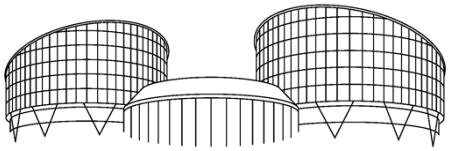

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF EMİNAĞAOĞLU v. TURKEY

(Application no. 76521/12)

JUDGMENT

Art 6 § 1 (civil) • Access to court • Tribunal established by law • Inability of judicial officer to have recourse to judicial review of disciplinary proceedings against him • Need to safeguard the independence of the judiciary and public trust in its functioning • Art 6 applicable • Special bond of trust between State and applicant not justification for exclusion of Convention rights given judiciary members' special status and importance of judicial review of disciplinary proceedings concerning them • Absence of review by a body exercising judicial functions or by an ordinary court
Art 8 • Private life • Use in disciplinary investigation of recordings of applicant's telephone conversations, intercepted during the criminal investigation against him, not "in accordance with the law"
Art 10 • Freedom of expression • Disciplinary sanctions imposed on applicant for different statements made • Highly defective decision-making process without indispensable safeguards for judicial professions and for the chair of an association of judges and prosecutors • Absence of effective and adequate safeguards against abuse

STRASBOURG

9 March 2021

FINAL

05/07/2021

This judgment has become final under Article 44 § 2 of the Convention.
It may be subject to editorial revision.

In the case of Eminağaoğlu v. Turkey,

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

Jon Fridrik Kjølbro, *President,*
Marko Bošnjak,
Aleš Pejchal,
Egidijus Kūris,
Carlo Ranzoni,
Pauliine Koskelo,
Saadet Yüksel, *judges,*

and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 26 January 2021,

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

INTRODUCTION

1. The case concerns disciplinary proceedings against the applicant, who was a judicial officer[1], mainly on account of certain statements he had made on various occasions.

THE FACTS

2. The applicant was born in 1967 and lives in Ankara. He was represented by Ms P. Akgül Doğusoy, lawyer.

3. The Government were represented by their Agent.

4. The facts, as submitted by the parties, can be summarised as follows.

I. THE CIRCUMSTANCES OF THE CASE

A. The applicant's career

5. On 23 November 1989 the applicant began his career in the national judicial service. On 1 July 1998 he was appointed to the post of prosecutor at the Court of Cassation. In June 2011 he was appointed as judge in Istanbul. Then on 13 June 2012, when he was a judicial officer "of the first grade" (*birinci sınıf*), he was transferred to the post of judge at Çankırı by an instrument of appointment issued on the same day by the High Council of Judges and Prosecutors (*Hakimler ve Savcılar Yüksek Kurulu* – "the HSYK"), after a disciplinary sanction had been imposed on him.

When he was a judge in Çankırı, on 10 February 2015, he applied to the HSYK for leave of absence in order to stand in the twenty-fifth parliamentary elections. In response the HSYK decided that he should be regarded as resigning from his duties with effect from 10 February 2015.

[1] Term including judges and prosecutors, "*magistrat*" in French.

Moreover, at the material time, he was chair of Yarsav, an association of judges and prosecutors.

B. Background to the case

6. In the Government's submission, prior to the imposition of the disciplinary sanction which is the subject of the present case, the Ministry of Justice had received two letters of denunciation from C.V. and from U.C., the latter being the press officer of a teachers' union, on 11 February 2008 and 13 September 2009 respectively.

With regard to the first letter, the applicant had been criticised for taking part in a parade to promote secularism.

As to the second letter, the author had denounced the applicant's conduct in relation to several press statements he had made with the alleged aim of influencing the "Ergenekon" trial (on this trial, see, among other cases, *Özkan v. Turkey* (dec.), no. 15869/09, 13 December 2011: in 2007, the Istanbul Public Prosecutor's Office had initiated a criminal investigation against alleged members of a criminal organisation known as "Ergenekon", all of whom were suspected of engaging in activities aimed at the overthrow by force and violence of the elected government; in a number of indictments, the Istanbul public prosecutor's office had brought criminal proceedings before the Istanbul Assize Court against several individuals – including generals and army officers, members of the intelligence services, businessmen, politicians and journalists – for planning a *coup d'état* with the aim of overthrowing the democratic constitutional order, a crime punishable by life imprisonment, mainly on the basis of Article 312 of the Criminal Code; the defendants in the trial were ultimately acquitted).

7. Again according to the Government, in two letters of 13 and 14 August 2008 certain evidence obtained in the course of a criminal investigation into a terrorist organisation was submitted to the Ministry of Justice with a view to criminal proceedings against the applicant.

8. In the context of two criminal investigations into the "Ergenekon" organisation initiated on 14 August and 14 October 2008 (with the approval of the Minister of Justice granted on 15 April and 5 September 2008), the Office of the Inspector General of Justice had applied to the Istanbul Assize Court for authorisation, *inter alia*, to place under surveillance the telephone line registered in the applicant's name, in accordance with section 101 of Law no. 2802 on judges and prosecutors ("Law no. 2802").

It appears from the file that this request for approval indicated, among other reasons, that the "Ergenekon" organisation had a particular structure and that its strict hierarchy prevented its members from knowing each other, that it presented a definite public danger in view of its capacity for action, and that there was no other means of identifying its members or finding out about its action plans.

It can also be seen from the file that, on 14 October 2008, the Istanbul Assize Court granted the requested authorisation for a limited period of three months (for details of the phone tapping, see paragraphs 26-35 below).

9. The Government further indicated that, on 17 September 2009, the inspectors investigating the allegations in question had submitted their report, concluding that some of the allegations called for criminal and disciplinary investigations. Since the applicant's conduct had been considered by the inspectors to require the opening of a criminal investigation, the investigation file had been transmitted to the competent public prosecutor's office pursuant to section 89 of Law no. 2802 and, in addition, a copy of that file had been submitted to the HSYK pursuant to section 87 of the same Law.

C. Disciplinary proceedings against the applicant

1. Opening of disciplinary proceedings

10. According to the applicant, on 30 October 2009 the Minister of Justice agreed to open disciplinary proceedings against him (the relevant document was not produced by the parties). The information in the file shows that the applicant stood accused, through his actions and statements, of undermining the dignity and honour of the profession and of having forfeited his personal dignity and esteem.

11. Furthermore, the applicant stated that, in a letter of 12 November 2009, the Directorate General for Criminal Affairs at the Ministry of Justice had informed him of the disciplinary proceedings opened against him and had invited him to submit arguments in his defence.

12. On 10 December 2009 the applicant submitted observations in his defence. He denied all the allegations made against him. In addition, he contested the manner in which the investigation had been conducted, invoked the protection of Articles 6, 8, 10, 11 and 13 of the Convention and maintained that it was his duty to share his views with public opinion.

2. Decision of 19 July 2011

13. On 19 July 2011 the Second Chamber of the HSYK, sitting as a panel of seven members, namely N.O. (President), A.E.T., A.G., Z.Oz., H.S., A.A. and B.E., issued its decision on the disciplinary proceedings against the applicant. It decided by a majority to impose the sanction of transfer (*yer değiştirme cezası*) on the applicant pursuant to section 68(2)(a) of Law no. 2802 (see paragraph 39 below) on the ground that, by his statements to the media, he had undermined the dignity and honour of the profession and had forfeited his personal dignity and esteem (*mesleğin şeref ve nüfuzu ile şahsi onur ve saygınlığını yitirdiği*) (decision no. 460).

The parts of that decision relevant to the present case read as follows (the allegations confirmed at the end of the disciplinary proceedings are indicated in italics – see paragraphs 18 and 24 below):

"... The investigation into Judge Ömer Faruk Eminağaoğlu reveals as follows.

(1) He organised a press statement on behalf of Yarsav [association of judges and prosecutors] on the premises of the Court of Cassation on 12 January 2009, in violation of sections 2 and 3 of the Associations Act ...

(2) By directly targeting the judges and prosecutors involved in the criminal case known as 'Ergenekon' and by making illegal political statements, he sought to influence [the pending case] in breach of Article 277 of the Criminal Code; to achieve this, he took advantage of his official title [and] made statements and criticisms about the investigation procedure and its conduct in favour of certain suspects and defendants in order to influence public opinion.

In that connection:

(a) On 29 October 2008, at 10.59 a.m., he had a telephone conversation with I.T., a columnist for the daily newspaper *Cumhuriyet*, and discussed with him [the failure to grant] a promotion to Z.O., the prosecutor who was conducting the *Ergenekon* criminal investigation; after this conversation, he sent a telephone message to certain members of the High Council of Judges and Prosecutors and telephoned to correct a number he had given.

(b) On 10 January 2009, at 2.13 p.m., during a telephone conversation with M.T.K., he made an appointment [with M.T.K.] to 'visit M.B., a representative of the daily newspaper *Cumhuriyet* in Ankara, between 5 p.m. and 5.30 p.m.'.

(c) *He paid a visit to the office of* Cumhuriyet*, the daily newspaper for which M.B. [journalist] worked (M.B. having been remanded in custody on charges of 'membership of a terrorist organisation [and] attempting to overthrow the government of the Republic of Turkey or partially or totally obstructing the performance of its duties'), [a visit which] was described in the 7 March 2009 issue of* Cumhuriyet *as 'a support visit'; in the statements he made [during the visit], he criticised the manner in which M.B.'s statement had been taken, in order to put pressure on the public prosecutor.*

(d) *On 21 March 2008 [during his appearance] on the private television channel Kanal Türk, during the programme broadcast at 6.30 p.m., he said the following: '... to remand a 91-year-old in custody there must be a suspicion, a suspicion of tampering with evidence and a [risk] of absconding. In these circumstances, you can remand a person in custody. But there are certain rules. If you summon him/her to take a statement, you must comply with the formalities. Otherwise you do not have the power to do what you want and as you like. The procedure has to be complied with [legally] as well ...; I saw the Prime Minister's statements broadcast on NTV [a private television channel] on 19 February ... and he said: 'These are the people who harassed us before we came to power. Now we are trying to unmask them' ... we cannot allow any suspicion to hang over the justice system that a criminal investigation is being carried out to order. In no way can such a doubt be allowed to subsist. Justice must be given to the justice system. It cannot be claimed that a criminal investigation was a 'success' of the justice system and the executive [at the same time]. The justice system cannot conduct a criminal investigation together with the executive ... It is the prosecutor who conducts the criminal investigation.*

(e) *In a television programme broadcast on 23 March 2008 ..., he was asked: 'In the context of the criminal investigation into the alleged terrorist organisation* Ergenekon*, is the fact that the journalist I.S. was arrested during the night and that this elderly and sick person was held in police custody for 30 hours compatible with democratic [values]?' and [the applicant] replied as follows: 'It is not even appropriate to answer that question, it is obvious that [this is not acceptable]. I also want to stress that the European Court of Human Rights has very frequently found violations by Turkey in this regard'. He went on to say: 'Is it the government that is conducting this criminal investigation on terror? Does the government know about it? Is it the government that is in control? When you look at some of the statements, speeches ..., the Prime Minister says: "We made some findings before we came to power, now we are trying to reveal them". This is a serious attack on the investigating authorities; in other words, you are saying that "we made some findings before we came to power and we have informed the justice system [of them]. It is the justice system which is investigating the matter". Can the justice system carry out an investigation to order? Such an attack is likely to influence the investigating authorities. Even so, that is not all they are saying ... they add that "up to a certain point, it was the security directorate which conducted the investigation, then handed it over to the justice system". Police custody is a possibility, legally speaking. Is it absolutely necessary to take someone into police custody? Is there any suspicion of [a risk of] absconding? You must explain this but you can't apply it [placement in police custody] in all circumstances. You have to explain the legal basis that can justify the taking of such measures during the night, at a given time. You can do so, you have the power to do so, but you cannot do this whenever you like if there is no necessity and you yourselves must justify this necessity'. The presenter asked him the following question: 'does that mean that they must demonstrate the need to go and arrest I.S. [the* Cumhuriyet *columnist] at 4 a.m. at his home?'; he replied as follows: 'You have to provide some justification for it, otherwise it is an abuse of power, arbitrary conduct*.

(f) In a telephone conversation on 7 January 2009 at 9.45 p.m., he advised Mr. A.A. that E.A. [that lawyer's client], who had been arrested in the context of the same criminal investigation [this must be the *Ergenekon* case], was required to remain silent when interviewed by the security directorate regardless of the questions and that, as lawyer [of that client], he had to submit a request for immediate appearance before the public prosecutor.

(g) *At the demonstration held at Anıtkabir on 18 April 2009 to protest against the remanding in custody of the university rector Başkent, M.H., and other rectors, he made the following statements to journalists: 'Now it has turned into an attack on science; they have started throwing a "grenade" [*hiza bombası *(a term used to describe an official warning, of the disciplinary type)] at the judiciary and science; we will not let anyone throw such grenades'.*

(h) *He participated in a round table entitled 'The* Ergenekon *Conspiracy, Putting the Judicial System to the Test' [*Ergenekon Tertibi ve Yargının Sınavı*], held in Germany on 9 May 2009 ..., and said [on that occasion]: 'in Turkey there is an undeclared state of emergency; they are trying to manipulate public opinion by putting pressure on the judicial system and by human rights violations'.*

(i) [about a telephone conversation with M.A., Chair of the Istanbul Bar Association]

(j) In a telephone conversation with I.T., a *Cumhuriyet* columnist, on 5 March 2009 at 4.10 p.m., in response to a question put by [him] concerning the second time the

columnist M.B. had been taken into police custody, he said: 'No, it is not possible Mr Ilhan, if he had previously absconded, he should not be released; but he did not abscond [after his release]; they have acted so [improperly], if the court ordered the release, it means that the conditions of detention were not satisfied: he had not absconded or tampered [with evidence]. This was confirmed by a court decision'.

(k) [concerning a telephone call from the same journalist, in which he expressed his views on the police custody and detention of M.B.]

(3) By his attitudes and behaviour, [the applicant] created the conviction that he could not perform his duties in a correct and impartial manner.

In this context, in view of his statements about a prosecution known to the public as the '*Ergenekon* case', [which is] a pending case and [about which the applicant] could have to form an opinion in his capacity as public prosecutor at the Court of Cassation during the examination on points of law, [he] acted not as a public prosecutor but as a politician.

(a) On 21 October 2008, at 2.28 p.m., in a telephone conversation that he had with S.Y., a journalist working for the daily newspaper *Yeniçağ*, he openly expressed his views on the disqualification of a judge in charge of the case in question and on the jurisdiction of the court and dictated these views to the journalist, warning him that his name should not appear in the article.

(b) On 10 January 2009, at 11.02 p.m., in a telephone conversation with Mr A.A., he asked about the situation of some of the suspects in the *Ergenekon* case; after Mr A.A. had told him 'that he had spoken with Mr Turan, who told him that the questioning by the public prosecutor's office was continuing', he asked to be 'kept informed regardless of the time'.

(c) *In articles published in the 25 January 2007 issues of the daily newspapers* Milliyet *and* Vatan*, quoting an article written by [the applicant] and published on a website accessible to lawyers, he stated that 'the criminal cases concerning Article 301 of the Criminal Code [had been] brought because of pressure from public opinion and the media rather than being assessed from a legal perspective, [that] Hrant [Dink, a Turkish journalist of Armenian origin, murdered in 2007 – see* Dink v. Turkey*, nos. 2668/07 and 4 others, 14 September 2010] [had not been admitted] as a Turk, [and that] this [was] the problem for those who had distorted the ideas of Atatürk (*Atatürkçülük*) and the Treaty of Lausanne'.*

(d) *During a news programme on the private channel Kanal D broadcast on 28 January 2007, he said: 'from a legal perspective, Article 301 of the Criminal Code is problematic; in the case of Hrant Dink, as the principal prosecutor at the Court of Cassation, [I] expressed the opinion that the offence had not been committed, that the criminal prosecution had been initiated by "pulling with forceps" a sentence of the eighth article [written by M. Dink]; the courts ruled by taking into account only the perception of public opinion'.*

(e) *In a documentary on the murder of Hrant Dink published on 8 February 2007 ..., he said ... : 'The criminal prosecutions relating to Article 301 of the Criminal Code were triggered by pressure from public opinion; whereas from a legal perspective nobody has the right to be a third-party intervener, many [people] have made requests to intervene [in the context of] these cases, [being driven] by different political sensitivities; the statements of the accused are not quoted in full in the press and only some of the statements that are the subject of the proceedings are quoted; the context in which these statements were made is not taken into consideration; the term "Turkishness" in Article 301 [of the Criminal Code] may also include the judge*

who is going to hear the case; [I myself] prepared an opinion that an offence had not been committed by Dink's article, but the Court of Cassation rejected it'.

(f) [about a lunch that the applicant had with an accused in the *Ergenekon* case]

(g) [about the applicant's participation in a meeting at which many of the accused in the *Ergenekon* case were present]

(h) [concerning a visit by the applicant to S.K., a former Principal Public Prosecutor at the Court of Cassation, against whom an arrest warrant had been issued]

(i) [concerning attempts to make a telephone call to H.T., a person who had been remanded in custody in connection with the above-mentioned case and subsequently released on bail due to health problems]

(j) [about a lunch that the applicant had with another accused person in the same case]

(k) The statements, attitudes and behaviour listed under (2) (b), (c), (d) and (f) above.

...

(4) By his wrongful conduct and improper relations, he has [undermined] the dignity and honour of the profession and has forfeited his personal dignity and esteem.

(a) *While serving as a prosecutor at the Court of Cassation, he engaged in speeches and behaviour which are not in keeping with his official position or with the aims and regulations of Yarsav [the association of judges and prosecutors], of which he was chair.*

For example:

(i) At a conference ... he said: '... the voice which once spoke out in Çankaya [former residence of the President of the Republic] against the statements of international institutions that cross the line of intervention in the judicial system is no longer speaking out today'.

(ii) Regarding a statement by the President of Religious Affairs, A.B., published in the daily newspaper Hürriyet *on 8 March 2008, in which he had stated '... the compulsory religious education course is against the law; why did the Supreme Administrative Court, which issued [this] decision, not ask for our opinion?', [the applicant] said the following: 'the fact that A.B., who had protested in the past about a failure to obtain the opinion of the Islamic clergy (*ulema*), expressed himself in this way is very unjust, [shows a great] bias, [is] illegal; the fact of directing criticism against the courts, which could only take as a reference national or international legal texts, which could only be based on [these], amount to intervention of religion in the legal field, of the State, [and] is inadmissible in a secular legal order'.*

(iii) He took part in a meeting held on 9 December 2007 ... and expressed himself as follows on that occasion : 'In 1969 we were Imran Öktem [former President of the Court of Cassation, known for his pro-secular ideas, who died in 1969], at our [1969] funeral [we were harassed]; in 1978 we were Doğan Öz [public prosecutor, murdered in 1978], they killed us, [but] we continued to practise our profession; in 1992 we were Yaşar Günaydın [public prosecutor, murdered in 1992], they killed us, [but] we continued to practise our profession ..."; in 1995, we were Ali Günday [Chair of the Bar of Gümüşhane, murdered in 1995], they killed us, [but] we continued to practise our profession; in 2006, we were Yücel Özbilgin [judge at the Supreme Administrative Court, murdered in 2006], they killed us, [but] we continued

to practise our profession; today they want to enchain the justice system; in the new Constitution, it is the part devoted to the justice system that is undergoing the most significant changes; they are in the process of destroying the independence of the justice system';

(iv) In his statements published on 16 May 2007 in the daily newspapers ..., he said the following: 'F.K., a former secretary to the Ministry of Justice, who was appointed as Minister of Justice, is not independent [during the election period the Minister of Justice was to be replaced by an independent Minister of Justice]. The fact that he was appointed Minister of Justice enabled him to chair the High Council of Judges and Prosecutors, which had lodged a complaint against him] because of his attitude and behaviour during the election of the members of the Court of Cassation and the Supreme Administrative Court'.

(v) In his statements published on 17 August 2007 and 18 August 2007 in the daily newspapers ..., he stated with regard to A. Gül's candidature for the Presidency of the Republic: 'The conduct expected of persons against whom legal proceedings have been brought and are still pending is not to become President of the Republic, in order to preserve the honour of the State; the appearance of wives is a message conveyed to society; [consequently,] the fact that the President of the Republic put on display the Islamic headscarf, [a symbol] belonging to a religion and now having acquired a political dimension, through the intermediary of his wife, not as her own personal choice ..., [demonstrates that] he could not act independently of religion and that he has supported the spread of the Islamic headscarf'.

(vi) In his interview with The Guardian *on 28 July 2008, he said : 'The AKP [*Adalet ve Kalkınma Partisi - *Justice and Development Party], the ruling party, was seeking a system of sharia law that would destroy the country's secular system. The government had exposed its true agenda in a series of measures, including attempts to establish halal standards in food production, signing bilateral agreements underwritten by "Islamic laws" with fellow Muslim countries, increasing religious education at State schools and allowing female students to wear headscarves at university; the moves were aimed at reviving an Islamic consciousness dormant since the end of the Ottoman Empire, leading to a religious society where secular lifestyles were discouraged and women denied equal status'.*

(vii) In his interview entitled 'The Prime Minister's statements on the warnings of the Principal Public Prosecutor at the Court of Cassation' published on 22 January 2008 in the daily Cumhuriyet*, he said the following: 'the courts are not bodies that act upon the requests of the legislature and the executive; the political authority cannot change the concept of freedom of expression and must not, through actions and speeches, prepare the ground for the erasure of judicial decisions with which it must comply; the political leadership must abandon [the idea] of making a target for such speeches, which are incompatible with law and democracy; the political leadership, which is not satisfied with this situation, has sought to devalue the role of the judiciary in the current system; in this context, the political leadership has demonstrated its aim of rendering the courts passive* vis-à-vis *the legislature and the executive in the draft Constitution; the political authority must abandon its vision of superiority; the supremacy of law is fundamental; it must not be forgotten that in a State governed by the rule of law there are areas in which the power of the majority cannot allow everything; it [the political authority] must not create unfounded expectations and tensions over matters that cannot be changed from a legal perspective.'*

(viii) [In the interview published] in the daily newspapers on 31 January 2008 ... and broadcast on the television channel ..., he expressed himself as follows: 'The amendment relating to the Islamic headscarf is not compatible with revolutionary laws; this situation will have consequences which are capable of changing the social structure and overturning the current secular system ...; this is the main reason why the courts could not recognise freedom of dress; even though the European Court of Human Rights has noted this situation, it is astonishing to see that the Turkish legislature, symbol of the war of independence, does not take it into account'.

(ix-xviii) [regarding numerous statements by the applicant published in daily newspapers or broadcast on private television channels, and regarding a statement by the applicant published in the 31 January 2008 issue of the daily newspaper *Hürriyet* on the wearing of Islamic headscarves by female students]

(xix) [concerning several telephone conversations on the political activities of a political party]

4.b He passed on information to certain individuals and the media, [which is] incompatible with his position as prosecutor at the Court of Cassation.

...

(5) [concerning conduct which does not respect the secrecy of the judicial investigation]

...

(6) [concerning failure to comply with working hours]."

14. In reaching its decision, the Second Chamber of the HSYK took into account the conduct and statements listed in paragraphs 2 and 4 in their entirety, and also those listed in paragraph 3, sub-paragraphs (a), (b), (c), (d), (e), (h), (i) and (k).

It took the view, *inter alia*, that, by directly targeting the judges and prosecutors involved in the *Ergenekon* criminal case and by making unlawful political statements, the applicant had sought to influence the pending case and that, to that end, he had taken advantage of his official title and had made statements and criticisms about the investigation and in support of certain suspects and defendants in order to influence public opinion. It further found that, by his attitudes and conduct in relation to the *Hrant Dink* and *Ergenekon* cases – judgments which could be appealed against on points of law and thus be examined by the Court of Cassation, where he might thus be called upon to submit a legal opinion – the applicant had created the conviction that he could not carry out his duties in a correct and impartial manner and had acted not as a public prosecutor but as a politician.

The parts of the conclusion of this decision that are relevant to the present case read as follows:

"While he was serving as prosecutor at the Court of Cassation, [the applicant] engaged in speeches and conduct which were not in keeping with his official position or the aims and regulations of Yarsav, of which he was chair; he had contacts with certain individuals in a manner that was incompatible with his office ..., and he passed

on information on various subjects to the media in a manner that was inappropriate to his position as prosecutor at the Court of Cassation. [As a result,] he has [undermined] the dignity and prestige of the profession and has forfeited his personal dignity and esteem. [Consequently], the sanction of disciplinary transfer must be imposed on him, pursuant to section 68(2)(a) of Law no. 2802 ..."

3. The applicant's request for review of the 19 July 2011 decision

15. On 20 February 2012 the applicant applied to the Second Chamber of the HSYK for a review of its decision of 19 July 2011. In support of his request, he complained in particular about a lack of reasoning in the decision and relied, *inter alia*, on his right to freedom of expression.

16. On 29 March 2012 the Second Chamber of the HSYK dismissed the application for a review of its decision.

4. The applicant's appeal to the HSYK's Plenary Assembly

17. The applicant appealed against the decision of 19 July 2011 before the Plenary Assembly of the HSYK.

18. On 6 June 2012 the Plenary Assembly, consisting of seventeen members including five members of the Second Chamber, and sitting as an appellate formation, gave its decision in which it rejected the applicant's appeal in so far as it concerned the above-mentioned points 2 (c), (d), (e), (g) and (h), point 3 (c), (d) and (e) and point 4 (a) (i-viii), and upheld the disciplinary sanction in question.

It took the view, however, that some of the allegations listed in the above-mentioned point 2 (a), (b), (f), (i), (j) and (k), point 3 (a), (b) and (i), point 4 (a) xix, and point 4 (b) (i-x), were based on the transcriptions of bilateral telephone communications and that their content was not of such a nature or seriousness as to call for the imposition of a sanction. It decided that it was not necessary to impose a sanction in respect of the accusations concerning the said telephone conversations.

As the HSYK decided not to amend the disciplinary sanction, the transfer of post imposed on the applicant thus became final.

5. The applicant's disciplinary transfer

19. The case file shows that, during the disciplinary investigation, the applicant was appointed to a new post as judge in Istanbul. After the disciplinary sanction became final, by a decision of 13 June 2012, the First Chamber of the HSYK decided to transfer him to a post of judge in Çankırı.

6. The applicant's request for rectification of the decision of 6 June 2012

20. On 5 October 2012 the applicant submitted a request for rectification of the decision of 6 June 2012.

21. On 7 November 2012 the HSYK declared that request inadmissible, taking the view that the decision of 6 June 2012, following an appeal by the applicant, had become final, pursuant to section 33 of Law no. 6087.

7. Review of the disciplinary sanction following the entry into force of Law no. 6572

22. On 2 December 2014, following the entry into force of Law no. 6572, a transitional provision was added to Law no. 2802 (transitional section 19 of Law no. 6572). This provision allowed judges and prosecutors to apply to the Plenary Assembly of the HSYK for a review of disciplinary sanctions imposed on them pursuant, *inter alia*, to section 68 of Law no. 2802 for acts committed between 14 February 2005 and 1 September 2013.

23. On 6 January 2015, on the basis of transitional section 19 of Law no. 6572, the applicant applied to the HSYK for a review of the disciplinary sanction imposed on him.

24. In a decision of 15 April 2015 the HSYK decided to review the disciplinary sanction and to give the applicant a reprimand instead.

The parts of that decision relevant to the present case read as follows:

> "... The request for review ... has been examined and it has been unanimously decided ... to impose the sanction of reprimand pursuant to section 65(2)(a) of Law no. 2802, in place of the sanction of disciplinary transfer, which was decided on 19 July 2011 and became final on 6 June 2012 for the acts listed in points 2 (c), (d), (e), (g), (h), 3 (c), (d), (e), 4 (a) (i-viii) ..."

25. In a decision of 7 October 2015 the HSYK's Plenary Assembly rejected the applicant's request for a review of the decision of 15 April 2015 (a copy of that request was not produced by the parties).

D. Phone tapping and criminal proceedings

26. On a date not specified in the file, criminal proceedings were brought in the Court of Cassation against the applicant for violation of Articles 277 and 288 of the Criminal Code, ultimately resulting in his acquittal on the charges brought under those provisions (judgment of the Court of Cassation of 3 June 2010).

27. Furthermore, in the context of two criminal investigations initiated on 14 August and 14 October 2008, the Office of the Inspector General of Justice submitted to the Istanbul Assize Court a request for authorisation, *inter alia*, to place under surveillance the telephone registered in the applicant's name, under section 101 of Law no. 2802 (information supplied by the Government; see paragraph 8 above).

28. On 14 October 2008 the Istanbul Assize Court granted the requisite authorisation for a limited period of three months. In so doing, it stated, among other reasons, that the "Ergenekon" organisation had a special

structure and that its strict hierarchy prevented its members from knowing each other, that it presented a definite public danger in view of its capacity for action, and that there was no other means of identifying its members and finding out about its action plans.

29. On 14 January 2009 the inspectors conducting the investigation requested an extension of the telephone surveillance.

30. On 15 January 2009 the Istanbul Assize Court granted the requested extension for three months, reiterating the reasons given in the earlier decision. According to a document in the file, the interception of the applicant's telephone calls was discontinued at the end of that period (namely on 14 April 2009).

31. On 19 January 2009, after examining the reports relating to the first period of telephone tapping, the inspectors took the view that the recorded conversations fell within the ordinary law for the purposes of section 93 of Law no. 2802 and Article 250 of the Code of Criminal Procedure. Accordingly, these reports were forwarded to the Istanbul Public Prosecutor's Office responsible for organised crime.

32. On 28 December 2009 the above-mentioned public prosecutor discontinued the investigation. In so deciding he took the view that the evidence gathered did not make it possible to say that the judges or prosecutors in question – including the applicant – had provided assistance or support to the organisation in question. Taking the view that the actions of one of the judges might require an individual disciplinary or criminal investigation, he referred this part of the case to the Ministry of Justice. Furthermore, relying on Article 17 § 1 of the Code of Criminal Procedure, he stated that since the suspects had not been called to give evidence in the investigation against them, it was not necessary to notify them of his decision. In addition, he ordered the destruction of the material obtained in the course of the surveillance and the drawing-up of a report to that effect, together with notification of the telephone surveillance to the persons concerned.

33. In a letter of 31 December 2009 marked "confidential", the Istanbul public prosecutor in charge of the investigation sent the applicant, at his office in Uşak, under Article 137 §§ 3 and 4 of the Code of Criminal Procedure, an information note on the discontinuance of the proceedings and the destruction of the material gathered during the surveillance. According to the information in the file, on the same date the records of the telephone tapping were destroyed by the Istanbul Public Prosecutor's Office in accordance with the discontinuance decision. On 5 January 2010 the computer media carrying the recordings in question were in turn destroyed by the same authorities.

34. On 23 March 2012 the applicant appealed against the decision of 28 December 2009 to discontinue the case and requested the destruction of all the data obtained through the interception of his communications.

35. In a decision of 22 May 2012 the Assize Court in Ankara dismissed the applicant's appeal, noting that the records of the intercept evidence had already been destroyed.

II. RELEVANT DOMESTIC LEGAL FRAMEWORK AND PRACTICE

A. The status of prosecutors in the Turkish judicial system

36. The Turkish judicial system does not make a fundamental distinction between the status of judges and prosecutors: first, the HSYK takes decisions regarding the admission of judges and prosecutors into the profession, their appointment, their transfer to other posts, their promotion and the supervision of judges and prosecutors in the performance of their duties (see Article 159, paragraphs 8-9, of the Constitution). Moreover, under Law no. 2802 on judges and prosecutors, they are subject, among other things, to the same provisions relating to their careers and disciplinary proceedings. In particular, Article 139 of the Turkish Constitution reads as follows:

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

B. The Constitution

37. The HSYK (the "High Council of Judges and Prosecutors", which has become the "Council of Judges and Prosecutors" since the constitutional reform of 2017) is a body constituted under Article 159 of the Constitution, as amended on 12 September 2010 by Law no. 5982. At the relevant time this provision read as follows:

> "The High Council of Judges and Prosecutors shall be established and shall exercise its functions in accordance with the principles of the independence of the courts and the security of tenure of the judiciary.
>
> The High Council of Judges and Prosecutors shall have a total of twenty-two full members and twelve substitute members; it shall comprise three chambers.
>
> The Minister of Justice shall be the chair of the Council. The Under-Secretary of the Ministry of Justice shall be an *ex officio* member of the Council. The following shall be appointed for terms of four years: four full members, whose qualifications shall be specified by law, shall be appointed by the President of Turkey from among the teaching staff in the field of law at higher education institutions and/or from among practising lawyers; three full members and three substitutes shall be elected by the general assembly of the Court of Cassation from among the members of that court; two full members and two substitutes shall be elected by the general assembly Supreme Administrative Court from among its members; one full member and one substitute shall be appointed by the general assembly of the Justice Academy of Turkey from among its members; seven full members and four substitutes shall be

elected from among the judges and public prosecutors of the first grade [with the requisite qualifications for classification in the first grade] at the civil courts; three full members and two substitutes shall be elected from among the judges and public prosecutors of the first grade [with the requisite qualifications for classification in the first grade] at the administrative courts. [The members thus appointed] may be re-elected on the expiry of their term of office.

The election of members to the Council shall be held within sixty days before the expiry of the term of office of the member in question. In case of a vacancy concerning a member appointed by the President of the Republic, before the expiry of the term of office, the new member shall be appointed within sixty days from the date on which the vacancy occurs. In the event of a vacancy in respect of any other member [the full member shall be replaced by the substitute member for] the remaining period of the term of office.

In the elections in which [the members of the general assemblies of the Court of Cassation, the Supreme Administrative Court and the Justice Academy of Turkey vote for] members to be elected to the Council [from among their peers] and in which [judges and prosecutors] vote for the members to be elected to the Council from among the judges and prosecutors of the first grade from civil and administrative courts, the candidates obtaining the greatest number of votes shall be elected as full members and as substitute members, respectively. These elections shall take place once for every term of office and by secret ballot.

The full members of the Council, other than the Minister of Justice and the Under-Secretary to the Ministry of Justice, may not assume any duties other than those prescribed by law or be appointed or elected to another office by the Council during their term of office.

The administration and the representation of the Council are carried out by the Chair of the Council. The Chair of the Council shall not participate in the work of the chambers. The Council shall elect the presidents of chambers from among its members and one Deputy Chair from among the presidents of chambers. The Chair [of the Council] may delegate some of his/her powers to the Deputy Chair.

The Council shall take decisions regarding the admission of judges and public prosecutors of civil and administrative courts into the profession, appointments, transfers to other posts, the delegation of temporary powers, promotions, and admission to the first grade, decisions concerning those whose continuation in the profession is found to be unsuitable, the imposition of disciplinary sanctions and removal from office; it shall take final decisions on proposals by the Ministry of Justice concerning the abolition of a court, or changes in the territorial jurisdiction of a court; it shall also exercise the other functions vested in it by the Constitution and legislation.

As to the supervision of judges and public prosecutors with regard to the performance of their duties in accordance with laws, rules, regulations and circulars ... enquiries and investigations concerning them shall be carried out by the Council's inspectors, upon the proposal of the relevant chambers and with the permission of the Chair of the High Council of Judges and Prosecutors. ...

The decisions of the Council, other than dismissal from the profession, shall not be subject to judicial review.

A Secretariat General shall be established under the Council. The Secretary General shall be appointed by the Chair of the Council from among three candidates nominated by the Council from among judges and public prosecutors of the first

grade. The Council is empowered to appoint, with their consent, the Council's inspectors, judges, and public prosecutors to temporary or permanent functions [within the Council]. ... The election of the members of the Council, the formation of the chambers and the division of tasks between chambers, the duties of the Council and its chambers, the quorum for meetings and decision-making, the operating procedures and principles, [the possibility of] appealing against the decisions and proceedings of the chambers and the procedure for examining such appeals, and the establishment and the duties of the Secretariat General, shall be laid down in law."

Prior to the constitutional reform of 2010, paragraph 10 of that provision read as follows:

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

38. Article 159 of the Constitution was amended in the constitutional reform of 2017. Henceforth, the Council of Judges and Prosecutors is composed of fifteen members and has two chambers. The Chair of the Council is always the Minister of Justice and the Under-Secretary to the Ministry of Justice is an *ex officio* member. The President of the Republic appoints four members. The other seven members are appointed by the Grand National Assembly.

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

39. The relevant provisions of Law no. 2802, on appointments by way of transfer, read as follows:

Section 15 – Grades and seniority

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

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

..."

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

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

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

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

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

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

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

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

...”

Section 35: Appointment by way of transfer

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

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

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

...

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

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

Section 62: Disciplinary sanctions

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

(a) a warning,

(b) a reduction in salary,

(c) a reprimand,

(d) deferment of advancement to a higher rank,

(e) deferment of promotion,

(f) transfer,

(g) dismissal from profession.

...”

Section 65: Reprimand as a disciplinary sanction

“Reprimand shall mean a written notification indicating that particular conduct has been found to be improper.

A reprimand shall be imposed as a sanction in the following cases:

(a) [existence of] conduct capable of undermining the reputation and trust required by the official position, whether or not the conduct has occurred in the performance of the person’s duties,

...”

Section 68: Sanction of disciplinary transfer

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

The following are sanctioned with disciplinary transfer:

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

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

...”

Section 69: Dismissal

“...

Where the act which calls for the application of a disciplinary sanction is capable of undermining the honour, dignity and prestige of the profession it shall give rise to the sanction of dismissal, even if it does not constitute an offence entailing a judgment against the person concerned.”

Section 73: Applications for review and appeals

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

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

An objection may be filed against that decision.

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

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

....”

Section 74: Enforcement

“1. Disciplinary sanctions shall take effect from the date of their imposition and shall be immediately enforced by the Ministry of Justice.

...”

Section 82: Investigations

“The opening of a preliminary enquiry (*inceleme*) or an investigation (*soruşturma*) in respect of judges and prosecutors for offences committed in connection with or in the course of their official duties, [and for] attitudes and conduct incompatible with their status and functions, shall be subject to authorisation by the Ministry of Justice. The Ministry of Justice may entrust the preliminary enquiry or the investigation to judicial inspectors or to a more senior judge or prosecutor than the person under investigation.

...”

Section 87: Closure of investigation

“[Any] finalised investigation file concerning judges and prosecutors [shall be sent] to the directorate general for criminal affairs of the Ministry of Justice. After examining [the file], the directorate general shall issue a written opinion, following which the Ministry shall decide whether it is necessary to prosecute or to impose a disciplinary sanction; the file shall then either be forwarded to the competent authority, or [or be archived].”

Section 101: Powers

“The judicial inspectors may, if it is considered necessary, hear individuals under oath and, if appropriate, use letters of request and carry out searches if the circumstances so require. They may directly gather material evidence and the necessary information from any entities and institutions. During inspections, enquiries and investigations carried out by the judicial inspectors, the institutions and persons concerned shall provide any information or documents that may be requested.”

40. Under section 102 of Law no. 2802, the reference salary of judges and prosecutors shall correspond to the gross amount of all the remuneration paid to the civil servant holding the highest post. Under section 103 of the same Law, the highest ranking judges and prosecutors, such as the President of the Court of Cassation and the President of the Supreme Administrative Court, shall receive the full reference salary, whereas the newly recruited judges and prosecutors shall receive 41% thereof. Judges and prosecutors of the first grade shall receive a gradual increase in their gross salary of 2% every three years, for as long as they remain eligible for appointment to the Court of Cassation or Supreme Administrative Court. In any event, their rate of remuneration shall not be higher than 83%, the rate applicable to judges of the Court of Cassation and the Supreme Administrative Court.

D. Law no. 6087 on the High Council of Judges and Prosecutors (known as the “Council of Judges and Prosecutors” since the constitutional reform of 2017)

41. The relevant provisions of Law no. 6087 on the High Council of Judges and Prosecutors, as in force at the relevant time, read as follows:

Section 1

“The purpose of this Law is to govern the establishment, organisation, duties, powers and working procedures and principles of the High Council of Judges and Prosecutors in compliance with the principle of independence of the courts and tenure of judges and prosecutors.”

Section 3

“(1) The High Council for Judges and Prosecutors shall consist of twenty-two full and twelve substitute members.

(2) The Council shall operate through its three chambers.

(3) The Chair of the Council shall be the Minister of Justice.

(4) The Under-Secretary to the Ministry of Justice shall be an *ex officio* member of the Council. In case of absence, his/her acting deputy shall attend the meetings.

(5) The Council shall consist of the Minister of Justice, the Under-Secretary to the Ministry of Justice, four full members to be appointed by the President of the Republic, three full and three substitute members to be elected by the Court of Cassation, two full and two substitute members to be elected by the Supreme Administrative Court, one full and one substitute member to be elected by the Academy of Justice, seven full and four substitute members to be elected from among the first-grade judges and prosecutors of the ordinary courts, three full and two substitute members to be elected from among the first-grade administrative judges and prosecutors.

(6) The Council shall be independent in the exercise of the duties and authorities set forth herein below. No organ, authority, office or individual may give orders or instructions to the Council.

(7) The Council shall perform its duties taking into consideration the principle of the independence of the courts and the security of tenure of judges and prosecutors and within the framework of the principles of fairness, impartiality, accuracy, honesty, consistency, equality, competence and qualification."

Section 7

"(1) The Plenary Assembly shall consist of the members of the Council. It shall have the following duties: ...

(b) to examine appeals lodges against the decisions of the chambers and to rule thereon;

..."

Section 18

"(1) The members of the Council shall be appointed for four years according to the following arrangements:

(a) Four full members shall be appointed by the President of the Republic from among academics who have served for at least fifteen years in the field of law within higher education institutions and from among lawyers who have at least fifteen years of effective service.

(b) Three full and three substitute members shall be elected by the general assembly of the Court of Cassation from among the members [of that court].

(c) Two full and two substitute members shall be elected by the general assembly of the Supreme Administrative Court from among the members [of that court].

(ç) One full and one substitute member shall be elected by the general assembly of the Turkish Academy of Justice from among the members [of that institution].

(d) Seven full and four substitute members shall be elected by judges and prosecutors of the ordinary courts from among [their peers] of the first grade who still hold the requisite qualifications for classification in the first grade.

(e) Three full and two substitute members shall be elected by administrative judges and prosecutors from among [their peers] of the first grade who still hold the requisite qualifications for classification in the first grade.

(2) Members [of the Council] may be re-elected at the end of their tenure and may vote in the election of members of the Council.

..."

Section 29

"... (3) The Plenary Assembly shall convene with a quorum of at least fifteen members and shall take decisions by an absolute majority of the total number of its members."

Section 30

"... (3) The chambers shall convene with a quorum of at least five members and shall take decisions by an absolute majority of the total number of its members."

Section 33

"(1) The Chair and the persons concerned may apply to the Plenary Assembly for the review of any decision which has been adopted by the Plenary Assembly at first instance, within ten days from the notification of the [said] decisions; decisions taken upon an application for review shall be final.

(2) The Chair and the persons concerned may apply for the review of a decision handed down by a chamber, within ten days from the notification of the [said] decision.

(3) The Chair and the persons concerned may, within ten days following notification, appeal to the Plenary Assembly against decisions taken by chambers after review. Decisions of the Plenary Assembly on appeal shall be final.

(4) Complainants shall also be entitled to challenge disciplinary decisions and [request their review].

(5) No appeal may be lodged with judicial authorities against decisions of the Plenary Assembly and of chambers except for decisions of dismissal. The Supreme Administrative Court shall hear appeals against dismissals, sitting as the first instance court. Such cases shall be deemed urgent by the Supreme Administrative Court."

42. Under Law no. 6087, as in force at the time, in his capacity as Chair of the HSYK, the Minister of Justice held significant powers, in particular to draw up the agenda of the Council, to appoint the Secretary General and to approval proposals to bring disciplinary proceedings made by the competent chamber of the HSYK (third Chamber), thus giving him a right of veto over disciplinary investigations against judges or prosecutors. He was not, however, entitled to attend meetings of the Plenary Assembly concerning disciplinary proceedings or to sit in any of the chambers or to participate in the transactions thereof.

E. Relevant leading decisions of the HSYK

43. In their observations the Government referred to the leading decision taken by the HSYK on 8 April 2015 concerning the assessment of the performance of judges and prosecutors. According to the Government, the performance of judges and prosecutors of the first grade was assessed every three years from the date of their admission to that grade (Article 5 of above-mentioned decision) and, in order to receive a promotion, those concerned had to meet the requirements specified in that decision, without having forfeited the qualifications required for access to the first grade (Article 6 of that decision).

In addition, the Government produced the leading decision of the HSYK on the admission of judges and prosecutors to the first grade dated 11 April 1983 (published in the Official Gazette on 1 May 1983). Under Article 5 of that decision, judges and prosecutors eligible for promotion to the first grade must not have received the sanction of disciplinary transfer and must not have received, more than once, a lesser sanction such as a reprimand or the deferment of advancement to a higher step or rank.

F. Relevant provisions concerning the interception and recording of communications

44. The relevant provisions concerning the interception and recording of communications can be found in the *Karabeyoğlu v. Turkey* (no. 30083/10, §§ 39-48, 7 June 2016) judgment.

III. RELEVANT INTERNATIONAL LAW AND PRACTICE

45. The relevant international law and practice in the present case can be found in the *Baka v. Hungary* [GC] (no. 20261/12, §§ 72-87, ECHR 2016) and *Oleksandr Volkov v. Ukraine* (no. 21722/11, §§ 78-80, ECHR 2013) judgments.

Interim opinion of European Commission for democracy through law (Venice Commission)

46. At its 85th Plenary Session (17-18 December 2010) the European Commission for democracy through law adopted an interim opinion on the Draft Law on the High Council for judges and prosecutors (of 27 September 2010) of Turkey (document CDL-AD(2010)042). The relevant extracts from that opinion read as follows:

> "**A. System for the organisation of the judiciary**
>
> 17. In order to understand the new reform of the HSYK, an understanding of the general organisation of the Turkish judiciary is necessary, in particular the system for

the qualification, appointment, transfer and dismissal of judges and prosecutors, as well as supervision, complaints, inspection and disciplinary measures.

18. In comparison with most European countries, the system for the organisation of the judiciary in Turkey is highly centralised, rather strict, provides for wide powers of supervision and inspection and has a large institutional framework. Combined with a certain tradition for politicising the administration and controlling the judiciary, this explains why the issue of the composition and competences of the HSYK is of such paramount importance not only to the Turkish judiciary itself, but also to political and public life in general. Under this system, most aspects of the organisation of judges and prosecutors have been handled directly by the authorities in Ankara, including qualification, appointments, transfers, dismissals, complaints, disciplinary actions, etc.

...

21. Up until the present reform, the competences to administer and supervise the judiciary and prosecution service were, to a large extent, divided between the Ministry of Justice and the HSYK, with the Ministry itself responsible for many of the tasks. ... This system has now been substantially reformed. The number of members of the HSYK was increased from 7 to 22 (with 12 substitutes), with a much broader and more pluralistic composition. The HSYK was given the status of a separate and independent public legal entity, with its own budget, administrative staff and premises. Most of the relevant competences that formerly belonged to the Ministry of Justice were transferred exclusively to the HSYK as an independent institution.

22. To understand the new changes, it is important to note that this is an institutional reform which, for the most part, concerns the top layer of the judicial administrative structure in Turkey. It is the management of the judicial administration that is being changed, and moved from the Ministry of Justice and the former HSYK to the much more independent and pluralistically composed new HSYK. The underlying administrative structure seems not to have undergone any major changes, except for having moved formally and physically from the Ministry of Justice to the HSYK. This includes the existing judges, the Inspection Board and the rest of the administrative staff.

23. The result is that the new HSYK has been established as a strong and separate new institution not only in legal, but also in actual terms. It is large, consisting of the 22 members (of which 20 are full time), some 40 judge rapporteurs, the Inspection Board with approximately 160 inspectors (judges by training) and ordinary staff amounting to around 380 people. Altogether this is now an institution with approximately 600 people, in a large 15-story building in central Ankara ...

B. General observations on the new reform of the HSYK

...

27. When studying Article 159 and the draft Law on HSYK, it is evident that the Turkish authorities are familiar with the European standards laid down by the Committee of Ministers of the Council of Europe and by the Venice Commission in its earlier reports and opinions. The draft Law on HSYK reflects the criteria of the Venice Commission on a number of points, and should, in general, be welcomed as a substantive and definite step in the right direction. In particular, the Venice Commission welcomes:

- the increase in the number of members of the HSYK;

- the pluralistic composition of the HSYK, with 10 of the members elected by their peers;

- the institutionalisation of the HSYK as a separate legal entity with public law status, administrative autonomy, and with its own budget, premises and staff;

- the wide transfer of power from the Ministry of Justice to the HSYK, both as regards legal competences, staff and resources;

- the substantial reduction in the power and position of the Minister for Justice as President of the HSYK;

- the creation of an internal appeals system, and the introduction of judicial review against decisions that are still made by the President (Minister for Justice).

28. The new HSYK is formally a much more independent institution than its predecessor, and the new system formally fulfils most European standards. However, at the same time, the Venice Commission has noted that there is considerable controversy in Turkey as to whether the new HSYK will in fact prove to be a more independent and impartial institution ...

29. While many of the new rules on the HSYK are in line with European standards, there are some issues that still require attention, and which will be dealt with in the following parts of this Opinion.

C. Composition and elections of the HSYK

...

34. While the Venice Commission, in general, supports the new composition of the HSYK, it regrets the fact that Parliament is not included in the processes of appointing members to the HSYK. It is advisable for judicial councils to include members who are not themselves representatives of the judicial branch. But, such members should preferably be appointed by the legislative branch instead of by the executive.

...

H. Judicial review

74. Article 7.2.c of the draft Law on HSYK establishes the competence of the HSYK's Plenary Assembly to: 'examine and render decisions about the objections raised against the decisions taken by the chambers'.

75. Article 33 adds that the re-examination of decisions 'established for the first time' by the Plenary Assembly and of those of the chambers may be requested by the President or 'the concerned ones' within 10 days after notification of the decisions themselves; complaints can also be made in respect of decisions pertaining to discipline; the Plenary Assembly decisions are final and no appeal may be made to judicial authorities for decisions of the Plenary Assembly and chambers other than those for the removal of office (i.e. dismissal), which are dealt with by the Council of State. as the first instance court. Judicial review of the acts of the Council concerning judges should be required by adopting a bureaucratic model, regulated by law.

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

to disciplinary decisions, but also to other decisions which affect the interests and rights of judges and prosecutors.

..."

THE LAW

I. PRELIMINARY OBJECTIONS

47. The Government first asked the Court to declare the application inadmissible for abuse of the right of application. They stated that the applicant had failed to inform the Court that the disciplinary sanction at issue had been replaced by a reprimand. In their view, the withdrawal of the disciplinary transfer, which was the subject of the application, had a direct effect on the case. Accordingly, the applicant's alleged failure to provide the Court with any information on this matter, which was essential for the resolution of the case, constituted an abuse of the right of individual application.

48. Secondly, the Government invited the Court to dismiss the application on the ground that the applicant lacked victim status. They submitted that the sanction of disciplinary transfer imposed on the applicant, having become final on 6 June 2012, had subsequently been annulled by the HSYK. They stated that, in a decision of 15 April 2015, the HSYK had granted the applicant's request under Law no. 6572 and had decided to review the sanction in question and replace it with a reprimand. They therefore took the view that the applicant no longer had victim status within the meaning of Article 34 of the Convention and that the application was incompatible *ratione personae* with the provisions of the Convention.

49. The Court reiterates that, under Article 35 § 3 (a) of the Convention, an application may be rejected as an abuse of the right of individual application if, among other reasons, it was knowingly based on untrue facts (see *Gross v. Switzerland* [GC], no. 67810/10, § 28, ECHR 2014; *Kerechashvili v. Georgia* (dec.), no. 5667/02, 2 May 2006; *Miroļubovs and Others v. Latvia*, no. 798/05, § 63, 15 September 2009; and *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 97, ECHR 2012). Incomplete and therefore misleading information may also amount to abuse of the right of application, especially if the information concerns the very core of the case and no sufficient explanation is given for the failure to disclose that information (see *Hüttner v. Germany* (dec.), no. 23130/04, 9 June 2006; *Predescu v. Romania*, no. 21447/03, §§ 25-26, 2 December 2008; and *Kowal v. Poland* (dec.), no. 2912/11, 18 September 2012). The same applies where new, significant developments occur during the proceedings before the Court and where – despite being expressly required to do so by Rule 47 § 6 of the Rules of Court – the applicant fails to disclose that information to the Court, thereby preventing it from ruling on the case

in full knowledge of the facts (see *Centro Europa 7 S.r.l. and Di Stefano*, cited above, § 97, and *Miroļubovs and Others*, cited above, § 63). However, even in such cases, the applicant's intention to mislead the Court must always be established with sufficient certainty (see *Al-Nashif v. Bulgaria*, no. 50963/99, § 89, 20 June 2002; *Melnik v. Ukraine*, no. 72286/01, §§ 58-60, 28 March 2006; *Nold v. Germany*, no. 27250/02, § 87, 29 June 2006; and *Centro Europa 7 S.r.l. and Di Stefano*, cited above, § 97).

50. In the present case, the Court notes that the applicant's complaints relate to the disciplinary sanction imposed on him on 19 July 2011, which became final on 6 June 2012, that is to say, before the application was lodged. It can be seen from the file that this sanction was indeed enforced, since the applicant, who was serving as a judge in Istanbul, was transferred on 13 June 2012 to Çankırı (see paragraph 19 above). The Court also notes that, in his application form, the applicant provided full information about his complaints.

It is acknowledged that Law no. 6572 of 2 December 2014 – enacted after the present application was lodged – afforded the applicant the possibility of requesting a review of the disciplinary sanction in question. The applicant duly availed himself of that remedy, exercising it after lodging his application, and this enabled him to obtain the conversion of his disciplinary sanction, but not its total annulment, and thus none of the consequences that would have resulted therefrom. The disciplinary transfer, which had already been enforced, was replaced by a milder sanction, namely a reprimand, for the same conduct as that which had been the subject of the original disciplinary proceedings (see paragraph 24 above).

51. Admittedly, the Court notes that the severity and consequences of the two sanctions are not identical. While the imposition of the sanction of disciplinary transfer, which is the second harshest sanction after dismissal, automatically prevents a judge or prosecutor from being promoted to the first grade, a single reprimand does not produce such consequences (see paragraphs 39-40 above). That being said, it is not argued in the present case that the conversion of the initial sanction, which constitutes a new fact occurring after the lodging of the present application, retroactively led to the consequences of that sanction being erased. Moreover, it is apparent from the decision of 15 April 2015 that the disciplinary accusations against the applicant remained unchanged (see paragraph 24 above). It should also be borne in mind that the applicant's complaints related to the initial sanction, which was only reduced after he lodged his application. In those circumstances, it cannot be concluded that the applicant had, from the outset of the proceedings, failed to inform the Court of one or more elements that would have been essential to the consideration of the case. Accordingly, there is no reason to consider that there has been an abuse of the right of individual application in the present case and the Government's objection in that connection should therefore be dismissed.

52. As to the applicant's victim status, the Court reiterates that according to its settled case-law, a decision or measure favourable to an applicant is not in principle sufficient to deprive him of his status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see *Murray v. the Netherlands* [GC], no. 10511/10, § 83, 26 April 2016). In the present case, as indicated above, the review of the disciplinary sanction, which had already been enforced, did not enable the applicant to benefit from the complete annulment of the measure, with all the consequences that would have stemmed therefrom, and the disciplinary accusations against him remained unchanged. Consequently, the decision of 15 April 2015 cannot be regarded as an acknowledgment, not even in substance, of the violation of the Convention rights alleged by the applicant or as a measure of redress.

Accordingly, the objection submitted in this connection by the Government must also be rejected.

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

53. Under Article 6 of the Convention the applicant complained that there had been no judicial review of the disciplinary proceedings against him and that this had been in breach of his right of access to a court.

Moreover, he argued that the proceedings before the HSYK concerning the impugned disciplinary sanction had not been compatible with the requirements of independence and impartiality.

Lastly, he complained that the decisions given in his case lacked reasoning.

The Court finds that the applicant's complaints should be examined under Article 6 § 1 of the Convention, of which the 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 ... hearing ... by an independent and impartial tribunal established by law. ..."

A. Admissibility

1. The parties' submissions

54. The Government submitted that Article 6 of the Convention was inapplicable in its civil aspect, as no "civil" rights were, in their view, at issue. They maintained that the dispute was entirely a matter of public law and pointed out that domestic law did not afford the applicant any possibility of seeking judicial review of the HSYK's decision, since in their view the applicant's status as a judge/prosecutor was in principle an obstacle to the applicability of Article 6. They argued that, whilst domestic law did not provide the applicant with the possibility of having his claims

examined by a tribunal, such restriction on the right of access to a court was justified in the present case in the light of the case-law stemming from *Vilho Eskelinen and Others v. Finland* ([GC], no. 63235/00, ECHR 2007-II), taking into account the nature of the applicant's employment and the subject-matter of the dispute at issue. They referred to the Court's case-law on the subject, including, *inter alia*, *Serdal Apay v. Turkey* ((dec.), no. 3964/05, 11 December 2007) and *Özpınar v. Turkey* (no. 20999/04, § 30, 19 October 2010). They concluded that the complaints under Article 6 were incompatible *ratione materiae* with the Convention.

55. Referring to the criteria set out in the *Vilho Eskelinen and Others* judgment (cited above), the Government also submitted that the applicant was a prosecutor at the Court of Cassation and consequently held a high-ranking position in the administration of justice. In their view, he was therefore exercising powers conferred by public law and performed duties consisting in safeguarding the general interests of the State.

56. The Government also pointed out, on the basis of the HSYK's leading decision on the assessment of the performance of judges and prosecutors, that those in the first grade were subject to such assessment every three years from the date of their admission to that grade and that, in order to be promoted, they had to meet the requirements specified in that decision, without having forfeited the qualifications required for admission to the first grade. The Government further made the following specific points: on the date when the sanction of disciplinary transfer was imposed on the applicant, he had been receiving a reference salary corresponding to a rate of pay of 81%; since the sanction was replaced by a reprimand, an adjustment of his reference salary to a rate of 83% had become possible on account of the fact that he had not forfeited the qualifications required for classification in the first grade; consequently, if he had continued to exercise the profession of judge or prosecutor, he would have obtained a 2% increase in view of the replacement of the initial sanction by a reprimand.

57. The applicant contested these arguments. In his application form he contended that the disciplinary sanction imposed on him had entailed negative and detrimental consequences for his career. This measure had prevented him from being appointed to a high-ranking judicial position and from working in certain judicial districts. In addition, he claimed that he had not been able to receive an indemnity on a permanent basis.

2. The Court's assessment

58. The Court observes that it has not been argued by either party that Article 6 § 1 is applicable in its criminal aspect. The proceedings at issue did not concern the determination of a criminal charge and therefore the criminal limb of that Article is not engaged (see, *mutatis mutandis*, *Oleksandr Volkov*, cited above, §§ 93-95, and *Denisov v. Ukraine* [GC], no. 76639/11, § 43, 25 September 2018).

(a) Relevant principles on the applicability of the civil limb of Article 6 § 1

59. The Court reiterates that for Article 6 § 1 in its "civil" limb to be applicable, there must be a dispute ("*contestation*" in the French text) over a "right" which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether it is protected under the Convention. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play (see, among many other authorities, *Boulois v. Luxembourg* [GC], no. 37575/04, § 90, ECHR 2012; *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, § 42, ECHR 2015; *Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, § 71, 29 November 2016; and *Regner v. Czech Republic* [GC], no. 35289/11, § 99, 19 September 2017).

60. It should further be noted that the scope of the "civil" concept in Article 6 is not limited by the immediate subject matter of the dispute. Instead, the Court has developed a wider approach, according to which the "civil" limb has covered cases which might not initially appear to concern a civil right but which may have direct and significant repercussions on a private pecuniary or non-pecuniary right belonging to an individual. Through this approach, the civil limb of Article 6 has been applied to a variety of disputes which may have been classified in domestic law as public-law disputes. These examples include disciplinary proceedings concerning the right to practise a profession (see *Le Compte, Van Leuven and De Meyere v. Belgium*, 23 June 1981, §§ 47 and 48, Series A no. 43, and *Philis v. Greece (no. 2)*, 27 June 1997, § 45, *Reports of Judgments and Decisions* 1997-IV), disputes involving the right to a healthy environment (see *Taşkın and Others v. Turkey*, no. 46117/99, § 133, ECHR 2004-X), prisoners' detention arrangements (see *Ganci v. Italy*, no. 41576/98, § 25, ECHR 2003-XI, and *Enea v. Italy* [GC], no. 74912/01, § 103, ECHR 2009), the right of access to investigation documents (see *Savitskyy v. Ukraine*, no. 38773/05, §§ 143-45, 26 July 2012), disputes regarding the non-inclusion of a conviction in a criminal record (see *Alexandre v. Portugal*, no. 33197/09, §§ 54 and 55, 20 November 2012), proceedings for the application of a non-custodial preventive measure (see *De Tommaso v. Italy* [GC], no. 43395/09, § 154, ECHR 2017 (extracts)), and the revocation of a civil servant's security clearance within the Ministry of Defence (see *Regner*, cited above, §§ 113-27).

61. Moreover, as regards the "civil" nature of such a right within the meaning of Article 6 of the Convention, the Court would point out that, according to its case-law, disputes between a State and its civil servants fall in principle within the scope of this provision unless the following two conditions are fulfilled in the aggregate: first, the State in its national law

must have expressly excluded access to a court for the post or category of staff in question; secondly, the exclusion must be justified on objective grounds in the State's interest (see *Vilho Eskelinen and Others*, cited above, § 62).

62. The Court further points out that the scope of the "civil" limb has been substantially extended in relation to public-employment disputes, a field which is directly relevant to the present case. In *Vilho Eskelinen and Others* (cited above) the Court, having regard to the existing state of affairs in the Contracting States and in view of non-discrimination considerations in relation to civil servants as compared to private employees, established a presumption that Article 6 applied to "ordinary labour disputes" between a civil servant and the State and that it would be for the respondent Government to show that a civil servant did not have a right of access to a court under national law and that this exclusion of the rights under Article 6 was justified (ibid., § 62). On the basis of the principles set out in *Vilho Eskelinen and Others*, Article 6 has been applied to employment disputes involving judges who were dismissed from judicial office (see, for example, *Oleksandr Volkov*, cited above, §§ 91 and 96; *Kulykov and Others v. Ukraine*, nos. 5114/09 and 17 others, §§ 118 and 132, 19 January 2017; *Sturua v. Georgia*, no. 45729/05, § 27, 28 March 2017; and *Kamenos v. Cyprus*, no. 147/07, § 88, 31 October 2017), removed from an administrative position without the termination of their duties as a judge (see, *Baka*, cited above, §§ 34 and 107-11, and *Denisov*, cited above, §§ 25 and 47-48), suspended from judicial office (see *Paluda v. Slovakia*, no. 33392/12, § 34, 23 May 2017) or otherwise subjected to a disciplinary sanction (see *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, §§ 119-20, 6 November 2018) It has also been applied to employment disputes involving civil servants who had lost a remote-area allowance which had been added to their salaries as a bonus (see *Vilho Eskelinen*, cited above, §§ 40 and 41) or who had been transferred to another office or post against their will, resulting in a decrease in salary (see *Zalli v. Albania*, no. 52531/07, 8 February 2011, and *Ohneberg v. Austria*, no. 10781/08, 18 September 2012). Furthermore, in *Bayer v. Germany* (no. 8453/04, 16 July 2009), which concerned the removal from office of a State-employed bailiff following disciplinary proceedings, the Court held that disputes about "salaries, allowances or similar entitlements" were only non-exhaustive examples of "ordinary labour disputes" to which Article 6 should in principle apply under the *Vilho Eskelinen* test (ibid., § 38; see also *Regner*, cited above, § 108).

63. The Court further notes that the criteria set out in *Vilho Eskelinen and Others* have been applied to all types of disputes concerning civil servants and judges, including in respect of their recruitment or appointment (see *Juričić v. Croatia*, no. 58222/09, 26 July 2011), career or promotion (see *Dzhidzheva-Trendafilova* (dec.), no. 12628/09, 9 October 2012),

transfer (see *Ohneberg*, cited above, § 25), and termination of service (see *Olujić v. Croatia*, no. 22330/05, § 67, 5 February 2009, concerning the disciplinary dismissal of the President of the Supreme Court, and *Nazsiz* (dec.), no. 22412/05, 26 May 2009, concerning the disciplinary dismissal of a prosecutor).

(b) Application of above-mentioned principles to the present case

(i) Existence of a right

64. The Court notes that there was undoubtedly a "dispute" (*contestation*) in the present case: the proceedings at issue concerned accusations about a breach of professional duty brought against the applicant in the disciplinary proceedings before the HSYK. This dispute was one of a real and serious nature and the proceedings that followed were decisive for the applicant's rights: these proceedings could have had serious repercussions for the applicant, such as his dismissal.

65. The Court is not persuaded by the Government's argument that the civil limb of Article 6 § 1 is not applicable for the sole reason that the applicant's dispute falls within the field of public law and there is no "civil" right at stake. A public-law dispute may bring the civil limb into play if the private-law aspects predominate over the public-law ones in view of the direct consequences for a civil pecuniary or non-pecuniary right (see *Denisov*, cited above, § 53). Admittedly, in the present case, the proceedings in question concerned a disciplinary measure. The dispute did not concern a question relating to "salaries, allowances or similar entitlements", which are, however, only non-exhaustive examples of the "ordinary labour disputes" to which Article 6 of the Convention should in principle apply (see *Bayer*, cited above, § 38). The Court nevertheless finds that Article 6 also applies in the present case – subject to the application of the criteria identified in the *Vilho Eskelinen and Others* judgment – for the reasons set out below.

66. The Court observes that the applicant, who was first a prosecutor at the Court of Cassation and later served as a judge in Istanbul, was subjected to disciplinary proceedings in respect of numerous and substantial accusations. As a result of these proceedings, some of the accusations were upheld and a disciplinary sanction was imposed on him on the grounds that, by his statements to the media, he had undermined the dignity and honour of the profession and had forfeited dignity and personal esteem. The measure in question is the harshest sanction after dismissal. The disciplinary proceedings against the applicant could have resulted in various sanctions ranging from a simple warning to suspension, or even dismissal. In particular, the main accusation against the applicant, namely that he had "undermined the honour and dignity" of the judicial profession, could also have entailed the sanction of dismissal (see paragraph 39 above). This

means that dismissal, as a sanction potentially applicable to the applicant, was certainly a possible outcome. Consequently, the disciplinary proceedings directly called into question the applicant's right to continue exercising his profession (contrast *Marušić v. Croatia* (dec.), no. 79821/12, §§ 74-75, 23 May 2017). The Court reiterates in this connection that disciplinary proceedings concerning the right to continue practising a profession are always regarded as involving "dispute as to rights ... of a civil nature" within the meaning of Article 6 § 1 of the Convention (see *Di Giovanni v. Italy*, no. 51160/06, § 36, 9 July 2013, and the references cited therein). In this connection, it would point out that in the *Di Giovanni* case (cited above), in which a judge had been given a mere warning, it concluded that the dispute had been one of a civil nature.

67. The Court further observes that the measure at issue in the present case concerned the applicant's place of employment; while he was serving as a judge in Istanbul, he had been transferred prematurely to another judicial district, in Çankırı. As pointed out above (see paragraph 62), Article 6 has been applied to employment disputes concerning civil servants who had been deprived of a remote-area allowance which had been added to their salaries, or who had been transferred to another office or post against their will, resulting in a reduction in their salary.

68. Moreover, it is apparent from the Government's observations (see paragraph 56 above) that the impugned measure also affected the applicant's remuneration as a judge/prosecutor (compare *Denisov*, cited above, § 54). Indeed, as a result of the disciplinary sanction in question, the applicant had forfeited the requisite qualification for classification in the first grade. As a result, he was unable to benefit from the 2% increase which was due to judges and prosecutors every three years. Admittedly, following the replacement of this sanction by a reprimand in 2015, he regained the said qualification. However, it has not been established that the softening of the sanction enabled the applicant, who had already left the judiciary in 2015, to obtain this increase retroactively.

(ii) "Civil" nature of the right: the Vilho Eskelinen *test*

69. Applying the *Vilho Eskelinen* test further (see, in the same vein, *Denisov*, § 55), the Court reiterates that, for the first of those conditions to be met, the respondent State must have expressly provided in its domestic law for exclusion from access to a court for the post or wage group concerned.

70. As regards the first condition of the *Eskelinen* test, that is to say whether national law "expressly excluded" access to a court for the post or category of staff in question, the Court notes that in the few cases in which it has found that condition to be fulfilled, the exclusion from access to a court for the post in question was provided for clearly and expressly (see examples cited in *Kövesi v. Romania*, no. 3594/19, § 119, 5 May 2020).

71. The Court would point out that, under Turkish law at the relevant time, in accordance with Article 159 § 10 of the Constitution, "no appeal [lay] against decisions of the Council before the ordinary courts". However, since the constitutional reform of 2010 there has been a right of appeal against the sanction of dismissal imposed by the HSYK (see paragraph 38 above). Accordingly, it can no longer be claimed that the disciplinary procedure concerning judges and prosecutors in Turkey, since the above-mentioned constitutional reform, is completely excluded from any judicial review. In particular, it is noteworthy that exclusion from access to a court is not linked to a post or category of employee but to the severity of the disciplinary sanction. It follows that judges and prosecutors dismissed from office following disciplinary proceedings are thus able to seek judicial review of the measure in question before the domestic courts. Consequently, the Court considers that the present case should be distinguished from the cases cited in *Kövesi* (cited above, § 119). However, it does not find it necessary to decide whether the first condition of the *Eskelinen* test is fulfilled in the present case. Indeed, it observes that, even if – leaving aside the specific regime applicable to dismissals, which are subject to judicial review – the national normative framework had expressly deprived the applicant of a right of access to a court in respect of the sanction at issue, the inapplicability of Article 6 § 1 of the Convention could not, in any event, be justified on objective grounds in the State's interest.

72. The Court reiterates that the mere fact that the applicant is in a sector or department which participates in the exercise of power conferred by public law is not in itself decisive. In order for the exclusion to be justified, it is not enough for the State to establish that the civil servant in question participates in the exercise of public power or that there exists, to use the words of the Court in *Pellegrin v. France* ([GC], no. 28541/95, § 65, ECHR 1999-VIII), a "special bond of trust and loyalty" between the civil servant and the State, as employer. It is also for the State to show that the subject matter of the dispute in issue is related to the exercise of State power or that it has called into question the special bond.

73. The Court takes note of the Government's argument in this connection. In order to justify the exclusion in question, the Government maintained that the subject-matter of the dispute was the exercise of the profession of judge/prosecutor and that the justice system was not an ordinary public service in so far as it was one of the essential manifestations of sovereignty. In their view, by its nature, the office of judge/prosecutor involves the exercise of powers inherent in the sovereignty of the State and therefore relates directly to the exercise of public authority. In that connection, the Government referred in particular to the *Pitkevich v. Russia* ((dec.), no. 47936/99, 8 February 2001) and *Serdal Apay* (cited above) decisions.

74. The Court would point out that, in the Turkish cases related to members of the judicial professions (see *Serdal Apay* and *Nazsiz*, decisions cited above), it certainly found that the removal from the scope of Article 6 of the Convention of disputes concerning public prosecutors was justified on State interest grounds. In reaching this conclusion, the Court relied on the *Pitkevich* precedent (cited above) dating from 2001 (prior to *Vilho Eskelinen and Others*), which excluded the judicial professions from the scope of Article 6 in accordance with the *Pellegrin* case-law. Similarly, in the case of *Özpınar* (cited above, § 30), in which the Court dealt with the case of a female judge who had been dismissed from her post following disciplinary proceedings, it relied on the *Serdal Apay* precedent (cited above), and noted that the position of judge in principle precluded the applicability of Article 6 in the light of the principles set out in the *Vilho Eskelinen and Others* judgment (cited above). It decided, however, to recharacterise the complaint by examining it under Article 13 in conjunction with Article 8, without giving a final ruling on the applicability of Article 6 of the Convention.

75. That being said, it should be borne in mind that under the legislation applicable at the material time in the cases which gave rise to the above-mentioned decisions and judgments, Turkey had categorically excluded access to a court for all kinds of disciplinary measures against judges and prosecutors. However, that legislation has changed since the constitutional reform of 2010.

76. More importantly, in its recent case-law, 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 (see *Baka*, cited above, § 164, and the references cited therein). This consideration applies with equal relevance to disciplinary proceedings affecting the careers of judges. Given the prominent place among State organs that judges and prosecutors hold in a democratic society, together with the growing importance attached to the separation of powers and to the necessity of safeguarding the independence of the justice system (see *Ramos Nunes de Carvalho e Sá*, cited above, § 196), the Court must pay particular attention to the protection of judges when it is called upon to review disciplinary proceedings against them in the light of the Convention provisions.

Such considerations may also apply *mutatis mutandis* to prosecutors in Turkey, in so far as the Turkish judicial system does not make any fundamental distinction between the status of judges and prosecutors (see paragraph 36 above, and, *mutatis mutandis, Kövesi*, cited above, § 124).

77. In this connection, since the *Vilho Eskelinen and Others* judgment (cited above) the Court has had to deal with only a few cases requiring examination of the second condition of the test set out therein: *Suküt*

v. Turkey ((dec.), no. 59773/00, 11 September 2007), where the case concerned the early retirement of a member of the armed forces for disciplinary reasons; and *Spūlis and Vaškevičs v. Latvia* ((dec.), nos. 2631/10 and 12253/10, 18 November 2014), which concerned the withdrawal of security clearance from one applicant, who had been entrusted with intelligence and counter-espionage, and from another applicant, who held one of the highest positions in the State Revenue Service and was in charge of the Customs Criminal Investigation Department. In these cases, the Court held that the exclusion from access to a court was justified because the subject matter of the disputes was related to the exercise of governmental authority or called into question the "special bond of trust and loyalty" between the individual concerned and the State as employer.

78. The Court finds that the above-mentioned case-law, which concerned an army officer and senior civil servants, all hierarchically attached to the executive branch of the State, cannot be transposed to the circumstances of the present case, which concerns a member of the judiciary. In the Court's view, the criterion that the subject-matter of the dispute must relate to the calling into question of the special bond of trust and loyalty must be read in the light of the guarantees of the independence of the judiciary. These two notions, namely the special bond of trust and loyalty required from civil servants and the independence of the judiciary cannot be easily reconciled. While the employment relationship between a civil servant and the State can traditionally be defined on the basis of trust and loyalty *vis-à-vis* the executive branch of government in so far as State employees are required to implement government policies, members of the judiciary enjoy specific guarantees which are considered essential to the exercise of judicial authority and they are bound by the duty, *inter alia*, to review acts of government. The complex nature of the working relationship between members of the judiciary and the State requires that the judiciary be sufficiently distant from other branches of the State in the exercise of its powers so as to enable its members to make decisions which are based to a greater extent on the requirements of law and justice, without fear or favour. It would be illusory to believe that members of the judiciary can uphold the rule of law and give effect to that principle if they are deprived by domestic law of Convention protection in relation to matters directly affecting their independence and impartiality (see *Kövesi*, cited above, § 124).

79. Furthermore, in the present case, it should be noted that, at the end of the disciplinary proceedings in question, the applicant was punished by the HSYK for statements he had made to the media. The subject-matter of the dispute was therefore essentially whether those statements were compatible with the applicant's duty of discretion, given his position at the time. Admittedly, this is a question which requires the weighing in the balance of the various interests at stake. However, in the light of the reasons given for

the HSYK's decisions, the Court has not identified any aspect of the subject-matter of the dispute which could give rise to "objective grounds in the State's interest" within the meaning of the *Vilho Eskelinen and Others* judgment (cited above), or grounds related to the exercise of governmental authority.

80. Accordingly, assuming that the first condition of the *Vilho Eskelinen and Others* test is fulfilled, the Court takes the view that the Government is not in a position to demonstrate that the exclusion from access to a court was justified on grounds in the State's interest or that the subject-matter of the dispute was connected with the exercise of governmental authority, or called into question the "special bond of trust and loyalty" between the applicant and the State as employer. Given the special status of members of the judicial professions and the importance of judicial review of disciplinary proceedings concerning them, the Court finds that it cannot be said that a special bond of trust between the State and the applicant justified excluding the rights guaranteed by the Convention (see, *mutatis mutandis*, *Savino and Others v. Italy*, nos. 17214/05 and 2 others, § 78, 28 April 2009).

Article 6 § 1 of the Convention is thus applicable in the light of the second condition of the test laid down in the *Vilho Eskelinen and Others* judgment (cited above).

(c) Conclusion

81. It is thus appropriate to reject the preliminary objection raised by the Government as to the inapplicability of Article 6 § 1 of the Convention.

82. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

83. In his application form, the applicant submitted that the HSYK, which had imposed the sanction on him, could not be regarded as an objective, independent and impartial body complying with the principle of fairness.

First, he complained of a violation of his right to a court. He claimed to have sustained the violation on account of the lack of judicial review of decisions imposing disciplinary sanctions, with the exception of the sanction of dismissal. He pointed out that, although such decisions were likely to have serious and irreversible consequences for the professional life of judges and prosecutors, they fell outside the scope of judicial review pursuant to Article 159 of the Constitution.

Secondly, the applicant criticised the alleged influence of the executive on the HSYK. This was demonstrated in his view by the fact that the Minister of Justice and the Under-Secretary of the Ministry of Justice, who belonged to the executive branch of government, were members of this body. Furthermore, he drew the Court's attention to the fact that the Minister of Justice chaired the HSYK and played a key role in bringing disciplinary proceedings against judges and prosecutors.

Thirdly, the applicant criticised some of the members of the Second Chamber of the HSYK, which had decided on the impugned disciplinary sanction issued on 19 July 2011, for also having sat in the Plenary Assembly of the HSYK which had heard his appeal. In his view, these members had already made known their position on the merits of the case and could not therefore be impartial.

Fourthly, the applicant complained of a lack of reasoning in the decisions delivered in his case.

84. In his rejoinder, the applicant argued, *inter alia*, that at the material time the HSYK had been largely dominated by members of an organisation designated by the Turkish authorities as "FETÖ/PDY" ("Fethullahist Terrorist Organisation / Parallel State Structure") and that they had used the disciplinary proceedings to intimidate him.

85. The Government disputed the applicant's arguments. They submitted that the HSYK was primarily an administrative body and it therefore exercised powers in matters of administration and inspection of the judiciary, enabling it to take binding decisions of an administrative nature. They added, however, that the HSYK could not be regarded as a completely administrative body within the State apparatus. According to the Government it was a constitutional body established and operating in accordance with the principle of the independence of the courts and the guarantees enjoyed by judges and prosecutors under Article 159 of the Constitution.

86. At the material time the HSYK had been composed of twenty-two full members and twelve substitute members. The Government gave the following additional information on its composition at that time: the Minister of Justice was the Chair of the HSYK and the Under-Secretary of the Ministry of Justice was an *ex officio* member; four full members, whose qualifications were laid down by law, were appointed by the President of the Republic from among members of the teaching staff in the field of law and lawyers; three full members and three substitute members were elected by the general assembly of the Court of Cassation from among the members of that court; two full members and two substitute members were elected by the general assembly of the Supreme Administrative Court from among the members of that court; one full member and one substitute member were elected by the general assembly of the Turkish Academy of Justice from among the members of that institution; seven full members and four

substitute members were elected by judges and prosecutors of the ordinary courts from among the first- grade judges still eligible; three full members and two substitute members were elected by the administrative court judges and prosecutors from among the first-grade judges still eligible. The Government added that, at the material time, the two *ex officio* members of the HSYK (the Minister of Justice and the Under-Secretary of the Ministry of Justice) came from the executive and the members enjoying the security of judicial tenure were in the majority; the term of office of the members of the HSYK was four years; and the establishment, status and powers of the Council were governed by the Constitution and the applicable law in such matters.

87. The Government pointed out that the independence of the members thus chosen to make up the HSYK was guaranteed by the Constitution and the relevant legislation and that nothing, whether in the appointment of those members or in the functioning of the Council, could undermine that independence.

88. As regards the appeal proceedings, the Government submitted that they had been conducted in accordance with the applicable legislation, namely section 33 of Law no. 6087, as in force at the material time. They stated that there was no evidence in the present case to suggest that the members of the HSYK had not been independent or impartial.

2. The Court's assessment

(a) Relevant principles on the right to an independent and impartial tribunal

89. The Court reiterates that the right to a fair hearing must be construed in the light of the rule of law, which requires that all litigants should have an effective judicial remedy enabling them to assert their civil rights. Everyone has the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way, Article 6 § 1 embodies the "right to a court", of which the right of access, that is, the right to institute proceedings before courts in civil matters, constitutes one aspect only (see, among other authorities, *Golder v. the United Kingdom*, 21 February 1975, § 36, Series A no. 18; *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, § 126, 21 June 2016; and *Naït-Liman v. Switzerland* [GC], no. 51357/07, § 113, 15 March 2018).

90. The Court further observes that an authority which is not classified as one of the courts of a given State may nevertheless, for the purposes of Article 6 § 1, fall within the concept of a "tribunal" in the substantive sense of this expression (see *Sramek v. Austria*, no. 8790/79, § 36, 22 October 1984). A court or tribunal is characterised in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law, with full jurisdiction, and after proceedings conducted in a prescribed manner (ibid., and see *Cyprus*

v. Turkey [GC], no. 25781/94, § 233, ECHR 2001-IV). A power of decision is inherent in the very notion of "tribunal" within the meaning of the Convention. The proceedings must provide the "determination by a tribunal of the matters in dispute", as required by Article 6 (see *Benthem v. the Netherlands*, 23 October 1985, § 40, Series A no. 97). For the purposes of Article 6 § 1 a tribunal need not be a court of law integrated within the standard judicial machinery. It may be set up to deal with a specific subject matter which can be appropriately administered outside the ordinary court system (see *Rolf Gustafson v. Sweden,* 1 July 1997, § 45, *Reports* 1997-IV). Moreover, only an institution that has full jurisdiction and satisfies a number of requirements, such as independence of the executive and also of the parties, merits the designation "tribunal" within the meaning of Article 6 § 1 (see *Beaumartin v. France*, 24 November 1994, § 38, Series A no. 296-B, and *Di Giovanni*, cited above, § 52).

91. Lastly, the Court would refer to the general principles on the requirements of an "independent and impartial tribunal" at the stages of the determination and review of a case, as described in *Denisov* (cited above, §§ 60-65; with regard to the concept of a "tribunal established by law ", see *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, §§ 218-234, 1 December 2020).

(b) The approach to be adopted for the examination of the applicant's complaints

92. The Court notes that in the present case, following the investigation conducted by the judicial inspectors on 30 October 2009, the Minister of Justice authorised the bringing of disciplinary proceedings against the applicant (see paragraph 10 above). Subsequently, on 19 July 2011, the HSYK decided to impose on the applicant the sanction of disciplinary transfer (see paragraphs 13-14 above). This sanction was confirmed by the HSYK Plenary Assembly, which decided, however, not to uphold certain accusations against the applicant (see paragraph 18 above). The disciplinary sanction, having thus become final, was enforced and the applicant was transferred to a new posting (see paragraph 19 above). On 15 April 2015, following the entry into force of Law no. 6572, the HSYK re-examined the disciplinary sanction imposed on the applicant and decided to replace it with a reprimand, but without amending the accusations against him (see paragraph 25 above). As a result, the applicant was disciplined on account of statements he had made on various occasions.

93. The Court notes at the outset that the applicant submitted, under Article 6 § 1 of the Convention, that there had been no judicial review of the disciplinary proceedings and that this breached his right of access to a court. He further argued that the proceedings before the HSYK relating to the disciplinary sanction at issue were not compatible with the requirements of

independence and impartiality. Lastly, he complained of a lack of reasoning in the decisions in his case.

94. The Court observes that some of the complaints raised before it concern the composition of the HSYK and the lack of judicial review of its decisions. In fact the HSYK is not considered in the Turkish legal order to be a "tribunal": it is a constitutional body, exercising its powers in accordance with the principle of the independence of the courts and the guarantees enjoyed by the judiciary under Article 159 of the Constitution.

The Court reiterates that neither Article 6 § 1 nor any other provision of the Convention obliges States and their institutions to comply with a given judicial order. In this connection, it reiterates its case-law to the effect that the word "tribunal" in Article 6 § 1 is not necessarily to be understood as signifying a court of law of the classic kind, integrated within the standard judicial machinery of the country (see *Savino and Others*, cited above, § 91). Moreover, there is no question of imposing on the States a given constitutional model regulating in one way or another the relationship and interaction between the various State powers. Consequently, in its analysis the Court must first consider whether the HSYK, the body responsible for imposing disciplinary sanctions, can be regarded as a "tribunal" in the substantive sense by virtue of its judicial role: determining matters within its competence on the basis of rules of law, with full jurisdiction, and after proceedings conducted in a prescribed manner (see *Sramek*, cited above, § 36, and *Cyprus v. Turkey*, cited above, § 233), irrespective of its status under Turkish law. If the answer to that question is in the negative, the next question is whether the applicant had the opportunity to refer the disciplinary measure, imposed by a body that did not itself meet the requirements of a "tribunal", for review by another body that met the requirements of Article 6 (see, for example, *Ramos Nunes de Carvalho e Sá*, cited above, § 132). Only in this way will the Court be able to deal with the substance of the applicant's main complaint concerning the right to a court.

(i) Respect for the principle that a case must be examined by a "tribunal"

95. The Court observes that the applicant's complaint, formulated not only under Article 6 but also under Article 13, mainly concerns an alleged infringement of his right to a court. It is therefore necessary to examine the whole of the proceedings leading to the imposition of a disciplinary sanction on the applicant in order to address the question whether he had the opportunity to submit the disciplinary measure at issue to a "tribunal" meeting the requirements of Article 6 § 1 of the Convention.

96. In the present case, it must first be ascertained whether the Second Chamber of the HSYK, when hearing the applicant's case, could be regarded as meeting the requirements of a "tribunal" within the meaning of Article 6 of the Convention. To this end, the Court will consider whether the

disciplinary authority exercised a judicial function and examine the nature of the proceedings before that authority.

97. The Court would emphasise that disciplinary measures may have serious consequences for the lives and careers of the member of judiciary concerned, such as the applicant in the present case, who was accused of acts that rendered him liable for dismissal, that is to say, for very serious sanctions which carried a significant degree of stigma (see, *mutatis mutandis*, *Ramos Nunes de Carvalho e Sá*, cited above, § 196). The judicial review carried out must be appropriate to the subject-matter of the dispute, that is to say, in the instant case, to the disciplinary nature of the administrative decisions in question. This consideration applies with even greater force to disciplinary proceedings against judges and prosecutors, who must enjoy the respect that is necessary for the performance of their duties. When a member State brings such disciplinary proceedings, public confidence in the functioning and independence of the judiciary is at stake; in a democratic State, this confidence guarantees the very existence of the rule of law (ibid.).

98. In the present case, the Court finds that the disciplinary sanction at issue was imposed on the applicant by the Second Chamber of the HSYK and was subsequently confirmed by the Plenary Assembly of that Council. According to the Government, the HSYK is an administrative body which, moreover, enjoys a *sui generis* status: it is a constitutional body exercising its duties in accordance with the principle of the independence of the courts and the guarantees enjoyed by members of judiciary under Article 159 of the Constitution.

99. The Court thus notes, as the Government stated, that at the material time the HSYK, which was composed for the most part of judges or prosecutors, exercised its duties in accordance with the principle of the independence of the courts and the guarantees afforded to judges and prosecutors. Moreover, there is no doubt that this body had exclusive competence and decision-making power in matters relating to the organisation of the judiciary, the careers of judges and prosecutors, as well as the disciplinary proceedings. However, the Court agrees with the Government's argument that the HSYK is a non-judicial body. Thus, as in the case of *Özpınar* (cited above), it is difficult to find, in the present case, when the applicant faced very severe sanctions, that the proceedings before the Second Chamber of the HSYK complied with the requirements of the procedural safeguards under Article 6 of the Convention: they were in fact mainly written proceedings and afforded very few safeguards to the judge/prosecutor concerned (ibid., § 77). In this connection, the Court observes that the relevant legislation did not contain any specific rules on the procedure to be followed, on the safeguards afforded to judges and prosecutors before the HSYK, or on the manner in which evidence was to be admitted and assessed. Moreover, the Second Chamber of the HSYK did

not hold hearings, nor did it summon or hear witnesses. Lastly, the decisions handed down by this Chamber contained only rudimentary reasoning, giving no indication of the grounds which led it to rule as it did.

100. Having answered in the negative the question of whether the Second Chamber of the HSYK could be regarded as meeting the requirement of a "tribunal", it is therefore appropriate to consider whether the applicant had the opportunity to refer the disciplinary measure for review by another body that met the requirements of Article 6.

101. The Court observes that the decisions of the Second Chamber of the HSYK, which hears disciplinary cases, could be challenged by way of an appeal lodged with the Plenary Assembly. However, there is no evidence to suggest that this body, which was responsible for reviewing the decision of the Second Chamber, afforded the guarantees of a judicial review. It is sufficient to recall the finding above as to the lack of procedural safeguards before the Second Chamber of the HSYK; this finding is also valid for the Plenary Assembly.

102. It follows, therefore, that neither the Second Chamber nor the Plenary Assembly of the HSYK can be characterised as a "tribunal" within the meaning of Article 6 § 1 of the Convention.

103. In this connection the Court reiterates its settled case-law according to which, even where an administrative body determining disputes over "civil rights and obligations" does not comply with Article 6 § 1 in some respect, no violation of the Convention can be found if the proceedings before that body are "subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 § 1" (see *Albert and Le Compte*, cited above, § 29, and *Tsfayo v. the United Kingdom*, no. 60860/00, § 42, 14 November 2006), that is, if any structural or procedural shortcomings identified in the proceedings before an administrative authority are remedied in the course of the subsequent control by a judicial body that has full jurisdiction (see, *Ramos Nunes de Carvalho e Sá*, cited above, § 132, with further references). That is not the case here. The Government have not put forward any grounds which could justify excluding the disciplinary sanction in question from any judicial review.

104. In the light of the foregoing, the Court concludes that the impugned sanction imposed on the applicant by the competent disciplinary authority has not been reviewed by another body exercising judicial functions or by an ordinary court. In these circumstances, it takes the view that the respondent State has impaired the very essence of the applicant's right of access to a court.

105. Accordingly, there has been a violation of Article 6 § 1 of the Convention on account of the breach of the principle that a case must be examined by a tribunal established by law.

(ii) Other complaints under Article 6

106. The applicant argued that the proceedings in the HSYK concerning the impugned disciplinary sanction had not been compatible with the requirements of independence and impartiality. He further complained about the lack of reasoning of the decisions given in his case.

107. The Government disputed this argument.

108. Having regard to the foregoing and in view of the Court's findings under Article 6 § 1 of the Convention it does not find any separate issue to be addressed in these complaints. Therefore there is no need to examine them separately.

III. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

109. The applicant alleged that there had been a breach of his right to freedom of expression on account of the disciplinary sanction imposed on him. He relied on Article 10 of the Convention, of which the relevant par reads as follows:

> "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. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or sanctions 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."

A. Admissibility

110. The Court finds that this complaint 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

111. In his application form the applicant argued that the opening of disciplinary proceedings against him on account of statements he had made on various occasions constituted a breach of his right to freedom of expression. He submitted that in the impugned statements he was merely

defending, in his capacity as chair of Yarsav, an association of judges and prosecutors, the rule of law and the independence of the justice system.

(b) The Government

112. The Government argued that the disciplinary sanction had been based on section 68(a) of Law no. 2802. The applicant, in his capacity as Principal Public Prosecutor at the Court of Cassation, could reasonably have foreseen that his offending remarks, made on different occasions, could entail disciplinary sanctions.

113. They further submitted that the disciplinary sanction had been imposed on the applicant for the purpose of maintaining the authority and impartiality of the judiciary within the meaning of Article 10 § 2 of the Convention.

114. Referring to the Court's case-law, the Government stated that members of the judiciary had to act in accordance with their duty of discretion and avoid any doubt as to their impartiality, on account of the nature of their public office.

115. The Government contended that the present case differed from the *Baka* case (cited above). In that case, the applicant had given his opinion on the legislative reforms at issue in his professional capacity as President of the Supreme Court and of the National Council of Justice. In the present case, however, the applicant's statements which had given rise to the disciplinary sanction had not concerned the position held by the applicant at the time of the events, namely that of prosecutor at the Court of Cassation. They therefore argued that the applicant had not been acting with the privilege deriving from his position as Principal Public Prosecutor at the Court of Cassation. They added that the statements in question had been made by the applicant in his capacity as chair of Yarsav, an association of judges and prosecutors. According to the Government, however, those statements had not been consonant with the aims of Yarsav, since the latter defined itself in its rules as a supra-political non-governmental organisation (NGO) set up to defend the independence and impartiality of the courts and the rule of law.

116. Furthermore, the Government drew the Court's attention to the importance of the applicant's position as prosecutor at the Court of Cassation. This position had given the applicant a prominent role within the justice system. Consequently, he should have exercised caution in expressing his thoughts and opinions. In the Government's view, it had been the applicant's duty, as a senior judicial officer, to exercise his freedom of expression with restraint, in so far as his statements were liable to undermine not only his own impartiality but also the impartiality of the judicial body to which he belonged.

117. The Government submitted that the applicant had not complied with the above-mentioned duty of discretion. They referred to some of the

misdeeds and statements that the HSYK took into consideration – as referred to at various points in the decision of 19 July 2011 – in imposing the disciplinary sanction on the applicant: those referred to in paragraph 4 (iii) (at a meeting the applicant had mentioned the names of murdered judges and had criticised the constitutional reform); those referred to in paragraph 2 (c) (statements in which the applicant had criticised the criminal investigation against a journalist, M.B., accused of belonging to a terrorist organisation); those referred to in paragraph 2 (e) (statements in which the applicant had criticised the measures taken against I.S., another journalist facing the same charges as M.B.); those referred to in paragraph 2 (g) (statements by the applicant in which he had said: "Now it has turned into an attack on science; they have started throwing a 'grenade' at the judiciary and science; we will not let anyone throw such grenades"); those referred to in paragraph 3 (h) (concerning a visit by the applicant to S.K., former public prosecutor at the Court of Cassation); and those referred to in paragraph 2 (h) (at a meeting the applicant had criticised the investigation into the "Ergenekon" organisation).

118. The Government maintained that the applicant's speeches had resembled political rhetoric, expressed on various occasions. They added that some of the statements in issue concerned ongoing judicial proceedings. In their view, the applicant had thus acted in breach of his duty of discretion and had shown that he could no longer exercise his profession as judge/prosecutor in an impartial manner. Consequently, the applicant's statements had clearly impaired the dignity and prestige of judicial office.

119. Accordingly, the Government submitted that the disputed measure had met a compelling social need and had been proportionate to the legitimate aim pursued, namely to maintain the authority and impartiality of the judiciary.

2. The Court's assessment

(a) General principles

120. The Court reiterates that the protection of Article 10 of the Convention extends to the workplace in general and to civil servants in particular (see *Vogt v. Germany*, 26 September 1995, § 53, Series A no. 323). While the Court has admitted that it is legitimate for a State to impose on civil servants, on account of their status, a duty of discretion, civil servants are individuals and, as such, qualify for the protection of Article 10 of the Convention (ibid., and see *Guja v. Moldova* [GC], no. 14277/04, § 70, ECHR 2008). It therefore falls to the Court, having regard to the circumstances of each case, to determine whether a fair balance has been struck between the fundamental right of the individual to freedom of expression and the legitimate interest of a democratic State in ensuring that its civil service properly furthers the purposes enumerated in

Article 10 § 2. In carrying out this review, the Court will bear in mind that whenever a civil servant's right to freedom of expression is in issue the "duties and responsibilities" referred to in Article 10 § 2 assume a special significance, which justifies leaving to the national authorities a certain margin of appreciation in determining whether the impugned interference is proportionate to the above aim (see *Baka*, cited above, § 162, and the references cited therein).

121. The Court further reiterates that, given the prominent place among State organs that the judiciary occupies in a democratic society, this approach also applies in the event of restrictions on the freedom of expression of a judge in connection with the performance of his or her functions, albeit the judiciary is not part of the ordinary civil service (see *Albayrak v. Turkey*, no. 38406/97, § 42, 31 January 2008, and *Pitkevich*, decision cited above). The Court has recognised that it can be expected of 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 in question (see *Baka*, cited above, § 164).

122. 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 is for this reason that judicial authorities, in so far as the exercise of their adjudicatory function is concerned, are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges (*Olujić*, cited above, § 59). It may therefore prove necessary to protect such confidence against destructive attacks that 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).

123. At the same time, the Court has also stressed, in cases concerning judges who have been in a similar situation to that of the present applicant, that having regard in particular to the growing importance attached to the separation of powers and the importance of safeguarding the independence of the justice system, any interference with the freedom of expression of a judge in such a position calls for close scrutiny on the part of the Court. Furthermore, questions concerning the functioning of the justice system fall within the public interest, the debate of which generally enjoys a high degree of protection under Article 10. Even if an issue under debate has political implications, this is not in itself sufficient to prevent a judge from making a statement on the matter. Issues relating to the separation of powers can involve very important matters in a democratic society which the public

has a legitimate interest in being informed about and which fall within the scope of political debate (see *Baka*, cited above, § 165).

124. Moreover, the Court reiterates the "chilling effect" that the fear of sanction has on the exercise of freedom of expression, in particular on other judges wishing to participate in the public debate on issues related to the administration of justice and the courts (see *Kudeshkina*, no. 29492/05, §§ 99-100, 26 February 2009). This effect, which works to the detriment of society as a whole, is also a factor that concerns the proportionality of the sanction or punitive measure imposed (ibid., § 99).

125. As mentioned above (see paragraphs 35 and 75 above), these considerations may also apply *mutatis mutandis* to prosecutors in Turkey, as the Turkish judicial system does not make any fundamental distinction between the status of judges and prosecutors.

126. Lastly, in order to assess the justification of an impugned measure, it must be borne in mind that the fairness of proceedings and the existence of procedural safeguards are factors to be taken into account when assessing the proportionality of an interference with the freedom of expression guaranteed by Article 10 (see, *mutatis mutandis*, *Castells v. Spain*, 23 April 1992, §§ 47-48, Series A no. 236; *Association Ekin v. France*, no. 39288/98, § 61, ECHR 2001-VIII; *Colombani and Others v. France*, no. 51279/99, § 66, ECHR 2002-V; *Steel and Morris v. the United Kingdom*, no. 68416/01, § 95, ECHR 2005-II; *Kyprianou v. Cyprus* [GC], no. 73797/01, §§ 171 and 181, ECHR 2005-XIII; *Mamère v. France*, no. 12697/03, §§ 23-24, ECHR 2006-XIII; *Kudeshkina*, cited above, § 83; and *Morice v. France* [GC], no. 29369/10, § 155, ECHR 2015). The Court has already found that the absence of an effective judicial review may support the finding of a violation of Article 10 (see, in particular, *Lombardi Vallauri v. Italy*, no. 39128/05, §§ 45-56, 20 October 2009). Indeed, as the Court has previously held in the context of Article 10, "[t]he quality of ... judicial review of the necessity of the measure is of particular importance in this respect, including to the operation of the relevant margin of appreciation" (see *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08 § 108, ECHR 2013).

(b) Application of those principles to the present case

(i) Whether there was an interference

127. As to the extent of the interference, the Court observes that the disciplinary sanction imposed on the applicant was not directly linked to his professional conduct in the justice system. In addition, the disciplinary offence of which he was found guilty concerned statements and opinions for which he had been reproached. Accordingly, the measure complained of essentially related to freedom of expression, and not the holding of a public post in the administration of justice, the right to which is not secured by the

Convention (see *Kudeshkina*, cited above, § 79). It follows that Article 10 is applicable in the present case.

The Court finds that it is not in dispute between the parties that the disciplinary sanction imposed on the applicant constituted an interference with the exercise of the right protected by Article 10 of the Convention. It will therefore examine whether that measure was justified in the light of Article 10 § 2 of the Convention.

(ii) Whether the interference was lawful

128. The Government stated that the impugned measure was based on section 68(2)(a) of Law no. 2802 and that, consequently, the interference was prescribed by law. The applicant did not submit any observations on that point.

129. The Court reiterates that the expression "prescribed by law", within the meaning of Article 10 § 2, requires that the impugned measure should have some basis in domestic law, but it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences, and that it should be compatible with the rule of law. Whether the first condition is met in the present case is not a matter of dispute. Indeed, it is not contested that the interference at issue – in the present case, the disciplinary investigation and the resulting disciplinary sanction – had a legal basis, namely section 68(2)(a) of Law no. 2802.

It remains to be ascertained whether the legal rule in question also met the requirements of accessibility and foreseeability. The Court reiterates that the level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed. It is moreover primarily for the national authorities to interpret and apply domestic law (see *Vogt*, cited above, § 48).

130. In the present case, the Court observes at the outset that the terms used in section 68(2) (a) of Law no. 2802, such as "dignity" and "honour of the profession", and "dignity and personal esteem" are general and allow multiple interpretations. It should also be pointed out that the Government did not cite any case-law of the HSYK with regard to the definition of the concepts mentioned in that provision. However, with regard to the rules on the conduct of members of the judiciary, a reasonable approach should be taken in assessing statutory precision (see, *mutatis mutandis, Oleksandr Volkov*, cited above, § 178). Accordingly, the Court is prepared to proceed on the assumption that the impugned interference was prescribed by law.

(iii) Whether there was a legitimate aim

131. The Court observes that, in the present case, the Government justified the investigation and ensuing sanction mainly by the duty of reserve and discretion that is binding on judges and prosecutors.

A certain number of Contracting States impose a duty of discretion on members of the civil service or judges and prosecutors. In the present case, the duty imposed on judges and prosecutors stemmed from the need to maintain their independence as well as the authority of their decisions. The Court thus finds that the resulting interference pursued at least one of the aims recognised as legitimate by the Convention, namely to maintain the authority and impartiality of the judiciary.

(iv) Whether the interference was "necessary in a democratic society"

132. In order to assess whether the measure taken by the national authorities in response to the applicant's actions met a "pressing social need" and was "proportionate to the legitimate aim pursued", the Court must look at the case as a whole. It will attach particular importance to the office held by the applicant – a prosecutor at the material time and later appointed as a judge –, his statements and the context in which they were made, together with the decision-making process which led to the measure in question.

(α) The office held by the applicant

133. The Court observes that at the material time the applicant was a member of the public prosecutor's office attached to the Court of Cassation. There can be no doubt that this specific status −which the applicant enjoyed in the national legal system − gave him a central role within the judicial professions in the administration of justice. That role imposed a duty on him to act as a guarantor of individual freedoms and the rule of law, through his contribution to the proper functioning of the justice system and thus to public confidence in that system (see *Kayasu v. Turkey*, nos. 64119/00 and 76292/01, § 91, 13 November 2008).

134. Moreover, it should be borne in mind that, at the material time, the applicant was also the chair of the association Yarsav, which defended the interests of members of the judicial professions and the principle of the rule of law. It should be pointed out that, in the proceedings before the HSYK, the applicant explained that he had made the disputed statements in his capacity as chair of that association. In this connection, the Court has accepted that when an NGO draws attention to matters of public interest, it is exercising a public watchdog role of similar importance to that of the press (see *Animal Defenders International*, cited above, § 103) and may be characterised as a social "watchdog" warranting similar protection under the Convention as that afforded to the press (ibid.; and see *Magyar Helsinki*

Bizottság v. Hungary [GC], no. 18030/11, § 166, 8 November 2016). It has recognised that civil society makes an important contribution to the discussion of public affairs (see, for instance, *Steel and Morris*, cited above, § 89, and *Magyar Helsinki Bizottság*, cited above, § 166). Consequently, the applicant had not only the right but also the duty, as chair of this legally established association, which continued to engage freely in its activities, to express an opinion on questions concerning the functioning of the justice system. As stated above (see paragraph 123), even if such issues have political implications, this is not in itself sufficient to prevent a judge from making a statement on the matter (see *Baka*, cited above, § 165).

135. Accordingly, the Court observes that, first, the applicant was bound by the duty of discretion inherent in his position as judge/prosecutor and that, secondly, as the chair of an association of judges and prosecutors, he had a role as a stakeholder in civil society. Thus his role and duties included expressing his views on the legislative reforms which were likely to have an impact on the courts and on judicial independence. It refers in this connection to the Council of Europe instruments, which recognise that each judge is responsible for promoting and protecting judicial independence and that judges and courts should be consulted and involved in the preparation of legislation concerning their profession and, more generally, the functioning of the justice system (see paragraph 45 above, and, as to the relevant international instruments, *Baka*, cited above, §§ 72-73 and 82-86).

(β) The content of the offending statements

136. The Court notes that the applicant made a number of statements on various occasions about different matters. It reiterates that, in principle, the judicial authorities are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges. That discretion should dissuade them from making use of the press, even when provoked. It is the higher demands of justice and the elevated nature of judicial office which impose that duty (see *Poyraz v. Turkey*, no. 15966/06, § 69, 7 December 2010). Judges must also show restraint when they express criticisms about their fellow civil servants, in particular other judges (see *Di Giovanni*, cited above, §§ 80-83, and *Simić v. Bosnia and Herzegovina* (dec.), no. 75255/10, 15 November 2016).

137. In the present case the HSYK decided to impose a disciplinary sanction on the applicant mainly for three series of statements, which are mentioned at different points of its decision of 19 July 2011. For the purposes of the present case it will examine those statements separately. It will not, however, take account of those referred to in point 3 (h) (concerning a visit paid by the applicant to S.K., former prosecutor at the Court of Cassation), even though the Government referred to them in their observations (see paragraph 117 above), since they were dismissed by the Plenary Assembly of the HSYK (see paragraph 18 above).

– *First series of statements*

138. The Court observes that the first set of statements consisted mainly of criticisms of certain measures taken during the criminal investigation against the organisation known as "Ergenekon". It is apparent from the statements in question that the applicant was in particular questioning the manner in which those measures had been applied. During a visit to a daily newspaper, the applicant also criticised the manner in which the statement of one of its journalists had been taken (point 2 (c)). In his remarks made during a television programme, he pointed out the legal conditions for detention in police custody, citing the case of a 91-year-old person, and criticised statements made by politicians on an ongoing case (point 2 (d)). Similarly, in his statements of 23 March 2008 (point 2 (e)), he not only criticised the detention in police custody, in the middle of the night, of a journalist who, he said, was elderly and ill, but also denounced the pressure which he claimed was being exerted by politicians on an ongoing case. As regards, lastly, two statements that he made during a demonstration and a panel discussion could be seen more as a warning to the executive and as a defence of the independence of the judiciary.

139. The Court notes at the outset that the applicant's criticisms were directed primarily against the preventive measures taken during the criminal investigation in a high-profile case, and not against the criminal proceedings as such. The reality of the measures criticised by the applicant was not disputed by the Government. Consequently, those criticisms had a factual basis and must therefore be regarded as findings of fact which, in the specific context, were indissociable from the opinions expressed by the applicant in his statements. It is important to note that he was a member of the public prosecutor's office attached to the Court of Cassation and was serving as a public prosecutor. Having regard to his high-ranking status in the judicial professions, the Court must bear in mind that, whenever the right to freedom of expression of persons in such a position is at issue, the "duties and responsibilities" referred to in Article 10 § 2 assume a special significance since it can be expected of 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 *Wille v. Liechtenstein* [GC], no. 28396/95, § 64, ECHR 1999-VII). The Court reiterates that the duty of discretion on the part of members of judiciary requires that even authentic information be disclosed accurately and reliably (see *Guja*, cited above, § 75, and *Wille*, cited above, §§ 64 and 67). Accordingly, it must be examined whether the opinions expressed by the applicant on a factual basis were nevertheless excessive in view of his status as judge/prosecutor.

140. The Court observes that the applicant publicly criticised a high-profile pending criminal case. Admittedly, through his statements, the applicant was commenting on a worrying situation regarding the

implementation of certain investigative measures. He also maintained that the judiciary was under pressure from the government (compare *Kayasu*, cited above, § 101). This was undoubtedly a matter of very significant public interest, which should be open to free debate in a democratic society (compare *Kudeshkina*, cited above, § 94). Moreover, the Court sees no reason to believe that the applicant was driven by a desire to derive personal benefit from his action, that he had a personal grievance, or that he was motivated by any other hidden agenda. It can therefore be accepted that the applicant's comments were indeed prompted by the intentions that he indicated and that he was acting in good faith. However, even though the Court finds it significant that the applicant did not play any role in the conduct of the investigation or the prosecution in question, it should be borne in mind that his remarks also consisted in criticism of the judicial handling of an ongoing case. Seen from that perspective and having regard to the principles stemming from the duty of discretion on the part of members of judiciary (see paragraphs 120-21 above), it also attaches weight to the reasons put forward by the Government to justify the interference with the applicant's right to freedom of expression, reasons which can be considered relevant to this series of statements.

– *Second series of statements*

141. As to the second series of statements, they related mainly to remarks made by the applicant on the various aspects of criminal proceedings brought against a Turkish journalist of Armenian origin (Mr Dink, murdered in 2007; see *Dink v. Turkey*, nos. 2668/07 and 4 others, 14 September 2010). In those statements, the applicant criticised the wording of Article 301 of the Criminal Code and the manner in which the above-mentioned case was dealt with by the domestic courts, stating that, in his capacity as public prosecutor at the Court of Cassation, he was of the opinion that the offence of which the journalist was accused had not been committed (paragraph 3 (c-e)).

142. The Court observes that these statements were found by the HSYK to constitute a breach of the duty of impartiality. It should be noted, however, that the applicant's remarks concerned a case that had already been decided. The applicant did indeed openly criticise Article 301 of the Criminal Code and the position taken by the national courts *vis-à-vis* criminal proceedings under that provision. However, it should be pointed out that cases relating to that provision have given rise to findings of a violation by the Court (see *Dink*, cited above, and *Altuğ Taner Akçam v. Turkey*, no. 27520/07, 25 October 2011). It is noteworthy that, in the *Altuğ Taner Akçam* judgment (cited above, § 95), the Court held, *inter alia*, that Article 301 of the Criminal Code did not meet the "quality of law" requirement on the ground that its unacceptable terms, being too broad, resulted in a lack of foreseeability as to its effects. The Court therefore fails

to see how the criticisms at issue can be regarded as an action or statement undermining the dignity of the applicant's profession.

143. The present case also differs from other cases in which public confidence in the administration of justice and the need to protect that confidence from destructive attacks were at stake (see *Di Giovanni*, cited above, § 81, and *Kudeshkina*, cited above, § 86). The Government relied on the need to maintain the authority and impartiality of the judiciary, but the opinions and statements publicly expressed by the applicant did not contain attacks on other members of the justice system (compare *Di Giovanni* and *Poyraz*, cited above), nor did they concern criticism of the judicial handling of an ongoing case (*Kudeshkina*, cited above, § 94).

144. The Court notes, by contrast, that the applicant expressed his opinion and criticisms on a provision affecting freedom of expression. Accordingly, it takes the view that his statements were clearly part of a debate on matters of general interest. It follows that the applicant's freedom of expression should have enjoyed a high level of protection and that any interference with the exercise of that freedom should have been strictly scrutinised, with only a narrow margin of appreciation being afforded to the authorities of the respondent State (see, *mutatis mutandis, Previti v. Italy* (dec), no. 45291/06, § 253, 8 December 2009).

– *Third series of statements*

145. As regards the third series of statements, the Court observes that they dealt with certain topical issues. More specifically, they criticised: the attitude of the President of the Republic *vis-à-vis* international institutions; statements by the President of Religious Affairs on judicial decisions relating to compulsory religious education; constitutional reform (the applicant cited the names of judges and prosecutors who had been murdered in the performance of their duties); and the appointment of the former Secretary to the Ministry of Justice as Minister of Justice during the election period. In those statements he also took a position on the wearing of the Islamic headscarf by the wife of the President of the Republic, on the importance of the separation of powers and the principle of secularism, and on politicians' speeches directed at the courts and the justice system in general (point 4 (a) (i-viii)).

146. The Court notes that this series of statements was found to be incompatible not only with the judicial professions but also with the aim of the association of which the applicant was chair.

147. The Court observes that some of the statements in question – namely his criticism of statements by the President of Religious Affairs on judicial decisions relating to compulsory religious education, his criticism of constitutional reform, his criticism of the appointment of the former Secretary to the Ministry of Justice as Minister of Justice during the election period, his reminder of the importance of the separation of powers and the

principle of secularism, and his position on politicians' speeches directed at the courts and the justice system in general – largely concerned issues relating to the justice system. In this connection, the Court would simply repeat the considerations it expressed above, namely that these statements clearly concerned a debate on matters of general interest and called for a high level of protection of the applicant's freedom of expression.

148. Admittedly, some of those statements related to topical issues which were not directly relevant to questions concerning the justice system. In this connection, it should be emphasised that it is important that, although their participation in public debate on major societal issues cannot be ruled out, members of the judiciary should at least refrain from making political statements of such a nature as to compromise their independence and undermine their image of impartiality. That being so, in the instant case, the Court observes that, in its decision on the merits, the HSYK made no distinction between the applicant's statements which related directly to the judicial system and those concerning different issues. Furthermore, it takes the view that account should have been taken of the fact that the applicant was also speaking in his capacity as chair of an association of judges and prosecutors. Although political statements by members of the judicial professions may give rise to reservations, it must be noted that, in its decision of 19 July 2011, the HSYK did not explain how the political statements in question were such as to undermine "the dignity and honour of the profession" and to cause the applicant to forfeit "dignity and personal esteem" (point 4). In fact only a minority of the statements at issue did not directly concern the justice system and those statements did not contain any gratuitous attacks on politicians or other judicial officers. The Court cannot find sufficient grounds in the HSYK's decision to justify the conclusion that, by his statements, the applicant undermined the dignity and honour of the judicial professions (contrast *Simić v. Bosnia and Herzegovina* (dec), no. 25255/10, §§ 35-36, 15 November 2016).

(γ) Whether there were procedural safeguards

149. The Court would refer back to its conclusion under Article 6 of the Convention that the disciplinary sanction in question was not reviewed by one of the ordinary courts of the respondent State's justice system (see paragraph 105 above). It can be seen from Article 159 of the Constitution that disciplinary sanctions imposed on judges and prosecutors are not subject to judicial review except for the sanction of dismissal.

150. It must be emphasised that the role of the courts in a democratic State is to guarantee the very existence of the rule of law. When disciplinary proceedings are brought against a judge, public confidence in the functioning of the justice system is at stake. The Court is of the view that any judge and prosecutor who face disciplinary proceedings must be afforded safeguards against arbitrariness. He or she must in particular be

able to have the measure in question scrutinised by an independent and impartial body competent to review all the relevant questions of fact and law, in order to determine the lawfulness of the measure and censure a possible abuse by the authorities. Before that review body the person concerned must have the benefit of adversarial proceedings in order to present his or her views and counter the arguments of the authorities (see paragraph 124 above and, for a recapitulation of the relevant principles, *Ramos Nunes de Carvalho e Sá*, cited above, §§ 176-86).

151. In addition, it should be observed that in the present case the HSYK gave its decision without seeing fit to address the arguments of the applicant, who was relying on the protection of Article 10 of the Convention. In that connection, even though the Government's considerations about the duty of discretion of members of judiciary may be found relevant in the present case, the Court observes that the HSYK failed to weigh in the balance the applicant's right to freedom of expression, in an appropriate manner and in accordance with the above-mentioned relevant criteria. In those circumstances, the Court is not persuaded that sufficient grounds have been put forward in the present case in order to justify the impugned measure. Moreover, the same shortcomings and the same lack of any judicial review prevent the Court from effectively exercising its European scrutiny as to the question whether the national authorities applied the established norms in its case-law concerning the weighing-up of the various interests at stake.

(δ) Conclusion

152. In the light of the considerations given above, the Court concludes that the Government's submissions about the duty of discretion of members of the judiciary were relevant, especially as regards the first and third series of statements in question. However, particularly in view of the fact that the decision-making process followed in the present case was highly defective and did not afford the safeguards that were indispensable to the applicant's status as a judicial officer and as the chair of an association of judges and prosecutors, it considers that the impugned restrictions on the applicant's right to freedom of expression under Article 10 of the Convention were not accompanied by effective and adequate safeguards against abuse (see, to similar effect, *Baka*, cited above, § 174).

153. Having regard to the foregoing, the Court finds that there has been a violation of Article 10 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

154. The applicant alleged that the failure to destroy the recordings obtained through telephone tapping was illegal. He submitted that the recordings at issue had been kept in the file and that only copies had been

destroyed. In addition to this complaint, he alleged that these recordings had been leaked to the press and that he had been transferred outside Ankara, following the imposition of a sanction, without due respect for the guarantees related to his status as a judicial officer or for his family requirements. He relied on Article 8 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

155. The Government submitted that the essence of the applicant's complaint under Article 8 of the Convention concerned an alleged violation of his right to respect for his private life on account of the use, in the context of the disciplinary investigation, of recordings of his telephone conversations, which had been intercepted during the criminal investigation. They first argued that the applicant did not have victim status within the meaning of Article 34 of the Convention. In that connection, they made the following points: even if the Second Chamber of the HSYK had based its decision of 19 July 2011, *inter alia*, on the recordings of the telephone conversations, the Plenary Assembly of the HSYK had re-examined the accusations against the applicant following his appeal; in its decision that formation had held that the content of the telephone conversations was not of such a nature and gravity as to justify the imposition of a disciplinary sanction and, consequently, it had decided not to impose a sanction on the applicant in respect of any acts based on that intercept evidence. The Government argued, secondly, that the applicant had not exhausted domestic remedies. In their view, the applicant could have sued for compensation in respect of the damage allegedly sustained as a result of the telephone tapping in question.

156. The applicant did not comment on these points.

157. The Court begins by noting that the applicant has not complained about the monitoring of his telephone calls or about the legislation applicable in such matters. It notes that, in so far as the applicant might be understood as complaining that a disciplinary sanction had been imposed as a result of an unlawful use of recordings obtained through telephone tapping and the consequences of that measure, it can be seen from the decision of 6 June 2012, adopted by the Plenary Assembly of the HSYK, that those recordings did not give rise to the imposition of a disciplinary sanction against him (paragraph 18 above). Furthermore, with respect to the applicant's allegation that these recordings were leaked to the press, the Court observes that the applicant did not provide any evidence to support

this complaint. The same is true of the alleged consequences of the measure. However, the Court considers that in the circumstances of the case it is unnecessary to dwell on this part of the complaint on the following grounds.

158. The Court notes that the applicant's complaint under Article 8 of the Convention, as formulated in his application form, was rather open-ended. Indeed, he further alleged that the failure to destroy the recordings obtained through telephone tapping was illegal. The Court notes that, in their observations on the admissibility and merits of the application, the Government stated that "the essence of the applicant's complaint concern[ed] an alleged violation [of his right to respect for his private life] on account of the fact that the records of his telephone conversations, [obtained during the criminal investigation], were used in the administrative investigation".

159. In the light of the criteria developed in its case-law on the notion of "complaint" (see *Radomilja and Others v. Croatia* ([GC], nos. 37685/10 and 22768/12, §§ 110-27, 20 March 2018), the Court is prepared to accept that the applicant's complaint also concerns the use of the recordings of his telephone conversations, obtained during the criminal investigation, outside the purpose for which they were collected. In so doing, it takes into account not only the manner in which this complaint was presented in the application form and the facts complained of (ibid., § 120) but also the characterisation given by the Government to this complaint.

160. Therefore, in so far as the applicant might be understood to have complained about the use, in the context of the disciplinary investigation, of recordings of his telephone conversations, which had been intercepted during the criminal investigation, the Court considers that the present case is similar to that of *Karabeyoğlu* (cited above). In that case, with regard to the system of compensation invoked by the Government, it dismissed a similar preliminary objection of failure to exhaust domestic remedies (ibid., § 60) and concluded that the tapping of the applicant's telephone lines constituted an interference by a public authority within the meaning of Article 8 § 2 of the Convention (ibid., § 76). Consequently, it dismisses the Government's objections that the applicant failed to exhaust domestic remedies and lacked victim status. It notes that this part of the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and is not inadmissible on any other grounds. It must therefore be declared admissible.

161. With regard to the substance of this complaint, the Court would point out that, again in the above-cited *Karabeyoğlu* case, it found that there had been a violation of Article 8 of the Convention, taking the view that the material obtained by the interception of telephone communications in criminal proceedings had been used for the purposes of the disciplinary investigation and that such interference was not "in accordance with the law" within the meaning of Article 8 § 2 of the Convention (ibid., § 119). Having assessed the present case in the light of the principles set out in its

above-mentioned case-law, the Court finds that the Government have failed to present any factual element or argument that would lead to any other conclusion. Indeed, it observes in the present case that while, according to a letter of 31 December 2009, the Istanbul public prosecutor in charge of the investigation sent the applicant an information note on the discontinuance of the proceedings and the destruction of material gathered during the surveillance (see paragraph 32 above), a copy undoubtedly remained in the hands of the judicial inspectors, who used this data as part of the disciplinary investigation against the applicant. As noted in the case of *Karabeyoğlu* (cited above, § 117), the use of these data outside the purpose for which they had been collected was not in conformity with domestic legislation.

The Court therefore finds a violation of Article 8 of the Convention as regards the use, in the context of a disciplinary investigation, of recordings of the applicant's telephone conversations.

V. OTHER COMPLAINTS

162. Under Article 13 the applicant complained about a lack of judicial review of the disciplinary procedure.

Lastly, relying on Article 14 of the Convention, he complained that the criminal investigation (which was discontinued) and the disciplinary proceedings had been conducted on account of his position as chair of Yarsav, an association of judges and prosecutors.

A. Article 13 of the Convention

163. Under Article 13 the Court observes that the applicant complained about the lack of any judicial review of the disciplinary proceedings. It first notes that this complaint is the same as the one raised under Article 6 § 1. It reiterates, in any event, that the role of Article 6 in relation to Article 13 is *lex specialis*, the requirements of Article 13 being absorbed by the more stringent requirements of Article 6 (see, for example, *Baka*, cited above, § 181). Given the Court's findings under Article 6 § 1 of the Convention (see paragraph 105 above), the present complaint under Article 13 raises no separate issue (see, for example, *Oleksandr Volkov*, cited above, § 189).

Accordingly, the Court finds that it does not need to examine separately the admissibility or merits of the complaint under Article 13 of the Convention taken together with Article 10.

B. Article 14 of the Convention

164. Under this provision the applicant complained that the criminal investigation (which was discontinued) and the disciplinary proceedings had

been conducted on account of his position as chair of Yarsav, an association of judges and prosecutors.

The Court has not found any evidence to suggest that the proceedings against the applicant were brought wholly or in part on one of the discriminatory grounds in Article 14. It further observes that the applicant is not able to provide any explanation in support of his allegations.

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

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

165. 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."

166. The Court notes that the applicant indicated in his application form that he wished to obtain pecuniary compensation for the non-pecuniary damage he claimed to have sustained as a result of the violations of the Convention.

167. The Court would point out that, in the letter that it sent to the applicant's representative at the stage of the proceedings when notice of the application was given to the Government, it clearly stated that the indication given by the applicant at an earlier stage of his wishes by way of just satisfaction would not compensate for any failure to make such a "claim" in his observations. Consequently, in the light of the general principles, as set out in the *Nagmetov v. Russia* judgment ([GC], no. 35589/08, §§ 57-61, 30 March 2017), and its established practice in such matters, the Court takes the view that the indication by the applicant, at an initial non-contentious stage of the proceedings before it, of his wish to obtain compensation cannot be regarded as a "claim" within the meaning of Rule 60 of the Rules of Court. In addition, it notes that it is not in dispute that no "claim" for just satisfaction was made in the proceedings before the Chamber after notice of the application was given in 2019. Accordingly, there is no cause to make any award to the applicant on this basis.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints concerning Articles 6 § 1, 10 and 8 of the Convention admissible;

2. *Declares* the complaint under Article 14 of the Convention inadmissible;

3. *Holds* that there has been a violation of Article 6 § 1 of the Convention as regards the applicant's right to a court;

4. *Holds* that there is no need to examine the other complaints under Article 6 § 1 of the Convention;

5. *Holds* there has been a violation of Article 10 of the Convention;

6. *Holds* that there has been a violation of Article 8 of the Convention;

7. *Holds* that there is no need to examine separately the admissibility or merits of the complaint under Article 13 of the Convention;

8. *Dismisses* the applicant's claim for just satisfaction.

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

Stanley Naismith
Registrar

Jon Fridrik Kjølbro
President