

BEFORE THE GRAND CHAMBER  
EUROPEAN COURT ON HUMAN RIGHTS

***Anatoliy Oleksiyovych Denisov v Ukraine***

**Application no. 76639/11**

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WRITTEN SUBMISSIONS ON BEHALF OF THE INTERNATIONAL COMMISSION OF JURISTS (ICJ)

INTERVENER

*pursuant to the Registrar's notification dated 27 July 2017 that the Court had granted permission under Rule 44 § 3 of the Rules of the European Court of Human Rights*

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31 August 2017

## **I. Introduction**

In this submission, the International Commission of Jurists (ICJ) provides the Court with an analysis in relation to (a) The role of court presidents in the self-governance of the courts and in maintaining judicial independence (b) International standards in relation to security of tenure of judges and court presidents (c) The importance of procedural safeguards, including under Article 6.1 ECHR, in decisions affecting the career and tenure of court presidents; (d) In light of international standards and principles, the extent to which a disciplinary measure such as removal from the position of president of a court may interfere with the right to respect for private life as protected by Article 8 ECHR.

It will be argued that court presidents, in many European jurisdictions, play an important role in the self-governance and impartiality of the judiciary. Upholding the independence of the judiciary requires, *inter alia*, that court presidents should, in the discharge of these functions, enjoy independence from the executive, as well as from other powerful interests. The intervener will argue that the nature of court presidents' role has consequences for the application of Convention rights to measures affecting their judicial career, including removal from the role of court president, even in cases where they retain judicial office.

## **II. International standards relevant to the role of court presidents and security of tenure**

### ***The role of court presidents and the Independence of the Judiciary***

An independent judiciary, operating within a system that respects the separation of powers, is an essential element of the rule of law and a necessary condition for the effective protection of human rights.<sup>1</sup> Judicial independence, as affirmed by the jurisprudence of the Court, encompasses both an institutional, systemic dimension and a personal dimension relating to the situation and conduct of an individual judge.<sup>2</sup> The former may be characterized as the independence of the judicial branch as a whole from the interference by the other branches of government and the public, or as structural independence. The second aspect, of equal importance, refers to the independence of the individual judge, including his or her independence within the judicial profession.<sup>3</sup>

Those responsible for judicial self-governance, including, in many national systems, court presidents, play an important role in upholding both aspects of judicial independence. To maintain the institutional independence of the judiciary,

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<sup>1</sup> UN Basic Principles on the Independence of the Judiciary (adopted by the 7<sup>th</sup> UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 1985, and endorsed by General Assembly Res 40/32 of 29 November 1985 and 40/146 of 13 December 1985); UN Human Rights Council, Resolution 35/12 on independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, UN Doc A/HRC/35/12 (adopted 22 June 2017); ICJ, Declaration of Delhi, 10 January 1959; *Stafford v. UK* [GC], Application no. 46295/99, Judgment of 28 May 2002, para. 78: "the notion of separation of powers between the executive and the judiciary has assumed growing importance in the caselaw of the Court"; Draft Universal Declaration on the Independence of Justice (Singhvi Declaration), articles 4 and 74; Bangalore Principles, Value 1.

<sup>2</sup> *Parlov-Tkalcic v Croatia*, Application no. 24810/06, Judgment of 22 December 2009, para.86; *Agrokompleks v. Ukraine*, Application no. 23465/03, Judgment of 6 October 2011 para. 137

<sup>3</sup> UNODC, Commentary on the Bangalore Principles of Judicial Conduct, September 2007 ('Commentary on the Bangalore Principles'), paras. 23, 39: "...judicial independence requires not only the independence of the judiciary as an institution from the other branches of government; it also requires judges being independent from each other. In other words, judicial independence depends not only on freedom from undue external influence, but also freedom from undue influence that might come from the actions or attitudes of other judges..."

they must perform their managerial role independently from the executive and other interests. Their role is also especially significant with regard to the personal independence of judges of their court. As the *Council of Europe Committee of Ministers Recommendation CM/Rec (2010) 12* states in article 22: “[t]he principle of judicial independence means the independence of each individual judge in the exercise of adjudicating functions. In their decision making judges should be independent and impartial and able to act without any restriction, improper influence, pressure, threat or interference, direct or indirect, from any authority, including authorities internal to the judiciary. Hierarchical judicial organization should not undermine individual independence.” Individual independence of judges requires, therefore, that judges remain free from undue influence or pressure from their colleagues who hold positions such as that of President of a Court.<sup>4</sup>

Although the role of court president varies as between national systems, in many European jurisdictions, court presidents play a significant role in the self-governance of the judiciary. They typically, *inter alia*, hold powers relating to judicial appointments, evaluations, promotions and disciplinary proceedings; make decisions regarding judicial salaries and benefits; and assign cases to judges in their court.<sup>5</sup> International standards explicitly recognise all of these functions as potentially having an impact on the independence and impartiality of individual judges and the independence and impartiality of the judiciary as a whole.<sup>6</sup> and below the interveners set out some examples of how such impacts have actually occurred in practice.

A particularity of court presidents’ role is that, in contrast to executive officials who in some systems are assigned a role in the administration of the courts, they exercise administrative and management functions but do so as judges, in the interests of the effective and efficient self-governance of the judiciary. Their role as court president is an intrinsic part of their judicial career. In its Opinion on the role of court presidents, the Consultative Council of European Judges (CCJE) noted that court presidents, being part of the judiciary and sitting in cases as regular judges in line with the principle *primus inter pares*<sup>7</sup>, have special functions, which are distinct from those of their colleagues. The CCJE noted the key role of court presidents in representing the courts<sup>8</sup> and their fellow judges<sup>9</sup> and in maintaining judicial independence.

Recommendation 1 of CCJE Opinion 19 identifies the essential features of the role: “The role of court presidents is to represent the court and fellow judges, to ensure the effective functioning of the court, thus enhancing its service to

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<sup>4</sup> See concurring opinion of Judge Sicilianos in *Baka v Hungary*, [GC] Application no.20261/12, Judgment of 23 June 2016, para.4: “The principle of the independence of the judiciary is not simply a matter of its relations with the executive and the legislative branches. It also concerns judicial independence within the system of the administration of justice itself. Judges must be free, in their individual capacity, not only from any external influence, but also from any “inside” influence. This “internal judicial independence” implies that judges do not receive instructions and are not subjected to pressure from their colleagues or from persons exercising administrative responsibilities in a court, such as the president of a court or the president of a court’s section”

<sup>5</sup> See CCJE Opinion 19 on the Role of Court presidents, para.6-8; Regarding specific country examples, see for example, ICJ, *Securing Justice: the Disciplinary System for Judges in the Russian Federation*; ICJ, *Appointing the judges: Selection of Judges in the Russian Federation*; ICJ, *Serbia: the long road to judicial self governance*.

<sup>6</sup> See for instance UN Basic Principles on the Independence of the Judiciary, op cit Principles 11, 13, 14, 17-20; Measures for the Effective Implementation of the Bangalore Principles, paragraphs 3.1-3.3, 4.1, 10.1(h), 12.1-12.7, 13.5, 14.1-14.2, 15.1-15.8, 17.1-17.4; UN Human Rights Council, 35/12, U.N. Doc. No. A/HRC/35/12 (22 June 2017), para. 3.

<sup>7</sup> CCJE, Opinion No.19 (2016), op cit, para. 15.

<sup>8</sup> CCJE, Opinion No. 19 (2016), op cit, para. 7.

<sup>9</sup> CCJE, Opinion No.19 (2016), op cit para. 6.

society, and to perform jurisdictional functions ... In performing their tasks, court presidents protect independence and impartiality of the court and individual judges and they have to act at all times as guardians of these values and principles”.

While the CCJE acknowledged that the level, intensity and scope of the role of court presidents varies in national systems, it recognised that court presidents take part in “[...] the work of relevant bodies of judicial self-government and autonomy, such as the Council for the Judiciary, Congress of Judges, General Assembly of Judges, professional organisations of judges, depends on the national legal system.”<sup>10</sup> Court presidents “contribute to developing the whole judicial system as well as to ensuring the maintenance and delivery of high quality independent justice by their individual courts”.<sup>11</sup>

The extensive powers and responsibilities sometimes accorded to court presidents also carry risks of abuse. The jurisprudence of this Court illustrates the potential for court presidents to misuse their power to the detriment of internal independence of judges of their court, leading to violations of human rights.<sup>12</sup> Recognising this potential, the Kiyev Declaration on Judicial Independence in Eastern Europe, South Caucasus and Central Asia recommends limits on the role of court presidents in regard to powers of remuneration, privileges, case assignment, or disciplinary action, and prescribes limited terms of office for court presidents and independent and transparent processes for their selection.<sup>13</sup>

Such concerns are borne out by the research of the International Commission of Jurists, including in several jurisdictions in the Council of Europe region, where it has found that the power of court presidents can be abused to interfere with the individual independence of judges, or can be a conduit for undue executive or other influence on judges. In a report on the Russian Federation, for example, the ICJ found that: “Court presidents expect to, and do, exercise significant power over judges in their courts and beyond, and in some cases, that power is abused. The powers of court presidents extend throughout the judicial system and affect the disciplinary process, the appointments process, allocation of cases and the salaries and benefits of judges.”<sup>14</sup> Separately, ICJ research into the procedure for the selection of judges in the Russian Federation raised concerns regarding the undue informal influence of court presidents on judicial appointments.<sup>15</sup> In a report on the Serbian judicial system, the ICJ highlighted the “hierarchical grip” of court presidents on judges through case assignment and raised concerns regarding procedures for the appointment of court presidents, and the role of court presidents in evaluation of judges.<sup>16</sup>

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<sup>10</sup> CCJE, Opinion No 19 (2016), op cit, para. 8.

<sup>11</sup> CCJE, Opinion No 19 (2016), op ict, para. 7.

<sup>12</sup> *Pavlov-Tkalcic v Croatia*, op cit para.86 ; *Agrokompleks v. Ukraine*, op cit, para.137; *Daktaris v Lithuania*, Application no 42095/98, Judgment of 10 October 2000, para.35; *Moiseyev v. Russia*, Judgment of 9 October 2008, Application no. 62936/00, para 182

<sup>13</sup> OSCE/ODIHR, Kiyev Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, 2010 paras.11-16

<sup>14</sup> ICJ, *Securing Justice: the Disciplinary System for Judges in the Russian Federation (2012)*, p.7. See also pp.9, 18-19, 21, 28-29, 47, <https://www.icj.org/wp-content/uploads/2012/12/MISSION-RUSSIA-REPORT.pdf>

<sup>15</sup> ICJ, *Appointing the judges: procedure for the selection of judges in the Russian Federation*, (2014) p.9, 16-17, 37 -40, 59-62. <http://icj.wppengine.netdna-cdn.com/wp-content/uploads/2014/11/RUSSIA-Selecting-the-judges-Publications-Reports-2014-Eng.pdf>

<sup>16</sup> ICJ, *Serbia's Judges and Prosecutors: the Long Road to Independent Self-Governance*, (2016), pp.27, 43 – 45 , <https://www.icj.org/wp-content/uploads/2016/02/Serbia-Long-Road-to-Indep-Self-Gov-Publications-Reports-Fact-Finding-Mission-Report-2016-ENG-1.pdf>

Averting the risk of such abuses requires systems for the independence and accountability of court presidents. It equally requires that procedures for the selection and removal of judges from the role of court president should be conducted by independent bodies or the judiciary itself, and should apply standards of due process which prevent undue influence on court presidents through the disciplinary process. Removal or the threat of removal of a judge from the office of court president, while he or she continues in office as a judge, has the potential to affect both his or her personal independence as a judge. It may also have a chilling effect, causing court presidents to be less likely to discharge their management functions in a way that respects and protects the independence of individual members of their court.

It is therefore essential for the protection of judicial independence that safeguards be put in place to ensure fair proceedings in decisions affecting their career and security of tenure.

### ***International standards on security of tenure of judges***

Regulation of almost every aspect of the judicial career can affect judicial independence.<sup>17</sup> As noted by the UN Human Rights Committee, judicial independence may be affected by, amongst other things, “the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature”.<sup>18</sup>

The UN Basic Principles on the Independence of the Judiciary state, in principle 12, that “judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.” The Draft Universal Declaration on the Independence of Justice (Singhvi Declaration) stresses that the “term of office of the judges, their independence, security, adequate remuneration and conditions of service shall be secured by law and shall not be altered to their disadvantage.”<sup>19</sup>

At a Council of Europe level, the Committee of Ministers Recommendation 2010/12 states that “security of tenure and irremovability are key elements of the independence of judges. Accordingly, judges should have guaranteed tenure until a mandatory retirement age, where such exists.”<sup>20</sup> Security of tenure until a

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<sup>17</sup> CCJE Opinion No 1 (2001) Concerning the Independence of the Judiciary and the Irremovability of Judges, para. 11.

<sup>18</sup> Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc CCPR/C/GC32 (2007), para. 19; *Langborger v. Sweden* (1989) ECHR 11, para. 32; *Kleyn and Others v. The Netherlands* (2003) ECHR 226, para. 190.

<sup>19</sup> Singhvi Declaration, article 16(a). Furthermore, it stresses that “[r]etirement age shall not be altered for judges in office without their consent” (Singhvi Declaration, article 18(c)).

<sup>20</sup> Recommendation CM/Rec (2010)12 on Judges: independence, efficiency and responsibilities, Chapter VI.49. See further international and regional standards: Universal Charter of the Judge, article 8: “A judge must be appointed for life or for such other period and conditions, that the judicial independence is not endangered”; International Bar Association’s (IBA) Minimum Standards of Judicial Independence, article 1(b): “Personal independence means that the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control” and article 22; Paris Minimum Standards of Human Rights Norms in a State of Emergency, principle B.3(c); Burgh House Principles on the Independence of the International Judiciary, principle 3.1; Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa, principles A(4)(n)(2) and A(4)(p); Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government, principle IV; Latimer House Guidelines for the Commonwealth, 19 June 1998 (Guidelines on good practice governing relations between the Executive, Parliament and the Judiciary in the promotion of good

mandatory retirement age or the expiry of a fixed term of office is said to be “a fundamental tenet of judicial independence”.<sup>21</sup>

Standards developed in other regions also affirm these principles; for example, the Beijing Statement of Principles of Independence of the Judiciary in the LAWASIA Region states that a “judge’s tenure must not be altered to the disadvantage of the judge during his or her term of office.”<sup>22</sup>

Consistent with these standards, the importance of security of tenure of judges, as an element of the right to a fair trial by an independent and impartial tribunal, has been affirmed by this Court<sup>23</sup> as well as by the UN Human Rights Committee,<sup>24</sup> and the UN Human Rights Council.<sup>25</sup>

### **Security of tenure of court presidents**

Appointment as a court president differs from appointment as a judge in that most national systems do not contemplate life appointment; in the majority of systems, court presidents are appointed for a short, fixed term of office.<sup>26</sup> Nevertheless, security of tenure for the designated term of office as court president is necessary to preserve both the independence of the court president and that of the judges in the court over which he or she presides.

Indeed, the significant powers which court presidents often hold within the judiciary, and their capacity to influence the independence of judges of their court, make security of tenure vital. As judges Pinto de Albuquerque and Dedov noted in a concurring opinion in *Baka v Hungary* (in comments endorsed by the CCJE) “there is nothing in these standards to suggest that the principle of irremovability of judges should not apply to the term of office of presidents of courts, irrespective of whether they perform, in addition to their judicial duties,

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governance, the rule of law and human rights to ensure the effective implementation of the Harare Principles). section II, para. 1; Magna Carta of Judges, principles 4 and 19; European Charter on the Statute for Judges, principle 3.4. Within the jurisprudence of the ECtHR, see, among others, *Campbell and Fell v. UK*, Application nos. 7819/77 and 7878/77, Judgment of 28 June 1984, para. 80; *Incal v. Turkey* [GC], Application no. 22678/93, Judgment of 9 June 1998, para. 65. C.f. Leandro Despouy, Special Rapporteur on the independence of judges and lawyers, Annual Report to the Human Rights Council, UN Doc. A/HRC/11/41, 24 March 2009, para. 57; Venice Commission, Report on the Independence of the Judicial System, Part I: the Independence of Judges, CDL-AD(2010)004, para. 38.

<sup>21</sup> CCJE Opinion No 1 (2001), op cit, para. 57.

<sup>22</sup> Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (As Amended at Manila, 28 August 1997), article 21.

<sup>23</sup> *Kleyn v. Netherlands* [GC], Application no.39343/98, Judgment of 6 May 2003, para. 190: “in order to establish whether a tribunal can be considered “independent” for purposes of Article 6 §1, regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressure and the question whether it presents an appearance of independence.”

<sup>24</sup> UN Human Rights Committee General Comment 32, op cit, para. 19.

<sup>25</sup> UN Human Rights Council, Resolution 35/12, U.N. Doc. No. A/HRC/35/12 (22 June 2017), operative para. 3: “Stresses that the term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and age of retirement should be adequately secured by law, that the security of tenure of judges is an essential guarantee of the independence of the judiciary and that grounds for their removal must be explicit, with well-defined circumstances provided by law, involving reasons of incapacity or behaviour that renders them unfit to discharge their functions, and that procedures upon which the discipline, suspension or removal of a judge are based should comply with due process”.

<sup>26</sup> CCJE Opinion No.19, op cit, para.44; Kiev Declaration, para.15: “Court chairpersons should be appointed for a limited number of years with the option of only one renewal. In case of executive appointment, the term should be short without possibility of renewal.” Bangalore Implementation Measures, para 27: “The procedure in certain states of the Chief Justice or President of the Supreme Court being elected, in rotation, from among the judges of that court by the judges themselves, is not inconsistent with the principle of judicial independence and may be considered for adoption by other states.”

administrative or managerial functions".<sup>27</sup>

Standards developed by the CCJE make explicit the application of the principle of security of tenure to the office of court president.<sup>28</sup> CCJE Opinion No 19 on the Role of court presidents envisages that serious organisational failures or an incapacity to fulfil the functions of court president can lead to a procedure for removal but affirmed that "the safeguards of irremovability from office as a judge apply equally to the office of a court president."<sup>29</sup> It clarified that "[w]hen judges are appointed to the presidency of a court for a particular term, they should serve that term in full. A president can only be removed from office (e.g. following disciplinary proceedings) following the application - as a minimum - of those safeguards and procedures that would apply when consideration is being given to a removal from office of an ordinary judge."<sup>30</sup> It therefore recommended that: "The principle of irremovability of judges should apply to the term of office of court presidents, irrespective of whether they perform, in addition to their judicial duties, administrative or managerial functions .."<sup>31</sup>

### III. Due Process in removal of court presidents

As this Court has noted, international standards and jurisprudence have attached significant and increasing importance to procedural fairness in the removal or dismissal of judges.<sup>32</sup> Indeed international standards including the UN Basic Principles on the Independence of the Judiciary consistently affirm the right to a fair hearing in all judicial disciplinary proceedings<sup>33</sup> and stipulate that decisions to discipline, suspend or remove a judge should (with at most limited exceptions) be subject to an independent review of a judicial character.<sup>34</sup> The procedure adopted must provide the judge with a fair hearing, including full information on the disciplinary charges, legal representation at the hearing, the possibility to present a full defence and to be judged by an independent and impartial tribunal.<sup>35</sup>

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<sup>27</sup> Consultative Council of European Judges (CCJE), Opinion N° 19 (2016), The Role of Court presidents; *Baka v. Hungary* [GC] op cit, joint concurring opinion of Judges Pinto de Albuquerque and Dedov, para.19

<sup>28</sup> CCJE Opinion No.19 (2016), op cit para. 45.

<sup>29</sup> CCJE Opinion no.19 op cit para.45

<sup>30</sup> CCJE Opinion no.19 op cit para.46

<sup>31</sup> CCJE Opinion no.19, op cit recommendation 10

<sup>32</sup> *Baka v Hungary*, op cit, para. 121.

<sup>33</sup> UN Basic Principles, principle 17; Singhvi Declaration, articles 26, 27, 28 and 29; CoE Committee of Ministers Recommendation (2010)12, article 69; European Charter on the Statute of the Judge, article 5.1; Consultative Council of European Judges (CCJE), Opinion no. 1, para. 60; Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, Art. 26; African Guidelines, A.4(q); Beijing Statement, article 26; Statute of the Iberoamerican Judge, article 14; Latimer House Guidelines, op cit., VI.1(A); Commonwealth Principles, VII(b).

<sup>34</sup> European Charter on the Statute for Judges, principle 5.1 ("The decision of an executive authority, of a tribunal, or of an authority pronouncing a sanction, as envisaged herein, is open to an appeal to a higher judicial authority"); CoE Committee of Ministers Recommendation Chapter CM/Rec(2010)12, VII.69; Magna Carta of Judges, principle 6 ("Disciplinary proceedings shall take place before an independent body with the possibility of recourse before a court"); UN Basic Principles, principle 20 ("Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings."); Beijing Statement, article 26; African Guidelines, principle A.4(q). See also, Venice Commission, Estudio núm. 494/2008, para 43; Leandro Despuoy, op cit, para. 61; Gabriela Knaul, Report on mission to Turkey (2012), UN Doc. A/HRC/20/19/Add.3, para. 30; Gabriela Knaul, Report on mission to Mexico (2011), UN Doc. A/HRC/17/30/Add.3, para. 14; Gabriela Knaul, Report on mission to Mozambique (2011), op cit, para 98; Gabriela Knaul, Report on mission to the Russian Federation (2009), UN Doc. A/HRC/11/41/Add.2, para. 99.

<sup>35</sup> Singhvi Declaration, article 26(a): "complaint against a judge shall be processed expeditiously and fairly under an appropriate practice and the judge shall have the opportunity to comment on the complaint at the initial stage. The examination of the complaint at its initial stage shall be kept confidential, unless otherwise

Some element of due process applies not only to disciplinary action but to other decisions that significantly impact on the judicial career, and whose abuse therefore has the potential to affect judicial independence. The European Charter on the Statute for Judges in particular emphasizes the need for independent decision making, stating that, “[i]n respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary”.<sup>36</sup> It also provides that any sanction against a judge is to be “open to an appeal to a higher judicial authority”.<sup>37</sup>

The UN Special Rapporteur on the Independence of Judges and Lawyers also affirms the importance of the independence of institutions charged with ensuring judicial accountability, recommending that such bodies “should preferably be composed entirely of judges, retired or sitting, although some representation of the legal profession or academia could be advisable. No political representation should be permitted.”<sup>38</sup> The Special Rapporteur also concludes that “the right to have disciplinary decisions reviewed by a higher judicial tribunal should be guaranteed for judges”.<sup>39</sup>

Such guarantees equally apply to proceedings leading to removal from the office of court president which, as set out above, is a judicial office playing an important role in the self-governance of the judiciary. Reflecting the general principles set out above, CCJE Opinion 19 specifically provides that, in the case of early removal from the office of court president, the procedure should be transparent and any risk of political influence should be firmly excluded.<sup>40</sup> In recommendation 10 of Opinion 19 it notes that: “Removal of a court president before the expiration of his/her mandate should, as a minimum, be subject to the same safeguards as the removal of ordinary judges.” Furthermore, the Implementation Measures for the Bangalore Principles provide that: “Except pursuant to a system of regular rotation provided by law or formulated after due consideration by the judiciary, and applied only by the judiciary or by an independent body, a judge should not be transferred from one jurisdiction, *function* or location to another without his or her consent.” (emphasis added)<sup>41</sup>

**The intervener therefore submits that the principle of independence of the judiciary necessarily implies security of tenure in the office of court president, for the duration of his or her term of office. In order to ensure such security of tenure and to maintain the independence both of individual court presidents, and their capacity to uphold independence of judges in their court, proceedings for the removal from the position of court president must provide the same guarantees of independence and fairness of the proceedings as those for removal from the office of judge.**

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requested by the judge”, and article 28: “The proceedings for discipline of judges shall ensure fairness to the judge and the opportunity of a full hearing.” See also, IBA Minimum Standards of Judicial Independence, article 27; African Guidelines, articles 4(q) and (r); Beijing Statement, article 26; Latimer House Guidelines, op cit., VI.1, para.(a).

<sup>36</sup> European Charter on the Statute for Judges, Principle 1.3. See similarly Council of Europe Committee of Ministers Recommendation (2010)12, adopted 17 November 2010, para 46.

<sup>37</sup> European Charter on the Statute for Judges, Principle 5.1.

<sup>38</sup> Report of the Special Rapporteur on Independence of Judges and Lawyers, UN Doc A/HRC/26/32 (28 April 2014), para 126.

<sup>39</sup> Ibid, para 129

<sup>40</sup> Ibid, para. 47.

<sup>41</sup> Measures for the Effective Implementation of the Bangalore Principles on Judicial Conduct (para. 13.5).

#### **IV. Application of Article 6.1 and Article 8 ECHR in light of international standards on the judiciary**

##### ***Special considerations in the application of article 6.1 to dismissal of Court presidents***

These general principles should also, in the submission of the interveners, be reflected in the application of Article 6.1, both as regards its scope of application, and in the substance of the protection it affords. As has been reiterated by the Grand Chamber in *Baka v Hungary*, the existing “presumption of applicability of Article 6” encompasses cases of employment disputes concerning employees of the State, including judges.<sup>42</sup> Following *Eskelinen and Others v Finland*, in order for protection under Article 6.1 to be excluded in such cases, two conditions must be met: the national law must expressly exclude access to a court for the post or category of staff; and the exclusion must be justified on objective grounds in the State’s interest.<sup>43</sup> Under this doctrine, it is presumed that Article 6.1 applies to employment disputes involving public sector workers, in the absence of convincing reasons put forward by the State.<sup>44</sup> Applying the Eskelinen test, this Court has, in a number of cases, found article 6.1 to be applicable to questions of the judicial career and removal of judges from office.<sup>45</sup>

The application of the second aspect of the Eskelinen test to employment disputes concerning judges, including in their role as court presidents, raises particular issues, in light of the essential role of an independent judiciary operating within a system that respects the separation of powers. **In the submission of the interveners, when assessing any justification advanced by the State for excluding judges’ access to court in regard to their career and security of tenure, consideration must be given to the strong public interest of upholding the role, independence and integrity of the judiciary in a democratic society under the rule of law. The interveners submit that it can never be in the legitimate interests of the State to deprive judges of access to court or of due process protection in disputes capable of affecting their institutional or individual independence, including in cases that concern their security of tenure or conditions of service.**

**The interveners further submit that in the assessment of the adequacy of procedural safeguards in accordance with Article 6.1, and in considering the justification of any restrictions on aspects of Article 6.1 rights, in cases concerning the career of judges, including court presidents, consideration should be given to the particular significance of these proceedings for judicial independence and the rule of law, a founding principle of the Convention system.** Although the individual judge may be immediate beneficiary of the full protection of his or her article 6.1 rights, the protection ultimately benefits all persons entitled under article 6.1 to the “independent and impartial tribunal” of which the individual judge is part.

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<sup>42</sup> *Baka v Hungary*, op cit, paras.103- 105.

<sup>43</sup> *Vilho Eskelinen and Others v. Finland* [GC], Application no. 63235/00, Judgment of 19 April 2007, para. 62.

<sup>44</sup> *Vilho Eskelinen and Others v. Finland* op cit, para. 62.

<sup>45</sup> *Olujić v. Croatia*, Application no. 22330/05, Judgment of 5 February 2009; *G v. Finland*, Application no. 33173/05, Judgment of 27 January 2009; *Jurčić v. Croatia*, Application no. 58222/09, Judgment of 26 July 2011; *Dzhidzheva-Trendafilova v. Bulgaria*, Application no. 12628/09, decision of 9 October 2012; *Volkov v. Ukraine*, Application no. 21722/11, Judgment of 9 January 2013.

### ***Special considerations in the application of the Article 8 ECHR right to respect for private life in removal of court presidents***

It is well established that the broad scope of the right to respect for private life protected by Article 8 ECHR, encompasses the right of an individual “to form and develop relationships with other human beings, including relationships of a professional or business nature”.<sup>46</sup>

In particular, private life is likely to be affected where protection of honour and reputation are at stake.<sup>47</sup> However, “... an attack on a person’s reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life”.<sup>48</sup> It has been established that removal from judicial office may engage the right to respect for private life, due to the impact on professional relationships, reputation and material well-being. In *Ermenyi v Hungary*, Article 8 was accepted as being engaged in the removal from office of a Court Vice-President.<sup>49</sup> In *Volkov v Ukraine* the Court found that:

“[t]he dismissal of the applicant from the post of judge affected a wide range of his relationships with other persons, including relationships of a professional nature. Likewise, it had an impact on his “inner circle” as the loss of his job must have had tangible consequences for the material well-being of the applicant and his family. Moreover, the reason for the applicant’s dismissal, namely breach of the judicial oath, suggests that his professional reputation was affected.”<sup>50</sup>

Moreover, where sanctions follow disciplinary investigation, not only professional reputation but private life may be directly at stake. In *Ozpinar v Turkey*, concerning dismissal of a judge, it was held: “[...] la Cour est d’avis que l’enquête menée par l’inspecteur sur la vie privée et professionnelle de la requérante, au cours de laquelle les témoins ont été interrogés sur tel ou tel aspect de la vie de la requérante, ainsi que la révocation administrative qui en a résulté, motivée essentiellement par les conclusions tirées des agissements de celle-ci, peuvent être considérées comme une ingérence dans son droit au respect de sa vie privée”.<sup>51</sup>

In a like manner, dismissal of a court president through a disciplinary procedure affects his or her professional reputation as a person who is considered to be qualified for this post in terms of professional and personal merit and honour. **The intervener submits that the nature of the role of court president, whether or not its day-to-day discharge mainly involves administrative functions, always implies a leadership role in relation to the self-governance and, often, the external representation of the judiciary, and therefore the independence of the judiciary. This in turn implies that removal from this role engages the individual’s private life under Article 8.1 ECHR. In particular, it affects professional relationships which the individual has developed in her or his career, and is likely to cast significant doubt on her or his professional reputation and standing, raising questions as to honour, probity and**

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<sup>46</sup> *C. v. Belgium*, 7 August 1996, para. 25, Reports 1996-III

<sup>47</sup> *Pfeifer v. Austria*, Application no. 12556/03, para.35, Judgment of 15 November 2007; *A. v. Norway*, Application no. 28070/06, Judgment of 9 April 2009, paras. 63-64,

<sup>48</sup> *Axel Springer v Germany*, Application no 39954/08, Judgment of 7 February 2012

<sup>49</sup> *Ermenyi v Hungary*, Application no.22254/14, 22 November 2016, para.30

<sup>50</sup> *Volkov v Ukraine*, Application no. 21722/11, Judgment of 9 January 2013, para. 166.

<sup>51</sup> *Özpinar v Turkey*, Application no.20999/04, Judgment of 19 October 2010, para. 48.

**personal and professional merit, amongst colleagues within the judiciary, and in the society at large.**