 2004-VII; *Stoichkov v. Bulgaria*, no. 9808/02, § 51, 24 March 2005; *Hammerton v. the United Kingdom*, no. 6287/10, § 98, 17 March 2016; and *Gumeniuc v. the Republic of Moldova*, no. 48829/06, § 24, 16 May 2017).

The present case has nothing to do with any of the above-mentioned contexts. It is not the fairness of the trial that is under review[2], but the basis for the establishment of the sentencing tribunal.

8. Even assuming that the "flagrant violation of domestic law" test is the correct test to be applied in the context of the requirement that a tribunal

2. On this specific point we agree with the majority when they state that a violation of the principle that a tribunal must be "established by law" does not require a separate examination of whether that violation rendered the trial in the case of the applicant unfair (see paragraph 114 of the judgment).

must be "established by law", we are of the opinion that the majority do not correctly apply such a test.

First of all, we would like to recall that according to the Court the comparable "flagrant denial of justice" test is a stringent test of unfairness. A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6. What is required is "a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article" (see, among others, *Ahorugeze*, cited above, § 115; *Othman (Abu Qatada)*, cited above, § 260; *Tsonyo Tsonev v. Bulgaria (no. 3)*, no. 21124/04, § 59, 16 October 2012; *Al Nashiri v. Poland*, cited above, § 563; *Husayn (Abu Zubaydah)*, cited above, § 553; *Hammerton*, cited above, § 99; and *Harkins*, cited above, § 64). Transposed to the requirement that a tribunal must be "established by law", this would mean that there could only be a violation of Article 6 § 1 of the Convention where the breach of the rules relating to the establishment or the jurisdiction of the tribunal is of such a fundamental nature as to amount to the destruction of the very essence of the guarantee of establishment by law (compare paragraph 123 of the judgment).

Furthermore, in assessing whether a breach of such a nature has occurred, the starting point must be the assessment of the gravity of the breach by the domestic courts. It is within the framework of the domestic legal system, as interpreted by these courts, that legitimacy issues must be assessed.

In this regard, we note that while the majority agree with the Supreme Court's finding that there were flaws in the process of appointment of judges to the Court of Appeal, they reject the Supreme Court's finding that these flaws were not of such a nature as to affect the legitimacy of the appointment of A.E. or, more generally, the legal basis for the "establishment" of the Court of Appeal.

We cannot agree with such an approach. The assessment of the consequences of a violation of certain rules of domestic law is in itself a matter of domestic law. As such, it is not for the Court to substitute its assessment for that of the domestic courts, unless that assessment was arbitrary or manifestly unreasonable or, in the words of the majority, there was a "flagrant violation" of domestic law.

What the majority are doing, in disregard of the principle of subsidiarity, is simply to substitute their assessment of the gravity of the breach of

certain rules relating to the appointment of the judges of the Court of Appeal for that of the Supreme Court. We believe that nothing in the Supreme Court's reasoning warrants such an approach. The five reasons given by the majority to reject the Supreme Court's reasoning (see paragraphs 112-22 of the present judgment) do not comprise any argument which would support the conclusion that the Supreme Court's assessment was arbitrary or manifestly unreasonable.

9. In our opinion, the Court of Appeal was a tribunal "established by law" when it examined the criminal charges against the applicant. Like the Supreme Court, we find that the breaches of some of the rules relating to the appointment of judges to the Court of Appeal were not such as to result in the Court of Appeal lacking the required legal basis to subsequently hear cases with the participation of one or more of the four judges who have been favoured by the Minister of Justice above those presented by the Evaluation Committee.

Our conclusion is based in particular on the following elements:

- the Minister of Justice had the right to make changes to the list of candidates submitted by the Evaluation Committee;
- she presented arguments for her proposals and for the changes she had decided to make to the list of candidates submitted by the Evaluation Committee;
- Parliament approved the Minister's proposal to nominate fifteen named individuals as judges of the Court of Appeal; we do not consider that the failure to vote separately on each candidate constituted a "serious defect" in the appointment procedure (see paragraph 122 of the judgment), and rather agree with the Supreme Court that this failure did not have any significance[3];
- we agree with the Supreme Court that the Minister of Justice did not sufficiently substantiate her proposal; however, all the steps taken by the Minister of Justice, the voting in Parliament and in general the whole

3. We find it strange that the majority consider that the requirement of an "active participation of Parliament in voting on the candidates" was intended to "[safeguard] judicial independence *vis-à-vis* the executive branch", and that the requirement of separate voting on each candidate was intended "to minimise the risk of party-political interests unduly influencing the process by which the qualifications of each candidate to the newly established Court of Appeal were to be evaluated and ultimately confirmed by the legislative branch, the Parliament" (see paragraph 121 of the judgment). Where the law provides that the proposals by a Minister for appointments to a judicial position are to be approved by Parliament, this means that the executive branch cannot decide alone, but it does not at all rule out political considerations playing a role in the appointment process. Moreover, the involvement of Parliament will normally require an agreement by the parties constituting the majority on each of the candidates proposed by the Minister. It is in our opinion not "significant", to use the wording of the Supreme Court, whether this agreement is expressed through separate votes on each candidate or through a global vote on the package of candidates.

selection process, were conducted in a public and transparent manner, as is illustrated by the fact that the process was a highly debated event in Iceland;

- in accordance with the Minister of Justice's proposal and Parliament's acceptance of the list presented by her, the President of Iceland signed the appointment letters for the fifteen candidates nominated for the position of judge of the Court of Appeal, including A.E.;

- the appointment of the judges was generally conducted in accordance with the "formal procedural rules" as interpreted by the Supreme Court in its judgment of 24 May 2018;

- the substantive requirements provided for by domestic law in order to be appointed as a judge of the Court of Appeal were met by all candidates, including A.E.

We therefore conclude, like the Supreme Court, that there has been no violation of Article 6 § 1 of the Convention.

10. We finally would like to draw the attention to the consequences following from the present judgment.

With regard to the consequences for Iceland, the majority limit themselves to referring to the possibility of reopening the criminal proceedings against the applicant (see paragraph 131 of the judgment). Nothing is said about the general measures that may have to be adopted in order to ensure that violations similar to the one that occurred in the present case will not occur in other cases. We note that the issue raised by the applicant in the present case may arise anew in any of the cases that are brought, or will be brought, before the Court of Appeal. It will be for the competent authorities, under the supervision of the Committee of Ministers, to tackle this thorny issue.

The present judgment will also have consequences for States other than the respondent State. The question will undoubtedly arise whether and to what extent court decisions can be challenged on the basis of a flaw in the procedure for appointing a judge to sit on the bench, a flaw which may have occurred a long time before the case arrived before that judge. May we predict that this is an issue that, sooner rather than later, will return to the Court, in the framework either of its contentious jurisdiction or of its newly acquired advisory jurisdiction?