



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

FIFTH SECTION

DECISION

Application no. 75255/10
Krstan SIMIĆ
against Bosnia and Herzegovina

The European Court of Human Rights (Fifth Section), sitting on 15 November 2016 as a Chamber composed of:

Angelika Nußberger, *President*,

Erik Møse,

Khanlar Hajiyev,

Ganna Yudkivska,

Faris Vehabović,

Yonko Grozev,

Carlo Ranzoni, *judges*,

and Milan Blaško, *Deputy Section Registrar*,

Having regard to the above application lodged on 6 December 2010,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Krstan Simić, is a citizen of Bosnia and Herzegovina, who was born in 1948 and lives in Banja Luka.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicant, may be summarised as follows.

3. On 5 June 2007 the applicant was elected a judge of the Constitutional Court of Bosnia and Herzegovina (“the Constitutional Court”).

4. Before becoming a judge the applicant was the vice-president of the Alliance of Independent Social Democrats (*Savez nezavisnih socijaldemokrata*; “SNSD”), a political party established in 1996 and based

in Banja Luka, and a member of the National Assembly of the Republika Srpska.

5. On 30 November 2009 a local non-governmental organisation, Parents' Forum of the Republika Srpska (*Forum Roditelja Republike Srpske*), informed the Constitutional Court of a letter (and sent three pages thereof) which had been written by the applicant and sent to Mr Milorad Dodik, the president of the SNSD and the then prime minister of the Republika Srpska. The letter was not dated, but according to its contents and the applicant's own later admission it had been written and sent in May 2009.

6. In the letter the applicant discussed the work of the Constitutional Court and made comments concerning the work of one employee of the Republika Srpska Government. The relevant part of the letter reads (the translation has been provided by the Constitutional Court):

"I am not certain when it comes to the strategic (political) decisions that the international judges cannot be influenced by the OHR [Office of the High Representative for Bosnia and Herzegovina], but the individual judges are in no position to carry out any kind of lobbying as concerns the international judges, while in the cases such as *Malbašić*, the Bosniacs or Croats are not to be lobbied either, as they only have the Federation interest on their mind ...

[...]

In any event, I am always at your disposal but in the hassle and bustle that surrounds you I am afraid that you do not use my experience and opportunities sufficiently enough. My attitude is not to impose as I am aware of the problems you are in ...

[...] high average, passed the bar exam, computer proficient, possesses knowledge of English and is a member of the SNSD party.

However, in the systematization of the work duties, it should be foreseen that she retains her present duties (...lawsuits, has significant experience, has raised that position to high level in the Government, when she has any major problem she consults me) and also receives new assignments along with the present duties."

7. The contents of the letter were subsequently published in different media.

8. On 3 December 2009 the Constitutional Court asked the applicant to submit his comments concerning the impugned letter.

9. On 31 December 2009 an interview with the applicant was published in *Slobodna Bosna*, the local weekly magazine, in which he said, *inter alia*:

"I will share, when the time comes, with the readers of *Slobodna Bosna* whatever I have learned during my term which could seriously compromise the work of the Constitutional Court, its judges and also certain high-level politicians."

10. Another interview with the applicant was published in the same magazine on 7 January 2010, the relevant part of which reads as follows:

"I shall explain who works in the Constitutional Court of Bosnia and Herzegovina and how, and to what extent the crime has settled within the highest judicial instance of the state. And I have evidence for everything.

I am tired of keeping quiet about someone else's criminal activities, tired of talking about how the Constitutional Court operates, which always ends up with corruption, tired of interference of the crime and politics with our work.

There is no state in the world like Bosnia and Herzegovina. We have no other institution, except the one in which I work, to protect the law and justice. Unfortunately, it has failed to do so."

11. On 8 January 2010, without the knowledge and approval of the Constitutional Court, the applicant held a press conference in Banja Luka at which he made comments concerning the impugned letter. He also discussed certain cases and remarked on the impartiality of the Constitutional Court.

12. On 29 January 2010 the Constitutional Court held an extraordinary plenary session at which it discussed its position concerning the applicant's conduct and decided to prepare a proposal for his removal from office.

13. At the Constitutional Court's session of 25 March 2010 the applicant confirmed that he was the author of the impugned letter.

14. On 8 May 2010 at the extraordinary plenary session the Constitutional Court held unanimously that the applicant had breached the Rule 94 (2) of its Rules by knowingly damaging the reputation of the Constitutional Court and the reputation of a judge and decided to remove him from office. By virtue of Article VI of the Constitution, that decision was final and binding. The relevant part of the decision reads as follows (the translation has been provided by the Constitutional Court):

"1. Based on the Conclusion of the Constitutional Court of Bosnia and Herzegovina ('the Constitutional Court') reached at the Extraordinary plenary session held on 29 January 2010, the President of the Constitutional Court, on behalf of the Constitutional Court, submitted on 4 March 2010 a Proposal for Dismissal of the Judge of the Constitutional Court Mr Krstan Simić no. K-I-15/10 on account of a violation of Rule 94 paragraphs 1 and 2 of the Rules of the Constitutional Court.

II. Procedure before the Constitutional Court

2. On 30 November 2009 the Constitutional Court received a letter from the Parents' Forum of RS-BiH from Banja Luka, accompanied by another letter (pages 1, 2 and 4) composed by Mr Krstan Simić, judge of the Constitutional Court of BiH, addressed to the president of the Independent Social-Democrats Coalition political party ('SNSD') and the prime minister of the Republika Srpska, Mr. Milorad Dodik.

3. After the contents of the referenced letter were published in the media, the President of the Constitutional Court had consultations with the national judges of the Constitutional Court. It was concluded that the issue of the public appearance of Judge Krstan Simić [was] to be discussed at the separate plenary session in terms of Rule 95 of the Rules of the Constitutional Court. It was also concluded that it should be requested from Judge Krstan Simić to submit his written statement on the Parents' Forum letter and the letter he had addressed to the president of the SNSD Political Party and the prime minister of the Republika Srpska.

4. Based on the previous conclusion, on 3 December 2009, the Constitutional Court requested Judge Krstan Simić to submit his written statement concerning the Parents'

Forum letter and the controversial letter addressed to the president of the SNSD and the prime minister of the Republika Srpska.

5. On 14 January 2010, Judge Krstan Simić submitted his written statement.

6. On 29 January 2010 the Constitutional Court held an extraordinary plenary session and preliminary deliberation about the following item of the Agenda: ‘The Information and Taking a Position on the Public Appearances of Mr Krstan Simić, Judge of the Constitutional Court of Bosnia and Herzegovina’. The Constitutional Court concluded that before it resumed its extraordinary plenary session, all relevant evidence, materials and documentation should be obtained and, based on that, a proposal for the conceivable dismissal of Judge Krstan Simić drafted, to enable the Constitutional Court to deliberate and decide whether there are any reasons for his dismissal. In addition, the Constitutional Court concluded that the Proposal for Dismissal, together with the copies of all the evidence, materials and documentation should be communicated to Judge Krstan Simić to respond to, with an invitation to do so within 14 days at the latest.

7. On 4 February 2010 pursuant to Rule 33 of the Rules ... the Constitutional Court requested from the prime minister of the Republika Srpska to submit a copy of the third page of the aforementioned letter. The prime minister of the Republika Srpska failed to respond to the request ...

8. Also, on 4 February 2010, pursuant to Rule 33 of the Rules ..., the Constitutional Court requested from Alternative Television Banja Luka and the Radio-Television of the Republika Srpska and, on 12 February 2010, from the Public Broadcasting Service of Bosnia and Herzegovina and Public Broadcasting of the Federation of Bosnia and Herzegovina, to submit the complete recording of the press-conference held by Judge Krstan Simić in Banja Luka on 8 January 2010.

9. On 4 February 2010, pursuant to Rule 33 of the Rules ..., the Constitutional Court requested from the weekly magazine *Slobodna Bosna* ..., to submit the complete recording of an interview with Judge Krstan Simić, which was the subject of articles of this magazine dated 31 December 2009 and 7 January 2010 and, in case of unavailability of this tape recording, a written statement by the journalist on the authenticity of the quoted statements of Judge Krstan Simić.

10. Within the period from 12 February through 25 March 2010, Alternative Television Banja Luka, Radio-Television of the Republika Srpska, and the Public Broadcasting Services of Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina submitted their available materials ...

11. On 16 February 2010 the Constitutional Court received a written statement by a journalist of *Slobodna Bosna* N. D., confirming the authenticity of the quoted statements of Judge Krstan Simić which were published in the articles of this magazine of 31 December 2009 and 7 January 2010.

12. The Proposal for Dismissal was communicated to Judge Krstan Simić on 8 March 2010. However, Judge Simić failed to submit his written statement within the given time-limit of 14 days.

13. On 25 March 2010 the Constitutional Court resumed its Extraordinary plenary session at which it deliberated about the item of the Agenda: ‘Consideration of the Proposal for Dismissal of Mr. Krstan Simić, Judge of the Constitutional Court of Bosnia and Herzegovina’. The Constitutional Court established that the procedure for dismissal of a judge of the Constitutional Court may be defined as an *ad hoc* procedure of a *sui generis* nature, for which there are no detailed Rules on how to

conduct the procedure. For that reason and by application of Rule 79 of the Rules of the Constitutional Court, the Constitutional Court concluded that a fair hearing must be guaranteed to Judge Krstan Simić, including all the principles stipulated under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the European Convention'). Furthermore, the Constitutional Court afforded an opportunity to Judge Simić to state his position in respect of all the allegations contained in the Proposal for Dismissal before all the judges of the Constitutional Court during the proceedings at the session. The Constitutional Court then proceeded to discuss the preliminary issues, arriving at the conclusion to adjourn the session until 8 May 2010, so that the Constitutional Court could communicate, in the meantime, to Judge Krstan Simić, upon his request, the documentation he requested, render him an opportunity to access and inspect specific documents of the Constitutional Court and afford him enough time to engage a legal representative of his choice. A time-limit of 15 days was set to Judge Simić to submit his written statement in response to the Proposal for Dismissal. Also, the Constitutional Court concluded that it should resume its deliberations on 8 May 2010 even in the case that Judge Simić [failed] to appoint a legal representative, submit his written statement or attend the scheduled session. Judge Simić was notified of these conclusions orally and he agreed to them.

14. By letters no. K-I-16/10 of 26 March and 5 April 2010 respectively, the aforementioned conclusions were also communicated to Judge Simić in writing.

15. On 4 May 2010, Judge Simić submitted his written statement in which, among other things, he informed the Constitutional Court that he would not be attending the resumed extraordinary plenary session for private reasons. He also failed to appoint a legal representative or to examine the case-files of the Constitutional Court.

16. The Constitutional Court resumed its extraordinary plenary session on 8 May 2010 in the absence of Judge Simić.

...

28. In his responses of 14 January and 4 May 2010, Judge Krstan Simić states that the letter to the president of the SNSD and the prime minister of the Republika Srpska was sent to his friend, that it was a private letter and that he had not given his consent for that letter to be used. He, further, finds that all the media articles relating to him and the letters addressed to the Constitutional Court concerning him have been deliberately orchestrated with a view of his dismissal. He claims that the interview with journalist N.D. was not authorized and that he held the press-conference on 8 January 2010 because he was put under pressure. He also stated that all the statements given in public had been given within the scope of the freedom of expression.

...

VII. Position of the Constitutional Court

36. During the course of its extraordinary plenary session, the Constitutional Court discussed the preliminary issues, examined all available evidence, materials and documentation It then conducted deliberations and reached a decision on the merits by consensus that Judge Simić had to be dismissed from the office of the Judge of the Constitutional Court pursuant to Article VI(1)(c) of the Constitution of Bosnia and Herzegovina in conjunction with Rule 101 paragraph 1 line 5 of the Rules of the Constitutional Court due to the violation of Rule 94 paragraph 2 of the Rules of the Constitutional Court for the following reasons:

VII.1. Contents of the letter of Judge Krstan Simić

37. In accordance with the constitutional principle of the rule of law, the Constitutional Court must be an independent and impartial constitutional authority. That, in principle, primarily defines its relation to the executive authority. The independence and impartiality of the Constitutional Court implies that its judges are free, that they do not have to be accountable to anyone and that they are not bound by anyone's instructions (cf. the Judgment of the European Court of Human Rights *Ringeisen v. Austria*, Series A, No. 13, of 16 July 1971, paragraph 95; *Schiesser v. Switzerland*, Series A, No. 34, of 4 December 1979, paragraph 29). Furthermore, it is not only required that the judges of the Constitutional Court are truly independent but also to appear to be so, which is subject to an objective test (cf. the Judgment of the European Court of Human Rights, *Campbell and Fell v. the United Kingdom*, Series A, No. 80, of 28 June 1984, paragraph 77 and ff).

38. It clearly follows from the contents of the letter that the president of the SNSD, Mr Milorad Dodik, had been in contact with Judge Krstan Simić (first page of the letter) even before the controversial letter was ever written. Judge Simić responded to those contacts by written communication. Furthermore, Judge Simić states in his letter that he is 'always at disposal' of the president of SNSD, offering him openly 'his experience and opportunities' (page 2 paragraph 7). Moreover, his letter contains an unsolicited request for a higher degree of cooperation, which clearly follows from the statement: 'I am afraid that you do not use my experience and opportunities sufficiently enough'. In addition, Judge Simić openly discusses the possibility of employing someone from the SNSD personnel in the executive authorities of the Republika Srpska, giving his opinion and recommendations in respect of those persons and stating that those persons are in consultations with him whenever there appears any major problem (page 4, paragraph 2). According to this, Judge Simić is in the habit of giving advice to the officials of the executive authorities of one of the Entities.

39. Given the contents of the controversial letter and taking into account the fact that Judge Simić held the office of the first vice-president of the SNSD, prior to taking the office of the judge of the Constitutional Court, an objective observer gets an inevitable impression that Judge Simić did not sever relations with his former political party and its president and that he is prepared to continue maintaining such contacts which are useful to that political party. As a matter of fact, he is even initiating them. That may be clearly concluded from the statements made in the letter, offering his expertise and experience, a higher degree of cooperation, and rendering his own opinions and advice to one of the members of his former party 'wherever he has a major problem' in the Government of the Republika Srpska.

40. Such ties between a judge of the Constitutional Court and political parties, i.e. executive authorities of one of the Entities, may be defined as liaisons incompatible with the institutional and operative independence of the Constitutional Court, which all judges must endeavour to strengthen. In the public eye, such relations are damaging to the reputation of the Constitutional Court, in particular as concerns the perception of its independence and impartiality, i.e. the prohibition of preferential treatment of specific parties.

41. Accordingly, Judge Simić, by such statements, has deliberately endangered and inflicted damage on the independence of the Constitutional Court, thereby undermining both his reputation as a judge of the Constitutional Court and the reputation of the Constitutional Court itself, in terms of Rule 94 paragraph 2 of the Rules of the Constitutional Court.

42. The fact that the controversial letter was not of business but of private nature does not affect this conclusion of the Constitutional Court and neither does the fact that Judge Simić and the president of SNSD and the prime minister of the Republika Srpska, Mr Milorad Dodik, are friends as indicated by Judge Simić. The obligation of a judge of the Constitutional Court, as the holder of the judicial authority to safeguard the independence of the court as an institution and his own independence in relation to the holders of the other authority, is in effect in both private and professional relations. Therefore, even if the letter was of private nature, it may still endanger the independence of a judge of the Constitutional Court and the Constitutional Court itself as an institution.

VII.2. Public appearances of Judge Krstan Simić

43. Furthermore, in the interviews given to the weekly magazine *Slobodna Bosna* on 31 December 2009 and 7 January 2010 and at the press conference held on 8 January 2010 in Banja Luka, Judge Simić presented serious accusations against the judges of the Constitutional Court and the Constitutional Court itself as an institution, associating them with (a) crime (b) corruption (c) interference of politics with the work of the Constitutional Court and (d) failure to perform the constitutional function it has been entrusted with. Moreover, Judge Simić claimed he had evidence to substantiate his allegations.

44. Judge Simić did not deny the quoted allegations, pursuant to the applicable Defamation Act, or in any other manner. On the other hand, on 16 February 2010, the Constitutional Court received a written statement by the journalist of the weekly magazine *Slobodna Bosna*, N. D., confirming the authenticity of the quoted statements of Judge Simić. The Constitutional Court, therefore, considers the statements given in public by Judge Krstan Simić to be accurately quoted.

45. Judge Simić invoked freedom of expression as guaranteed under Article II (3) (h) of the Constitution of BiH and Article 10 of the European Convention. In his opinion the freedom of expression allows him to express his opinion publicly and in the manner as he has done. Finally, he stated that pressure was applied on him as a judge, on account of which he found it necessary and justified to state his opinion in public.

46. The Constitutional Court emphasizes that freedom of expression is extremely important for democracy and democratic processes in a society. The state must pay special attention to this particular freedom ... This Article not only protects the information and ideas perceived as positive or considered hazardless or those on which no position has been taken, but also those that offend, shock and disturb. That is what tolerance and pluralism require and without that there is no democratic society (cf. AP 1819/07 of 11 November 2009, the judgment of the European Court of Human rights, *Handyside v. the United Kingdom*, Series A, No 24, of 7 December 1976, paragraph 49). This is particularly the case when it concerns the public personalities or institutions of authority since the threshold of tolerance must be raised to a higher level (cf. judgment of the European Court of Human Rights, *Castells v. Spain*, Series A, No 236, of 23 April 1992, paragraph 46).

47. Nevertheless, the freedom of expression under Article II (3) (h) of the Constitution and Article 10 of the European Convention is not absolute ... according to Article 10 paragraph 2 of the European Convention, freedom of expression 'may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests [...] or for maintaining the authority and impartiality of the judiciary'.

48. The Constitutional Court finds that the sanction of dismissal of a judge from office of the Judge of the Constitutional Court, under Article VI (1) (c) of the Constitution of Bosnia and Herzegovina in conjunction with Rule 101 paragraph 1 line 5 of the Rules of the Constitutional Court, *i.e.* on account of a severe violation of Rule 94 paragraph 2 of the Rules of the Constitutional Court, may be a justified measure for non-compliance with the restrictions of the freedom of expression.

49. Therefore, as previously stated, every judge of the Constitutional Court must be aware that by accepting his/her judicial office he/she also accepts certain restrictions in terms of public appearances. The goal of such restrictions is to protect public interest – the confidence of the public in respect of the judiciary, protection of its independence and impartiality, the integrity, reputation and honour of judges. When a judge appears in public, his/her main concern must be the protection of that public interest.

50. Judge Krstan Simić appeared in public on his own initiative, through written media and by organising the press conference. Judge Simić was aware that organising a press conference in such a manner was unprecedented as far as the Constitutional Court is concerned, as he himself stated prior to the press conference. He pointed out that his appearance was contrary to the position of the Constitutional Court concerning public relations. The Constitutional Court, further, holds that the purpose of those public appearances was to seriously discredit and raise charges against the other judges of the Constitutional Court and the Constitutional Court as an institution and their disqualification. Finally, Judge Simić publicly presented his claim that the Constitutional Court did not protect the law and justice, *i.e.* that it did not perform its duties in a proper and professional manner. Judge Simić publicly promised that these grave charges against the Constitutional Court and its judges would be substantiated by evidence, stating: ‘I have all the evidence’.

51. The Constitutional Court holds these appearances to be completely contrary to the high judicial standards of behaviour of judges. Indeed, even if those statements of Judge Simić were founded, his conduct was completely unprofessional and inconsistent with the principles of a fair hearing. Namely, a judge, even if he or she claims to be in a possession of evidence for the alleged criminal activity of the individual judges, must not act outside the institution, present his or her position in public and prejudge a conceivable outcome ... (presumption of innocence) but must use relevant state system, provided for by the positive regulations of Bosnia and Herzegovina which makes possible the examination of such claims in accordance with its jurisdiction, relevant procedure and substantive legal grounds. Judge Simić, prior to presenting his positions and claims in public, did not even attempt to tackle these issues within the Constitutional Court, although prior to his public appearances he knew that the Constitutional Court, sitting in a plenary session, would give him the opportunity to discuss the issue of his position in the Constitutional Court, where he could have presented his allegations and positions. Moreover, according to what the Constitutional Court learned about this matter, Judge Simić did not even attempt to submit any evidence to the competent prosecutor’s offices in Bosnia and Herzegovina.

52. Due to aforesaid, the public appearances of Judge Simić have brought into question the confidence of the public in respect of the constitutional-judicial authority as well as the Constitutional Court as an institution ... Judge Simić thereby inflicting damage to the dignity of the Constitutional Court and its judges. This is best illustrated by the introductory notes of the journalist of *Slobodna Bosna* in the article dated 31 December 2009 ‘The highest judicial institution of the state, the Constitutional Court of Bosnia and Herzegovina, is dangerously shaken up these days

under the burden of insinuations, corruption charges, political set-ups and party conflicts!'.

53. According to the established facts, it is not possible to find any reasons which could justify Judge Simić in his actions. The Constitutional Court does not find his claim of having been under pressure to be well-founded.

54. On the basis of the established facts, the Constitutional Court concludes that Judge Simić had consciously overstepped the allowed restriction on freedom of expression of a judge, thereby undermining the reputation and dignity of a judge of the Constitutional Court in contravention with Rule 94 paragraph 2 of the Rules of the Constitutional Court. In that manner, Judge Simić inflicted damage to his own reputation and dignity as a judge as well the reputation of the other judges and the Constitutional Court as an institution.

...

VII.3. Conclusion

56. The Constitutional Court emphasizes first and foremost that it operates in highly complex legal and political circumstances. At this stage of the constitutional development of Bosnia and Herzegovina, the role of the Constitutional Court is very important and difficult while, objectively, its decisions have a significant impact on political processes within the state. The Constitutional Court resolves, amongst other things, complicated constitutional issues with far-reaching implications, often involving legislative or executive authorities at the state- or entity-level as direct participants. This very fact shows that there exists an undeniable public interest for the Constitutional Court to build and maintain its reputation, independence and impartiality and not to allow these principles to be endangered or violated. Otherwise, the authority of the Constitutional Court as an institution and the authority of its decisions shall be lost. The Judges of the Constitutional Court, as the distinguished jurists of the highest moral standing, must be aware of these principles at any given moment.

57. ... With his actions, Judge Simić inflicted great damage on the Constitutional Court, reflected in undermining of the confidence of the public and the authorities in respect of the independence, impartially and professional work of the Constitutional Court as well as degrading of the achieved results.

58. The Constitutional Court holds that it will have to bear the consequences of the aforementioned actions of Judge Krstan Simić for a long time and that it will have to make an extra effort to regain the undermined confidence of the public and public authorities in its autonomy, independence, impartiality and professionalism.

59. ... The Constitutional Court holds that the conditions have met to take the decision on dismissal of Judge Krstan Simić from his office, in pursuance of Article VI(1)(c) of the Constitution of BiH.

...

61. Pursuant to Article VI ... of the Constitution of Bosnia and Herzegovina, this decision of the Constitutional Court shall be final and binding and shall not be subject to any review before any legislative, judicial or administrative authority.”

15. The decision was not served on the applicant but was published in the Official Gazette of Bosnia and Herzegovina on 6 July 2010.

16. On 28 June 2010 the applicant initiated proceedings before the Court of Bosnia and Herzegovina (“the State Court”) seeking to annul the Constitutional Court’s decision of 8 May 2010.

17. On 9 December 2010 the State Court declared that it lacked jurisdiction to examine the case as the Constitutional Court had exclusive jurisdiction in all matters concerning the status of its judges.

18. On 24 January 2011 the Appeals Chamber of the State Court upheld the decision of 9 December 2010.

B. Relevant domestic law

19. The Constitution of Bosnia and Herzegovina (Annex 4 to the General Framework Agreement for Peace in Bosnia and Herzegovina) entered into force on 14 December 1995. The Constitutional Court was set up pursuant to Article VI of the Constitution, which, in so far as relevant, reads as follows:

“The Constitutional Court of Bosnia and Herzegovina shall have nine members.

a) Four members shall be selected by the House of Representatives of the Federation, and two members by the Assembly of the Republika Srpska. The remaining three members shall be selected by the President of the European Court of Human Rights after consultation with the Presidency.

b) Judges shall be distinguished jurists of high moral standing. Any eligible voter so qualified may serve as a judge of the Constitutional Court. The judges selected by the President of the European Court of Human Rights shall not be citizens of Bosnia and Herzegovina or of any neighbouring state.

c) The term of judges initially appointed shall be five years, unless they resign or are removed for cause by consensus of the other judges. Judges initially appointed shall not be eligible for reappointment. Judges subsequently appointed shall serve until age 70, unless they resign or are removed for cause by consensus of the other judges.

...

The Constitutional Court shall uphold this Constitution.

a) The Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina, including but not limited to:

- Whether an Entity’s decision to establish a special parallel relationship with a neighbouring state is consistent with this Constitution, including provisions concerning the sovereignty and territorial integrity of Bosnia and Herzegovina.

- Whether any provision of an Entity’s constitution or law is consistent with this Constitution.

...

b) The Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina.

c). The Constitutional Court shall have jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina; or concerning the existence of or the scope of a general Rule of public international law pertinent to the court's decision.

...

Decisions of the Constitutional Court shall be final and binding.”

20. The relevant provisions of the Rules of the Constitutional Court (Official Gazette of Bosnia and Herzegovina, nos. 60/05, 76/05, 64/08, 51/09, 22/14 and 57/14) read as follows (the translation has been provided by the Constitutional Court):

Rule 38

(Attendance of the sessions)

“The sessions of the Constitutional Court shall be attended by the judges, the Secretary General, the Registrar, the Heads of Departments and the person responsible for public relations.

The President of the Constitutional Court may decide for other qualified persons to attend the session.”

Rule 46

(Public hearing)

“When necessary to directly deliberate on an issue relevant for taking a decision during the proceedings before the Constitutional Court, the plenary Court shall hold a public hearing.

The Constitutional Court shall take a decision on the need to hold a public hearing, on a proposal of a Judge Rapporteur or another judge”.

Rule 80 (former Rule 83)

(Selection of judges)

“The judges of the Constitutional Court shall be selected in accordance with Article VI(1) of the Constitution.

The judges shall be distinguished lawyers of high moral standing...”

Rule 82 (former Rule 85)

(Solemn declaration)

“Before taking up office each elected judge shall, at the first sitting of the plenary Court at which the judge is present, or in case of need before the President of the Constitutional Court, take the following oath or make the following solemn declaration:

I solemnly declare that in exercising my functions as a judge of the Constitutional Court of Bosnia and Herzegovina, I will uphold the Constitution and laws of Bosnia

and Herzegovina and that I will exercise my functions as a judge conscientiously and impartially.”

Rule 91 (former Rule 94)

(Conscientious Exercise of Judicial Functions, Preservation of Reputation and Dignity)

“The judges shall perform the function of a judge conscientiously.

The judges shall uphold the reputation and dignity of the Constitutional Court and the reputation and dignity of a judge.”

Rule 96 (former Rule 97)

(Incompatibility of the Office of Judge of the Constitutional Court)

“The position of a judge shall be incompatible with:

a) a membership in a political party or a political organization in Bosnia and Herzegovina ...”

Rule 98 (former Rule 101)

(Termination of Office)

“(1) A judge may be dismissed from office before the end of his or her term in the following cases:

...

e) if he or she fails to perform the function of a judge in accordance with Rule 91 of these Rules.

(2) The Constitutional Court shall establish the existence of reasons referred to in paragraph 1 of this Article and it shall dismiss the judge from office on the basis of a consensus of other judges and inform the body which elected that judge.”

COMPLAINTS

21. The applicant alleged a breach of his rights guaranteed by Article 6 § 1 of the Convention in the proceedings before the Constitutional Court. In particular, he complained that he had not been given an adequate opportunity to present his case and that thus the principle of equality of arms had not been respected. He further complained about the lack of a public hearing and the outcome of these proceedings. The applicant also alleged that his removal from office violated his right to freedom of expression guaranteed by Article 10 of the Convention. Lastly, he complained under Article 13 of the Convention of the lack of an effective legal remedy for his substantive complaints.

THE LAW

A. Alleged violation of Article 6 § 1 of the Convention

22. The applicant alleged a breach of his rights under Article 6 § 1 of the Convention, which in relevant part reads as follows:

“1. 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 ...”

23. Even assuming *ratione materiae* compatibility of these complaints with the provisions of the Convention (see *Vilho Eskelinen and Others v. Finland*, [GC], no. 63235/00, ECHR 2007-II), they are manifestly ill-founded for the following reasons.

24. At the outset, the Court reiterates that it is not its task to substitute its own assessment of the facts for that of the national courts. The Court’s task is to ascertain whether the proceedings in their entirety, including the way in which evidence was permitted, were “fair” within the meaning of Article 6 § 1 (see, *Dombo Beheer B.V. v. the Netherlands*, 27 October 1993, § 21, Series A no. 274).

25. The Court further reiterates that, according to its case-law, the principle of equality of arms requires that each party must be afforded “a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent” (see, among other authorities, *Avotiņš v. Latvia* [GC], no. 17502/07, § 119, ECHR 2016).

26. Turning to the present case, the Court notes that the proceedings for the applicant’s removal from office took place before the Constitutional Court, the highest judicial authority of the respondent State. The decision to remove the applicant was given unanimously in a plenary session. Before the proceedings commenced the applicant was invited to submit his written statement. At the plenary session of 25 March 2010 he appeared before the court and submitted his arguments to the judges. The applicant did not ask for any witness to be heard before the court. The sessions of 25 March 2010 was adjourned so that the applicant could be given enough time to inspect the case-file and other relevant documents of the Constitutional Court and to appoint a legal representative. The applicant was also invited to submit another written statement. However, he did not use his right to examine the documents. Moreover, he failed to appear at the resumed plenary session held on 8 May 2010, of which he was duly informed, or to appoint a legal representative. The applicant therefore had the opportunity to present his case, both in writing and in oral submissions. He had knowledge of and could comment on all the relevant documents with a view to influencing the court’s decision, as required in adversarial proceedings. In these circumstances, the Court cannot accept the applicant’s argument that there

has been a breach of the principle of “equality of arms” inherent in the concept of a fair hearing (see, *mutatis mutandis*, *Juričić v. Croatia*, no. 58222/09, § 72, 26 July 2011).

27. As to the outcome of these proceedings, the Court emphasises that, in accordance with Article 19 of the Convention, its sole duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. In particular, it is not its function to deal with errors of fact or law allegedly made by a national court in assessing the evidence before it, unless and in so far as they may have infringed rights and freedoms protected by the Convention (see, among many other authorities, *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I). The Court cannot itself assess the facts which have led a national court to adopt one decision rather than another; otherwise, it would be acting as a court of fourth instance and would disregard the limits imposed on its action (see *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 197, ECHR 2012, and *Avotiņš*, cited above, § 99).

28. As regards the applicant’s complaint about the lack of a public hearing before the Constitutional Court, the Court reiterates that in proceedings before a court of first and only instance the right to a “public hearing” in the sense of Article 6 § 1 entails an entitlement to an “oral hearing” (see *Göç v. Turkey* [GC], no. 36590/97, § 47, ECHR 2002-V). Article 6 § 1 does not, however, prohibit courts from deciding, in the light of the special features of the case submitted to them, to derogate from this principle (see *Martinie v. France* [GC], no. 58675/00, § 40, ECHR 2006-VI). The obligation to hold a hearing is therefore not absolute. For example, a hearing may be dispensed with if a party unequivocally waives his or her right thereto and there are no questions of public interest making a hearing necessary. A waiver can be made explicitly or tacitly, in the latter case for example by refraining from submitting or maintaining a request for a hearing (see, for example, *Döry v. Sweden*, no. 28394/95, § 37, 12 November 2002, and *Schädler-Eberle v. Liechtenstein*, no. 56422/09, § 100, 18 July 2013).

29. As already noted above, the Constitutional Court held a hearing in the applicant’s case. The applicant was heard in person at the plenary session of 25 March 2010 (contrast, *Juričić*, cited above, § 86). As regards the exclusion of public from that hearing, the Court notes that the sessions of the Constitutional Court are, in general, held in private, but the court may exceptionally order a public hearing. However, the applicant did not ask for a public hearing to be held. He did not submit to the Court any evidence showing that he did so at any stage of the proceedings before the Constitutional Court. The Court therefore finds that he can reasonably be considered to have waived his right to a public hearing (see, *mutatis mutandis*, *Döry*, cited above, § 38; *Lundevall v. Sweden*, no. 38629/97, § 35, 12 November 2002; and *Schuler-Zgraggen v. Switzerland*, 24 June 1993,

Series A no. 263, § 58; and contrast *Olujić v. Croatia*, no. 22330/05, § 73, 5 February 2009).

30. In view of the above, the Court finds that there is no appearance of a violation of Article 6 in the present case. It follows that the complaints under Article 6 § 1 are manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and must be rejected as inadmissible, pursuant to Article 35 § 4 thereof.

B. Alleged violation of Article 10 of the Convention

31. The applicant complained that he was removed from office because of his public statements contrary to Article 10 of the Convention, which provides:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

32. The Court reiterates that Article 10 applies also to the workplace, and that civil servants, such as the applicant, enjoy the right to freedom of expression (see *Baka*, cited above, § 140; *Wille v. Liechtenstein* [GC], no. 28396/95, § 41, ECHR 1999-VII; *Guja v. Moldova* [GC], no. 14277/04, § 52, 12 February 2008; and *Kudeshkina v. Russia*, no. 29492/05, § 85, 26 February 2009). At the same time, the Court is mindful that employees owe to their employer a duty of loyalty, reserve and discretion. This is particularly so in the case of civil servants since the very nature of civil service requires that a civil servant is bound by a duty of loyalty and discretion (see *Ahmed and Others v. the United Kingdom*, 2 September 1998, § 55, *Reports of Judgments and Decisions* 1998-VI, and *De Diego Nafria v. Spain*, no. 46833/99, § 37, 14 March 2002). Disclosure by civil servants of information obtained in the course of their work, even on matters of public interest, should therefore be examined in the light of their duty of loyalty and discretion (see *Guja*, cited above, §§ 72-78).

33. The Court reiterates that issues concerning the functioning of the justice system constitute questions of public interest, the debate on which enjoys the protection of Article 10. However, the Court has on many occasions emphasised the special role in society of the judiciary, which, as the guarantor of justice, a fundamental value in a law-governed State, must

enjoy public confidence if it is to be successful in carrying out its duties. It may therefore prove necessary to protect that confidence against destructive attacks which are essentially unfounded, especially in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying (see *Prager and Oberschlick v. Austria*, 26 April 1995, § 34, Series A no. 313). The phrase “authority of the judiciary” includes, in particular, the notion that the courts are, and are accepted by the public at large, as being the proper forum for the settlement of legal disputes and for the determination of a person’s guilt or innocence on a criminal charge (see *Worm v. Austria*, 29 August 1997, § 40, Reports 1997-V). What is at stake as regards protection of the judiciary’s authority is the confidence which the courts in a democratic society must inspire in the accused, as far as criminal proceedings are concerned, and also in the public at large (see, *mutatis mutandis*, among many other authorities, *Fey v. Austria*, 24 February 1993, Series A no. 255-A). For this reason the Court has found it incumbent on public officials serving in the judiciary that they should show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called into question (see *Baka*, cited above, § 164, and *Wille*, cited above, § 64).

34. Turning to the present case, the Court notes that on 30 November 2009 the Constitutional Court received a letter written by the applicant and addressed to the then prime minister of the Republika Srpska and the president of the SNSD. On 3 December 2009 the Constitutional Court invited the applicant to submit his written statement concerning the impugned letter (see paragraph 8 above). The Court further notes that, subsequently, the applicant gave media interviews in which he criticised the Constitutional Court and held an unauthorised press conference without offering any evidence supporting his allegations.

35. The Court notes that the applicant was removed from office for damaging the reputation of the Constitutional Court and the reputation of a judge, thereby failing to perform his function. It thus considers that the Constitutional Court’s decision to remove the applicant from office of a judge essentially related to his ability to exercise his functions, that is, to the appraisal of his professional qualifications and personal qualities in the context of his activities and attitudes relating to the Constitutional Court (see, *mutatis mutandis*, *Harabin v. Slovakia* (dec.), no. 62584/00, ECHR 2004-VI). Therefore, contrary to the applicant’s claims, the Court considers that the reasons for the applicant’s removal from office were the impugned letter, the content of which has undoubtedly given rise to reasonable suspicion as to his impartiality and independence, and the behaviour incompatible with the role of a judge. In that respect the present case is to be distinguished from other cases, notably from *Baka* (cited above, §§ 151 and 152) and *Kudeshkina* (cited above, §§ 79 and 80), in which the decisions to remove the applicants from office were prompted by the views they had

publicly expressed and therefore constituted an interference with their right to freedom of expression.

36. The Constitutional Court examined the applicant's complaint under Article 10 and gave a detailed and extensively-reasoned decision. Its reasoning is capable of supporting the conclusion that the applicant's actions had seriously undermined the authority of the Constitutional Court and public confidence in the judiciary as a whole.

37. In view of the above, the Court finds that there is no appearance of a violation of Article 10. It follows that this complaint is manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and must be rejected as inadmissible, pursuant to Article 35 § 4 thereof.

C. Alleged violation of Article 13 of the Convention

38. The applicant has also invoked Article 13 of the Convention with regard to his above complaints. Even assuming that the applicant has an "arguable claim" to be the victim of a violation of a Convention right (see *Boyle and Rice v. the United Kingdom*, 27 April 1988, § 52, Series A no. 131), the Court reiterates that where, as in the instant case, the applicant alleges a violation of the rights conferred by the Convention by the final judicial authority of the domestic legal system, the application of Article 13 is implicitly restricted. Therefore, the absence of a remedy against the Constitutional Court's decision does not raise an issue under Article 13 of the Convention (see *Juričić*, cited above, § 100, and *Harabin v. Slovakia*, no. 58688/11, § 171, 20 November 2012).

39. It follows that this complaint is manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and must be rejected as inadmissible, pursuant to Article 35 § 4 thereof.

For these reasons, the Court unanimously

Declares the application inadmissible.

Done in English and notified in writing on 8 December 2016.

Milan Blaško
Deputy Registrar

Angelika Nußberger
President