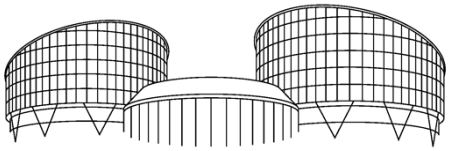

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF GLOVELI v. GEORGIA

(Application no. 18952/18)

JUDGMENT

Art 6 § 1 (civil) • Access to court • Inability of judicial candidate to seek judicial review of decision refusing to appoint her to a judicial post • Art 6 applicable • Genuine and serious dispute over "right" in domestic law to a fair procedure in the examination of an application for a judicial post • Second condition of the *Eskelinen* test not met • Exclusion of the applicant, who met statutory eligibility requirements, from a judicial competition, without judicial review, not in the interest of a State governed by the rule of law • Link between integrity of judicial appointment process and requirement of judicial independence • Importance of procedural fairness in cases involving selection, appointment and career of judges • Very essence of right of access to court impaired

STRASBOURG

7 April 2022

FINAL

07/07/2022

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

In the case of Gloveli v. Georgia,

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

Síofra O'Leary, *President,*
Ganna Yudkivska,
Lətif Hüseynov,
Lado Chanturia,
Ivana Jelić,
Arnfinn Bårdsen,
Kateřina Šimáčková, *judges,*
and Victor Soloveytchik, *Section Registrar,*

Having regard to:

the application (no. 18952/18) against Georgia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Georgian national, Ms Marina Gloveli ("the applicant"), on 3 April 2018;

the decision to give notice to the Georgian Government ("the Government") of the complaint concerning access to a court and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 18 January and 15 March 2022,

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

INTRODUCTION

1. The case concerns the applicant's complaint under Article 6 § 1 of the Convention of a violation of her right of access to a court on account of her inability to have recourse to a judicial review of the decision refusing to appoint her to a judicial post.

THE FACTS

2. The applicant was born in 1958 and lives in Tbilisi. She was represented by Ms L. Mukhashavria, a lawyer based in Kvemo Shukhuti.

3. The Government were represented by their Agent, Mr B. Dzamashvili of the Ministry of Justice.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. BACKGROUND

5. The applicant is a practising lawyer in Georgia with more than twenty years' experience. Between 1999 and 2005 she also served as a judge in the Tbilisi Court of Appeal. Subsequently, she participated in competitions for

vacant judicial positions six times, most recently in October 2017. All of her applications were unsuccessful. The present case concerns the procedure related to her latest attempt to seek appointment (see paragraphs 9-10 below).

II. PROCEEDINGS BEFORE THE CONSTITUTIONAL COURT

6. On 9 February 2016, following one of the judicial competitions, the applicant and two other unsuccessful candidates lodged a constitutional complaint with the Constitutional Court alleging that sections 36(4), 49(1)(a) and 50(4) of the Act of 13 June 1997 on Courts of Ordinary Jurisdiction ("the Courts Act") did not comply with Articles 29 and 42 of the Constitution. They alleged, *inter alia*, that they did not have access to a court to assert their constitutional right to a fair procedure in admission to public service as no court had jurisdiction to examine disputes related to judicial appointments.

7. On 10 March 2017 amendments to the Courts Act entered into force, by which the High Council of Justice ("the HCJ") decisions concerning judicial appointments became amenable to appeal before the Supreme Court (see paragraphs 18-20 below).

8. On 7 April 2017 the Constitutional Court rejected the above-mentioned constitutional complaint, concluding that the newly introduced amendments to the Courts Act, by creating a new judicial remedy, had essentially resolved the issue raised by the complainants (see paragraphs 21-22 below). It noted, in particular, that in the context of that specific dispute, the new legislative amendments had implemented the complainants' constitutional right of access to a court by establishing the Chamber for the Review of Judicial Appointments (*საკვალიფიკაციო პალატა*) of the Supreme Court ("the Qualifications Chamber"), which had jurisdiction to examine appeals concerning the allegedly arbitrary refusal of judicial appointments.

III. APPLICATION FOR A JUDICIAL VACANCY

9. On 18 October 2017 a new judicial competition was announced by the HCJ. The applicant applied for a vacant position as a judge in a court of appeal. As part of the application, she submitted various documents confirming her professional and academic achievements (see for the relevant procedure paragraph 16 below). Having reviewed the documents submitted by the applicant, on 25 November 2017 the HCJ announced that the applicant had been admitted for the participation in the competition (see paragraph 16 below). After conducting a background check, on 29 December 2017 members of the HCJ interviewed her, and individually conducted assessments using score sheets.

10. On 20 January 2018 the applicant was notified that her application for the vacancy had been rejected (*განაცხადი უარყოფილია*) as she did not meet the minimum competency score. She later obtained copies of the score

sheets filled in by each member of the HCJ who had interviewed and assessed her.

IV. PROCEEDINGS BEFORE THE SUPREME COURT

11. On 2 February 2018 the applicant lodged an appeal with the Qualifications Chamber seeking invalidation of the decision of the HCJ on the basis of section 35^4 (3)(b) of the Courts Act. She alleged that the decision was arbitrary and discriminatory. In support, she submitted as evidence a recording of a televised statement by N.J., a non-judicial member of the HCJ, who had claimed that throughout the competition several HCJ members had had "protégé" candidates and had arbitrarily lowered the assessment scores of the other judicial candidates. The applicant also argued that the very low scores assigned to her by several members of the HCJ were indicative of that bias.

12. On 6 February 2018 the Qualifications Chamber declared the applicant's appeal inadmissible for lack of jurisdiction. The main reasons given by the Supreme Court in its decision were as follows:

> "... the judicial candidate was unable to achieve the minimum pass score in the competency component [of the assessment], as a result of which her candidacy was not put to a vote before the [HCJ]. Accordingly, the precondition provided for by section 35(12) of the [Courts Act] was not met. In view of the foregoing, the body in question has not examined the application for appointment and hence has not issued a decision refusing the applicant's appointment which qualifies for being challenged before the [Qualifications Chamber] ... [F]or these reasons, the Qualifications Chamber finds the appeal inadmissible ..."

13. The Qualifications Chamber further held, with reference to the Court's judgments in cases of *Beaumartin v. France* (24 November 1994, § 38, Series A no. 296-B) and *Sigma Radio Television Ltd v. Cyprus* (nos. 32181/04 and 35122/05, §§ 151-57, 21 July 2011), that it did not satisfy the requirement of a court or tribunal with "full jurisdiction" to exercise a judicial review of the facts of the case, and that its decision was in line with its established practice (case no. ևՆՅ-2-17). The decision stated in its operative part that it was final and not amenable to appeal.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

A. Constitution of 1995

14. The relevant Articles of the Constitution provided as follows:

Article 29

"1. Every citizen of Georgia satisfying the appropriate statutory requirements shall have the right to hold a position in public service."

Article 42

"1. Everyone shall be entitled to seek judicial protection of his or her rights and freedoms."

B. Act of 13 June 1997 on Courts of Ordinary Jurisdiction (as in force at the material time – "the Courts Act")

1. Appointment of judges

15. Under section 47 of the Courts Act, the HCJ is the authority responsible for the recruitment, promotion and dismissal of judges. It is composed of eight judicial members elected by an assembly of judges and six non-judicial members, five of whom are elected by Parliament and one of whom is appointed by the President. Each of them is elected or appointed for a term of four years. The President of the Supreme Court serves as an *ex officio* member of the HCJ.

16. Under section 34 of the Courts Act, every citizen of Georgia over 30 years of age is eligible to be appointed (elected) as a judge if he or she has at least a master's degree in law or an equivalent academic qualification, has practised law for at least five years, is proficient in the official language of the State, has passed the examination for admission to the judiciary, and has successfully completed the judicial training programme organised by the HCJ. According to section 35(8) of the Courts Act, the HCJ reviews applications together with the documents submitted in support and if the above criteria are met, publishes brief information about the relevant judicial candidates on their official website. Candidates are subsequently interview by the HCJ and checked on the basis of the so-called assessed by members of the HCJ on the basis of competency and integrity criteria (section 35(9) of the Courts Act). Each member fills in a score sheet following the review of the application files and the completion of interviews with the judicial candidates.

17. Pursuant to section 35(12) of the Courts Act, voting takes place only in respect of candidates assessed by the majority of members of the HCJ as meeting the integrity criteria fully or in part, and who have achieved at least 70% of the highest possible final competency score.

2. Appeal against decisions of the HCJ

18. On 8 February 2017 Parliament, as part of a broader judicial reform project, passed amendments to the Courts Act which made decisions of the HCJ refusing judicial appointments amenable to appeal in the Supreme Court. The amendments became effective on 10 March 2017.

19. Under the amended sections 19^1, and $35^4(1)$ of the Courts Act, an unsuccessful judicial candidate may lodge an appeal with the Qualifications Chamber against a decision of the HCJ refusing his or her appointment to judicial office. In so far as it is relevant to the present case, a refusal may be appealed against if the candidate considers that a member of the HCJ was not impartial, acted discriminatorily or abused his or her authority while taking a decision relating to the competition.

20. Under sections $35^4(3)$, 36^6 and 36^7 of the Courts Act, following the examination of an appeal against a refusal to appoint a candidate to judicial office, the Qualifications Chamber may annul the decision of the HCJ and remit the matter to it for re-examination. The relevant legislative amendments read as follows:

Section 19^1 – Qualifications Chamber of the Supreme Court

"1. The Qualifications Chamber of the Supreme Court shall, under the procedure provided for by sections 35^4, 36^5, and 36^6 of this Act, examine appeals filed against decisions of the High Council of Justice refusing appointment to judicial office ...

Section 35^4 – Appeal against a decision of the High Council of Justice of Georgia

1. A judicial candidate may appeal against the decision of the High Council of Justice of Georgia refusing his or her appointment to judicial office to the Qualifications Chamber of the Supreme Court, if he or she considers that:

(a) a member of the High Council of Justice of Georgia was biased during the competition;

(b) a member of the High Council of Justice of Georgia acted discriminatorily during the competition;

(c) a member of the High Council of Justice of Georgia exceeded his or her powers under the legislation of Georgia, as a result of which the rights of a judicial candidate were violated, or judicial independence was threatened;

...

2. The appeal shall be filed with the High Council of Justice of Georgia within two weeks after the relevant decision ... is served on the judicial candidate. [The High Council of Justice of Georgia] shall transfer within three days [the appeal] together with the attached documents to the Qualifications Chamber of the Supreme Court.

3. Following examination of the case, the Qualifications Chamber of the Supreme Court shall take one of the following decisions:

(a) uphold the decision of the High Council of Justice of Georgia refusing to appoint a judicial candidate to a judicial post;

(b) annul the decision of the High Council of Justice of Georgia ... and remit the case for a new examination.

...

5. If the Qualifications Chamber of the Supreme Court decides to annul the decision of the High Council of Justice and remit the case, the High Council of Justice, having regard to the decision of the Qualifications Chamber of the Supreme Court, shall re-

examine the issue of appointment of the judicial candidate to judicial office and take a decision appointing or refusing appointment of a judicial candidate ..."

C. Judgment of the Constitutional Court (Plenary) of 7 April 2017 in the case of Kevlishvili, Dotiashvili and Gloveli v. The Parliament of Georgia, no. 3/2/717

21. In its judgment of 7 April 2017 (see paragraph 8 above) the Constitutional Court noted that the right of admission to public service through a fair procedure under Article 29 of the Constitution was applicable to judicial appointments, and that the candidates should therefore be afforded the right of access to a court to seek determination of that right, as required under Article 42 of the Constitution. Moreover, it pointed out that procedural fairness was guaranteed by the Constitution at every stage of the recruitment process.

22. The relevant parts of the judgment read as follows:

"8. According to the well-established practice of the Constitutional Court, a judicial position, for Constitution purposes, shall be treated as a position in public service, the holding and exercise of which, regulated by law, shall be in line with Article 29 of the Constitution ... Accordingly, the legislation regulating the holding of a judicial position is subject to the standards provided for by the Constitutional Court in connection with the exercise of the right enshrined in Article 29 of the Constitution (subject to the constitutional status and specificities of a judicial position).

18. Under Article 84 § 1 of the Constitution, a judge is independent in his or her work and adheres only to the Constitution and the law. Any influence on a judge or interference with his or her work for the purpose of influencing decision-making is prohibited and punishable by law. It is undisputed that a judicial position at a city or appellate court is inherently apolitical. Judges take legal decisions and adjudicate in accordance with the Constitution and the law. The process of appointment to a judicial position at a city or appellate court is not related, either by the legislation or by the Constitution, to political decision-making. For the purpose of organising the judicial appointment [process], Article 86^1 § 1 of the Constitution of Georgia provided for the establishment of a constitutional body, the High Council of Justice of Georgia, to select and appoint to a position a judicial candidate who best meets the position [requirements] of a judge.

30. Under Article 29 § 1 of the Constitution, a decision on appointment to public office, including that of a judge, must be adopted through a procedure in which impartiality is ensured ... The process must be conducted in such a manner as to rule out, as far as possible, arbitrary refusals to appoint meritorious candidates. The requirement to appoint meritorious candidates to judicial office is related not only to the right of a person to hold a public office, but also to the public interest, [according to which] judicial functions should only be exercised by individuals qualifying for judicial office ...

31. The right to a reasoned decision is not limited to a reasoned final decision concerning the appointment [refusal to appoint] to office only. The Constitution of Georgia lays down the requirement to give reasons not only in formal appointment decisions, but [also implies] that reasons must be given throughout the entire recruitment process ...

38. The High Council of Justice of Georgia, after examining the applications and supporting documents of judicial candidates participating in a judicial competition, publishes on [its] website brief information about the judicial candidates whose applications met the requirements laid down by the legislation. The assessment of judicial candidates [then] takes place based on interviews and [background] information obtained in accordance with the procedure prescribed by law. A judicial candidate is selected on the basis of two main criteria, competency and integrity.

60. The High Council of Justice of Georgia is a constitutional body which exercises the constitutional power of appointing judges. This fact does not preclude judicial control over the [appointment] process from being exercised. The right to a fair trial entails the requirement that all decisions (acts) of public authorities that violate human rights be challenged and adjudicated in court ...

61. The right to a fair trial as recognised in Article 42 § 1 of the Constitution of Georgia provides for the judicial review ... of any acts restricting rights. The above requirement of the Constitution, subject to the relevant peculiarities, covers the judicial review of a refusal to appoint [a candidate] to public office. The judicial review of a refusal to appoint a candidate to public office serves to prevent the adoption of arbitrary, unsubstantiated and biased decisions."

II. RELEVANT INTERNATIONAL MATERIALS

A. United Nations

23. The United Nations (UN) Basic Principles on the Independence of the Judiciary, adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders held in Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, provide in so far as relevant, as follows:

Qualifications, selection and training

"10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory."

B. Council of Europe

24. The relevant extract from the 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:

"48. ... Procedures of [the authority taking decisions on the selection and career of judges] should be transparent with reasons for decisions being made available to

applicants on request. An unsuccessful candidate should have the right to challenge the decision, or at least the procedure under which the decision was made."

25. The Explanatory Memorandum to this recommendation further provides as follows:

"50. It is essential that the independence of judges be guaranteed when they are selected and throughout their professional career, and that there should be no discrimination. All decisions concerning the careers of judges should be based on objective criteria, free from considerations outside their professional competence ..."

26. The relevant extract from the Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and the Rule of Law (DGI) of the Council of Europe on the draft law on amendments to the Courts Act, adopted by the Venice Commission at its 100th Plenary Session (Rome, 10-11 October 2014, CDL-AD(2014)031), reads as follows:

5. Appeal against decisions of the High Council of Justice refusing appointments (draft [section] 35^3)

"60. The draft provision gives a right to an 'interested person' to challenge the decision on refusing the appointment. The 'interested person' seems to be the candidate whose candidature has been refused. This is in line with paragraph 48 of the Recommendation CM/Rec(2010)12 of the Committee of Ministers which states that 'an unsuccessful candidate should have the right to challenge the decision, or at least the procedure under which the decision was made'. However, the draft provision seems to be narrow and excluding the possibility of the unsuccessful candidate to challenge the decision to select another – successful – candidate. During the meetings held in Tbilisi, the representatives of the High Council of Justice underlined the ambiguity of the term 'interested person' and considered that its meaning should be clarified in the practice. However, rather than the practice, the law should provide for clear indication concerning the criteria for legal standing against such decisions of the High Council of Justice."

27. In its Urgent Opinion on the Selection and Appointment of Supreme Court Judges adopted by the Venice Commission at its 119th Plenary Session (Venice, 21-22 June 2019, CDL-AD(2019)009), the Venice Commission issued the following recommendation:

"Reasoned decisions regarding the selection and exclusion of candidates must be produced, with the possibility for a judicial appeal (see [section] 35^4 of the [Courts Act])."

28. At its 74th Plenary Meeting held in Strasbourg from 28 to 2 December 2016, the Council of Europe Group of States Against Corruption (GRECO) adopted its Fourth Evaluation Report on Georgia, concerning corruption prevention in respect of members of parliament, judges and prosecutors (GrecoEval4Rep(2016)3). The report published on 17 January 2017 made the following relevant remarks on the appointment of judges:

"GRECO recommended reforming the recruitment and promotion of judges, including by ensuring that any decisions in those procedures by the High Council of [Justice] a) are made on the basis of clear and objective, pre-established criteria –

notably merit, in a transparent manner and with written indication of reasons, and b) can be appealed to a court."

C. Other international texts

29. In May 2012 the General Assembly of the European Network of Councils for the Judiciary adopted a declaration (the Dublin Declaration), setting minimum standards regarding the recruitment, selection, appointment and promotion of members of the judiciary. The relevant extracts of the declaration read as follows:

" ...

9. The entire appointment and selection process must be open to public scrutiny, since the public has a right to know how its judges are selected.

10. An unsuccessful candidate is entitled to know why he or she failed to secure an appointment; and there is a need for an independent complaints or challenge process to which any unsuccessful applicant may turn if he or she believes that he/she was unfairly treated in the appointment process."

THE LAW

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

30. The applicant complained of a violation of her right of access to a court on account of her inability to have recourse to a judicial review of the decision refusing to appoint her to a judicial post. She relied on Article 6 § 1 of the Convention, the relevant part of which reads 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

31. The Government submitted that Article 6 of the Convention was inapplicable in its civil aspect in the present case. They argued that (i) there was no "right" at issue which was recognised under domestic law; (ii) if the Court were to find otherwise, the "right" in question was not "civil" within the meaning of the Court's case-law; (iii) there was no genuine and serious dispute over a "right" the applicant could claim under domestic law; and (iv) the outcome of the relevant proceedings before the HCJ had not been directly decisive for the applicant.

32. The Government submitted that no such right as the right to be appointed to judicial office existed under domestic law, and that the procedure to establish whether the applicant was "sufficiently competent" to

participate in a judicial competition had not been determinative of her "civil rights" within the meaning of Article 6 § 1 of the Convention. Article 29 of the Constitution concerned only those "satisfying the appropriate statutory requirements", and only for them was there a right recognised under Georgian law, also confirmed by the practice of the Constitutional Court, of equal participation in a competition for public office. The Government further referred to a decision of the Qualifications Chamber dated 5 July 2017 (case no. ᲑᲑᲓ-2-17), predating the decision in the applicant's case, by which it had declared inadmissible a case of another unsuccessful judicial candidate for lack of jurisdiction. It likewise concluded that since the relevant candidate had failed to achieve the required competency score, his or her candidacy had not been shortlisted for actual voting by the HCJ. Accordingly, the latter had not issued a formal decision refusing that candidate's appointment, which could have been challenged before the Qualifications Chamber. Against this background, the Government argued that unlike in the cases of *Baka v. Hungary* ([GC], no. 20261/12, 23 June 2016) *and Juričić v. Croatia* (no. 58222/09, 26 July 2011), the applicant's access to a court had been explicitly excluded by the Courts Act, as only formal final decisions refusing appointment to a judicial post were amenable to judicial appeal.

33. The applicant contested the Government's arguments. She claimed, with reference to the relevant decision of the Constitutional Court, that her "civil" right of equal access to public service and employment, including her right of access to a court in connection with related disputes, was recognised in the relevant domestic legislation. She maintained that the relevant decision of the HCJ had effectively determined her civil right to participate on an equal footing in the judicial competition, and that she should therefore have been entitled to a fair hearing in that determination.

2. The Court's assessment

(a) General principles

34. The relevant general principles concerning the applicability of Article 6 of the Convention in the context of disputes concerning the appointment, career and dismissal of judges were summarised by the Court in the case of *Baka* (cited above, §§ 100-06) and, most recently, in *Grzęda v. Poland* ([GC], 43572/18, 257-64, 15 March 2022); see also *Dolińska-Ficek and Ozimek v. Poland*, nos. 49868/19 and 57511/19, §§ 220-28, 8 November 2021; *Gumenyuk and Others v. Ukraine*, no. 11423/19, §§ 44-59, 22 July 2021; *Eminağaoğlu v. Turkey*, no. 76521/12, §§ 59-63, 9 March 2021, and *Bilgen v. Turkey*, no. 1571/07, §§ 47-52 and §§ 65-68, 9 March 2021).

(b) Application of these principles to the present case

35. In the light of the relevant general principles, in the present case, in order to determine the applicability of Article 6, the Court needs to examine

(i) the existence of a right; (ii) whether there was a "genuine" and "serious" dispute about a right; and (iii) whether the right in question was "civil" within the meaning of that provision.

(i) Existence of a right

36. The Court must first analyse the actual nature of the applicant's complaint before the domestic authorities. In that connection, the Court reiterates that it is the right as asserted by the claimant in the domestic proceedings that must be taken into account in order to assess whether Article 6 § 1 of the Convention is applicable (see *Stichting Mothers of Srebrenica and Others v. the Netherlands* (dec.), no. 65542/12, § 120, ECHR 2013 (extracts)).

37. In the present case, the applicant, a former judge, complained that the decision to reject her candidacy for a judicial post had been arbitrary and discriminatory (see paragraph 11 above). In her appeal lodged with the Qualifications Chamber, she asserted her right to a fair procedure in the competition through which she sought readmission to the judiciary, and the crux of her complaint was the alleged bias and lack of objectivity on the part of some members of the HCJ. The Court therefore considers that what was at the heart of the relevant proceedings was not the right to be appointed to judicial office, as alleged by the Government, but the right to a fair procedure in the examination of an application by a former judge for a judicial post (see *Regner v. the Czech Republic* [GC], no. 35289/11, § 105, 19 September 2017; *Frezadou v. Greece*, no. 2683/12, § 28, 8 November 2018, and *Juričić*, cited above, § 52, with further references therein; see also *Bilgen*, cited above, § 57).

38. The Court notes that Article 29 of the Constitution provided for the right of equal access to public service (see paragraph 14 above). In relation to the above provision, on 7 April 2017 the Constitutional Court confirmed the right of appointment to judicial office through an equal and fair procedure and the corollary procedural right of access to a court to challenge decisions relating to judicial appointments (see paragraphs 21-22 above). The Constitutional Court explicitly stated that the judicial selection and appointment process was not part of a political decision-making process as the judges of the first and second-instance courts were exercising purely legal functions. Accordingly, all the guarantees enshrined in Article 29 of the Convention concerning the right of equal access to public service were applicable to judicial competitions. The Court notes in this connection that for a "right" to trigger the application of Article 6 § 1 of the Convention, it is sufficient to show that the applicant could arguably claim an entitlement under national law. As noted in *Grzęda*, in determining whether there was a legal basis for the right asserted by the applicant, the Court needs to ascertain only whether the applicant's arguments were sufficiently tenable, not whether he would necessarily have been successful had he been given access to a court

(ibid., § 268). In such circumstances, considering the relevant domestic legal framework, as interpreted by the Constitutional Court, the Court considers that there was arguably a "right" recognised under Georgian law to a fair procedure in judicial competitions, including the right to be protected against arbitrary and discriminatory rejections (see *Dolińska-Ficek and Ozimek,* cited above, §§ 229-30; *Tsanova-Gecheva v. Bulgaria*, no. 43800/12, § 84, 15 September 2015; *Juričić*, cited above, § 52; *Dzhidzheva-Trendafilova v. Bulgaria* (dec.), no. 12628/09, §§ 48-49, 9 October 2012; *Kübler v. Germany*, no. 32715/06, § 46, 13 January 2011; and *Lombardi Vallauri v. Italy*, no. 39128/05, § 62, 20 October 2009).

39. In the present case, the main point of disagreement, in the Court's view, is the triggering point at which this right came into play. According to the Government, the "right" in question was not relevant to the applicant's case as she was not shortlisted for the actual voting stage of the competition to fill a vacant judicial position. In support of this, they relied on Article 29 of the Constitution, which guarantees the right to hold a position in public service to every citizen satisfying "the appropriate statutory requirements". They also relied on the decision of the Supreme Court of 5 July 2017, predating the decision in the applicant's case (see paragraph 32 above). The applicant, for her part, argued that by not shortlisting her for the actual voting, she had been prevented from participating in a judicial competition on an equal and fair footing.

40. The Court cannot accept the Government's argument that the applicant did not satisfy the "appropriate statutory requirements" for participation in a judicial competition. Her application was shortlisted by the HCJ for the participation in the judicial competition and she was formally registered, in line with the procedure provided under section 35 of the Courts Act, as a judicial candidate (see paragraph 9 above). The applicant also underwent a background check and an interview. The Court's understanding of the judicial selection procedure in Georgia, as set out above, is also supported by the Constitutional Court's decision of 7 April 2017, which explicitly stated that the HCJ had published on its website brief information about the judicial candidates whose applications had met the requirements for participation in the judicial competition, as laid down by law (see paragraph 38 of the decision, cited in paragraph 22 above). The applicant's name was among those published (see paragraph 9 above).

41. In the light of the above, the Court is satisfied that, having regard to the terms of Article 29 of the Constitution, as interpreted by the Constitutional Court, there was in domestic law a "right" to a fair procedure in the examination of an application for a judicial post, which the applicant could assert.

(ii) "genuine" and "serious" dispute

42. The Court considers that the dispute was "genuine" and "serious" as it concerned the fairness of the judicial selection and appointment procedure and could lead to the annulment of the contested decision and the reconsideration of the applicant's application for the post (see *Dolińska-Ficek and Ozimek,* § 232, *Juričić*, § 52, and *Tsanova-Gecheva*, § 84, all cited above; see also *Fiume v. Italy*, no. 20774/05, § 35, 30 June 2009, and *Bara and Kola v. Albania*, nos. 43391/18 and 17766/19, § 58, 12 October 2021). It remains to be determined whether the nature of the right in question was civil within the autonomous meaning of Article 6 § 1, in the light of the criteria developed in the *Vilho Eskelinen and Others* judgment ([GC], no. 63235/00, ECHR 2007-II).

(iii) "Civil" nature of the right: the Eskelinen test

(α) The first condition of the *Eskelinen* test

43. As regards the first condition of the *Eskelinen* test, that is, whether national law "expressly excluded" access to a court for the post or category of staff in question (see *Eskelinen*, cited above, § 62), the Court notes that in its recent judgment in *Grzęda* (cited above) it considered it necessary to further develop the first condition of the *Eskelinen* test, noting as follows:

> "291. The Court will now take the opportunity offered by the present case to further develop the first condition of the *Eskelinen* test. It observes that this condition is deliberately strict, given that it is part of a test that, if fully satisfied, will rebut the presumption of the applicability of Article 6 to ordinary labour disputes involving civil servants (see *Vilho Eskelinen and Others*, cited above, § 62), excluding them from one of the most fundamental entitlements provided for in the Convention, the right to a court. The strict nature of this condition is borne out by the fact that it has been seldom satisfied (see *Bilgen*, cited above, § 70). Only very rarely has a respondent State been able to show that access to a court was expressly excluded for an applicant (see *Baka*, cited above, § 113, and the cases referred to therein). As the two conditions stipulated in the *Eskelinen* judgment are cumulative, where the first one is not met, that suffices already to find that Article 6 is applicable, without there being any need to consider the second limb of the test (see *Baka*, cited above, § 118).
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> 292. The Court considers that a straightforward application of the first condition would not be entirely apt in all situations. It is therefore prepared to accept that the first condition can be regarded as fulfilled where, even without an express provision to this effect, it has been clearly shown that domestic law excludes access to a court for the type of dispute concerned. Thus, first of all, this condition is satisfied where domestic law contains an explicit exclusion of access to a court. Secondly, the same condition may also be satisfied where the exclusion in question is of an implicit nature, in particular where it stems from a systemic interpretation of the applicable legal framework or the whole body of legal regulation."

44. In this connection, the Government argued that Georgian law excluded access to a court for a judicial candidate who had not been shortlisted for the actual voting stage of the judicial competition (see

paragraph 32 above). They submitted, with reference to the relevant provisions of the Courts Act, that an appeal could be lodged with the Qualifications Chamber only against a final decision of the HCJ refusing appointment to judicial office. The same approach, according to them, derived from the practice of the Qualifications Chamber. The applicant asserted that domestic law did not explicitly exclude access to a court for claims relating to the early stages of the judicial competition.

45. In the present case, the amended sections 19^1 § 1, 35^4(1) and 36^5(1) of the Courts Act provided that an appeal could be lodged with the Qualifications Chamber against a decision of the HCJ refusing appointment to judicial office (compare *Tsanova-Gecheva,* cited above, § 86). The Qualifications Chamber with reference to the above provisions considered that it had no jurisdiction to entertain the applicant's application as it did not concern a final decision of the HCJ refusing the appointment to a judicial post. The Court cannot but note, however, that in its decision of 7 April 2017, the Constitutional Court confirmed the right to challenge decisions relating to judicial appointments and stated that procedural fairness was guaranteed by the Constitution at every stage of the recruitment process (for the relevant decision, see paragraphs 21-22 above). It explicitly stated that, in the context of appointment or refusal to appoint a judicial candidate, "adequate reasons [had to] be given throughout the entire recruitment process" and that "the right to a fair trial entail[ed] the requirement that all decisions (acts) of public authorities that violate human rights be challenged and adjudicated in court" (see paragraph 22 above). Furthermore, the Constitutional Court rejected the applicant's constitutional complaint, which was based in substance on the same arguments as those made to the Court, concluding that the new legislative amendments had implemented her constitutional right of access to a court by establishing the Qualifications Chamber, which had jurisdiction to examine appeals concerning the allegedly arbitrary refusal of judicial appointments (see paragraph 8 above). Against this background, it appears that the Constitutional Court's reading of the relevant provisions of domestic law was different from that of the Supreme Court; or at the very least, by virtue of its decision the Constitutional Court could be said to have created a legitimate expectation for the applicant that her grievances related to the judicial competition would be examined by the Qualifications Chamber.

46. In such circumstances, given the wording of the relevant provisions of the Courts Act as well as the decision of the Constitutional Court, the Court is unable to conclude that domestic law contained an explicit exclusion of access to a court for the type of dispute concerned (contrast *Özpınar v. Turkey*, no. 20999/04, § 30, 19 October 2010; *Nedeltcho Popov v. Bulgaria,* no. 61360/00, § 38, 22 November 2007; and *Suküt v. Turkey*, (dec.), no. 59773/00, 11 September 2007). As to the exclusion of an implicit nature, by way of an interpretation (see paragraph 43 above), the Court notes the following: as already stated in the *Baka* judgment, it must determine

whether access to a court had been excluded under domestic law before, rather than at the time, the impugned measure concerning the applicant was adopted. To hold otherwise would mean that the impugned measure itself, which constituted the alleged interference with the applicant's "right", could at the same time be the legal basis for the exclusion of the applicant's claim from access to a court (see *Baka*, cited above, § 116). In the present case, there was only one decision, which preceded the applicant's case, in which the Qualifications Chamber had also dismissed on jurisdictional grounds an appeal brought by an unsuccessful judicial candidate against the HCJ (see paragraph 32 above). However, that decision was devoid of a "comprehensive and detailed analysis" of the relevant domestic legislation through the prism of the Convention case-law and relevant international standards (ibid., § 117). As for the inadmissibility decision on the applicant's case, the Qualifications Chamber failed to reconcile its reasoning with that of the Constitutional Court. The interpretation of the relevant domestic provisions and the comprehensive analysis given by the Constitutional Court were not taken into consideration by the Qualifications Chamber.

47. In the light of the foregoing, and noting that its role is not to resolve problems of interpretation of domestic legislation, the Court cannot conclude that the national law as in force since the adoption of the legislative amendments of 8 February 2017 (see paragraphs 18-20 above) excluded access to a court for the applicant's dispute. However, even if the Government's argument that domestic law expressly excluded access to a court were to be accepted, the Court still has to satisfy itself that the exclusion was justified on "objective grounds in the State's interest" (see *Vilho Eskelinen,* cited above, § 62). It will, hence, proceed with the examination of the second condition of the test.

(β) The second condition of the *Eskelinen* test

48. The Court will now examine whether, in the present case, the exclusion of access to a court could be justified on objective grounds in the State's interest. It notes from the outset that the parties made no submissions on this point.

49. In this connection, 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; see also *Eminağaoğlu,* §§ 76 and 78, and *Bilgen*, § 58, both cited above). Given the prominent place that the judiciary occupies among State organs in a democratic society and the importance attached to the separation of powers and to the necessity of safeguarding the independence of the judiciary (see *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 196, 6 November 2018, with further references therein), 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. The Court has stated that judicial independence is a prerequisite to the rule of law (see *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, § 239, 1 December 2020). In this connection, as far as the characterisation of a court as "independent" within the meaning of Article 6 § 1 is concerned, it has held that regard must be had, *inter alia*, to the manner of appointment of its members (see, for instance, *Ramos Nunes de Carvalho e Sá*, § 144, and *Ástráðsson*, § 230, both cited above). As stated by the Court in *Ástráðsson*, there appears to be a considerable consensus among the member States that the requirement of a "tribunal established by law" encompasses the process of the initial appointment of a judge to office (ibid., § 228).

50. The Court has already stated that judges should be selected on the basis of merit and objective criteria, not only to ensure public confidence in the judiciary but also to supplement the guarantee of the personal independence of judges (see *Bilgen*, cited above, § 63, with further references). In that connection, in its previous case-law it has referred to paragraph 25 of Opinion. No. 1 (2001) of the CCJE, which recommends that "the authorities responsible in member States for making and advising on appointments and promotions should now introduce, publish and give effect to objective criteria, with the aim of ensuring that the selection and career of judges are based on merit, having regard to qualifications, integrity, ability and efficiency" and highlighted the importance of a rigorous process for the appointment of ordinary judges to ensure that the most qualified candidates – both in terms of technical competence and moral integrity – are appointed to judicial posts (see *Ástráðsson*, cited above, §§ 221-22). The Court has also stated that domestic law needs to be couched in unequivocal terms, to the extent possible, so as not to allow arbitrary interferences in the appointment process, including by the executive (ibid., § 230). In this connection, the Court notes that there exists a clear link between the integrity of the judicial appointment process and the requirement of judicial independence in Article 6 § 1 (see *Thiam v. France*, no. 80018/12, §§ 81-82, 18 October 2018).

51. Against this background, the Court considers that, in view of the particular circumstances of the present case, the exclusion of the applicant, a judicial candidate who met the statutory eligibility requirements, from a judicial competition in the absence of any judicial review of this decision, cannot be regarded, in view of the importance of the protection of judicial independence, as being in the interest of a State governed by the rule of law. It refers in this connection to the relevant international standards, which likewise state that any decision concerning the selection and career of judges, or at least the procedure under which such a decision is made, should be amenable to judicial review (see paragraphs 24-27 above). The Court notes, at the same time, that it is not called upon to review the judicial appointment

systems that are in place in the various Council of Europe member States. As already noted in its case-law, there are variety of different systems in Europe for the selection and appointment of judges and what is decisive is that appointees are free from influence or pressure when carrying out their adjudicatory role (see *Ástráðsson,* cited above, § 207, with further references). The question is always whether, in a given case, the requirements of the Convention are met (see *Kleyn and Others v. the Netherlands* [GC], nos. 39343/98 and 3 others, § 193, ECHR 2003-VI, and *Henryk Urban and Ryszard Urban v. Poland*, no. 23614/08, § 46, 30 November 2010).

52. The Court finds, accordingly, that the second condition of the *Eskelinen test*, namely that the applicant's exclusion from access to a court be justified on objective grounds in the State's interest, has not been met.

(iv) Conclusion as to the applicability of Article 6

53. It follows that Article 6 § 1 of the Convention under its civil head is applicable. The Government's preliminary objection as to the applicability of Article 6 § 1 must accordingly be dismissed. The Court further 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

1. The parties' submissions

54. The applicant maintained, referring in particular to the relevant decision of the Constitution Court, that her right to challenge in court the allegedly arbitrary and discriminatory decision of the HCJ had been breached. She claimed that the procedure for the selection and appointment of judges was of such importance for the proper functioning of the judiciary as a whole that any decision taken at any stage of the procedure should be subject to judicial scrutiny.

55. The Government, in reply, claimed that the applicant's right of access to court had not been violated. They maintained, firstly, that the domestic legislation, in line with the relevant international standards, provided, with the establishment of the Qualifications Chamber, for the judicial review of HCJ decisions. Secondly, the Qualifications Chamber had full jurisdiction within the meaning of Article 6 § 1 of the Convention to review decisions of the HCJ concerning the selection and appointment of judges. Lastly, the decision of the Qualifications Chamber in the applicant's case had been in line with domestic case-law and there had been no arbitrariness in the way the Qualifications Chamber had interpreted the relevant domestic provisions.

2. The Court's assessment

(a) General principles

56. The right of access to a court was established as an aspect of the right to a fair hearing guaranteed by Article 6 § 1 of the Convention in *Golder v. the United Kingdom* (cited above, §§ 28-36). In that case, the Court found the right of access to a court to be an inherent aspect of the safeguards enshrined in Article 6, referring to the principles of the rule of law and the avoidance of the arbitrary exercise of power which underlay much of the Convention. Thus, Article 6 § 1 secures to everyone the right to have a claim relating to his civil rights and obligations brought before a court (see *Zubac v. Croatia* [GC], no. 40160/12, § 76, 5 April 2018, with further references).

57. In respect of matters that fall within the ambit of the Convention, the Court's case-law has tended to show that where there is no access to an independent and impartial court, the question of compliance with the rule of law will always arise (see *Golder*, cited above, § 34). However, the Court has itself acknowledged that 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. A limitation will not be compatible with Article 6 § 1 if, however, 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*, § 120, and *Zubac*, § 78, both cited above).

(b) Application of these principles to the circumstances of the current case

58. In the present case, the applicant's appeal against the rejection of her candidacy for a judicial post was not reviewed by the Qualifications Chamber on the merits. The latter declared the applicant's appeal inadmissible for lack of jurisdiction (see paragraph 12 above; contrast *Dzhidzheva-Trendafilova*, cited above, §§ 51-57). Thus, the Qualifications Chamber concluded that it did not have jurisdiction to hear judicial appointment-related disputes unless a competition procedure reached the stage of voting by members of the HCJ. However, the Court cannot but note that the applicant was shortlisted for the competition on the basis of her application form, and that she also underwent a background check, was interviewed by members of the HCJ and was assessed on the basis of competency and integrity criteria. All of the above-mentioned stages of the judicial competition were conducted by the very same HCJ which was eventually expected to vote on the applicant's candidacy. By excluding from judicial review the above-mentioned stages of the competition all together, the Qualifications Chamber did not appear to fully consider the position of the Constitutional Court, which had stated that the right to a reasoned decision under the Constitution implied that adequate reasons had to be given throughout the entire recruitment process and that

while the appointment of judges was a constitutional power of the HCJ, the right to a fair trial entailed the requirement that all decisions (acts) of public authorities that violated human rights be challenged and adjudicated in court (see paragraphs 21-22 above).

59. Although its above findings with regard to the issue of applicability do not prejudge its consideration of the question of compliance (see *Vilho Eskelinen and Others*, § 64, and *Tsanova-Gecheva*, § 87, both cited above), the Court cannot but note the importance which international and Council of Europe instruments, as well as the case-law of international courts and practice of other international bodies, are attaching to procedural fairness in cases involving the selection, appointment and career of judges (see paragraphs 49-51 above; see also *Ástráðsson,* §§ 207, 215, and 226-27, and B*aka*, § 165, both cited above). Bearing this in mind, the Court considers that the Qualifications Chamber by depriving itself of jurisdiction to examine the applicant's appeal against the decision of the HCJ impaired the very essence of her right to access to a court.

60. There has accordingly been a violation of the applicant's right of access to a court, as guaranteed by Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

61. 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

62. The applicant claimed 121,000 euros (EUR) in respect of pecuniary damage for loss of income and EUR 10,000 in respect of non-pecuniary damage.

63. The Government contested these claims.

64. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it awards the applicant EUR 3,600 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

65. The applicant also claimed EUR 3,660 for the legal costs and expenses incurred before the Court and EUR 50 for various administrative expenses.

66. The Government submitted that the applicant had failed to show that the relevant expenses had indeed been incurred, and that they were necessary and reasonable as to quantum. The Government also claimed that the

applicant's lawyer did not meet the criteria of a representative under Rule 36 §§ 2 and 4 (a) of the Rules of Court, as she was not a member of the Georgian Bar Association. Accordingly, no award of legal costs for her representation could be granted.

67. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court rejects the claim for costs and expenses in its entirety.

C. Default interest

68. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

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

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

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

Done in English, and notified in writing on 7 April 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik Registrar	Síofra O'Leary President