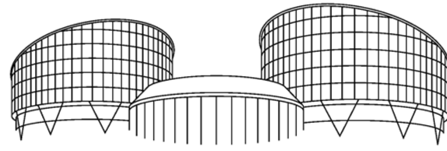

FOURTH SECTION

CASE OF MNATSAKANYAN v. ARMENIA

(Application no. 2463/12)

JUDGMENT

Art 6 § 1 (civil) • Access to court • District Court judge's premature dismissal from office following disciplinary proceedings against him • Inability to have recourse to judicial review of Council of Justice's decision recommending his dismissal • Art 6 applicable • No weighty reasons exceptionally justifying absence of judicial review • Very essence of right of access to court impaired

STRASBOURG

6 December 2022

FINAL

06/03/2023

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Mnatsakanyan v. Armenia,

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

Yonko Grozev, *President*,
Tim Eicke,
Armen Harutyunyan,
Gabriele Kucsko-Stadlmayer,
Pere Pastor Vilanova,
Jolien Schukking,
Ana Maria Guerra Martins, *judges*,
and Ilse Freiwirth, *Deputy Section Registrar,*

Having regard to:

the application (no. 2463/12) against the Republic of Armenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Armenian national, Mr Samvel Mnatsakanyan ("the applicant"), on 24 December 2011;

the decision to give notice to the Armenian Government ("the Government") of the complaints concerning the alleged violations of the applicant's rights of access to a court and to freedom of expression and of the prohibition of discrimination, and to declare inadmissible the remainder of the application;

the parties' observations;

the letter by the applicant's widow and daughter informing the Court of the applicant's death and of their wish to pursue the application lodged by him;

Having deliberated in private on 23 November 2021 and 15 November 2022,

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

INTRODUCTION

1. The case concerns the applicant's alleged inability to have recourse to judicial review of the decision to recommend his dismissal from the office of a judge. The applicant further considered that his dismissal had violated his right to freedom of expression and was discriminatory.

THE FACTS

2. The applicant was born in 1956 and lived in Yerevan prior to his death, which occurred on 17 August 2021. He was represented by Mr Ghazaryan, a lawyer practising in Yerevan.

3. The Government were represented by their Agent, Mr Y. Kirakosyan, Representative of the Republic of Armenia on International Legal Matters.

4. The facts of the case may be summarised as follows.

5. On 30 April 2011 the police brought charges against a certain A.K. for banditry.

6. On the same date the applicant, who was a judge at the Avan and Nor Nork District Court of Yerevan, granted the investigator's application seeking to have A.K. detained for a period of two months. That decision was upheld upon appeal.

7. On 30 May 2011 the applicant granted an application by A.K. seeking to be released on bail.

8. On 1 June 2011 the Chairman of the Court of Cassation requested that the Disciplinary Committee of the Council of Justice ("the Disciplinary Committee") initiate disciplinary proceedings against the applicant on the grounds that his decision of 30 May 2011 had not been properly reasoned.

9. On 2 June 2011 the Disciplinary Committee examined the relevant materials and concluded that the applicant's decision of 30 May 2011 had lacked proper reasoning and that he had not demonstrated the required level of professional competence.

10. On 13 June 2011 the applicant filed written submissions with regard to the disciplinary proceedings against him. He argued, *inter alia*, that it was not acceptable to punish a judge because of a difference of opinion or to be guided by the existing practice and custom, which could be viewed as arbitrary.

11. On 16 June 2011 the Disciplinary Committee applied to the Council of Justice requesting that it impose a disciplinary penalty on the applicant since, in its view, he had committed gross violations of the rules of criminal procedure and a gross violation of the rules of judicial ethics.

12. On 24 June 2011 the Council of Justice held a hearing with the participation of the applicant, who replied to the questions put to him by its members.

13. On the same day the Council of Justice adopted a decision recommending to the President of Armenia that the applicant be dismissed from his post. The relevant parts of that decision read as follows:

> "Having discussed the issue of subjecting [the applicant] to disciplinary action, having heard the report of the member of the [Disciplinary Committee], [and] the judge's explanations, and having examined the evidence and the materials ... the Council [of Justice] finds that the application [of the Disciplinary Committee] should be granted for the following reasons:
>
> ...
>
> [references to Article 6 of the Convention, the Constitution, the Judicial Code, Rules of judicial ethics, the Code of Criminal Procedure, and case-law of the Court of Cassation with regard to the duty of the courts to give sufficient reasons for their decisions]
>
> ...

The Council [of Justice] finds that in his decision of 30.05.2011 [the applicant] failed to provide any reasons to justify his decision to substitute detention with [bail] and instead, in the reasoning part of the decision, he merely mentioned the arguments submitted by counsel and the position of the [prosecution] in that respect ... The court did not indicate any factual circumstance which would make it possible to conclude that the grounds for detention as stated in the decision of 30.04.2011 no longer existed.

[reference to another decision of the Council of Justice where it had considered that a decision to place an individual in detention had been arbitrary in that no sufficient reasons had been given by the relevant judge]

Taking into account the position expressed in the above-mentioned decision and, having compared it with the circumstances of the case at hand, the Council [of Justice] finds that in the present case too [the applicant] has shown an arbitrary approach, as the delivery of a decision not based on facts and lacking reasons is a manifestation of arbitrariness independently of whether an individual is detained or released from detention by the judicial act in question ...

In view of the foregoing, the Council [of Justice] considers that ... [the applicant] had failed to substantiate the judicial decision ... thereby committing an apparent and gross violation of procedural law, and has not demonstrated the requisite level of professional competence ... committing gross violations of the rules of judicial ethics ...

The Council [of Justice] finds it necessary to address [the applicant's] arguments raised before the [Disciplinary Committee].

According to [the applicant] the basis for initiating disciplinary proceedings against him was the fact that he had released a person charged with a grave offence on bail.

The decision ... to substitute detention with bail by itself, ... was not a subject of discussion in the decision of the [Disciplinary Committee] to initiate proceedings against [the applicant] ...

The ground for initiating disciplinary proceedings has been the lack of the requisite professional competence, which had resulted in a gross violation of the rules of judicial ethics, as well as the delivery of an unreasoned and unjustified decision which manifested an arbitrary approach.

...

The Council [of Justice] finds it necessary to emphasise that the basis for imposing a disciplinary penalty on [the applicant] is not the fact of his releasing an individual on bail, but the delivery of a decision which was not reasoned ... which the Council [of Justice] views as a manifestation of arbitrariness.

..."

14. On 8 July 2011 the Chamber of Advocates released a public statement in support of the applicant, accusing the Council of Justice of the discriminatory application of its disciplinary powers over judges. It stressed that the reason for such a discriminatory application of disciplinary measures against judges was the Council of Justice's bias in favour of the prosecution. In its statement the Chamber of Advocates included extracts from various judicial decisions taken by other judges when ordering detention and/or rejecting requests for bail, arguing that the reasoning contained in those

decisions was similar to that given by the applicant in his decision of 30 May 2011.

15. On 11 July 2011 the President of Armenia issued a decree terminating the applicant's functions as a judge.

16. On 24 August 2011 the applicant brought a claim in the Administrative Court, seeking to declare the Council of Justice's decision dated 24 June 2011 invalid or void *ab initio* and the President's decree of 11 July 2011 invalid.

17. On 31 August 2011 the Administrative Court refused to admit the applicant's claim against the Council of Justice's decision of 24 June 2011 and declared his claim against the President's decree of 11 July 2011 inadmissible on procedural grounds. In particular, the Administrative Court stated that pursuant to the Judicial Code, the Council of Justice had acted as a court when taking the decision of 24 June 2011, which was not amenable to appeal because the Judicial Code had explicitly excluded such decisions from further judicial review. As for the applicant's claim contesting the President's decree of 11 July 2011, the Administrative Court found that the applicant had failed to mention the legal grounds in support of it, and gave him fifteen days to rectify his claim in that respect and to resubmit it.

18. The applicant appealed. He argued that the Council of Justice was an administrative body rather than a court, as it did not have the required judicial qualities of a court, such as independence and impartiality. He referred in that respect to the fact that the Council of Justice included four legal scholars who were not professional judges. He also argued that the proceedings before the Council of Justice did not offer the same level of procedural guarantees as the ordinary courts.

19. On 12 October 2011 the Administrative Court of Appeal dismissed the applicant's appeal.

20. A further appeal on points of law by the applicant was declared inadmissible by the Court of Cassation on 23 November 2011.

21. On 14 December 2011 the applicant resubmitted his claim in so far as the President's decree of 11 July 2011 was concerned.

22. On 2 May 2012 the Administrative Court dismissed the applicant's claim, finding that the President's decree of 11 July 2011 had been adopted in line with the requirements of the law that is on the basis of the Council of Justice's decision of 24 June 2011; there were therefore no grounds for declaring it invalid.

23. His subsequent appeals were dismissed in the final instance by the Court of Cassation on 24 October 2012.

24. Upon an application by the applicant, on 18 December 2012 the Constitutional Court delivered a decision finding, in particular, that Article 111 § 6 of the Judicial Code was in conformity with the Constitution.

RELEVANT LEGAL FRAMEWORK

I. RELEVANT DOMESTIC LAW

A. The Constitution of 1995 (following the amendments introduced on 27 November 2005)

25. The relevant provisions of the Constitution read, at the material time, as follows:

Article 55

"The President of the Republic:

...

11. upon the proposal of the Council of Justice appoints the president, chamber presidents and judges of the Court of Cassation, presidents of first instance, appellate and specialised courts; terminates their office; gives consent to initiating proceedings concerning their prosecution, detention or subjecting them to administrative responsibility; upon the recommendation of the Council of Justice appoints the judges of appellate, first instance and specialised courts;

..."

Article 94.1

"The Constitution and the law shall define the procedure for the formation and activities of the Council of Justice.

The Council of Justice shall consist of nine judges elected, as defined by law, by secret ballot by the General Assembly of Judges of the Republic of Armenia for a period of five years, two legal scholars appointed by the President of the Republic and two legal scholars appointed by the National Assembly.

The sittings of the Council of Justice shall be headed by the President of the Court of Cassation without the right to vote."

Article 95

"In conformity with the procedure stipulated in the law the Council of Justice:

...

(5) shall subject the judges to disciplinary action, [and] submit recommendations to the President of the Republic on terminating the power of a judge, detaining a judge, on agreeing to involve the judge as an accused or to institute court proceedings to subject the judge to administrative liability."

Article 96

"Judges and the members of the Constitutional Court shall be irremovable. Judges and the members of the Constitutional Court shall hold their offices until the age of 65. They may be removed from office only in the cases and in a manner prescribed by the Constitution and the law."

B. Judicial Code (in force from 18 May 2007 until 9 April 2018)

26. The relevant provisions of the Judicial Code, as in force at the material time, were as follows.

27. Under Article 14 § 2, judges hold office until the age of 65.

28. Under Article 97, the Council of Justice is an independent body which exercises its powers set out in the Constitution in accordance with the procedure set out by the Judicial Code.

29. Under Article 99 § 1, judicial members of the Council of Justice are elected by the General Assembly of Judges according to the following groups: one member from the courts of general jurisdiction of Yerevan, two members from the regional courts of general jurisdiction, one member from the Civil Court of Appeal, one member from the Criminal Court of Appeal, one member from the Administrative Court of Appeal, one member from the Administrative Court and two members from the Court of Cassation.

30. Article 111 § 6 provides that decisions of the Council of Justice to impose a disciplinary measure on a judge or on issuing a recommendation to the President of Armenia to terminate a judge's functions are final, enter into force at the time of delivery by the Council of Justice at a hearing, and are not amenable to appeal.

31. Article 153 § 1 provides that the Council of Justice has jurisdiction to impose a disciplinary penalty on a judge in the circumstances set out exhaustively in the second paragraph of the same provision.

Under Article 153 § 2, a judge may be subjected to disciplinary action for an apparent and gross violation of a provision of procedural law in the administration of justice (Article 153 § 2 (2)); or gross or ordinary violation of the rules of judicial ethics (Article 153 § 2 (4)).

32. Article 157 § 1 provides that the Council of Justice, having examined the matter of subjecting a judge to disciplinary action, may impose one of the following disciplinary measures:

(1) a warning;

(2) a reprimand combined with a reduction of 25% of salary for a period of six months;

(3) a strict reprimand combined with a reduction of 25% of salary for a period of twelve months; or

(4) a recommendation to the President of the Republic to terminate a judge's term of office.

33. Article 158 § 1 provides that the Council of Justice acts as a court when examining the matter of imposing a disciplinary measure on a judge. The procedure for the examination of cases by the Council of Justice is regulated by the Code of Administrative Procedure in so far as it is applicable.

34. Article 160 § 1 sets out the rights of the judge in the course of the disciplinary proceedings, including the following:

(1) To study, take excerpts from and make copies of the materials serving as a basis for the examination of the matter by the Council of Justice;

(2) To ask questions to the speakers, make objections, provide explanations and to make applications;

(3) To present evidence and participate in its examination;

(4) To participate in the relevant hearing either personally or through an advocate.

When the Council of Justice examines the matter of subjecting a judge to disciplinary action, the judge is entitled to the safeguards enshrined in Article 19 of the Constitution and Article 6 § 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 160 § 4 of the Judicial Code).

35. Article 166 provides that if, within a two-week period after receiving the recommendation issued by the Council of Justice to terminate a judge's term of office, the President of the Republic has not terminated the judge's powers, the recommendation is considered to have been rejected. In such a case, the judge is by virtue of law considered to have been subjected to the disciplinary measure prescribed by Article 157 § 1 (3) (see paragraph 32 above).

C. Fundamentals of Administrative Action and Administrative Procedure Act of 2004

36. Section 38 provides that administrative bodies must provide the participants in a procedure with an opportunity to be heard on the circumstances under examination.

II. RELEVANT COUNCIL OF EUROPE MATERIALS

37. The relevant extract from the appendix to Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe to member States on judges' independence, efficiency and responsibilities, adopted on 17 November 2010, reads as follows:

> "Liability and disciplinary proceedings
>
> 66. The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence.
>
> ..."

38. The relevant parts of Opinion no. 3 (2002) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and

impartiality, adopted on 19 November 2002, read as follows (footnotes omitted):

> "c. Disciplinary liability
>
> ...
>
> 59. The questions which arise are:
>
> (i) What conduct is it that should render a judge liable to disciplinary proceedings?
>
> ...
>
> 60. As to question (i), the first point which the CCJE identifies (repeating in substance a point made earlier in this opinion) is that it is incorrect to correlate breaches of proper professional standards with misconduct giving rise potentially to disciplinary sanctions. Professional standards, which have been the subject of the first part of this opinion, represent best practice, which all judges should aim to develop and towards which all judges should aspire. It would discourage the future development of such standards and misunderstand their purpose to equate them with misconduct justifying disciplinary proceedings. In order to justify disciplinary proceedings, misconduct must be serious and flagrant, in a way which cannot be posited simply because there has been a failure to observe professional standards set out in guidelines such as those discussed in the first part of this opinion."

THE LAW

I. PRELIMINARY REMARKS

39. The Court notes at the outset that the applicant died on 17 August 2021 (see paragraph 2 above), while the case was pending before the Court. The applicant's widow, Mrs Lia Mnatsakanyan, and his daughter, Ms Hasmik Mnatsakanyan, who are his heirs, informed the Court that they wished to pursue the application lodged by him.

40. The Government contended that the complaints raised in the application were of an inherently personal nature and concerned non-transferable rights, and thus invited the Court to strike the application out of its list of cases.

41. The Court has accepted on numerous occasions that where the applicant has died after the application was lodged the close relatives are entitled to take his or her place in the proceedings, if they express their wish to do so (see, among other authorities, *Dalban v. Romania* [GC], no. 28114/95, §§ 38-39, ECHR 1999-VI; *Ashot Harutyunyan v. Armenia*, no. 34334/04, §§ 86-87, 15 June 2010; and *Ergezen v. Turkey*, no. 73359/10, §§ 27-30, 8 April 2014).

42. The Court reiterates in this connection that in determining this matter the decisive point is not whether the rights in question are transferable to the heirs wishing to pursue the procedure, but whether the heirs or the next of kin can in principle claim a legitimate interest in requesting the Court to deal with the case on the basis of the applicant's wish to exercise his or her individual

and personal right to lodge an application with the Court (see *Ergezen*, cited above, § 29; *Ksenz and Others v. Russia*, nos. 45044/06 and 5 others, §§ 86-87, 12 December 2017; and *Barakhoyev v. Russia*, no. 8516/08, §§ 22-23, 17 January 2017). It further reiterates that human rights cases before it generally have a moral dimension and persons close to an applicant may thus have a legitimate interest in ensuring that justice is done, even after the applicant's death (see *Ksenz and Others*, cited above, § 86, and *Malhous v. the Czech Republic* (dec.) [GC], no. 33071/96, ECHR 2000-XII).

43. In view of the above and having regard to the circumstances of the present case, the Court accepts that the applicant's heirs have a legitimate interest in pursuing the application in the late applicant's stead. It will therefore continue dealing with the case at their request. For convenience, it will, however, continue to refer to Mr Mnatsakanyan as the applicant in the present judgment (see, for example, *Dalban*, cited above, § 1).

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

44. The applicant complained that he had been denied access to a court to contest his premature dismissal from the post of judge. He relied on Article 6 § 1 of the Convention, which reads in its relevant parts as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Admissibility

1. The parties' submissions

45. The Government contended that Article 6 of the Convention did not apply in the present case. They argued that, by virtue of Article 111 § 6 of the Judicial Code, as in force at the material time (see paragraph 30 above), the applicant was expressly denied access to a court to dispute the Council of Justice's decision to recommend his dismissal from the judiciary. They further argued that this exclusion was justified on objective grounds. In particular, considering the special status of a judge exercising public power, the State had envisaged a special procedure for imposing disciplinary penalties on judges, including for termination of their term of office, by setting up a separate body, the Council of Justice, which was an independent and impartial body exercising judicial functions in line with the guarantees of a fair trial.

46. The applicant merely stated that he maintained his complaints. In his application, he had complained about the fact that judges were deprived of the opportunity to seek judicial review of the decisions of the Council of Justice which, he argued, was not a "tribunal" within the meaning of Article 6 § 1 of the Convention. He further argued that there was no objective justification for excluding judges from access to courts of general jurisdiction

to contest the decisions of the Council of Justice, given that the proceedings before the Council of Justice did not offer the same procedural guarantees as those which existed in the proceedings before the courts of general jurisdiction.

2. *The Court's assessment*

(a) Existence of a right

47. The Court reiterates that Article 6 § 1 of the Convention applies under its civil head to a dispute ("*contestation*" in the French text) over a "civil right" which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether it is also 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. 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 *Micallef v. Malta* [GC], no. 17056/06, § 74, ECHR 2009, and *Boulois v. Luxembourg* [GC], no. 37575/04, § 90, ECHR 2012).

48. The Court observes that the applicant, who was around 55 years old at the material time, had an entitlement under Armenian law, including the Constitution, to serve as a judge until the age of 65 (see paragraphs 25 and 27 above). Furthermore, his term of office could be prematurely terminated only in exceptional circumstances upon the recommendation of the Council of Justice (see paragraphs 25, 31 and 32 above). Although judges were dismissed by decree of the President, it is clear that the legal basis of the relevant decree was the recommendation issued by the Council of Justice as a result of the disciplinary proceedings initiated before it against judges (see paragraphs 31, 32 and 35 above). The Court therefore considers that in the present case there was a genuine and serious dispute over a "right" which the applicant could claim on arguable grounds under domestic law (see, *mutatis mutandis*, *Sturua v. Georgia*, no. 45729/05, § 24, 28 March 2017, and *Kamenos v. Cyprus*, no. 147/07, §§ 64-71, 31 October 2017). It remains to be determined whether the nature of the right in question was civil.

(b) Civil nature of the right

49. In cases concerning employment disputes involving civil servants, the Court applies a two-tier test established in its Grand Chamber judgment in *Vilho Eskelinen and Others v. Finland* ([GC], no. 63235/00, §§ 61-62, ECHR 2007-II – "the Eskelinen test"). In order for the respondent State to be able to rely before the Court on the applicant's status as a civil servant in excluding the protection embodied in Article 6, two conditions must be fulfilled. First, the State in its national law must have excluded access to a court for the post or category of staff in question (see *Grzęda v. Poland* [GC],

no. 43572/18, § 292, 15 March 2022). Secondly, the exclusion must be justified on objective grounds in the State's interest. In this context the Court has found that there can in principle be no justification for the exclusion from the guarantees of Article 6 of "ordinary labour disputes", such as those relating to salaries, allowances or similar entitlements, on the basis of the special nature of the relationship between the particular civil servant and the State in question. There will in effect be a presumption that Article 6 applies. It is for the respondent Government to demonstrate, first, that a civil-servant applicant does not have a right of access to a court under national law and, secondly, that the exclusion of the rights under Article 6 for the civil servant is justified (*Vilho Eskelinen and Others*, cited above, § 62).

50. The Court will examine whether the dispute over the applicant's dismissal could be excluded from the protection of Article 6 of the Convention on the basis of the conditions of the Eskelinen test.

51. The Court notes that by virtue of the then applicable provisions of the Constitution and the Judicial Code, the Council of Justice had competences concerning disciplinary proceedings against judges, in particular it could recommend their dismissal (see paragraphs 25 and 31-32 above). Under Article 158 of the Judicial Code the proceedings before the Council of Justice were of a judicial nature and the judge concerned was entitled to present his case, including evidence (see paragraphs 33-34 above, and contrast *Bilgen v. Turkey*, no. 1571/07, § 74, 9 March 2021).

52. That being said, the Court observes that, as opposed to other types of disciplinary measures, the jurisdiction of the Council of Justice with regard to the termination of a judge's office was limited to issuing a recommendation to that end to the President of Armenia who had the discretion not to follow up on it (see Article 157 § 1 (3) and Article 166 of the Judicial Code, quoted in paragraphs 32 and 35 above). In particular, in accordance with Article 55 (11) of the Constitution, as in force at the material time (see paragraph 25 above), the President of Armenia had the power to terminate judges' terms of office upon the proposal of the Council of Justice. At the same time, under Article 166 of the Judicial Code, the recommendation to terminate a judge's term of office submitted by the Council of Justice to the President of Armenia would be considered to have been rejected if, within a period of two weeks after its receipt, the latter did not actually terminate the relevant judge's term of office.

53. The Court therefore finds that, in so far as the matter of the termination of a judge's office specifically was concerned, the Council of Justice at the material time could not take any decision on the matter that was final. It could only issue a (non-binding) recommendation, and the legally binding decision to dismiss the judge had to be taken by the President. This finding makes it unnecessary to examine further whether the Council of Justice complied with the requirements of independence and impartiality (see, *mutatis mutandis*, *Bilgen*, cited above, § 74).

54. It therefore follows that at the time of the events, the Council of Justice was not the body competent to decide on the dismissal and did not fulfil a judicial function. Furthermore, domestic law excluded the possibility of an appeal against the Council of Justice's decision on issuing a recommendation to dismiss (see paragraph 30 above). This leads the Court to the conclusion that domestic law excluded access to a court for the decision on a dismissal of a judge. The first condition of the Eskelinen test is therefore satisfied.

55. Accordingly, the Court must next examine whether the second criterion established in the Eskelinen test, namely whether the exclusion was justified on objective grounds in the State's interest, was met.

56. The mere fact that the applicant is in a sector or department which participates in the exercise of power conferred by public law is not in itself decisive. In order for the exclusion to be justified, it is not enough for the State to establish that the civil servant in question participates in the exercise of public power or that there exists a "special bond of trust and loyalty" between the civil servant and the State, as employer. It is for the State to show that the subject of the dispute in issue is related to the exercise of State power or that it has called into question the "special bond of trust and loyalty" between the civil servant and the State, as employer (see *Vilho Eskelinen and Others*, cited above, § 62).

57. In a recent case concerning the inability of a judge to contest the decision on his transfer (see *Bilgen*, cited above), the Court found that it would not be justified to exclude members of the judiciary from the protection of Article 6 of the Convention in matters concerning the conditions of their employment on the basis of the special bond of loyalty and trust to the State. In reaching that finding, the Court stated that, while the employment relationship between a civil servant and the State can traditionally be defined as one based on trust and loyalty to the executive branch in so far as employees of the State are required to implement government policies, the same does not hold true for the members of the judiciary, who play a different and more independent role because of their duty to provide checks on government wrongdoing and abuse of power. Their employment relationship with the State must therefore be understood in the light of the specific guarantees essential for judicial independence and the principle of irremovability of judges. Thus, when referring to the special trust and loyalty that they must observe, it is loyalty to the rule of law and democracy and not to holders of State power. This complex aspect of the employment relationship between a judge and the State makes it necessary for members of the judiciary to be sufficiently distanced from other branches of the State in the performance of their duties, so that they can deliver decisions *a fortiori* based on the requirements of law and justice, without fear or favour. It would be a fallacy to assume that judges can uphold the rule of law and give effect to the Convention if domestic law deprives them of the guarantees of the Articles of the Convention on matters directly touching their individual

independence and impartiality (ibid., § 79). In the Court's opinion, this holds even more true in the circumstances of the present case which concerns a decision affecting the termination of the office of a judge.

58. Furthermore, when deciding to recommend the applicant's dismissal from the judiciary for having delivered one, in its opinion, unreasoned decision, the Council of Justice itself did not provide reasons for the application of the most serious type of disciplinary action in respect of the applicant (see paragraph 13 above). In these circumstances, there is no basis for the Court to find that the dispute concerned any exceptional or compelling reasons that could justify its exclusion from a judicial review (see, *mutatis mutandis*, *Bilgen*, cited above, § 80).

59. For the above reasons, the Court finds that the exclusion of a judicial review of the Council of Justice's decision to recommend the applicant's dismissal cannot be justified on the basis of the exercise of State sovereignty. Article 6 is therefore applicable to the present case and the Government's objection of incompatibility *ratione materiae* (see paragraph 45 above) should be dismissed.

(c) Other grounds for inadmissibility

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

B. Merits

61. The Government essentially reiterated their arguments summarised in paragraph 45 above.

62. The applicant, as noted in paragraph 46 above, did not make any submissions in reply to the Government's observations.

63. The Court reiterates that the right of access to a court – that is, the right to institute proceedings before the courts in civil matters – constitutes an element which is inherent in the right set out in Article 6 § 1 of the Convention, which lays down the guarantees as regards both the organisation and composition of the court, and the conduct of the proceedings. The whole makes up the right to a fair trial secured by Article 6 § 1. However, the right of access to the courts is not absolute and may be subject to limitations that do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Baka v. Hungary* [GC], no. 20261/12, § 120, 23 June 2016, with further references).

64. In the present case, the Council of Justice's decision of 24 June 2011 to recommend the premature termination of the applicant's judicial office was not reviewed, nor was it open to review, by an ordinary tribunal or other body exercising judicial powers (see Article 111 § 6 of the Judicial Code, quoted in paragraph 30 above; see also the Administrative Court's decision to decline jurisdiction, summarised in paragraph 17 above). Although the applicant did enjoy access to the Administrative Court against the President's decree of 11 July 2011 (see paragraphs 21-23 above), the scope of that administrative law action was limited to the examination of the validity of the President's decree in terms of its compliance with the applicable requirements of domestic law (see, in particular, paragraph 22 above) rather than providing review of the factual and legal basis of the decision of the Council of Justice of 24 June 2011, which had served as its basis. There is therefore no basis for the Court to consider that the Administrative Court exercised "sufficient jurisdiction" or provided "sufficient review" (see *Fazia Ali v. the United Kingdom*, no. 40378/10, §§ 75-76, 20 October 2015) of the Council of Justice's decision of 24 June 2011 in the proceedings before it in so far as the applicant's administrative action against the President's Decree of 11 July 2011 was concerned.

65. The Court notes its findings in paragraphs 57-59 above that the exclusion of a judicial review of the Council of Justice's decision to recommend the applicant's dismissal could not be justified on the basis of the exercise of State sovereignty, as had been argued by the Government (see paragraph 45 above). Although those findings with regard to the issue of applicability do not prejudge its consideration of the question of compliance with Article 6 § 1 of the Convention (see *Vilho Eskelinen and Others*, cited above, § 64), in cases involving the removal or dismissal of judges, there should be weighty reasons exceptionally justifying the absence of a judicial review (see, *mutatis mutandis*, *Bilgen*, cited above, § 96). However, no such reasons have been provided to the Court in the present case.

66. In view of the foregoing, the Court considers that the very essence of the applicant's right of access to a court was impaired (see *Baka*, cited above, § 121, and the relevant international instruments cited therein).

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

III. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

68. The applicant complained that his right to freedom of expression had been infringed in that the Council of Justice had sought the termination of his function as a judge. He relied on Article 10 of the Convention, the relevant part of which provides 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 ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

69. The Government submitted that the applicant was dismissed from his post for gross violation of the rules of procedural law and breach of the rules of judicial ethics, in that he had failed to adopt a reasoned decision when exercising his judicial function. They argued therefore that there had been no interference with the applicant's right to freedom of expression.

70. The applicant stated that he maintained his initial complaint.

71. The Court reiterates that Article 10 of the Convention also applies to the workplace, and that civil servants in general (see *Guja v. Moldova* [GC], no. 14277/04, § 52, ECHR 2008) and also members of the judiciary, such as the applicant, enjoy the right to freedom of expression (see *Wille v. Liechtenstein* [GC], no. 28396/95, § 41-42, ECHR 1999-VII; *Kudeshkina v. Russia*, no. 29492/05, § 85, 26 February 2009; and *Baka*, cited above, § 140).

72. The Court has on many occasions emphasised the special role in society of the judiciary which, as the guarantor of justice, a fundamental value in a State governed by the rule of law, must enjoy public confidence if it is to be successful in carrying out its duties (see *Baka*, cited above, § 164, with further references). This consideration has been set out in particular in cases concerning the right of judges to freedom of expression (see, as a recent example, *Guz v. Poland*, no. 965/12, § 86, 15 October 2020).

73. At the same time, in order to determine whether Article 10 of the Convention was infringed in so far as the right of judges to freedom of expression is concerned, it must first be ascertained whether the disputed measure amounted to an interference with the exercise of the applicant's freedom of expression – in the form of a "formality, condition, restriction or penalty" – or whether it lay within the sphere of the right of access to or employment in the civil service, a right not secured in the Convention. In order to answer this question, the scope of the measure must be determined by putting it in the context of the facts of the case and of the relevant legislation (see *Wille*, cited above, §§ 42-43, with further references, and *Harabin v. Slovakia* (dec.), no. 62584/00, ECHR 2004-VI).

74. Where it has found that disciplinary measures against judges were exclusively or preponderantly motivated by the exercise of the applicants' freedom of expression, the Court considered that there had been an interference with the exercise of their right to freedom of expression, as

guaranteed by Article 10 of the Convention (see, for example, *Kudeshkina*, cited above, §§ 79-80 where the disciplinary penalty imposed on the applicant had been prompted by her statements to the media, and *Baka*, cited above, §§ 145-52, where the applicant's mandate was prematurely terminated after he had publicly expressed his views and criticisms on various legislative reforms affecting the judiciary). In contrast, where the Court has found that the impugned measures were essentially linked to the respective applicants' professional ability to exercise judicial functions, it has found that there has been no interference with their rights under Article 10 of the Convention (see, among others, *Harabin*, cited above, and *Simić v. Bosnia and Herzegovina* (dec.), no. 75255/10, § 35, 15 November 2016).

75. In the present case, the applicant has never made any public statements or otherwise engaged in a public debate in his professional capacity. The Court notes that the applicant was punished by the Council of Justice for failing to properly reason his decision in a case assigned to him (see paragraph 13 above) which, in its assessment, had constituted a gross violation of procedural law and a gross violation of the rules of judicial ethics within the meaning of Article 153 § 2 (2) and (4) of the Judicial Code (see paragraph 31 above). While it is not the Court's role to determine the question whether the decision to recommend the applicant's removal from the office of a judge was justified at the time, it notes that, in any event, the impugned decision was solely based on the applicant's exercise of his judicial functions and was not in any manner linked to or motivated by the exercise of his freedom of expression. The Court therefore concludes that there was no interference with the exercise of the applicant's right to freedom of expression, as secured in Article 10 § 1 of the Convention.

76. It follows that this complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and should therefore be rejected in accordance with Article 35 § 4.

IV. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 10

77. The applicant complained that he had been discriminated against in the enjoyment of his rights under Article 10 of the Convention. He relied on Article 14, which provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

78. According to the consistent case-law of the Court, Article 14 of the Convention only complements the other substantive provisions of the Convention and the Protocols thereto. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms"

safeguarded by those provisions. The application of Article 14 does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention. It is necessary, but it is also sufficient, for the facts of the case to fall within the ambit of one or more of the Convention Articles (see *Beeler v. Switzerland* [GC], no. 78630/12, §§ 47-48, 11 October 2022).

79. The Court refers to its above finding to the effect that the applicant's complaint under Article 10 of the Convention does not fall within the ambit of this provision as there was no interference with the exercise of his right to freedom of expression (see paragraphs 75 and 76 above). It follows that his related complaint under Article 14 is also incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected pursuant to Article 35 § 4.

V. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 12 TO THE CONVENTION

80. The applicant complained that he had been discriminated against in that, unlike other office holders who had given similar type of reasoning in their decisions concerning the application of preventive measures, he had been subjected to disciplinary measures. He relied on Article 1 of Protocol No. 12 to the Convention, which provides:

> "1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
>
> 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."

81. The Court reiterates that whereas Article 14 of the Convention prohibits discrimination in the enjoyment of "the rights and freedoms set forth in [the] Convention", Article 1 of Protocol No. 12 extends the scope of protection to "any right set forth by law". It thus introduces a general prohibition of discrimination (see *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, § 53, ECHR 2009).

82. It is important to note that Article 1 of Protocol No. 12 extends the scope of protection to not only "any right set forth by law", as the text of paragraph 1 might suggest, but beyond that. This follows in particular from paragraph 2, which further provides that no one may be discriminated against by a public authority (see *Savez crkava "Riječ života" and Others v. Croatia*, no. 7798/08, § 104, 9 December 2010). According to the Explanatory Report on Article 1 of Protocol No. 12, the scope of protection of that Article concerns four categories of cases in particular where a person is discriminated against:

> "i. in the enjoyment of any right specifically granted to an individual under national law;
>
> ii. in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;
>
> iii. by a public authority in the exercise of discretionary power (for example, granting certain subsidies);
>
> iv. by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot)."

The Explanatory Report further clarifies that:

> "... it was considered unnecessary to specify which of these four elements are covered by the first paragraph of Article 1 and which by the second. The two paragraphs are complementary and their combined effect is that all four elements are covered by Article 1. It should also be borne in mind that the distinctions between the respective categories i-iv are not clear-cut and that domestic legal systems may have different approaches as to which case comes under which category."

83. Therefore, in order to determine whether Article 1 of Protocol No. 12 is applicable, the Court must establish whether the applicant's complaints fall within one of the four categories mentioned in the Explanatory Report (see *Savez crkava "Riječ života" and Others*, cited above, § 105).

84. In this connection, the Court observes that Article 14 § 2 of the Judicial Code, as in force at the material time, guaranteed the right to judges to hold office until the age of 65 (see paragraph 27 above). As already noted (see paragraph 48 above), that right was also guaranteed by Article 96 of the Constitution (see paragraph 25 above). Hence, the applicant, who was around 55 years old at the material time, had the right under the domestic law to serve as a judge for a further ten-year period. The Court therefore finds that this complaint falls at least under category (i) of the categories of cases of discrimination described in the Explanatory Report (see paragraph 82 above) and, consequently, that Article 1 of Protocol No. 12 to the Convention is applicable to it.

85. The Court reiterates that the same standards developed in its case-law concerning the protection afforded by Article 14 are applicable to cases brought under Article 1 of Protocol No. 12 to the Convention (see *Napotnik v. Romania*, no. 33139/13, §§ 69-72, 20 October 2020, for a recapitulation of the general principles).

86. The Court notes that the Council of Justice recommended the termination of the applicant's office on grounds of a gross violation of procedural law and a gross violation of the rules of judicial ethics, considering that he had failed to issue a reasoned decision. In particular, the Council of Justice found that, contrary to the requirements of the relevant rules of procedural law, in his decision of 30 May 2011 ordering the release on bail of an accused the applicant had failed to set out the grounds on the basis of

which he had considered that the legal provisions referred to therein had been applicable to the given case (see paragraph 13 above).

87. The Court reiterates that in its case-law it has held that, given the prominent place that the judiciary occupies among State organs in a democratic society and the growing importance attached to the separation of powers and to the necessity of safeguarding the independence of the judiciary, the Court must be particularly attentive to the protection of members of the judiciary against measures affecting their status or career that can threaten their judicial independence and autonomy (see, within the ambit of Article 6 § 1 of the Convention, *Bilgen*, cited above, § 58, with further references).

88. Furthermore, having regard to the international materials cited in paragraphs 37 and 38 above, the Court observes that, as a general principle, judges should not bear personal liability in relation to their exercise in good faith of their judicial functions. That is, in cases involving the liability of a judge a distinction is to be made between a disputable interpretation or application of the law, on the one hand, and a decision or measure which reveals a serious and flagrant breach of the law, arbitrariness, a serious distortion of the facts, or an obvious lack of legal basis for a judicial measure, on the other hand. Furthermore, such cases require consideration of the mental element of the alleged judicial misconduct. A good-faith legal error should be distinguished from bad-faith judicial misconduct.

89. It is with these considerations in mind that the decision of the Council of Justice to recommend the applicant's dismissal – the most extreme disciplinary measure available (see the relevant scale of disciplinary measures summarised in paragraph 32 above) – for having delivered one, in its assessment, unreasoned decision appears questionable from the point of view of the requirement of the protection of judicial independence and autonomy.

90. That being said, the Court observes that in support of his argument that he was treated differently from other judges (see paragraph 80 above), the applicant relied on examples of judicial decisions ordering detention and/or rejecting applications for bail, cited in the public statement of the Chamber of Advocates issued on 8 July 2011 (see paragraph 14 above). The applicant argued that those examples showed that other judges had provided reasons for their decisions which were of comparable length and scope to those provided by him in the decision of 30 May 2011, but those judges had not been punished since their decisions had favoured the prosecution.

91. The Court notes, however, that the statement of the Chamber of Advocates contained excerpts from several random judicial decisions which merely cited the parts of those decisions that reflected the conclusions of the relevant courts (see paragraph 14 above) rather than containing the full text of those decisions. These excerpts do not suffice to show that those decisions were comparable, as regards the length and scope of their reasoning, with the decision in respect of which a penalty was imposed on the applicant. It is

therefore open to doubt whether the applicant, who was punished for having failed to provide reasons for the decision of 30 May 2011, was in fact in a relevantly similar situation with other judges who had given decisions relating to detention or applications for release on bail.

92. Moreover, the Court reiterates that the extent to which the duty of the courts to give sufficient reasons for their decisions applies may vary according to the nature of the decision and can only be determined in the light of the circumstances of the case (see *Ruiz Torija v. Spain*, 9 December 1994, § 29, Series A no. 303-A, and *Hiro Balani v. Spain*, 9 December 1994, § 27, Series A no. 303-B). The question of whether or not a particular court has fulfilled its duty to provide reasons for a particular decision cannot therefore be determined in an abstract manner.

93. In view of the foregoing, and having regard to the above-mentioned case-law principles (see paragraphs 85 and 92 above), the Court considers that there is a lack of sufficient elements for it to find it established that the disciplinary penalty at issue was imposed on the applicant as a result of a difference in treatment.

94. It follows that the applicant's complaint under Article 1 of Protocol No. 12 is manifestly ill-founded and must be rejected, pursuant to Article 35 §§ 3 and 4 of the Convention.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

95. Article 41 of the Convention provides:

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

A. Damage

96. The applicant claimed compensation for loss of income in the amount of 85,451 euros (EUR) and EUR 38,236 in interest based on the default rate of the Central Bank of Armenia in respect of pecuniary damage. He further claimed EUR 16,000 in respect of non-pecuniary damage.

97. The Government claimed that there was no causal link between the violation alleged and the pecuniary damage claimed. In their opinion the claim in respect of non-pecuniary damage was excessive.

98. The Court does not discern any causal link between the violation found concerning the lack of access to a court and the pecuniary damage alleged. Consequently, there is no justification for making any award under this head (see *Saghatelyan v. Armenia*, no. 7984/06, § 57, 20 October 2015). The Court accepts that the applicant has suffered non-pecuniary damage, such as distress and frustration, resulting from his inability to dispute the

lawfulness of his dismissal, which is not sufficiently redressed by the finding of a violation of the Convention. Making its assessment on an equitable basis, the Court awards the applicant EUR 3,600 in respect of non-pecuniary damage, plus any tax that may be chargeable, to be paid to the applicant's widow and daughter jointly.

B. Costs and expenses

99. The applicant also claimed EUR 1,578 in respect of the costs and expenses incurred before the Court. The applicant submitted a contract for the provision of legal services whereby he was bound to pay this sum, which would also include any postal expenses, only in the event of the Court finding in his favour.

100. The Government contested these claims.

101. The Court has previously recognised the validity of contingency fee agreements for the purposes of making an award for legal costs (see, for example, *Saghatelyan*, cited above, § 62; *Asatryan v. Armenia*, no. 3571/09, §§ 78-79, 27 April 2017; and *Safaryan v. Armenia*, no. 576/06, §§ 62-63, 21 January 2016). The Court sees no reason to depart from that approach in the present case.

102. In the light of the above, the Court finds that the legal costs before the Court have been necessarily incurred in order to afford redress for the violation found. The Court reiterates, however, that legal costs are only recoverable in so far as they relate to the violation found. The Court notes that, in the present case, a violation of Article 6 was found in respect of the lack of access to a court while the entirety of the written pleadings, including the initial application and the subsequent observations, concerned numerous other complaints under Articles 10 and 14 of the Convention and under Article 1 of Protocol No. 12, which were declared inadmissible (see, *mutatis mutandis*, *Saghatelyan*, cited above, § 63). Hence, the legal costs claimed by the applicant cannot be awarded in full as the Court has dismissed the applicant's complaints in part. Regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,300 to cover the costs under this head. This sum is to be paid to the applicant's widow and daughter jointly.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Holds* that the applicant's widow, Mrs Lia Mnatsakanyan, and daughter, Ms Hasmik Mnatsakanyan, have standing to continue the present proceedings in the applicant's stead;

2. *Declares* the complaint concerning the lack of access to a court admissible, and the remainder of the application inadmissible;

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

4. *Holds*
   (a) that the respondent State is to pay the applicant's widow and daughter jointly, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 3,600 (three thousand six hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 1,300 (one thousand three hundred euros), plus any tax that may be chargeable to the applicant's heirs, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 6 December 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth	Yonko Grozev
Deputy Registrar	President