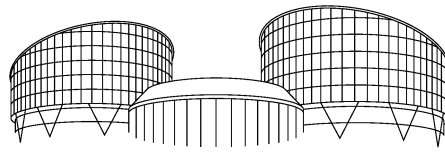


EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Information Note on the Court's case-law 246

December 2020



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

Andri v. Iceland [GC] - 26374/18

Judgment 1.12.2020 [GC]

Article 6

Criminal proceedings

Article 6-1

Tribunal established by law

Participation of judge whose appointment was vitiated by undue executive discretion without effective domestic court review and redress: *violation*

Facts – The newly-established Court of Appeal, which became operational in 2018, rejected the applicant's appeal against his criminal conviction. The applicant complained that one of the judges on the bench, A.E., had been appointed in breach of the procedures laid down in domestic law. The Supreme Court acknowledged that the judge's appointment had been irregular. Firstly, by replacing four of the candidates – whom the Evaluation Committee had considered to be amongst the fifteen best qualified – with four others, including A.E. – who had not made it to the top fifteen – without carrying out an independent evaluation of the facts or providing adequate reasons for her decision, the Minister of Justice had breached domestic law. Secondly, the Parliament had not held a separate vote on each individual candidate, as required by domestic law, but instead voted in favour of the Minister's list *en bloc*. The Supreme Court held, however, that these irregularities could not be considered to have nullified the appointment, and that the applicant had received a fair trial. In a judgment of 12 March 2019 (see [Information Note 227](#)) a Chamber of the Court found, by five votes to two, that there had been a violation the right to a tribunal "established by law". For these purposes, the decisive test was whether there had been a "flagrant" breach of domestic law. The case was referred to the Grand Chamber at the Government's request.

Law – Article 6 § 1 : The task of the Grand Chamber was limited to determining the *consequences* of the breaches of domestic law, notably whether Judge A.E.'s participation had deprived the applicant of the right to be tried by a "tribunal established by law". The case provided it with an opportunity to refine and clarify the meaning to be given to the concept of a "tribunal established by law", notably by considering how its individual components should be interpreted so as to best reflect its purpose and to ensure that the protection it offers is truly effective. The Grand Chamber also analysed its relationship with the other "institutional requirements" (those of independence and impartiality).

(a) Scope of the requirement of a "tribunal established by law"

1. "*Tribunal*": A "tribunal" is characterised by its judicial function and must also satisfy a series of requirements, such as independence, in particular of the executive, impartiality, duration of its members' terms of office. In addition, it was inherent in the very notion of a "tribunal" that it be composed of judges selected on the basis of merit through a rigorous process to ensure that the most qualified candidates – both in terms of technical competence and moral integrity – were appointed. The higher a tribunal was placed in the judicial hierarchy, the more demanding the applicable selection criteria should be. Non-professional judges could be subject to different selection criteria, particularly regarding the requisite technical competencies.

2. "*Established*": Having regard to its fundamental implications for the proper functioning and the legitimacy of the judiciary in a democratic State governed by the rule of law, the process of

appointing judges necessarily constituted an inherent element of the concept of “establishment” of a court or tribunal “by law”. While the Court’s relevant case-law had so far predominantly concerned breaches of domestic rules directly regulating the competence of a tribunal, or having immediate effects on its composition, there had been some precedent pointing in that direction, such as the case of *Ilatovskiy v. Russia* (6945/04, 9 July 2009). Furthermore, such an approach also found support in the purpose of the “established by law” requirement: reflecting the principle of the rule of law, it sought to protect the judiciary against unlawful external influence, from the executive in particular. The process of appointment of judges might be open to such undue interference and therefore called for strict scrutiny. The said requirement moreover encompassed any provision of domestic law including, in particular, provisions concerning the independence of the members of a court. It was thus evident that breaches of the law regulating the judicial appointment process might render the participation of the relevant judge in the examination of a case “irregular”. Finally, there was also a considerable consensus in this respect among the States surveyed.

3. “By law”: The nature and scope of the cases that had so far come before the Court had mostly called for a determination as to whether a court overseeing a case had any legal basis and whether the domestic law requirements had been complied with in the constitution and functioning of that court. However, the requirement of a “tribunal established by law” also meant a “tribunal established in accordance with the law”. That requirement in no way sought to impose uniformity in practices of the member States. The mere fact that the executive had decisive influence on appointments might not as such be considered to detract from it. The concern here related solely to ensuring that the relevant domestic law on judicial appointments was couched in unequivocal terms, to the extent possible, so as not to allow arbitrary interferences, including by the executive.

4. *Close interrelationship between the requirements of “independence”, “impartiality” and “tribunal established by law”*: The examination under the “tribunal established by law” requirement must not lose sight of the common purpose shared with the guarantees of “independence” and “impartiality”, namely that of upholding the fundamental principles of the rule of law and the separation of powers. It thus had to systematically enquire whether the alleged irregularity in a given case was of such gravity as to undermine the aforementioned fundamental principles and to compromise the independence of the court in question. “Independence” referred, in this connection, to the necessary personal and institutional independence that was required for impartial decision making, and characterised both (i) a state of mind, which denotes a judge’s imperviousness to external pressure as a matter of moral integrity, and (ii) a set of institutional and operational arrangements – involving both a procedure by which judges can be appointed in a manner that ensures their independence and selection criteria based on merit –, which must provide safeguards against undue influence and/or unfettered discretion of the other state powers, both at the initial stage of the appointment of a judge and during the exercise of his or her duties.

(b) The threshold test

The Grand Chamber endorsed the logic and the general substance of the “flagrant breach” test introduced by the Chamber, developing it further (below). In order to avoid ambiguity, however, it decided not apply the same concept. While the Contracting States should be afforded a certain margin of appreciation, the following criteria, taken cumulatively, provided a solid basis to guide the Court – and ultimately the national courts – in the assessment as to whether the irregularities in a given judicial appointment procedure were of such gravity as to entail a violation of the right to a tribunal established by law, and whether the balance between the competing principles has been struck fairly and proportionately in the particular circumstances of a case.

1. *The first step of the test*: There must, in principle, be a *manifest* breach of the domestic law, in the sense that the breach must be objectively and genuinely identifiable as such. The Court would in general cede to the national courts’ interpretation as to whether there had been a breach of the domestic law, unless the breach was “flagrant” – that is, unless the national courts’ findings could be regarded as arbitrary or manifestly unreasonable. However, the absence of a manifest

breach did not as such rule out the possibility of a violation of the right to a tribunal established by law. There might be circumstances where a judicial appointment procedure that was seemingly in compliance with the relevant domestic rules nevertheless produced results that were incompatible with the object and purpose of that Convention right. In such circumstances, the Court must also pursue its examination under the second and third limbs of the test.

2. *The second step of the test:* The breach in question had to be assessed in the light of the object and purpose of the requirement of a “tribunal established by law”, namely to ensure the ability of the judiciary to perform its duties free of undue interference and thereby to preserve the rule of law and the separation of powers. Therefore, only those breaches that relate to the fundamental rules of the procedure for appointing judges – that is, breaches that affect the *essence* of the right to a “tribunal established by law” – were likely to result in a violation of that right (for instance, the appointment of a person as judge who had not fulfilled the relevant eligibility criteria – or breaches that might otherwise undermine the purpose and effect of the “established by law” requirement, as interpreted by the Court). Regard should be had, in this respect, to the purpose of the law breached, that is, whether it sought to prevent any undue interference by the executive with the judiciary. Accordingly, breaches of a purely technical nature that had no bearing on the legitimacy of the appointment process must be considered to fall below the relevant threshold.

3. *The third step of the test:* The review conducted by national courts, if any, as to the legal consequences – in terms of an individual’s Convention rights – of a breach of a domestic rule on judicial appointments played a significant role in determining whether such breach amounted to a violation of the right to a “tribunal established by law”, and thus formed part of the test itself. Such review must be carried out on the basis of the relevant Convention standards, adequately weighing in the balance the competing interests at stake. In particular, a balance had to be struck to determine whether there was a pressing need – of a substantial and compelling character – justifying the departure from the principles of legal certainty and irremovability of judges, as relevant, in the particular circumstances of a case. Where the domestic review had been Convention-compliant and the necessary conclusions had been drawn, the Court would need strong reasons to substitute its assessment for that of the national courts.

The absence of a specific time-limit before which an irregularity in the appointment procedure could be challenged would not in practice have the effect of rendering the appointments open to challenge indefinitely. With the passage of time, the preservation of legal certainty would carry increasing weight in relation to the individual litigant’s right to a “tribunal established by law” in the balancing exercise that must be carried out. Account had also to be taken of the evidential difficulties that would arise with the passage of time and of the relevant statutory time-limits that might be applicable in domestic law to challenges of such nature.

(c) Application of the test to the circumstances of the present case

1. *Whether there was a manifest breach of the domestic law* – Given the findings of the Supreme Court of Iceland, the first condition of the test was clearly satisfied.

2. *Whether the breaches of the domestic law pertained to a fundamental rule of the procedure for appointing judges* – There had been a grave breach of a fundamental rule of the national judicial appointment procedure, especially seen in the light of its main aim: namely, to limit the influence of the executive (by involving an independent Evaluation Committee) and thereby to strengthen the independence of the judiciary in Iceland.

In relation to the *breaches committed by the Minister*, the latter had failed to explain why she had picked one candidate over another, as required under domestic law. All four of the candidates added by her had scored more points in judicial experience than the four removed. However, in the original list prepared by the Evaluation Committee, there had been candidates who had scored even lower in judicial experience than the four removed, who the Minister had nevertheless decided to keep. Similarly, among the candidates who had not been recommended by the Committee, there were those who had scored higher in judicial experience than the four

eventually chosen by the Minister. While the Minister purportedly had also had regard to subjective factors, such as “success” in career, there had been no explanation as to how she had measured it. The Minister’s actions were of such a nature as to prompt objectively justified concerns that she had acted out of political motives : the applicant’s allegations regarding the political connections between the Minister and the husband of the impugned judge could not be ignored; moreover, the Minister was a member of one of the political parties composing the majority in the coalition Government, by whose votes alone her proposal had been adopted in Parliament. This was sufficient to taint the legitimacy and transparency of the whole procedure.

In relation to the *shortcomings in the procedure before Parliament*, not only had it failed to demand that the Minister provide objective reasons for her proposals, but it had not complied with the special voting rules, which had undermined its supervisory role as a check against the exercise of undue executive discretion. Accordingly, the applicant’s belief that Parliament’s decision had been driven primarily by party political considerations might not be considered to be unwarranted.

3. *Whether the allegations regarding the right to a “tribunal established by law” were effectively reviewed and redressed by the domestic courts* – The Supreme Court had failed to carry out a Convention-compliant assessment and had had no regard to the question of whether the object of the safeguard enshrined in the concept of “established by law” had been achieved. First, even though that court had had the power to address and remedy the effects of the aforementioned irregularities, it had failed to draw the necessary conclusions from its own findings. The emphasis it had placed on the mere fact that the appointments had become official, suggested an acceptance, or even a resignation, that it had had no real say over the matter thereafter. The Supreme Court had mainly focused on the question whether the irregularities had had any actual implications for Judge A.E.’s independence or impartiality, a question which had no direct bearing on the assessment of a separate issue regarding the “tribunal established by law” requirement. Secondly, the Supreme Court had not responded to any of the applicant’s very specific and highly pertinent arguments and allegations in that latter respect (see above). It was therefore not clear from its judgment why the impugned procedural breaches had not been of such a nature as to compromise the lawfulness of the appointment of A.E. and, consequently, of her subsequent participation in the applicant’s case. Thirdly, as regards the balance that should have been struck by the Supreme Court, while the passage of a certain period of time might in principle tip the balance in favour of “legal certainty”, that was not the case on the present facts. The appointment of A.E. and the other three candidates in question had been contested immediately after the finalisation of the relevant procedure and the impugned irregularities had been established even before they had taken office.

1) The restraint displayed – and the failure to strike the right balance between preserving the principle of legal certainty on the one hand, and upholding respect for the law on the other – had not been specific to the instant case, but had been the Supreme Court’s settled practice. This practice posed problems for two main reasons. First, it undermined the significant role played by the judiciary in maintaining the checks and balances inherent in the separation of powers. Second, having regard to the significance and the implications of the breaches in question, and to the fundamentally important role played by the judiciary in a democratic State governed by the rule of law, the effects of such breaches might not justifiably be limited to the individual candidates who had been wronged by non-appointment, but necessarily concerned the general public.

4. *Overall*: The applicant had been denied his right to a “tribunal established by law”, on account of the participation in his trial of a judge whose appointment procedure had been vitiated by grave irregularities that had impaired the very essence of the right at issue.

Conclusion: violation (unanimously).

The Court found that the question as to whether the same irregularities had also compromised the independence and impartiality of the same tribunal did not require further examination.

Article 46: The finding of a violation in the present case could not as such be taken to impose on the respondent State an obligation under the Convention to reopen all similar cases that had since become *res judicata* in accordance with Icelandic law.

Article 41: A finding of a violation was sufficient just satisfaction in the present case.

Breaches of human rights by public authorities