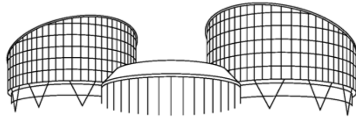

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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Unanimous violation of right to a "tribunal established by law" on account of grave breaches in the appointment of a judge to Icelandic Court of Appeal

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

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

The case concerned the applicant's allegation that the new Icelandic Court of Appeal (*Landsréttur*) which had upheld his conviction for road traffic offences was not "a tribunal established by law", on account of irregularities in the appointment of one of the judges who heard his case.

Given the potential implications of finding a violation and the important interests at stake, the Court took the view that the right to a "tribunal established by law" should not be construed too broadly such that any irregularity in a judicial appointment procedure would risk compromising that right.

It thus formulated a three-step test to determine whether irregularities in a judicial appointment procedure were of such gravity as to entail a violation of the right to a tribunal established by law. It then proceeded to find as follows.

Over the past decades, the legal framework in Iceland governing judicial appointments had seen some important changes aimed at limiting ministerial discretion in the appointments process and thereby strengthening the independence of the judiciary. Controls on ministerial power had been further intensified in connection with the appointment of judges to the newly established Court of Appeal, where Parliament had been tasked with approving every candidate proposed by the Minister of Justice, in order to enhance the legitimacy of this new court.

However, as found by the Icelandic Supreme Court, this legal framework had been breached, particularly by the Minister of Justice, when four of the new Court of Appeal judges had been appointed. While the Minister had been authorised by law to depart from the Evaluation Committee's proposal, subject to certain conditions, she had disregarded a fundamental procedural rule that obliged her to base her decision on sufficient investigation and assessment. This rule was an important safeguard to prevent the Minister from acting out of political or other undue motives that would undermine the independence and legitimacy of the Court of Appeal, and its breach had been tantamount to restoring the discretionary powers previously held by her office in the context of judicial appointments, thereby neutralising the important gains and guarantees of the legislative reforms. There had been further legal guarantees in place to remedy the breach committed by the Minister, such as the parliamentary procedure and the ultimate safeguard of judicial review before domestic courts, but all those safeguards had proved ineffective, and the discretion used by the Minister to depart from the Evaluation Committee's assessment had remained unfettered.

Applying its three-step test, the Court held that the applicant had been denied his right to a "tribunal established by law" on account of the participation in his trial of a judge whose appointment had been undermined by grave irregularities which had impaired the very essence of that right.

1. Grand Chamber judgments are final (Article 44 of the Convention).
All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

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Principal facts

The facts of Mr Ástráðsson's case

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

Mr Ástráðsson was convicted in March 2017 of driving without a valid licence and while under the influence of drugs. His appeal was heard by the new Court of Appeal (*Landsréttur*), which had been set up in January 2018. Judge A.E. was one of the judges assigned to his case and Mr Ástráðsson requested her withdrawal, arguing that there had been irregularities in the procedure for her appointment as established by the Supreme Court in its judgments of December 2017 (see below), but his request was denied.

The Court of Appeal upheld Mr Ástráðsson's conviction and in April 2018 he appealed to the Supreme Court, arguing that A.E.'s appointment had not been in accordance with the law and that he had not enjoyed a fair trial before an independent and impartial tribunal established by law. He also alleged that there had been a political motive for her appointment.

In May 2018 the Supreme Court dismissed his appeal. It found that despite flaws in the procedure by which A.E. had been appointed to the Court of Appeal, as established in its previous judgments of December 2017 (see below), her appointment had been valid. It took the view that there was insufficient reason to doubt that Mr Ástráðsson had been given a fair trial before independent and impartial judges.

The procedure for the appointment of Judge A.E.

A.E. had been appointed after a selection procedure whereby an Evaluation Committee had first assessed 33 candidates for the posts of the 15 Court of Appeal judges, and had recommended a list of 15 candidates whom it considered to be the most qualified for appointment to that office. Pursuant to the relevant provision of the Judiciary Act no. 50/2016 ("the new Judiciary Act"), the Minister of Justice could only depart from the assessment of the Evaluation Committee and propose one or more different candidates on the condition that the proposed candidate(s) had nevertheless been found by the Committee to fulfil all the minimum requirements laid down for such appointment in the Judiciary Act and that the proposal was accepted by Parliament. In the present case, the Minister of Justice chose 11 of the Committee's 15 suggested candidates, adding four others, including A.E., who had ranked lower on the Committee's list of the best candidates. The Minister presented certain arguments for the changes she had made in relation to the Committee's selection.

In June 2017 Parliament voted by a majority, in a single vote, to approve the Minister's list and later that month the President of Iceland signed the appointment letters for the new judges, including A.E.

Two candidates who had been proposed by the Evaluation Committee but removed by the Minister from the Committee's list sued the Icelandic State, challenging the legality of the appointment procedure. In December 2017 the Supreme Court rejected their claims for compensation for pecuniary damage but awarded each of them 700,000 Icelandic krónur (ISK) (approximately 5,700 euros (EUR)) for non-pecuniary damage.

The Supreme Court, in two judgments of 19 December 2017, found that the Minister had breached administrative law by failing to substantiate her proposal to Parliament with an independent investigation that would have provided the necessary information for an assessment of the merits of the candidates that she had chosen. The procedure in Parliament had also been flawed, in so far as it concerned the four candidates not on the original list, as Parliament had approved the amended list *en bloc* without voting on each candidate separately, as required by law.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right to an independent and impartial tribunal established by law) of the European Convention on Human Rights, Mr Ástráðsson complained that one of the three judges on the bench of the newly constituted Court of Appeal, which had upheld his criminal conviction, namely A.E., had not been appointed in accordance with the relevant domestic law and that, therefore, the criminal charges against him had not been determined by a "tribunal established by law", within the meaning of that provision.

Mr Ástráðsson further complained that he had been denied the right to an independent and impartial tribunal as provided for in Article 6 § 1 of the Convention, having regard to the participation of A.E. on the bench of the Court of Appeal which had ruled on his case, in spite of the defects in her appointment.

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

In its Chamber judgment of 12 March 2019, the European Court of Human Rights, held, by five votes to two, that there had been a violation of Article 6 § 1 (right to a tribunal established by law) of the Convention. The Chamber found in particular that the process by which A.E. had been appointed had amounted to a flagrant breach of the applicable domestic rules. It had been to the detriment of the trust that the judiciary in a democratic society must inspire in the public and had impaired the very essence of the principle that a tribunal must be established by law. The Chamber further held, unanimously, that there was no need to examine the remaining complaints under Article 6 § 1 (right to an independent and impartial tribunal).

On 14 May 2019 the Government requested that the case be referred to the Grand Chamber under Article 43 (referral to the Grand Chamber). On 9 September 2019 the panel of the Grand Chamber accepted that request. A hearing was held on 5 February 2020.

The Government of Poland, the Commissioner for Human Rights of the Republic of Poland, the Public Defender (Ombudsman) of Georgia and the Helsinki Foundation for Human Rights were given leave to make written comments as third parties.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Jon Fridrik **Kjølbro** (Denmark), *President*,
Robert **Spano** (Iceland),
Linos-Alexandre **Sicilianos** (Greece),
Síofra **O'Leary** (Ireland),
Georgios A. **Serghides** (Cyprus),
Paulo **Pinto de Albuquerque** (Portugal),
Aleš **Pejchal** (the Czech Republic),
Faris **Vehabović** (Bosnia and Herzegovina),
Egidijus **Kūris** (Lithuania),
Branko **Lubarda** (Serbia),
Mārtiņš **Mits** (Latvia),
Georges **Ravarani** (Luxembourg),
Gabriele **Kucsko-Stadlmayer** (Austria),
Pere **Pastor Vilanova** (Andorra),
Jovan **Ilievski** (North Macedonia),
Péter **Paczolay** (Hungary),
María **Elósegui** (Spain),

and also Marialena **Tsirli**, *Registrar.*

Decision of the Court

Article 6 § 1 (right to a tribunal established by law)

Referring to the Icelandic Supreme Court's judgments of 19 December 2017, the Court observed that the process by which Judge A.E. had been appointed to the Court of Appeal had failed to comply with some of the relevant rules of domestic law on judicial appointments.

In view of the potential implications of finding a violation and the important countervailing interests at stake, the Court was of the view that the right to a "tribunal established by law" should not be construed too broadly such that any irregularity in a judicial appointment procedure would risk compromising that right. A finding that a court was not a "tribunal established by law" might have considerable ramifications for the principles of legal certainty and irremovability of judges. While those principles had to be carefully observed in view of the important purposes they served, to uphold them at all costs and at the expense of the requirements of a "tribunal established by law" might in certain circumstances inflict even further harm on the rule of law and on public confidence in the judiciary.

The Court thus formulated a three-step test to determine whether irregularities in a judicial appointment procedure were so serious that they entailed a violation of the right to a tribunal established by law, this being the threshold of gravity adopted by the Court.

Step 1: Whether there has been a manifest breach of domestic law

In its judgments of 19 December 2017 and 24 May 2018, the Icelandic Supreme Court concluded that domestic law had not been complied with in two respects during the process of appointment of the Court of Appeal judges: firstly, the Minister of Justice had failed to carry out an independent evaluation of the facts and had not provided adequate reasons for departing from the Evaluation Committee's proposal, contrary to section 10 of the Administrative Procedures Act; secondly, the Icelandic Parliament had failed to comply with the special voting procedure under temporary provision IV of the new Judiciary Act (a separate vote on each of the candidates proposed by the Minister).

Consequently, the Court found that there was no reason to question the Supreme Court's interpretation of domestic law and that the first condition of the test was satisfied.

Step 2: Whether breaches of domestic law pertained to any fundamental rule of the judicial appointment procedure

The Court noted that, in the recent legislative reforms, the Evaluation Committee had been empowered to issue binding recommendations for judicial appointments to courts at all three levels. While the law did allow the Minister, exceptionally, to deviate to a certain extent from the Committee's assessment, the use of this discretion remained subject to parliamentary control. The main aim of this mechanism was to limit the influence of the executive in the appointment of judges and thus to strengthen the independence of the judiciary in Iceland. In the light of these explanations, it fell to the Court to determine whether the breaches of the procedure for the appointment of the four judges proposed by the Minister, which included A.E., were of such gravity as to impair the legitimacy of that procedure and to undermine the very essence of the right to a "tribunal established by law".

With regard to the breaches committed by the Minister, according to her explanations to Parliament, her justification for deciding to depart from the Evaluation Commission's assessment lay mainly in the need to accord more weight to judicial experience in evaluating the candidates and to ensure gender balance. However, the Evaluation Committee's decision to accord the same weight to judicial experience as to litigation and administrative experience had been in line with the relevant legislation and the practice which the Committee had consistently followed for at least four years.

Furthermore, the Committee's assessment method had been in compliance with the gender balance requirements of the Equality Act (Law no. 10/2008). Moreover, the Icelandic Supreme Court, in its judgments of 19 December 2017, had clearly stated that the Minister of Justice could not rely on the gender equality considerations in that Act because they only applied where two candidates of different genders were considered equally qualified, and the Minister, given the inadequacy of her investigation, could not have reached such a decision.

However, even supposing that the Evaluation Committee's assessment had been flawed in these areas and that the Minister of Justice had then departed from the Committee's opinion on legitimate grounds, the main conclusion to be drawn from the findings of the Supreme Court in its December 2017 judgments was that the Minister had simply not explained why she had picked one candidate over another, as required by section 10 of the Administrative Procedures Act. The Minister's disagreement with the Evaluation Commission's assessment method had not therefore absolved her from the obligation to provide sound reasons for her decision to depart from that neutral assessment.

In the Court's opinion, the uncertainty surrounding the Minister's motives had raised serious fears of undue interference in the judiciary and had thus tainted the legitimacy of the whole procedure, especially since the Minister belonged to one of the political parties composing the majority in the coalition government, by whose votes alone her proposal had been adopted in Parliament.

Moreover, while the Court was not in a position to affirm that, as alleged by the applicant, the Minister had acted out of political motives, it was of the view that her actions could have prompted objectively justified concerns to that effect and that this had been sufficient to detract from the transparency of the selection process.

Lastly, the Minister's failure to comply with the relevant rules was all the more serious as she had been reminded of her legal obligations on a number of occasions by the legal advisers in her own Ministry, by the Chairman of the Evaluation Committee and by the *ad hoc* Permanent Secretary of the Ministry of Justice.

The Court also referred to the Supreme Court's finding in its December 2017 judgments that the Minister had acted "in complete disregard of [the] obvious danger" for the reputations of the deselected candidates. It was thus fair to conclude that the Minister seemed to have acted in full awareness of her obligations under the applicable domestic law.

Having regard to the breaches committed by the Minister of Justice and to the circumstances in which they had taken place, the Court found that they were not mere technical or procedural defects, but constituted grave irregularities which went to the essence of the right to a "tribunal established by law".

As to the shortcomings in the parliamentary procedure, the Court noted that not only had Parliament failed to demand that the Minister provide objective reasons for her proposals so that it could perform its duty effectively, but also, as the Supreme Court had acknowledged, it had disregarded the special voting rules under temporary provision IV of the new Judiciary Act by putting the Minister's proposal to a single vote instead of a separate vote on each of the candidates. Arguably, this failure on the part of Parliament would not in itself have amounted to a violation of the right to a "tribunal established by law", particularly as the MPs had been offered the opportunity to request a separate vote. That said, the voting procedure had surely compounded the grave breaches that the Minister of Justice had already committed in respect of the four candidates she had proposed and had undermined Parliament's role as a check against the exercise of undue executive discretion in judicial appointments. Accordingly, it had not been unjustified for the applicant to believe that Parliament's decision had been primarily driven by party political considerations.

While the special parliamentary voting procedure under the new Judiciary Act had sought to strengthen the legitimacy of appointments to the newly established Court of Appeal, the intervention of Parliament had not produced the desired effect. In other words, Parliament had not fulfilled its duty as guarantor of the lawfulness of the appointment procedure as regards the four candidates in question. Consequently, there had been a grave breach of a fundamental rule of the procedure for appointing judges to the Court of Appeal in the present case.

Step 3: Whether the alleged violations of the right to a "tribunal established by law" were effectively reviewed and remedied by the domestic courts

The Court noted that it had been within the Supreme Court's remit to address and remedy the effects of the above-mentioned irregularities on the applicant's fair trial rights. In its judgment of 24 May 2018, in Mr Ástráðsson's case, the Supreme Court had endorsed its earlier findings on the breaches committed by the Minister and Parliament in the process of appointments to the Court of Appeal. However, it had not drawn the necessary conclusions from its own findings, nor had it assessed the matter in a Convention-compliant manner. It had limited its examination to finding that, first, A.E.'s appointment had not been a "nullity" under Icelandic law and that, second, despite the flaws in the appointment procedure, the applicant had nevertheless enjoyed a fair trial before an independent and impartial "tribunal". In so finding, the Supreme Court had apparently placed a great deal of emphasis on the mere fact that the appointments had become official upon the signature of the President of Iceland and that, from that point onwards there had been no reason to doubt that the 15 Court of Appeal judges would perform their tasks independently and in accordance with the law.

In the Court's view, the way in which the Supreme Court's judgment had been constructed, and the particular emphasis on the fact that the appointments of the 15 judges, including A.E., had "become a reality upon the signing of their letters of appointment", suggested an acceptance, or even a resignation, on its part that it had no real say in the matter once the appointments had become official.

The restraint shown by the Supreme Court in examining the applicant's case – and its failure to strike the right balance between, in particular, preserving the principle of legal certainty on the one hand, and upholding respect for the law on the other – was not specific to the facts of the case, but had been that court's settled practice.

In the Court's view, this practice had been problematic for two main reasons. First, it undermined the judiciary's important role in maintaining the checks and balances inherent in the separation of powers. Second, given the significance and implications of the breaches in question, and the fundamentally important role played by the judiciary in a democratic society governed by the rule of law, the effects of such breaches might not be limited to the individual candidates who had been wronged by non-appointment; they necessarily concerned the general public. Consequently, the Court found that, in its review of the applicant's case, the Supreme Court had not duly considered whether the object of the safeguard enshrined in the "tribunal established by law" concept had been achieved.

In conclusion, having regard to the three-step test that it had devised, the Court held that the applicant had been denied his right to a "tribunal established by law" on account of the participation in his trial of a judge whose appointment had been undermined by grave irregularities which had impaired the very essence of the right at issue. There had thus been a violation of Article 6 § 1 of the Convention.

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

The Court observed that Mr Ástráðsson's complaints about the requirements of a "tribunal established by law" and about "independence and impartiality" stemmed from the same underlying

issue, namely the defects in the procedure for the appointment of A.E. as judge of the Court of Appeal.

As it had found earlier in the judgment, the irregularities in question were of such gravity that they undermined the very essence of the right to be tried before a tribunal established in accordance with the law. The Court thus held, by a majority, that the question whether the same irregularities had also compromised the independence and impartiality of the same court did not require further examination.

Article 46 (binding force and execution of judgments)

The Court noted that, in response to a question at the hearing as to whether the applicant would seek the reopening of the criminal proceedings against him in the event of a finding of a violation of Article 6, his representative had responded in the negative, and that, while he had subsequently attempted to retract that statement, he had not provided sufficient justification for the change in position.

It further took the view that, in accordance with its obligations under Article 46 of the Convention, it fell to Iceland to draw the necessary conclusions from the present judgment and to take any general measures as appropriate in order to solve the problems that had led to the Court's findings and to prevent similar violations from taking place in the future. That being said, it stressed that the finding of a violation in the present case should not be read as imposing on the respondent State an obligation under the Convention to reopen all similar cases that had since become *res judicata* in accordance with Icelandic law.

Just satisfaction (Article 41)

The Court, by a majority, held that a finding of a violation constituted sufficient just satisfaction for the non-pecuniary damage sustained by Mr Ástráðsson. It further held, unanimously, that Iceland was to pay him EUR 20,000 for costs and expenses.

Separate opinions

Judge Pinto de Albuquerque expressed a concurring opinion. Judges O'Leary, Ravarani, Kucsko-Stadlmayer and Ilievski expressed a joint partly concurring, partly dissenting opinion. Judge Serghides expressed a partly dissenting opinion. These opinions are annexed to the judgment.

The judgment is available in English and French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.