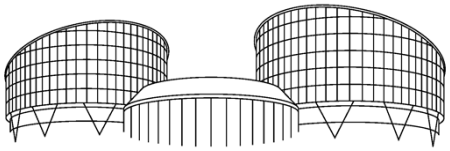

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF LORENZO BRAGADO AND OTHERS v. SPAIN

(Applications nos. 53193/21 and 5 others – see appended table)

JUDGMENT

STRASBOURG

22 June 2023

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Lorenzo Bragado and Others v. Spain,

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

Carlo Ranzoni*, President*,
Mārtiņš Mits,
Stéphanie Mourou-Vikström,
María Elósegui,
Mattias Guyomar,
Kateřina Šimáčková,
Mykola Gnatovskyy*, judges*,
and Victor Soloveytchik, *Section Registrar,*

Having regard to:

the applications (nos. 53193/21, 53707/21, 53848/21, 54582/21, 54703/21 and 54731/21) against the Kingdom of Spain lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by six Spanish nationals ("the applicants", see the appended table) on 22 October 2021;

the decision to give notice to the Spanish Government ("the Government") of the complaint under Article 6 concerning the applicants' proceedings before the Constitutional Court and a related matter concerning their right to respect for their private life and to declare inadmissible the remainder of the applications;

the parties' observations;

Having deliberated in private on 28 March and 16 May 2023,

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

INTRODUCTION

1. The present case concerns the Constitutional Court's rejection of the applicants' *amparo* appeal, in which they complained about Parliament's failure to pursue the appointment process for appointing a new General Council of the Judiciary from a list of candidates, which included their names. The applicants referred to Article 6 of the Convention.

THE FACTS

2. The applicants were represented by Mr V.J. Tovar Sabio, a lawyer practising in Granada.

3. The Government were represented by their Agent, Mr A. Brezmes Martínez de Villareal.

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

I. RENEWAL OF THE GENERAL COUNCIL OF THE JUDICIARY IN 2018

5. The General Council of the Judiciary (*Consejo General del Poder Judicial* – "the GCJ") is the governing body of the judiciary; its functions include the appointment and promotion of judges and conducting disciplinary procedures in respect of judges (see paragraph 30 below). The GCJ shall be formed by the President of the Supreme Court (who shall preside over it) and by twenty members appointed for five years: twelve members shall be chosen from judges and magistrates of all judicial categories and eight members shall be chosen from advocates and other lawyers (see paragraph 30 below). The constitutive session of a new composition of the GCJ was held on 4 December 2013. Its five-year mandate was scheduled to expire on 4 December 2018. Under Law no. 4/2013 (see paragraph 32 below), the procedure for appointing a new composition of a new GCJ consisted of two stages: (i) drawing up a list of candidates, and (ii) the selection by Parliament of the members of the GCJ from the final list of candidates (see paragraph 34 below).

6. On 3 August 2018 the President of the GCJ initiated the procedure for the renewal of the GCJ and declared the start of the period for the presentation of candidacies for membership of the GCJ by serving judges and magistrates.

7. At the time in question the applicants were Spanish judges and members of the Francisco de Vitoria Judges Association (*Asociación Judicial Francisco de Vitoria*), one of the associations authorised under Spanish law to endorse candidates for membership of the GCJ (see paragraph 44 below). The applicants presented their respective candidacies for membership of the GCJ. On 4 September 2018 the Association submitted to the Supreme Court a list of candidates endorsed by it. Other associations submitted their own candidates.

8. On 6 September 2018 a list of judges and magistrates (including the applicants) who fulfilled the statutory requirements for the GCJ membership was made public. On 27 September 2018 the President of the GCJ sent the list to the Presidents of the Congress of Deputies and the Senate (the two chambers of the Spanish Parliament).

9. On 9 October 2018 the Bureau (*Mesa* – the governing body) of the Congress[1] agreed to admit the matter for consideration, to indicate to the parliamentary groups the process to be followed for the renewal of the GCJ under section 567 of Law no. 6/1985 (see paragraph 34 below), and to publish

[1] The governing body and collegiate representation of the Chamber, consisting of the President of the Congress, four Vice-Presidents and four Secretaries. They are elected by the Chamber at the beginning of the legislature, using a system that favours their distribution among different parliamentary groups. The Bureau is responsible for internal government and the organisation of parliamentary work, such as programming the general lines of action of the Chamber, coordinating the work of its different bodies.

the final list of fifty-one candidates. That list was published on 15 October 2018.

10. In October and November 2018 the Bureau (of the Congress) agreed, at the request of two parliamentary groups, to three separate extensions of the time-limit as regards the processing of the list of candidates who were lawyers. The Senate Bureau agreed to accept the agreement on the final announcement of the candidacies for membership of the GCJ from judges and magistrates and to open a period of presentation of the candidacies for the appointment of the members from lawyers until 31 October 2018. In November 2018 two parliamentary groups submitted nominations from lawyers, which were accepted for processing on 20 November 2018 by the Senate Bureau. Subsequently, both groups withdrew those proposals.

11. Parliament was dissolved on 4 March 2019. On 27 March 2019 an official announcement was made regarding parliamentary business that was considered to be redundant or was to be carried over to the new legislature (the 13th Legislature). The renewal of the composition of the GCJ was not listed among the redundant tasks and thus was deemed to have rolled over to the next Parliament for examination.

12. After the general elections on 28 April 2019, the Chambers gathered in a constitutive session on 21 May 2019. In respect of the renewal of the GCJ, the matter was transmitted to the parliamentary groups, "awaiting the Bureau's agreement on the start of the renewal procedure for membership of the GCJ". On 11 July 2019 the President of the Supreme Court (who also serves, *ex officio*, as the President of the GCJ) sent a communication to the Presidents of the Congress and the Senate, reiterating the need to proceed with the renewal of the composition of the GCJ. On 16 July 2019 the communication was forwarded to the parliamentary groups. On 24 July 2019 the Senate also took note of the communication. On 24 September 2019 Parliament was dissolved, and new elections were scheduled for 10 November 2019. On 23 October 2019 it was officially announced that the matter of the renewal of the composition of the GCJ had been rolled over to the next Parliament (the 14th Legislature). It appears that the Chambers gathered in a constitutive session on 3 or 4 December 2019.

13. The Bureau of the Congress again decided to transmit the matter to the parliamentary groups. On 30 December 2019 the President of the GCJ again sent a communication, reiterating the need to renew the composition of the GCJ.

14. On 30 November 2020 Vox, one of the parliamentary groups, submitted a proposal to put the matter on the renewal of the GCJ on the agenda of the meeting of the Board of Spokespersons.[2] The Bureau (of the

[2] The body through which the parliamentary groups participate in organising the work of the Chamber. It consists of the President of Congress and the spokespersons of the groups. The main function is to set the agenda for the plenary sessions. It must be consulted on, *inter alia*, the preparation of the calendar and the ordering of work.

Congress) replied that the matter was not within the purview of the Board. According to the Government, on 9 February 2021 the Bureau dismissed Vox's appeal, stating that it was incumbent on the parliamentary groups to bring political impetus to the matter and that, given that the selection of GCJ members by a qualified majority corresponded to the plenary session, the parliamentary groups had to present "candidates for the jury" and had to reach preliminary agreement on the procedure to be followed.

15. On some forty-five occasions, in particular at meetings of the Board of Spokespersons, the President of the Senate reiterated the need for the parliamentary groups to reach an agreement with a view to filling the vacant posts in various constitutional institutions – in particular, the GCJ.

16. During that time, the previous composition of the GCJ (see paragraph 5 above) continued to exercise its function on an interim basis (see also paragraph 38 below).

II. *AMPARO* APPEAL BY THE APPLICANTS

17. On 14 October 2020 the applicants, together with the Francisco de Vitoria Judges Association, lodged an *amparo* appeal with the Constitutional Court (see paragraph 45 below). As to the subject of the appeal, it was stated as follows:

> "*Under sections 41(2) and 42 of Institutional Law no. 2/1979, inaction or an omission on the part of Parliament regarding its duty to renew the membership of the General Council of the Judiciary as to the judicial members, under sections 567, 568, 576 and 578 of Law no. 6/1985*
>
> Following receipt of the list of candidates, for more than two years no plenary sessions have been convened by the Congress and the Senate with a view to each Chamber voting on and appointing six members of the GCJ."

18. As to the statutory time-limit for lodging their *amparo* appeal under section 42 (see paragraph 46 below), the applicants stated:

> "The omission constituting an infringement of fundamental rights has continued to occur on a permanent basis, and the three-month period ... for the lodging of an *amparo* appeal has therefore not yet expired."

Before the Constitutional Court the applicants sought relief as follows:

> "to declare that the right of access to public functions (Article 23 § 2 of the Constitution) and [the applicants'] right of association ... were violated on account of the failure to respect the legally established procedures for the renewal of the General Council of the Judiciary ..., to afford a remedy to the applicants for the violation of the rights and, by consequence, to issue a resolution [urging] Parliament to implement without delay the legally established procedures provided [to ensure] the immediate renewal of the Council."

19. The applicants argued that the situation described above constituted a violation of their right under Article 23 § 2 of the Spanish Constitution (see paragraph 26 below) on account of Parliament's failure to convene (a/the)

plenary session(s) for two years in order to proceed to vote and appoint six members for each Chamber. The applicants alleged a violation of section 568 of Law no. 6/1985 on the procedure for the renewal of the GCJ and of the candidates' right of access to the GCJ, according to section 573 of that Law (see paragraph 35 above). The applicants stated that a new composition had to be approved by three-fifths of the members of each Chamber of Parliament (thus guaranteeing the stability of that institution and the independence of its members), and that the failure to renew had constituted a political anomaly adversely affecting the institution and the public's perception of it. The candidates were directly affected by the Congress's inaction, given that they had to maintain their professional status in order to continue to be able to meet the conditions required for their appointment which prevented them from taking up other public offices proposed by the associations.

20. Relying on Article 22 of the Constitution, essentially the Francisco de Vitoria Judges Association alleged a violation of sections 401 and 568 of Law no. 6/1985 (see paragraphs 34 and 44 below) because of the inactivity on the part of the Congress in respect of the appointment of candidates proposed by the judges' associations (see paragraph 7 above). The possibility for them to endorse candidates for appointment as members of the GCJ was an important participatory function, which was frustrated by the lack of any vote in the Congress. It harmed the associations' right by rendering the elections inoperative, rendering their own functions and their aims ineffective.

21. The applicants stated that their *amparo* appeal was of special constitutional significance and thus required, under section 50 of Law no. 2/1979, a decision on the merits by the Constitutional Court. The applicants referred to a European Commission report of September 2020 on the rule of law in Spain (see also paragraph 63 below) and argued that appointments by the previous composition of the GCJ did not (or would not) reflect the present composition of the Congress and Senate or the current parliamentary majority.

22. On 28 April 2021 the Constitutional Court ruled the *amparo* appeal inadmissible as having been lodged out of time (see paragraph 47 below). On 4 May 2021 the Registry of the Constitutional Court notified the applicants as follows:

> "[The panel] has examined the application and has decided to not transmit for processing, in accordance with [section 50 of Institutional Law no. 2/1979], in relation to section 42, because the application was submitted out of time."

On 3 June 2021 the Registry of the Constitutional Court also notified the applicants as follows:

> " ... even if it is considered that the alleged violations had arisen from the omission in the convocation of the plenary sessions of the Congress and the Senate to proceed with the vote and appointment of ten members for each Chamber, the [three-month] period would begin on 4 December 2018, the date of the end of the mandate of the [GCJ]; if it

> is understood that this is a consequence of the renewal of the Chambers through elections, a new term would run from the constitution of the [new] legislature, on 4 December 2019. The application was submitted to the Registry of the Court on 14 October 2020, and it was thus belated."

III. FURTHER DEVELOPMENTS

23. In late 2018 the fifth applicant took up a post in a court other than the one in which he was serving. Following a proposal by the GCJ, in March 2021 the first applicant was appointed as President of the High Court of Justice of the Canary Islands.

24. In December 2022 the parliamentary group of the Popular Party tabled a bill in the Congress that would change the appointment system in respect of GCJ members. It suggested that the judges and magistrates themselves designate the twelve members of judicial extraction.

25. The next elections to Parliament are expected to be held in late 2023.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. SPANISH LAW AND PRACTICE

A. The 1978 Spanish Constitution

26. Article 22 of the Constitution protects the right of association. Article 23 protects the right to participation and provides:

> "1. Citizens have the right to participate in public affairs, directly or through representatives freely elected in periodic elections by universal suffrage.
>
> 2. They likewise have the right of access on equal terms to public functions and positions [*derecho a acceder en condiciones de igualdad a las funciones y cargos públicos*], in accordance with the requirements determined by law."

27. According to the Constitutional Court (judgment no. 50/1986), Article 23 § 2 of the Constitution guarantees the right of access on equal terms to public functions and positions, subject to the requirements established by law, and does not give rise to the right to hold a specific position or to perform a specific function, or the right to propose oneself as a candidate for such a position or function. The right to take part in a selective or elective procedure that must lead to appointment to a position or function and, *a fortiori*, the right to take up such a position or function, only arises from the legal or regulatory rules that govern, in each case, access to the position or function in question. As a manifestation of the general principle of equality, Article 23 § 2 provides the right to challenge, before ordinary courts and ultimately before the Constitutional Court, any rule or any specific application of a rule that violates the principle of equality. The reference in Article 23 § 2 to the laws means that equality is predicated on the conditions established for access to a specific position or function, and that, therefore,

the requirements or conditions that citizens must meet in order to be able to aspire to various positions or functions may be different, without such differences being considered harmful to equality. There is a close relationship between the rights set out by Article 23 § 2 and Article 103 of the Constitution (see paragraph 55 below) and each should be interpreted in the light of the other.

28. The elements of the right set out by Article 23 § 2 include (i) access to and the exercise of a public function or position in conditions of equality and in accordance with the requirements established by law, and (ii) the right to remain, in conditions of equality and within the requirements established by law, in the public position or function to which one has been appointed and from which one cannot be removed, otherwise than in accordance with legally established procedures (*de acuerdo con procedimientos legalmente establecidos*). All the elements of the right under Article 23 § 2 – access, permanence and exercise – are subject to the need to be carried out "in conditions of equality" and in accordance "with the requirements established by law" (see, *inter alia*, the Constitutional Court's judgment no. 298/2006).

29. Article 66 provides that Parliament (the *Cortes Generales*) consists of the Congress of Deputies and the Senate, and exercises legislative power and other powers vested in it by the Constitution.

30. Article 122 provides:

> "1. The Institutional Law on the Judiciary shall determine the constitution, functioning and organisation of the courts, as well as the legal status of judges and magistrates ...
>
> 2. The General Council of the Judiciary is the governing body of the judiciary. The Institutional Law shall define its status [and] the regime [in respect of the incompatibility between their official functions and other activities conducted while in office] that applies to its members and their functions ...
>
> 3. The General Council of the Judiciary shall be formed by the President of the Supreme Court (who shall preside over it) and by twenty members appointed by the King for five years: twelve members [shall be chosen] from judges and magistrates of all judicial categories, pursuant to the requirements of the Institutional Law; four members [shall be chosen according to] a proposal made by the Congress and four members [shall be chosen according to] a proposal made by the Senate. They shall be elected by a three-fifths majority of the members ..."

31. Under Article 127 of the Constitution, judges and magistrates, while actively serving in office, may not hold another public office nor belong to political parties or trade unions. The law shall lay down the system and methods of forming professional associations for judges and magistrates.

B. Institutional Law no. 4/2013

32. Under the Preamble to the Law, members of the General Council of the Judiciary (GCJ) were to be appointed exclusively according to merit and capacity. The previous regulation governing appointment to the GCJ had

allowed for the non-renewal of the GCJ membership when its mandate ended; this had on occasion given rise to its mandate being extended – often for a long time. That situation was to be avoided as much as possible. Thus, it was established that the extension of the GCJ's mandate was not possible, except in the very exceptional case where neither of the Chambers of Parliament had fulfilled its duty to renew the GCJ. Under the Preamble to the Law, the Chambers could "at all times avoid" a situation that was manifestly inadequate for the proper functioning of institutions such as the GCJ.

33. This Law provided a new version of the parts of Institutional Law no. 6/1985 (see below) that concerned the GCJ.

C. Institutional Law no. 6/1985 as amended

1. General Council of the Judiciary (GCJ)

(a) Appointment (*designación*) procedure

34. Institutional Law no. 6/1985, as amended by Institutional Law no. 4/2013, provides the procedure for designating/appointing new members of the GCJ. The GCJ consists of the President of the Supreme Court, who presides over the GCJ, and twenty members: twelve of whom shall be serving judges and magistrates and eight lawyers (section 566). Section 567 provides that twenty members of the GCJ shall be designated (*designados*) by Parliament, pursuant to the procedure established by the Constitution and the Institutional Law; each Chamber of Parliament shall elect, by a three-fifths majority of its members, ten members of the GCJ: four lawyers and six judges or magistrates. Under section 568, each composition of the GCJ should be fully renewed every five years from the date of its constitution; the Presidents of the Congress and the Senate shall take the necessary measures (*deberán adoptar las medidas necesarias*) with a view to renewing the Council in due time; for this purpose and to enable the Chambers to proceed with the renewal of the GCJ, four months before the expiry of the above-mentioned time-limit, the President of the Supreme Court and the GCJ shall open the period for presenting candidacies for nomination to the GCJ as regards the judiciary part in the composition of the GCJ.

35. Under section 573, any judge or magistrate in active service in the judicial career may present his or her candidacy to be elected a judicial member of the GCJ (*Vocal por el turno judicial*), unless s/he is in any of the situations that, in accordance with the provisions of the Law, prevents him/her from doing so. A judge or magistrate who wishes to present his or her candidacy may choose between securing the endorsement of twenty-five serving members of the judiciary or the endorsement of a legally constituted judges' association (section 574). An electoral board shall resolve any questions that arise in the process of presenting candidacies for membership of the GCJ and shall then proceed with the announcement of the candidacies

and the publication of the list of candidates who have met the statutory requirements (section 576). A contentious administrative appeal may be lodged against the final announcement of candidacies before the Supreme Court (section 577). Under section 578, the President of the Supreme Court and the GCJ shall forward the list of admissible candidates (*las candidaturas definitivamente admitidas*) to the Presidents of the Congress and the Senate, so that the two Chambers may proceed with the designation of the GCJ members, in accordance with the requirements of section 567 (see paragraph 34 above).

36. Under section 569, the members of the GCJ shall be appointed by the King by Royal Decree; the new GCJ's constitutive session shall take place within five days of the expiration of the previous GCJ's term, except in the case provided by section 570 (2).

37. Under section 570, if on the day of the constitutive session of the new GCJ one Chamber has not elected the members, the GCJ shall be constituted with the ten members designated by the other Chamber and with the outgoing Council's members appointed by the Chamber that has failed to elect the number of members that it was supposed to elect (namely, ten members – paragraph 1). If neither Chamber has appointed the number of members allotted to it within the legally established period (*en el plazo legalmente previsto*), the outgoing Council shall continue in office until the new Council takes office (paragraph 2).

38. Following a reform providing for the *ad interim* regime for the GCJ (Institutional Law no. 4/2021), the acting GCJ could not proceed with the process of making appointments in respect of top judicial positions. The law prevented the acting Council from appointing the president of the Supreme Court, the presidents of Provincial Courts and High Courts of Justice, president of the National High Court, presidents of Chambers, and Supreme Court judges. Under section 570 *bis,* in the event that its membership has not been renewed within the period provided by law, the GCJ shall take up its duties in accordance with section 570 (2), but its activities shall be limited to the performance of certain functions, such as proposing the appointment of two judges to membership of the Constitutional Court. Under Institutional Law no. 8/2022, the GCJ was enabled to proceed in December 2022 with the appointment of two members of the Constitutional Court.

39. As regards the manner of the election of GCJ members by Parliament, in Judgment no. 108/1986 the Constitutional Court stated that the composition of the GCJ had to reflect the pluralism existing within society – and especially within the judiciary. That purpose was not undermined by vesting in Parliament the power to propose members of the GCJ, given that Institutional Law no. 6/1985 provided for certain safeguards (such as the requirement that appointments be made on the basis of a three-fifths qualified majority vote in each Chamber). Certainly, there was a risk of frustrating the

above-mentioned purpose if the Chambers, when making their proposals, only paid attention to the existing division of forces within their own midst and distributed the positions to be filled among the different parties in a manner that proportionately reflected their parliamentary strength. However, while the logic of the party system increased the likelihood of actions of that kind occurring, it also ensured that certain spheres of power would be kept out of the party struggle – including (and especially) judicial power.

(b) Competence of the GCJ

40. Under section 560, the GCJ has, *inter alia*, the following powers: to propose the appointment of the President of the Supreme Court and the GCJ; to propose the appointment of judges, magistrates and judges of the Supreme Court; to propose the appointment of two judges of the Constitutional Court; to participate, in the manner provided by law, in the selection of judges and magistrates; to resolve what is appropriate in matters of training, promotions, administrative situations and the disciplinary regime of judges and magistrates; and to appoint the Vice-President of the Supreme Court.

41. Under section 599, the competence of the plenary composition of the GCJ concerns: hearing a proposal for the appointment of the two judges of the Constitutional Court (whose appointment is entrusted to the GCJ) and a proposal for the appointment of the President of the Supreme Court and the GCJ; appointment of the Vice-President of the Supreme Court; all appointments or proposals for appointment and promotion involving any margin of discretion or appreciation of candidates' qualities; and resolution of the disciplinary proceedings in which the proposed sanction consisted of the termination of the judicial career of the person in question.

(c) Status of GCJ members

42. Under section 579, members of the GCJ shall carry out their activities with exclusive dedication (*con dedicación exclusiva*), their position being incompatible with any other position, profession or activity – public or private. In addition, the specific incompatible activities in which judges and magistrates may not engage, as listed under section 389, apply to them. The position of a GCJ member is incompatible with the simultaneous performance of other governmental responsibilities in the judicial field. In the event that such incompatibility is found in respect of a serving GCJ member, such responsibilities shall be assumed by whomever must replace the interested party under the relevant legislation.

43. Under section 584 *bis*, members of the GCJ shall receive such remuneration as is set by General State Budget Law as sole and exclusive in view of the importance of their function.

2. Professional association of judges and magistrates

44. Under section 401 of the Institutional Law, in accordance with Article 127 of the Constitution (see paragraph 31 above), the right of free professional association of judges and magistrates is recognised. Associations of judges and magistrates may have as lawful purposes the defence of the professional interests of their members in all aspects and the performance of activities aimed at the service of justice in general. Judges and magistrates may freely associate or not within professional associations.

D. Institutional Law no. 2/1979

45. Under section 41 of Institutional Law no. 2/1979, as amended by Institutional Law no. 6/2007, *amparo* appeals lodged with the Constitutional Court concern rights and freedoms safeguarded by Articles 14 to 29 of the Constitution, in such cases and forms as Institutional Law no. 2/1979 provides (paragraph 1). The *amparo* remedy protects against violations of those rights and freedoms that arise from, *inter alia*, legal instruments (*actos jurídicos*) or omissions (*omisiones*) on the part of public authorities, or their officials or agents (paragraph 2).

46. Section 42 reads:

> "Decisions and [legal] instruments which are not statutes [*las decisiones o actos sin valor de Ley*] and which emanate from [Parliament] or one of [its] organs, ... and [which] violate the rights and freedoms that are the subject of an *amparo* appeal, may be contested within three months from the time when, under the internal rules of the chambers or assemblies, they become final".

47. Under section 50, an *amparo* appeal is subject to an admissibility decision. A panel of three judges, acting unanimously, decides to admit (by means of issuing an order) an *amparo* appeal, in whole or in part, only where it complies with sections 41-46 and 49 and where the content of the application justifies a decision on the merits by the Constitutional Court because of its special constitutional significance for (i) the interpretation of the Constitution, (ii) its application or general effectiveness, and (iii) the determination of the content and scope of fundamental rights. An inadmissibility decision (*providencia*) shall be notified to the person who lodged the amparo appeal and to the public prosecutor. The latter may lodge an appeal within three days. Under section 86, a decision of initial inadmissibility (*decisión de inadmisión inicial*) is taken in the form of an order (*auto*); depending on the nature of their content, other legal acts are undertaken in the form of an order if they contain reasoning, or in the form of a decision (*providencia*) if they do not contain reasoning.

48. The examination of an amparo appeal on the merits results in it being either allowed or dismissed (section 53). One or more of the following forms of relief may be granted: (i) a declaration of nullity in respect of the decision, act or resolution that has prevented the full exercise of the rights or freedoms

protected, with a determination, where appropriate, of the extent of the effects of such nullity; (ii) recognition of the right or freedom in question, in accordance with its constitutionally declared content (*contenido constitucionalmente declarado*); and (iii) the restoration to the appellant of the integrity of her/his right or freedom by means of the adoption of the appropriate measures, if applicable (section 55).

49. In Judgment no. 147/1982 the Constitutional Court stated that as members of parliament, deputies and senators were neither public authorities nor official or agents within the meaning of section 41 (2) of Institutional Law no. 2/1979; only the body of which they were members could be considered to constitute a public authority because it could generate acts mentioned in that section or to act in such a way as to impose obligations on citizens and thereby interfere with their fundamental rights and freedoms.

50. In Judgment no. 659/1987 the Constitutional Court stated that section 42 provided for an *amparo* remedy against parliamentary acts violating rights and freedoms that were subject to such a means of constitutional protection. Such a remedy did not constitute judicial interference with normal parliamentary activities or a remedy by which to correct *lacunae* in the legal system, or any kind of inadequacy inherent therein.

51. In Judgment no. 173/2020 the Constitutional Court held that section 41(2) of Institutional Law no. 2/1979 established, in general, that the *amparo* remedy protected against violations of rights and freedoms caused by, *inter alia*, omissions. Therefore, there was no reason to interpret that the appeal for parliamentary *amparo* under section 42 could not be filed against omissions or simple factual actions of the parliamentary bodies that could result in the kind of violation of fundamental rights referred to in section 41(1), in accordance with Article 53 § 2 of the Constitution, having regard to the general nature of section 41 and the principle of adopting the interpretation most favourable to the effectiveness of fundamental rights, which had also been affirmed by the Constitutional Court in relation to Article 23 § 2 of the Constitution (see also Judgment no. 66/2021). In Judgment no. 242/1993 it had found a violation of Article 29 § 1 of the Constitution (Right to lodge an application) on account of the absence of any response by the Parliament of the Canary Islands to an application lodged by the appellant, and recognised, as a measure of restoration, the right to have his application processed in accordance with the regulations of the Parliament of the Canary Islands – including obtaining of an acknowledgment of receipt. The possibility of filing an appeal for parliamentary *amparo* against violations of rights or freedoms originated by the simple way of fact, was accepted in Judgment no. 101/1983.

52. The Constitutional Court also held that the above-mentioned three-month period, once the impugned act or decision had become final, was to be calculated from the date of its notification by means of the relevant

communication or by means of its publication in the official bulletin of the Chamber (Judgment no. 13/2018 and the cases cited therein).

E. Other material

1. Internal rules of the Congress and Senate

53. Under rule 205 of the internal rules of the Congress of Deputies, a proposal for the appointment of six GCJ members from judges and magistrates must conform to the following rules: (a) up to thirty-six candidates shall be drawn from judges and magistrates, pursuant to Law no. 6/1985; (b) those candidates shall be submitted directly to a Plenary vote (*la votación del Pleno*), after the Bureau of the Chamber has verified that they meet the constitutional and legally established requirements.

54. Under rules 184-86 of the internal rules of the Senate, a proposal for the appointment of six GCJ members from judges and magistrates is subject to the following procedure: (a) up to thirty-six candidates drawn from judges and magistrates, pursuant to Law no. 6/1985; (b) the candidates, except those already elected by the Congress of Deputies, shall be submitted directly to a Plenary vote (*la votación del Pleno*), after the Bureau of the Chamber has verified that they meet the constitutional and legally established requirements; and (c) the deliberation and voting pursuant to rule 186. Under rule 185, the Senate's appointments committee shall be chaired by the President of the Senate and shall comprise the parliamentary groups' respective spokespersons. Once it has been verified that the requirements of the Constitution and the laws specifying the requirements for holding office have been met, the Committee, on its own initiative or at the request of a parliamentary group, may decide on the appearance of the candidates. The Committee shall then draw up a report on the suitability of candidates for the posts to be filled. This report shall be submitted to the Plenary. The President of the Senate, in the light of the Committee's deliberations and the time elapsed since the beginning of the procedure, may propose to the Bureau of the Chamber the setting of a deadline for the presentation of candidatures. New applications will be processed under the same procedure. Under rule 186, the Plenary's deliberation shall encompass the presentation of the Committee's report and speeches/contributions made by the spokespersons of the parliamentary groups. During the voting (by ballot paper), each senator may vote for as many names as there are positions to be filled. The Bureau declares as elected the same number of those candidates who have obtained the most votes as the number of seats to be filled, provided that each of those candidates has been elected by the majority of votes required in each case by the Constitution or by the relevant legislation.

2. Other provisions of Spanish law and jurisprudence

55. Under Article 103 of the Spanish Constitution, organs of public administration are created, directed and coordinated in accordance with the law. The law shall regulate the status of civil servants, and their entry into the civil service in accordance with the principles of merit and ability.

56. Under section 55 of the Statute on Public Employment of 2015 (*Estatuto Básico del Empleado Público*) all citizens have the right of access to public employment (*al acceso al empleo público*), in accordance with the constitutional principles of equality, merit and ability, and in accordance with the provisions of that Statute and other provisions of national law. The selection procedures should guarantee those constitutional principles, as well as the impartiality of the members of the selection bodies, and should be transparent. Where so provided for by the relevant legislation, the Statute may apply to civil servants serving in constitutional State bodies and to personnel whose work serves the administration of justice (section 4 of the Statute).

57. Under section 25 of Law no. 39/2015 on the Common Administrative Procedure of Public Administrations, in procedures initiated *ex officio,* the expiration of the applicable maximum period for the issuance of a decision (*resolución expresa*) does not exempt the Administration in question from compliance with the legal obligation to resolve a matter (*la obligación legal de resolver*). Under the fifth additional provision of the Law, the administrative action of the constitutional bodies of the State (such as the competent bodies of the Congress of Deputies, the Senate and the GCJ) is governed by their specific regulations, within the framework of the principles that govern administrative action, in accordance with this Law.

58. The Government referred to the Constitutional Court's decision no. 225/2002, in which the appellant complained that he had presented his candidacy to the GCJ President, who had nevertheless not included it in the list of candidates; the Supreme Court had then ruled inadmissible the appellant's appeal for lack of jurisdiction, given the fact that the GCJ President's decision had simply constituted a preparatory step prior to the final decision (to be made within a parliamentary procedure). The Constitutional Court agreed with the Supreme Court, as Law no. 29/1998, which regulated contentious procedures before courts, was to be interpreted as excluding certain parliamentary instruments from jurisdictional control in respect of contentious-administrative proceedings, and the GCJ President's decision within the process for renewal of the GCJ composition merely constituted a preparatory step in respect of a parliamentary function, in which the President participated.

3. Additional factual elements

59. According to a report issued by the Supreme Court dated 18 October 2021, between 2018 and October 2021, eleven Supreme Court posts were

vacant (of a total of 79 judges). In 2022 the number of vacant seats in that court was expected to reach sixteen (20% of the full membership figure). That report also deemed that owing to the lack of judges the Supreme Court would issue about 1,000 fewer judgments in 2022 than it could have issued with a full composition and that, moreover, there would be considerable delays in it dealing with cassation appeals.

II. OTHER RELEVANT MATERIAL

60. For European standards in respect of councils for the judiciary, see Opinion No. 10 (2007) of the Consultative Council of European Judges on Council for the Judiciary in the Service of Society, and Opinion No. 24 (2021) of the Consultative Council of European Judges on Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems.

61. For matters relating to appointments to and the functioning of the Councils for the Judiciary, see Opinions by the Venice Commission (CDL-AD(2013)007, § 52; CDL-AD(2017)013, § 87; CDL-PI(2018)003rev, Chapter IV in particular; and CDL-AD(2023)006, §§ 17-18).

62. In June 2019 the Group of States against Corruption of the Council of Europe (GRECO) issued a 2nd Interim Compliance report in respect of Spain, within the Fourth Evaluation Round, Corruption prevention in respect of members of parliament, judges and prosecutors. Its findings (Recommendation V) read:

> "GRECO recommended carrying out an evaluation of the legislative framework governing the General Council of the Judiciary (GCJ) and of its effects on the real and perceived independence of this body from any undue influence, with a view to remedying any shortcomings identified.
>
> 30. In the Interim Compliance Report, GRECO regretted the lack of decisive action in this area and concluded that recommendation v had not been implemented.
>
> 31. The authorities of Spain report on the adoption, on 28 December 2018, of [Institutional Law] 4/2018 on the Judiciary. Whilst it does not change the method by which the members of the GCJ are appointed, it does include important novelties to infuse greater transparency and accountability into the functioning of the GCJ. In this respect, [Institutional Law] 4/2018 establishes: full-time dedication of all members of the GCJ, more prominence of the GCJ's plenary (thereby eliminating the prior presidential management system), qualified majorities in decision-making processes, accounting to Parliament on general activity, and greater transparency in the appointment of the higher ranks of the judiciary ...
>
> 32. GRECO acknowledges the efforts undertaken by the authorities in this area to strengthen internal democracy, transparency and accountability in the working methods of the GCJ. Having said that, GRECO regrets that the important work carried out by the Subcommittee of Justice in the Congress concerning the issue of the composition of the GCJ had failed in Parliament, in particular, the need to remove the selection of the judicial shift from politicians. GRECO considers that this has been a missed opportunity to remedy what has proven to become, in citizens' eyes, the Achilles' heel of the Spanish judiciary: its alleged politicisation.

33. Public outcry about the latter weakness was particularly acute in November 2018 as the new GCJ was being formed. On that occasion, information leaked out about political parties horse-trading for appointment to key judicial positions. The 2019 EU Justice Scoreboard shows that the independence of justice among both the general public and companies is perceived more severely than in previous years. Judicial associations are also markedly critical in this regard.

34. Against this background, GRECO can only recall its view that the establishment of judicial councils is generally aimed at better safeguarding the independence of the judiciary – in appearance and in practice. The result in Spain continues to be, unfortunately, the opposite, as already highlighted in the Fourth Round Evaluation Report and confirmed by recent events in the country. This is not to say that the independence of individual judges is questioned; GRECO has repeatedly been clear in this respect and wishes to do so again: there is no doubt about the independence and impartiality of judges on the bench ...

35. At the time of the evaluation visit, in 2013, GRECO stressed that when the governing structures of the judiciary are not perceived to be impartial and independent, this has an immediate and negative impact on the prevention of corruption and on public confidence in the fairness and effectiveness of the country's legal system. Six years later the situation is the same and, therefore, recommendation v cannot be considered implemented. GRECO reiterates its view that political authorities shall not be involved, at any stage, in the selection process of the judicial shift.

36. GRECO concludes that recommendation v has not been implemented."

An addendum (published in December 2022) to GRECO's 2nd Compliance Report reads:

"Recommendation v

...

14. GRECO concluded in the Second Compliance Report that this recommendation was not implemented. GRECO again reiterated the need to remove the selection of the judicial shift from politicians.

15. The authorities of Spain indicate that negotiations on the renewal of the General Council of the Judiciary (GCJ) were resumed in October 2022; they were nevertheless halted at the end of that very same month.

16. GRECO regrets the lack of any positive outcome to implement this recommendation. GRECO refers again to the standards of the Council of Europe regarding the election of the judicial shift in judicial councils: when there is a mixed composition of judicial councils, for the selection of judge members, the standards provide that judges are to be elected by their peers (following methods guaranteeing the widest representation of the judiciary at all levels) and that political authorities, such as Parliament or the executive, are not involved at any stage of the selection process. Last but not least, the four-year deadlock in the designation of the GCJ is a matter of critical concern, which needs to be addressed as a matter of priority ...

Recommendation vi

18. GRECO recommended that objective criteria and evaluation requirements be laid down in law for the appointment of the higher ranks of the judiciary, i.e. Presidents of Provincial Courts, High Courts of Justice, the National Court and Supreme Court judges, in order to ensure that these appointments do not cast any doubt on the independence, impartiality and transparency of this process ...

> 21. GRECO regrets the lack of any new development in this domain. It further notes that, following a reform in March 2021 specifying the ad interim regime for the General Council for the Judiciary ([Institutional Law] 4/2021), the acting Council cannot proceed to make appointments for top judicial positions. This is a most troubling situation."

63. In its 2022 Rule of Law Report (in the country chapter on the rule of law situation in Spain), the European Commission recommended to Spain that it proceed with the renewal of the Council for the Judiciary as a matter of priority, and that it initiate, immediately after that renewal, a process aimed at modifying the process by which its members were appointed, in such a manner that would reflect European standards. It stated:

> "The delay in the renewal of the Council for the Judiciary remains a concern. The Council for the Judiciary has been exercising its functions ad interim since December 2018. This raises concerns that it might be perceived as vulnerable to politicisation, as already referred to in the 2020 and 2021 Rule of Law Reports. Calls had been repeated to proceed with its urgent renewal and the situation has been described by key stakeholders as unsustainable and anomalous. Following the reform in March 2021 specifying the *ad interim* regime for the General Council for the Judiciary, the acting Council cannot proceed to make appointments for top judicial positions. On 24 June 2022, the Government tabled a reform allowing the Council for the Judiciary to proceed with the appointment of members of the Constitutional Court. The Technical Cabinet of the Supreme Court published on 18 October 2021 a report on the consequences of the lack of renewal of the Council for the Judiciary on the appointment of judges to the Supreme Court. The report concludes that the Supreme Court is exercising its functions with 14% fewer judges than required by law, and this could result in the Court issuing 1,000 fewer decisions per year, thus undermining the efficiency of justice."

THE LAW

I. JOINDER OF THE APPLICATIONS

64. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

65. The applicants complained that the ruling that their *amparo* appeal was inadmissible had been in breach of Article 6 § 1 of the Convention, which reads:

> "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

(a) The Government

66. The Government argued that the six-month time limit for lodging an application with the Court (as provided by Article 35 § 1 of the Convention at the time) had expired on 4 November 2021 but that three applicants had lodged their applications thereafter, according to their receipt stamps.

67. Before the Constitutional Court the applicants referred to the violation of purely political rights, which were not "civil rights" even within the autonomous meaning of Article 6 § 1 of the Convention – namely the right to equal access to public functions under Article 23 § 2 of the Constitution as regards nomination to a constitutional body. They limited the substance of their *amparo* appeal to a demand that the Chambers of Parliament be required to adopt such measures as would be necessary to ensure the continuation of the nomination procedure in respect of candidates for the General Council of the Judiciary (GCJ). That was a matter concerning the internal functioning of Parliament (see paragraph 58 above).

68. The Government submitted that the present case differed from cases relating to the dismissal of judges from their primary duties or from functions exercised in bodies that were similar to the GCJ. The applicants had not sustained any loss in relation to any post held by them. Nor could they rely on any current relationship relating to public service because they were not yet members of the GCJ. Nomination to it could not be considered as constituting promotion within a judicial career. Nor did they have any right to obtain membership of the GCJ, as appointment to that body depended on a discretionary decision taken by the Chambers.

69. In any event, Article 6 was inapplicable under the criteria established in *Vilho Eskelinen and Others v. Finland* ([GC], no. 63235/00, ECHR 2007-II) – known as the "*Eskelinen* test". The applicants in the instant case sought to challenge the actions of the Chambers in respect of the nomination of members of the GCJ. That type of claim was excluded from the jurisdiction of the domestic courts under section 42 of Law no. 2/1979, which only provided for direct recourse to the Constitutional Court. The Constitutional Court had previously considered that it had limited jurisdiction as regards section 42, having regard to respect for the autonomy of the Chambers. Furthermore, section 42 was aimed at ascertaining the constitutionality of the public action within the exercise of the State sovereignty. Related activities could not be subject to full judicial review, without violating the principle of the separation of powers, the principle of subsidiarity, and respect for parliamentary autonomy. The exclusion of judicial review under section 42 was not specifically directed against the applicants.

70. The Government noted that section 42 provided a specific remedy in respect of constitutional protection that facilitated the challenging of violations of protected rights and freedoms arising from parliamentary acts *stricto sensu*. However, section 42 did not enable full jurisdictional oversight of each act undertaken in the course of parliamentary activities. Permitting such complete control would violate the principle of the separation of powers (see paragraph 50 above). The subject of the *amparo* appeal was limited to acts of a strictly parliamentary nature (other than statutes). Essentially administrative acts of the Chambers – for instance relating to parliamentary personnel – could not be subject to contentious administrative proceedings before courts. Actions on the part of specific deputies or senators fell outside the scope of an *amparo* appeal (see paragraph 49 above). The same had to apply to parliamentary groups, which were formed by the will of deputies and senators and which acted as their representatives, and which did not constitute organs of the Chambers. That is why those groups had standing to contest actions undertaken by parliamentary organs (see, for instance, the Constitutional Court's judgment no. 177/2002).

(b) The applicants

71. The applicants pointed to the fact that the applications had been dispatched on 22 October 2021 as confirmed by the postmark, which was the relevant reference point according to the Court's case-law.

72. In their view, the *amparo* proceedings had concerned the question of civil rights, given that the applicants had taken part in the selection process, which was open to serving magistrates and judges and which required the candidates to satisfy certain other statutory requirements. It concerned the professional advancement of judges and magistrates and amounted to promotion within their legal career. The only political aspect of the case was related to the (allegedly) corrupt and politicised context of the renewal and functioning of the GCJ, given that it was influenced by certain political (namely, parliamentary) groups (see also paragraph 39 above). The renewal of the GCJ was a non-legislative function vested in Parliament and was thus not a purely political matter relating to the internal functioning of Parliament or its Chambers. Judicial control over the exercise of that function did not interfere with the Chambers' main, legislative, function. The Constitutional Court constituted the only judicial instance at which it was to examine an *amparo* appeal lodged under section 42 of Law no. 2/1979. In rejecting the applicants' appeal, the Constitutional Court had not applied, in a consistent and foreseeable manner, any relevant previous jurisprudence and had departed from its own judgment no. 52/2014 on the non-application of a statutory time-limit within the context of challenging inaction or a failure to act.

73. In addition, the second applicant submitted that in 2018 – at the age of 65 – he had decided to stand as a candidate for the GCJ. Having been

waiting for four years, in view of his age (approaching the age of retirement) he no longer had any serious career prospects such as membership of the GCJ. The third applicant submitted that because of Parliament's inaction she had been in a state of uncertainty for a long time and had had to postpone taking various decisions relating to her personal and professional life – in particular, because it had been regularly mentioned in the media that the parliamentary procedure was about to resume. That state of insecurity, uncertainty and exhaustion had affected her family and personal relationships and had frustrated her legitimate professional expectations. Certain circumstances had necessitated requesting a leave of absence from active judicial service to care for a dependent family member, and that had influenced her candidacy for membership the GCJ. Allegedly, she had had to pursue certain other activities mentioned in the CV that she had submitted in respect of her candidacy, despite the change in her family situation. In 2021 she had announced her candidacy to the Supreme Court; however, since March 2021, the GCJ had been prevented from making appointments to it (under a reform that had been a direct consequence of the deadlock situation in respect of the renewal of the GCJ). In 2022 she had not been accepted to sit on the judicial ethics committee of a judges' association, as her name was on the list of candidates for the GCJ.

2. The Court's assessment

(a) Six-month time-limit

74. The applications were dispatched to the Court on 22 October 2021. The dispatch date being relevant to the six-month period provided by Article 35 § 1 of the Convention at the relevant time (see *Vasiliauskas v. Lithuania* [GC], no. 35343/05, § 117, ECHR 2015), the Court considers that the complaints were lodged in time (after the applicants had been notified of the rejection of the *amparo* appeal as inadmissible – see paragraphs 22 and 47 above).

(b) Applicability of Article 6 of the Convention

75. The relevant general principles were recently summarised in *Grzęda v. Poland* [GC], no. 43572/18, §§ 257-64, 15 March 2022.

76. The present case raises an issue as to whether Article 6 § 1 of the Convention (under its civil head) is applicable to a dispute arising out of a prolonged and continuing failure to pursue the parliamentary procedure with a view to renewing the composition of the governing body of the judiciary, based on the final list of candidates from serving judges, including the applicants.

(i) Existence of a "right"

(α) General principles

77. For Article 6 § 1 of the Convention under its civil limb to be applicable, there must be a dispute over a "right" that can be said ("*que l'on peut prétendre*"), at least on arguable grounds, to be recognised under domestic law – irrespective of whether that right is protected under the Convention (see *Grzęda*, cited above, § 257). The dispute must be genuine and serious. The result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play (ibid.).

78. The dispute may relate to the actual existence of a right, its scope and the manner of its exercise (ibid.). Article 6 § 1 does not guarantee any particular content for "civil rights and obligations" in the substantive law of the Contracting Parties to the Convention: the Court may not create by way of interpretation of Article 6 § 1 "a substantive right" which has no legal basis in the State concerned (ibid., § 258). For the applicability of Article 6, the "right" at issue can be substantive or procedural, or a combination of both (see *Regner v. the Czech Republic* [GC], no. 35289/11, § 101, 19 September 2017). Where a substantive right recognised in domestic law is accompanied by a procedural right to have that right enforced through the courts, there can be no doubt about the fact that there is a "right" within the meaning of Article 6 § 1 (ibid., § 102, and *Dolińska-Ficek and Ozimek v. Poland*, nos. 49868/19 and 57511/19, § 222, 8 November 2021).

79. The mere fact that the wording of a legal provision affords an element of discretion does not in itself rule out the existence of a right. Article 6 applies where the judicial proceedings concern a discretionary decision resulting in interference in an applicant's rights (see *Regner*, cited above, § 102). In some cases, national law, while not necessarily recognising that an individual has "a subjective right", confers the right to a lawful procedure for examination of his or her "claim", involving matters such as ruling whether a decision was arbitrary or *ultra vires*, or whether there were procedural irregularities. This is the case regarding certain decisions where the authorities have a purely discretionary power to grant or refuse an advantage or privilege, with the law conferring on the person concerned "the right to apply to the courts", which, where they find that the decision was unlawful, may set it aside. In such a case Article 6 § 1 of the Convention is applicable, on condition that the advantage or privilege, once granted, gives rise to a civil right (ibid., § 105). While access to employment and to the functions performed may constitute in principle a privilege that cannot be legally enforced, this is not the case regarding the continuation of an employment relationship or the conditions in which it is exercised (ibid., § 117; see also *Denisov v. Ukraine* [GC], no. 76639/11, § 46, 25 September 2018).

80. Where, at the outset of proceedings, there was a genuine and serious dispute about the existence of a "right", the fact that the domestic courts concluded that that right did not exist does not retrospectively prevent the applicability of Article 6 § 1 of the Convention (see *Z and Others v. the United Kingdom* [GC], no. 29392/95, §§ 88-89, ECHR 2001-V; see also, where the domestic courts were called upon to decide for the first time on the issue in question, *Markovic and Others v. Italy* [GC], no. 1398/03, §§ 100-02, ECHR 2006-XIV; also compare and contrast *Károly Nagy v. Hungary* [GC], no. 56665/09, §§ 75-77, 14 September 2017, and *X and Others v. Russia*, nos. 78042/16 and 66158/14, § 47, 14 January 2020).

81. Furthermore, for a "right" to trigger the applicability of Article 6 § 1 of the Convention, it is sufficient to show that an applicant could arguably claim an entitlement under national law. In determining whether there was a legal basis for the right asserted by an applicant, the Court only needs to ascertain whether his or her arguments were sufficiently tenable, not whether s/he would necessarily have been successful had s/he been granted access to a court (see *Grzęda*, cited above, § 268). In so doing, the Court must have regard to the wording of the relevant legal provisions and to their interpretation, if any, by the domestic courts (see *Bilgen v. Turkey*, no. 1571/07, § 53, 9 March 2021), taking them as "the starting point" (see *Grzęda*, cited above, § 259). The Court must analyse the actual nature of the applicants' complaint before the domestic authorities. It is the right, as asserted by the claimant in those proceedings that must be considered to assess whether Article 6 § 1 of the Convention is applicable (see *Regner*, § 113, and *Bilgen*, § 54, both cited above; see also *Gloveli v. Georgia*, no. 18952/18, § 38, 7 April 2022).

(β) Other relevant case-law concerning the existence of a "right" for purposes of the applicability of Article 6 of the Convention

– *Proceedings regarding claims concerning access to employment in the public sector*

82. Neither Article 6 nor any other provision of the Convention or its Protocols guarantee, as such, a right to be appointed to a post or to be promoted within the civil service (see *Bara and Kola v. Albania*, nos. 43391/18 and 17766/19, § 55, 12 October 2021).

83. In *Savino and Others v. Italy* (nos. 17214/05 and 2 others, §§ 23-34, 40 and 68-69, 28 April 2009) some applicants had not been admitted, by a jury constituted by the administration of the Chamber of Deputies, to the second stage of a public competition for a staff position as a parliamentary assistant. The staff commission of the Chamber, a jurisdictional organ for staff, had then upheld their complaint regarding the competition procedure and the evaluation criteria for written tests during the first stage of the competition, and had provisionally admitted the applicants to the second stage pending the re-examination of the tests. That decision had then been set

aside, within an internal appeal procedure, by the relevant section of the Chamber. The Court of Cassation had declared the applicants' appeal inadmissible. Before this Court they complained under Article 6 of the Convention that the jurisdictional organs of the Chamber were not independent and impartial tribunals established by law. The Court noted that domestic law provided for the "right to apply to a court" and the right to obtain a review of the legality of the entire recruitment procedure carried out through a public competition; the Court also noted that the commission had accepted the applicants' arguments and had allowed their participation in the second stage of the competition. Thus, the proceedings before those jurisdictional organs had concerned a dispute regarding the applicants' "rights".

84. In *Majski v. Croatia (no. 2)* (no. 16924/08, § 50, 19 July 2011) the impugned proceedings concerned a decision to appoint another candidate to the post of deputy state attorney. The State Attorneys Council had found that both candidates satisfied the statutory requirements to be appointed to that post but had given priority not to the applicant, but to the other candidate. The courts had then rejected the applicant's complaint as inadmissible, finding that the contested decision did not constitute an "administrative act" within the meaning of the Administrative Disputes Act. According to the Administrative Court's case-law, every candidate satisfying the statutory requirements had "the right to equal participation in a competition for a public office", and that right was a corollary of the right to equal access to public service, as guaranteed by the Constitution. This Court considered, having regard to the findings of the State Attorneys Council, that the applicant had a "right" that could arguably be said to be recognised under Croatian law.

85. In *Juričić v. Croatia* (no. 58222/09, § 52, 26 July 2011) the applicant, a serving judge of the Administrative Court at the time in question, had applied for the post of judge of the Constitutional Court and had been shortlisted with three other candidates for a vote by Parliament, but had not received the required number of votes. According to the Administrative Court's case-law, every candidate satisfying the statutory requirements had "the right to equal participation in a competition for public office"; that right was a corollary of the right to equal access to the public service, as guaranteed by the Constitution. The Administrative Court found that the applicant's constitutional rights to equal access to the public service and to equal access to employment, as guaranteed by the Constitution, had been violated. While the Constitutional Court had subsequently set aside the Administrative Court's judgment, it had not called into question the applicant's entitlement to rely on those rights. This Court considered that the applicant had a "right" that could arguably be said to be recognised under Croatian law.

86. In *Frezadou v. Greece* (no. 2683/12, §§ 27-30, 8 November 2018) the domestic proceedings concerned the applicant's complaint against a ministerial decision to appoint some individuals to the vacant posts of

educational coordinators, a post for which the applicant had also applied. She questioned the legality of the procedure and the way in which she had been graded, alleging a breach of the principles of sound administration and of the protection of legitimate expectations. Domestic law gave the candidates who fulfilled the formal requirements specified in the relevant provisions "the right to apply to be appointed" as educational coordinators (a post that the applicant had held in the past). Domestic law provided judicial remedies against decisions not to appoint candidates to certain posts. As a result, the applicant had "the right to challenge before the courts" the fact that she had not been chosen for the posts and the legality of the selection procedure. The national courts had not rejected her complaint on the grounds of the non-existence of a right, but merely because the contested act had expired and, in their view, there had no longer been any reason to rule on the validity of the contested act. This Court considered that in the light of the domestic legislative framework, the applicant could arguably claim to have had "a right to participate in a lawful and fair recruitment procedure in public service".

87. In *Bara and Kola* (cited above, § 56) the proceedings brought by the first applicant in that case concerned a decision to appoint another candidate to the position of rector of a university. Domestic law gave candidates who fulfilled the statutory requirements specified in the relevant provisions the right to apply for that publicly funded position. Furthermore, domestic law provided for judicial remedies in respect of any procedural irregularities in the election for that position. The applicant had been one of three candidates who had met the eligibility requirements and possessed the necessary qualifications to run for that position. In the academic election, the first applicant had been ranked second. He subsequently challenged the lawfulness of the academic election and the results thereof before the administrative bodies and the courts. The Court noted that the national courts had not dismissed his complaints against the administrative decisions on the grounds of the non-existence of a right, but because there had been no irregularities in the conduct of the academic election. In those circumstances, the Court concluded that the applicant could arguably claim to have had "a right to participate in a lawful and fair academic election process" for the publicly funded position of university rector.

88. In *Gloveli* (cited above, §§ 30, 37-38 and 41) the applicant, a former judge, had brought proceedings in the Supreme Court, challenging the dismissal of her candidacy in a competition for a judicial post. She alleged bias on the part of some members of the High Council of Justice, asserting her right to a fair procedure in that competition. The Supreme Court had declined to examine the case for lack of jurisdiction. In view of the relevant domestic legal framework, as interpreted by the Constitutional Court, this Court considered 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". When examining

the complaint under Article 6 § 1 of the Convention about the applicant's access to the Supreme Court, this Court held that "a right to a fair procedure in the examination of an application for a judicial post" had been at the heart of the domestic proceedings.

– *Other relevant cases*

89. In *Tsanova-Gecheva v. Bulgaria* (no. 43800/12, §§ 84-85, 15 September 2015) the applicant, then a judge and Vice-President of the Sofia City Court, contested the appointment of another candidate to the post of President of that court. This Court noted that it had previously considered, within similar contexts, that a right to a legal and fair procedure of recruitment or promotion or to equal access to employment and public office could be considered as rights recognised, at least on arguable grounds, in national law. The Court specified that that was so where the national courts had recognised their existence and had examined the arguments relating to them. Bulgarian law contained detailed rules concerning the selection procedure, and the national courts had jurisdiction to examine arguments relating to compliance with that procedure.

90. In *Regner* (cited above, §§ 114-19) the applicant complained before the Court of the unfairness of the proceedings before the administrative courts that he had brought following the revocation by the National Security Authority of the security clearance issued to him in order to enable him to carry out his duties at the Ministry of Defence. In his submission, he had lost his function and subsequently his employment because of the decision revoking his security clearance. It was clear from the provisions of domestic law and their interpretation by the domestic courts that the possession of security clearance was a prerequisite for exercising professional activities requiring the persons concerned to have knowledge of or to handle classified State information. Security clearance was not an autonomous right but a condition *sine qua non* for the exercise of duties of the type carried out by the applicant. The Court considered that the loss of the applicant's security clearance had had a decisive effect on his personal and professional situation, preventing him from continuing to carry out certain duties at the Ministry of Defence. The Court determined whether the applicant could rely on a right or whether he was in a situation in which he aspired to obtain a mere advantage or privilege which the competent authority had a discretion to grant or refuse him without having to give reasons for its decision. Access to employment – and, further, to the functions performed by the applicant – constituted in principle a privilege that could be granted at the relevant authority's discretion and could not be legally enforced. That was not the case regarding the continuation of such an employment relationship or the conditions in which it was exercised. In the private sector, labour law generally conferred on employees the right to bring legal proceedings challenging their dismissal where they considered that they had been unlawfully dismissed, or unilateral

substantial changes had been made to their employment contract. The same applied, *mutatis mutandis*, to public-sector employees, save in cases where the exception provided for in *Vilho Eskelinen and Others* (cited above) applied. The applicant's ability to carry out his duties had been conditional on authorisation to access classified information. The revocation of his security clearance had therefore made it impossible for him to perform his duties in full and adversely affected his ability to obtain a new post in the civil service. The Court concluded that the link between the decision to revoke the applicant's security clearance and the loss of his duties and his employment was more than tenuous or remote. He could therefore rely on "a right to challenge the lawfulness of that revocation before the courts".

91. In *Cimperšek v. Slovenia* (no. 58512/16, § 36, 30 June 2020) the Court considered that, while in the Slovenian legal system there was no right to acquire the title of court expert, it was undisputed by the parties that the applicant, as a candidate for that title, had had the right to "a lawful procedure for the examination of [his] application". The Court also noted that Slovenian law allowed decisions taken by the relevant minister on the conferral of that title to be challenged before the judicial authorities, and that the applicant had contested the impugned decision before the Administrative Court.

92. In *Grzęda* (cited above, §§ 267-70) the applicant complained that he had been denied access to a court in order to contest the premature and allegedly arbitrary termination of his term of office as a judicial member of the National Council of the Judiciary. The Court considered that, in the light of the domestic legal framework in force at the time of his election and during his term of office, the applicant could arguably "claim an entitlement" under Polish law "to protection against removal from his position as a judicial member of the NCJ during that period". Moreover, "the claim to be entitled to serve his full term as a judicial member of the NCJ" found support in the fact that it was a body mandated by the Constitution to safeguard the independence of courts and judges. Although there is, in principle, no right under the Convention to hold a public post related to the administration of justice, such a right may exist at the domestic level.

93. In *Mirovni Inštitut v. Slovenia* (no. 32303/13, §§ 28-29, 13 March 2018) the applicant had submitted a tender to undertake research following a call for tenders made by the Government. The Court noted that the applicant had had no right to be awarded the sum of money offered by the Government and that in applying the relevant rules to determine which was the best scientific research programme, the domestic authorities had enjoyed a certain discretionary power. The parties before the Court did not dispute that the participants in the call for tender had had the right to a lawful procedure for the examination of their tenders. Citing *Regner* (cited above), the Court considered that the applicant "clearly enjoyed a procedural right to the lawful and correct adjudication of the tenders". Had the tender been awarded to the applicant, the latter would have been conferred a civil right.

(γ) Application of the general principles and case-law in the present case

94. The Court notes that the complaint under Article 6 of the Convention in the present case concerns an alleged violation of the applicants' right of access to a court, their claim was not examined on the merits in the proceedings before the Constitutional Court, being rejected as belated, and that claim was directed against Parliament and its organs on account of their failure to take certain actions with a view to pursuing the selection process in respect of candidates to the GCJ, including the applicants.

95. The applicants exercised, as serving judges, their right under section 573 of Law no. 6/1985 to present their candidacies for the positions of judicial members of the GCJ (see paragraph 35 above). They had received the requisite endorsements and fulfilled the statutory requirements for GCJ membership. Spanish law provided a judicial remedy against procedural irregularities arising during the process resulting in that list (see paragraph 35 above). The applicants were among the candidates on the final list to be considered by Parliament (compare *Gloveli*, cited above, § 40). They had reached that stage having passed the first stage of the process, which had resulted in their names being included in the final list of candidates from which judicial members of the GCJ were then to be selected by Parliament by December 2018.

96. Under the Spanish Constitution (see paragraphs 29 and 30 above), Parliament is vested with the non-legislative function of renewing the membership of the GCJ. The exercise of that function is mandatory – in particular as regards the proceedings leading to the final outcome (the actual vote by members of Parliament), and is subject to a specific and mandatory timeframe. Under section 568 of Institutional Law no. 6/1985, each composition of the GCJ should be fully renewed every five years from the date of its constitution. The new GCJ's constitutive session has to take place within five days of the expiration of the previous GCJ's term (see paragraph 36 above). The Presidents of the Congress and the Senate are to take the necessary measures with a view to renewing the GCJ in due time. This and other duties of Parliament and its organs are further specified in the internal rules of the Chambers of Parliament (see paragraphs 53 and 54 above). In particular, the list of candidates from the judiciary has to be submitted to a Plenary vote. The Chambers and their organs have a legal obligation to pursue the selection process on the basis of that list (see paragraph 34 above). However, in the instant case, that selection procedure remained pending before Parliament, at the initial stage, over three consecutive legislature terms (see paragraphs 11 and 12 above) between December 2018 and October 2020, when the applicants complained to the Constitutional Court.

97. The complaint lodged with the Court by the applicants concerns proceedings in which they relied on Article 23 § 2 of the Spanish Constitution – which provides the right of access on equal terms to public functions and

positions, in accordance with the requirements determined by law (see paragraphs 26-28 above; compare *Gloveli*, § 38, and *Juričić*, § 52, both cited above) – in connection with the exercise of their right under section 573 of Law no. 6/1985 (see paragraph 35 above).

98. The Court emphasises that what was at stake in those proceedings was not any right to become members of the GCJ. It appears that they did not have such a right under Spanish law (see paragraph 27 above). Rather, the applicants claimed a right to a lawful procedure in the timely examination of their admissible candidacies for access to public office – specifically, a right to have an outcome to proceedings relating to their candidacies having been adversely affected by (what they argued to have been) a manifestly prolonged, continuing and *prima facie* unlawful and unjustified non-pursuance of the mandatory selection process. It is also noted that the applicants' claim did not concern the voting or its results, but rather a preceding part of the parliamentary procedure.

99. The Government have not disputed that in the normal course of events the process before Parliament, at least, had to reach – within the timeframe linked to the end of the mandate of the previous composition of the GCJ – an intermediate outcome: namely, voting on the final list of candidates drawn from serving members of the judiciary. This unequivocally follows from the provisions of the applicable legislation (see paragraphs 32 and 96 above).

100. When summarily rejecting the applicants' case on a procedural ground, the Constitutional Court took no stance on the merits of their claims, including as to the existence or scope of the "right" under Spanish law whose protection was being sought. Thus, the Court does not have the benefit of the national court's interpretation of domestic law in that regard *vis-à-vis* the applicants. Their complaint before the Court specifically concerns that non-examination of the merits of their claims and the alleged breach of their right of access to a court under Article 6 § 1 of the Convention. In this context, the Court is not prepared to rule out the existence of the "right" merely because the national court did not recognise its existence and did not examine the grounds relating to that (compare *Regner*, § 105; *Bara and Kola*, § 55; and *Tsanova-Gecheva*, § 84, all cited above, in which the complaint before the Court did not concern any violation of the right of access to a court).

101. It is noted that the Constitutional Court did not reject the applicants' *amparo* appeal because of the non-existence or irrelevance of the right. It was rejected solely on the basis that it had been lodged belatedly – not for any other reason, such as the applicants' lack of standing, or a lack of interference with the constitutional right whose protection was sought (see, *mutatis mutandis*, *Frezadou*, § 29, and *Bara and Kola*, § 56, both cited above). No such findings may be made on the basis of the available material or the Government's submissions, which focus on contesting the "civil" nature of the right (see paragraph 110 below).

102. Given that according to the domestic legal procedure, the mandatory process of selection for the GCJ based on the final list of candidates from serving members of the judiciary necessarily had to result in a vote, the examination of the applicants' candidacies was predicated on the mandatary and specific course of action within a specific timeframe: namely, the convening of a plenary session to examine the matter of the GCJ membership. To continue to satisfy the eligibility requirements for their candidacies, the applicants had, at least, to be serving in an active judicial capacity throughout the selection process. They remained, for a manifestly prolonged period (for some two years at the time), in a state of uncertainty regarding that professional opportunity for their career as legal professionals and their applications for public office (see also paragraph 73 above). Considering the wording of the relevant provisions (see, in particular, paragraphs 28, 32-36 and 53-54 above) and the content of the applicants' claim before the Constitutional Court, this Court is satisfied that their arguments were sufficiently tenable, and that their right to have their candidacies examined can be said, at least on arguable grounds, to be recognised under Spanish law (see also paragraphs 55-57 above).

103. The applicants' claim was based on the alleged violation of the legally established procedure applicable to the parliamentary stage of the selection process. The alleged breach of their right of access to public office, seen in the light of the exercise of their right under section 573 of Law no. 6/1985, could arguably constitute a violation of the "requirements determined by law" within the meaning of Article 23 § 2 of the Constitution (see paragraph 39 above).

104. Furthermore, section 42 of Institutional Law no. 2/1979 provided for the possibility of lodging an *amparo* appeal with the Constitutional Court *vis-à-vis* Parliament or its organs, seeking the protection of individual constitutional rights (see paragraph 46 above). The applicants used that remedy. They challenged inaction in not pursuing the procedure by means of initiating a vote by Parliament. The applicants sought a declaration that their right had been violated on account of the failure to comply with the procedure required for the renewal of the GCJ. They also sought that their right be reinstated and, by consequence, that the Constitutional Court issue a resolution with a view to inducing Parliament to implement those procedures without further delay. The question of whether the "right" asserted by the applicants was accompanied by a procedural right to have it enforced through the courts (see *Dolińska-Ficek and Ozimek*, cited above, § 222) is linked to the Government's objection, which is examined below in respect of whether access to a court was excluded under the *Eskelinen* test (see paragraphs 123-129 below). It suffices to note at this juncture that the *amparo* appeal appeared to be the/an appropriate remedy, given the circumstances of the case. The Court considers that the "right" asserted by the applicants, on at

least arguable grounds, was accompanied by a further, procedural, right to have it enforced through a national court.

105. For Article 6 § 1 under its civil limb to be applicable, the relevant dispute may relate to the existence of the "right" (see *Grzęda*, cited above, § 257). The Government have not specifically substantiated that the dispute before the Constitutional Court was not a genuine and serious one, within the meaning of the Court's case-law (see *Gloveli*, cited above, § 42). The case was based on factual and legal elements, which were not manifestly without any prospect of success (compare *Teker v. Turkey* (dec.), no. 2272/11, §§ 71-77, 20 June 2017; see also *Eleftherios G. Kokkinakis – Dilos Kykloforiaki A.T.E. v. Greece*, no. 45826/11, § 64, 20 October 2016), frivolous or otherwise clearly unmeritorious. The case concerned an alleged violation of the applicants' right on account of the non-pursuance of the selection procedure to the GCJ, an institution of primary importance for the justice system. The case raised prima facie complex legal issues, including issues regarding the interpretation and application of the statutory time-limit under section 42 of Law no. 2/1979 (compare *Markovic and Others*, §§ 100-01, and *Károly Nagy*, §§ 60, 72 and 75, both cited above). Indeed, the applicants' complaint to the Court specifically concerns the alleged violation of their right of access to a court (see *Arribas Antón v. Spain*, no. 16563/11, §§ 24-25, 20 January 2015; also contrast *Eleftherios G. Kokkinakis - Dilos Kykloforiaki A.T.E.*, § 61, and *Teker* (dec.), § 68, both cited above). In this context, the Court does not consider that the dispute was not genuine and serious merely because the *amparo* appeal was rejected on a procedural ground.

106. Lastly, the Government have not specifically contested, and the Court considers, that the proceedings were "directly decisive" for the applicants' rights, within the meaning of the Court's case-law. Had the case been examined on the merits and ended in a favourable outcome (see paragraph 48 above), this could have resulted in the acknowledgment of the violation of their rights and/or in their candidacies being finally considered in the parliamentary procedure (compare *Bara and Kola*, cited above, § 58 and the cases cited therein; *Tsanova-Gecheva*, cited above, § 84; and *Dzhidzheva-Trendafilova v. Bulgaria* (dec.), no. 12628/09, § 43, 9 October 2012; as regards remedies resulting in the declaration of unlawfulness; also see *Karastelev and Others v. Russia*, no. 16435/10, § 116, 6 October 2020 and the cases cited therein, and *Pinkas and Others v. Bosnia and Herzegovina*, no. 8701/21, §§ 37 and 38, 4 October 2022 concerning constitutional proceedings). In particular, given the circumstances of the case it has not been established that the mere fact that the proceedings concerned inaction or a failure to act necessarily prevented the *amparo* remedy from being directly decisive for the right sought to be protected.

107. Therefore, in the Court's view, the impugned proceedings – on the basis of the applicants' claim about the non-observance of the time-limits for

conducting the appointment procedure for public office and the prolonged and continuing non-examination of their candidacies – concerned the existence and an alleged violation of their "right" that can be said, at least on arguable grounds, to be recognised under Spanish law.

108. The Court concludes that in the particular circumstances of the case the applicants, who were all included in the final list of candidates from which twelve judicial members of the GCJ were to be selected by Parliament, had a "right", which was recognised under national law at least on arguable grounds, to participate in a procedure for membership of the GCJ and to have their candidacies examined by Parliament in a timely manner according to domestic law.

(ii) "Civil" nature of the right

109. The next issue to be determined is that of whether the right claimed by the applicants was "civil" within the autonomous meaning of Article 6 § 1 of the Convention. The concept of "civil rights and obligations" cannot be interpreted solely by reference to the respondent State's domestic law; it is an autonomous concept deriving from the Convention (see *Grzęda*, cited above, § 287).

110. The Court will now turn to the Government's two, separate but intertwined, arguments aimed at contesting the "civil" nature of the right in question: one concerning the allegedly "political" nature of the right and the other, concerning the *Eskelinen* test.

(α) Alleged "political" nature of the right

111. Referring to *Cătăniciu v. Romania* ((dec.), no. 22717/17, §§ 34-35, 6 December 2018), the Government argued that both the right whose protection the applicants sought before the Constitutional Court and the related omission imputed to Parliament or its organs were purely or strictly "political".

112. In *Cătăniciu* the claim in the domestic proceedings concerned the question of whether, during the period that the applicant had held office as a municipal councillor, she had found herself in a situation involving a conflict of interests. Those proceedings had concerned the obligation, under Romanian law, not to place herself in such a situation when discharging the duties required by that elected office. The national courts' affirmative reply to that question had had disciplinary consequences for the applicant, who had, in the meantime, been elected to the national parliament. The Court considered that the domestic proceedings had concerned the manner of exercise of a "political office" and a "political obligation", thereby excluding the applicability of Article 6 of the Convention concerning "civil rights and obligations".

113. As the Court has recently reiterated, the catalogue of rights guaranteed by the Convention and Protocol No. 1 to it is based on "civil rights" and "political rights" (see *Beeler v. Switzerland* [GC], no. 78630/12, § 50, 11 October 2022). Domestic disputes, which may be classified as election-related disputes concerning "political rights", do not fall within the scope of Article 6 of the Convention since they do not concern the determination of "civil rights and obligations" (see *Mugemangango v. Belgium* [GC], no. 310/15, § 96, 10 July 2020 and cases cited therein, on disputes relating to the rights protected by Article 3 of that Protocol concerning the choice of the legislature).

114. The applicants' case before the Constitutional Court concerned no such context or the exercise of any related "political rights" under the Convention or the Protocol to it, or under national law. The claim before the Constitutional Court was lodged by serving judges and concerned their candidacies in a procedure for membership of the GCJ, the governing body of the judiciary. Such membership by no means implied any "political obligations" or the exercise of any "political rights". Nor was it classified as a "political office" (compare *Gloveli*, cited above, §§ 22 and 38). One of the key manifestations of the GCJ's contribution to the governance of the judiciary and safeguarding judicial independence is its jurisdiction over the area of judicial appointments (see paragraphs 40 and 41 above). Membership of the GCJ was subject to the limitations applicable to judges and magistrates as regards incompatible activities, and excluded the simultaneous performance of other governmental responsibilities in the judicial field (see paragraph 42 above).

115. Furthermore, the procedure for selecting members of the GCJ from serving magistrates and judges was not intended to be "political" within the meaning of the above-mentioned case-law or, *a fortiori*, politicised or instrumentalised for political reasons or ends (compare *Gloveli*, cited above, §§ 22 and 38). The selection process was to comply with certain criteria, which were generally applicable for equal access to public functions or positions and the civil service under Spanish law, such as the criteria of merit and capacity (see paragraphs 32 and 55-56 above). It is noted in this connection that the Constitutional Court of Spain specifically warned against the risks related to any partisan approach, on the part of dominant political groups, to selecting members of the GCJ (see paragraph 39 above; see also the Venice Commission's findings in the documents cited in paragraph 61 above). Importantly, the applicants' domestic claim was related to the part of the procedure preceding any actual voting by members of parliament (or the results thereof). Although vested in Parliament, the function relating to that procedure and, in so far as relevant in the present case, that specific part of the procedure vested in its organs were not related to Parliament's core, legislative, function (compare *Savino and Others*, cited above, §§ 23-25, regarding a staff recruitment procedure within and for Parliament, and

Juričić, cited above, §§ 8-10, regarding a judicial recruitment procedure before Parliament).

116. Accordingly, the Government's argument must be dismissed.

(β) The *Eskelinen* test

117. The Court reiterates that the scope of the "civil" concept in Article 6 is not limited by the immediate subject matter of a dispute. The civil limb may cover cases which might not initially appear to concern a "civil" right but which may have direct and significant repercussions on a private pecuniary or non-pecuniary right belonging to an individual. The civil limb of Article 6 has been applied to a variety of disputes that may have been classified in domestic law as public-law disputes (see, for instance, *Mirovni Inštitut*, cited above, §§ 28-29). The scope of the civil limb has been extended in relation to public-employment disputes (see *Denisov*, cited above, §§ 51-54).

118. The respondent Government argued that Article 6 of the Convention was inapplicable under the *Eskelinen* test. The Court reiterates that unless two conditions are fulfilled, the respondent State cannot argue before the Court that an applicant's status as a civil servant excludes him or her from benefitting from the protection embodied in Article 6 of the Convention. The first of those conditions is that the State in its national law must have excluded the right of access to a court in respect of disputes regarding the post or staff category in question. Secondly, such an exclusion must be justified on objective grounds as being in the State's interest. In order for such an exclusion to be justified, it is not enough for the State to establish that the civil servant in question participates in the exercise of public power or that there exists "a special bond of trust and loyalty" between the civil servant and the State (as his or her employer). It is also for the respondent State to show that the subject matter of the dispute in issue is related to the exercise of State power or that it has "called into question" such a special bond. Thus, there can in principle be no justification for the exclusion from the Article 6 guarantees of ordinary labour disputes (such as those relating to salaries, allowances or similar entitlements) on the basis of the special nature of the relationship between the particular civil servant and the State in question. There is, in effect, a presumption that Article 6 applies. It is for the respondent State to demonstrate, firstly, that a civil servant applicant does not have a right of access to a court under national law and, secondly, that the exclusion of the rights under Article 6 in respect of that civil servant is justified (see *Grzęda*, cited above, § 261; see also paragraph 123 below).

119. Although it does not form part of the ordinary civil service, the judiciary forms part of typical public service (see *Grzęda*, cited above, §§ 262-63 and the cases cited therein). The Court examined the respondent Governments' objections based on the *Eskelinen* test, in relation to various types of disputes involving judges and their positions or career. Those

objections were also examined and dismissed in the context of a premature termination of a serving judge's term of office as a member of the National Council of the Judiciary (ibid.; see also *Żurek v. Poland*, no. 39650/18, §§ 129-34, 16 June 2022) and in the context of a suspension by a similar Council of one of its non-judicial members (see *Loquifer v. Belgium*, nos. 79089/13 and 2 others, §§ 36-41, 20 July 2021).

120. The salient feature of the present case is that the impugned proceedings concerned not the applicants' main professional activities as judges but an unfulfilled opportunity for them, as candidates whose names had been included in the final list composed of serving judges, to be considered by Parliament for the membership of the Spanish GCJ.

121. In its judgments concerning proceedings relating to unsuccessful applications within recruitment procedures to judicial posts (see *Juričić*, §§ 53-56, and *Tsanova-Gecheva*, §§ 85-87, both cited above, concerning, respectively, applications lodged by serving judges for a post in a higher court and for the position of president of a court; see also *Gloveli*, cited above, §§ 43-52, concerning a former judge's application, in substance, for readmission to judicial service), at this point in its assessment the Court also focused on the *Eskelinen* test. A similar approach was adopted in judgments relating to recruitment procedures to other posts in the national public/civil service (see *Frezadou*, §§ 31-32; *Savino and Others*, §§ 70-79; and *Majski (no. 2)*, §§ 51-54, all cited above; compare *Bara and Kola*, cited above, § 57, where the Court also noted that the election and subsequent appointment to the publicly funded position of university rector concerned the exercise of an individual's professional career and, consequently, his or her pecuniary interests). The Court finds no reason to adopt a different approach in the present case. It is noted, however, that the appointment procedure for membership of the Spanish GCJ concerned the progress of the applicants' career as legal professionals (see paragraphs 42 and 43 above).

122. In view of the foregoing, the Court considers that the *Eskelinen* test is prima facie pertinent to the facts of the case. It will thus examine whether it has been complied with.

– *The first condition of the* Eskelinen *test*

123. As regards the first condition of the *Eskelinen* test (that is, whether national law "excluded" access to a court), the Court has recently (in *Grzęda*, cited above) specified:

> "291. ... 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 .., 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 ... Only very rarely has a respondent State been able to show that access to a court was expressly excluded in an applicant's case ... As the two conditions stipulated in the *Vilho Eskelinen and Others* 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 ...

292. ... a straightforward application of the first condition would not be entirely apt in all situations ... [T]he 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 from 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."

124. The Government argued that an *amparo* appeal was excluded from the purview of the courts because an application under section 42 of Law no. 2/1979 only provided for direct recourse to the Constitutional Court; that the latter's purview was particularly narrow to respect the autonomy of Parliament. However, it is not in dispute that section 42 provided a remedy in respect of a violation of constitutional rights *vis-à-vis* certain forms of parliamentary activities. Thus, even though the scope of that type of constitutional review was limited, it has not been clearly shown that access to a court was expressly excluded.

125. As regards an *amparo* appeal on account of inaction or omission rather than any specific final decision or action taken by Parliament or its organs, the Court notes that section 41(2) provided a general framework for various types of *amparo* appeals and provided for the possibility to challenge "omissions" (see paragraph 46 above). The Constitutional Court took no specific stance regarding whether or not such an omission or inaction was justiciable under section 42 or, more specifically, whether or not the applicants' *amparo* appeal fell within its scope. However, the material before the Court clearly shows that an omission could be subject to review under section 42 (see paragraph 51 above).

126. As to whether the alleged inaction complained of in the *amparo* appeal was to be imputed to Parliament or its organs or, rather to parliamentary groups and the deadlock situation between them (and thus might arguably be inadmissible *ratione personae* under section 42), the Court has examined the domestic case-law submitted by the Government (see paragraph 49 above) and finds their argument unconvincing. It is clear from the applicants' *amparo* appeal that their claim was directed against Parliament and its organs. The applicants specifically referred to the alleged violation of specific duties incumbent on the organs of Parliament (see paragraphs 34, 53, 54 and 96 above). The claim was not related to the legislative function or any Act of Parliament or any failure to legislate.

127. It has not been substantiated that the prevention of the applicants having access to a court was of an implicit nature – stemming, for example, from a systemic interpretation of the applicable legal framework or the whole body of legal regulation (see *Grzęda*, cited above, § 292). The Constitutional Court's inadmissibility decision of 2002 referred to by the Government

(see paragraph 58 above) concerned a substantially different set of facts, a previous legislative framework governing the renewal of the GCJ membership and a different framework and chain of remedies before courts.

– *Conclusion as to the* Eskelinen *test*

128. It is incumbent on the respondent Government to discharge the burden of proof as regards the first condition of the *Eskelinen* test and to rebut the presumption of the applicability of Article 6 of the Convention (see *Grzęda*, cited above, § 291). It has not been convincingly substantiated in the present case that access to the Constitutional Court was excluded in respect of the specific claim lodged with it by the applicants. Thus, having examined the parties' submissions and the available material, the Court is satisfied for the purposes of the present case that that claim could have been adjudicated by the Constitutional Court. Therefore, the first condition of the *Eskelinen* test has not been met. In view of this conclusion, it is not necessary to examine whether the second condition of the *Eskelinen* test has been met (see *Grzęda*, cited above, § 292).

129. Accordingly, the Government's objection must be dismissed.

(c) Conclusion in respect of the question of admissibility

130. It follows that the Government's objection to the applicability of Article 6 § 1 of the Convention must be dismissed. The Court finds that Article 6 of the Convention under its civil head is applicable to the present case.

131. The Court also notes that the 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

(a) The applicants

132. Restating their submissions on the applicability of Article 6 of the Convention, the applicants maintained their complaint.

(b) The Government

133. Section 42 of Law no. 2/1979 explicitly provided for a three-month time-limit in respect of an *amparo* appeal and that time-limit was to be calculated with reference to the final nature of the act being challenged. In the absence of a remedy for challenging it in internal parliamentary procedures, that finality was determined with reference to the publication of the above-mentioned act (the Constitutional Court's judgment no. 147/1982).

134. The Government submitted that, even assuming that Article 6 of the Convention was applicable, there had been no violation caused by the decision taken by the Constitutional Court. The existence and application of time-limits and conditions of inadmissibility did not necessarily entail a violation of Article 6. Section 42 clearly provided a time-limit for lodging a claim: namely, three months after the impugned acts became final under the internal rules of the Chambers. The applicants' arguments concerning the alleged inconsistency in the application of the time-limit were based on a single judgment of the Constitutional Court concerning specifically the effect of a tacit rejection by an administrative authority of a person's claim. As to foreseeability of section 42, the Government stated that in their *amparo* appeal the applicants had acknowledged the existence of a time-limit. It had not been unforeseeable to consider that, even though alleged inaction on the part of the authorities was being challenged, the legislature's intention in respect of section 42 had been to avoid scenarios in which situations complained of would not be allowed to persist indefinitely. Thus, a three-month time-limit – calculated as running from the last relevant action – was established.

135. The application of the time-limit in the applicants' case was neither incoherent nor novel. The Constitutional Court's judgment no. 52/2014, mentioned by the applicants, concerned an administrative authority's implicit rejection of a claim lodged with that authority and the possibility to challenge it before a court until the authority provided an explicit reply granting or dismissing that claim. The present case did not concern a claim lodged with an administrative authority or even a petition to Parliament; rather, it concerned a candidacy for a post that would be appointed on a discretionary basis by Parliament. The present case concerned a matter regulated by the Constitution and by Law no. 6/1985; it did not concern a matter that was regulated by the legislation on administrative procedure. The applicants did not substantiate that in a similar situation the Constitutional Court would have decided or had decided differently, as regards the application of the time-limit. While *amparo* appeals under section 42 of Law no. 2/1979 were rarer than appeals under sections 43 and 44, the particular nature of the case did not, *per se*, mean that Article 6 of the Convention had been violated. The Constitutional Court had twice given rulings under section 42 within the context of an omission (see paragraph 51 above). In one of those judgments the issue of belatedness had not arisen because the *amparo* appeal had been submitted diligently. By contrast, in the present case the obligation to renew the GCJ (with reference to which an omission to act was argued) had expired with the end of the mandate of the previous GCJ in December 2018; the applicants had then waited for some two years until October 2000 before lodging their *amparo* appeal. The other judgment had concerned the failure to acknowledge receipt of or to reply to an application lodged with Parliament of the Canaries. Relying on that judgment, the applicants could have induced

Parliament's Bureau(s) to comply with their parliamentary obligations; in the event of a refusal, they could have challenged that refusal within three months. The applicants had not lodged any complaint or claim with the Chambers of Parliament.

136. The application of the time-limit in the applicants' case had not been unforeseeable or arbitrary. In the judgments mentioned above the claimants had specified the moment at which the omission in respect of a form of parliamentary activity had crystallised, and they had diligently lodged their respective applications within three months of that moment. In the present case the decisive moment had clearly arisen on the date of 4 December 2018, when the time-limit for renewing the GCJ had expired. At that time, the applicants had already realised the existence and extent of the violation; thus, all the elements enabling them to lodge an *amparo* appeal within three months had been in place. It had also been possible to identify other, clear and relevant, reference points in respect of parliamentary events (such as the constitution of a new Chamber) that had arguably added to the gravity of the alleged omission, given that the renewal of the GCJ had clearly been listed as a pending matter. At that time, the process for the renewal of the GCJ had had to be reactivated and, because it had failed to do that, the new Chamber of Parliament had arguably been responsible for another omission, which had had to be challenged by means of an *amparo* appeal within three months. The applicants' argument that there was no time-limit for challenging any prolonged inaction or omission sat ill with the spirit and purpose of section 42 and the principle of legal certainty, which was even more important when such a sensitive matter as a non-legislative parliamentary act(ivity) was at stake.

2. The Court's assessment

(a) General principles

137. The right of access to a court is an aspect of the right to a fair hearing guaranteed by Article 6 § 1 of the Convention and an inherent aspect of the safeguards enshrined in Article 6, having regard to the principles of the rule of law and the avoidance of arbitrary power that underlay much of the Convention (see *Grzęda*, cited above, § 342). Thus, Article 6 § 1 secures to everyone the right to have a claim relating to their civil rights and obligations brought before a court (ibid.). The right of access to a court is not absolute and may be subject to limitations that do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (ibid, § 343; see also *Gloveli*, cited above, § 57). In particular, the right of access to a court may be subject, in certain

circumstances, to legitimate restrictions, such as statutory limitation periods (see *Stubbings and Others v. the United Kingdom*, 22 October 1996, §§ 51 and 52, *Reports of Judgments and Decisions* 1996-IV; *Gajtani v. Switzerland*, no. 43730/07, §§ 64 and 75, 9 September 2014; and *Sanofi Pasteur v. France*, no. 25137/16, §§ 50-55, 13 February 2020).

138. As to Article 6 § 1 of the Convention, it does not compel the Contracting Parties to set up courts of appeal or of cassation or courts having jurisdiction in *amparo* cases (see *Arrozpide Sarasola and Others v. Spain*, nos. 65101/16 and 2 others, § 99, 23 October 2018, and *Dos Santos Calado and Others v. Portugal*, nos. 55997/14 and 3 others, § 111, 31 March 2020). However, where such courts do exist, the guarantees of Article 6 must be complied with – for instance, in that it guarantees to litigants an effective right of access to the courts for the determination of their civil rights and obligations (see *Zubac v. Croatia* [GC], no. 40160/12, § 80, 5 April 2018). While admissibility conditions for recourse before such courts may be stricter – in view of the scope of their jurisdiction in a given country – than for an ordinary appeal, national authorities do not have an unlimited discretionary power in that regard (see *Dos Santos Calado and Others*, cited above, § 112). Thus, it is pertinent to consider the entirety of the domestic proceedings and the role of the relevant court in them (ibid.).

139. As regards the right of access to a court under Article 6 § 1 of the Convention before a superior court (ibid., §§ 113-16), it is appropriate to consider whether the conditions of access to it were foreseeable for a litigant; whether on account of the procedural mistake or obstacle that barred access to a court for the applicant, the latter had to bear an excessive burden on account of that mistake or obstacle; and whether there was "excessive formalism" – for instance, consisting of a particularly rigorous interpretation of a procedural rule – resulting in the limitation of the applicant's access to a court. The right of access to a court is impaired when the rules cease to serve the aims of legal certainty and the proper administration of justice and form a sort of barrier preventing the litigant from having his or her case determined on the merits by the competent court (see *Gil Sanjuan v. Spain*, no. 48297/15, § 31, 26 May 2020, and *Olivares Zúñiga v. Spain*, no. 11/18, § 28, 15 December 2022).

(b) Application of the general principles to the present case

140. The Court reiterates that in their *amparo* appeal the applicants alleged a continuous and continuing omission, at the parliamentary stage, to take specific actions required by law with a view to pursuing the selection process *vis-à-vis* their position as candidates to be considered for appointment to the GCJ.

141. The *amparo* appeal was rejected on a procedural ground, because of the expiry of the three-month time-limit under section 42 of Law no. 2/1979 (see paragraph 46 above). The Constitutional Court's decision merely stated

that ground (see paragraphs 22 and 47 above). It is common ground between the parties that, after that inadmissibility decision, some elements relating to the application of the time-limit in respect of the facts of the case were provided (see paragraphs 22 and 47 above). Thus, the Court will take them into account in the present case. It is with reference to the national court's reasoning that the Court shall now examine the substance of the applicants' complaint under Article 6 of the Convention.

142. The parties do not disagree that the task of dealing with the list of candidates submitted during the 12th legislature (and the renewal procedure pending before Parliament on the basis of that list) was rolled forward to the succeeding legislatures (namely the 13th and 14th legislatures); it was during this time that the Constitutional Court rejected the applicants' *amparo* appeal as belated. The Court also reiterates that setting up a general framework for various types of *amparo* appeals, including the one under section 42, section 41(2) provided for the possibility to challenge "omissions" (see paragraph 46 above). The material before the Court clearly shows that an omission could be subject to review under section 42 (see paragraph 51 above). The Constitutional Court took no stance regarding whether or not the continuous and continuing omission or inaction alleged by the applicants was justiciable under section 42 or, more specifically, whether or not the applicants' *amparo* appeal fell within its scope (see also paragraph 125 above). The Court notes that the applicants specifically referred to the continuous and continuing nature of the alleged inaction on the part of Parliament and its organs and of the alleged violation of their rights on account of that prolonged inaction (see paragraph 18 above). The Constitutional Court did not respond to that specific submission, which was central to the determination of the applicability of and compliance with the three-month time-limit under section 42 of Law no. 2/1979.

143. The Court reiterates that it is in the first place for the national authorities, notably the courts, to interpret and apply national law (see *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, § 249, 22 December 2020). The role of adjudication vested in the courts (in particular the superior courts) is to dissipate interpretational doubts. There must come a day when a legal norm is applied for the first time (ibid., §§ 250 and 253). Having regard to the text of the Constitutional Court's decision and the material submitted to the Court, there appeared to have been no (settled) jurisprudence concerning the statutory time-limit and which would be foreseeably applicable to the specific factual and legal context raised in the applicants' *amparo* appeal.

144. The Court also notes that the Constitutional Court was the only level of jurisdiction able to deal with the situation complained of within the above-mentioned *amparo* appeal (compare *Arribas Antón*, cited above, § 50 where the constitutional proceedings concluded the chain of remedies pursued before other courts; *Zubac*, cited above, § 125; *Katsikeros v. Greece*,

no. 2303/19, § 79, 21 July 2022; and *Pasquini v. San Marino*, no. 50956/16, § 159, 2 May 2019).

145. In view of the foregoing and given both the evident general importance of the matter, the apparent novelty or rareness of the legal issues raised before the Constitutional Court, and the particular circumstances of the case and with due regard to the aims of legal certainty and the proper administration of justice it was reasonable to expect that any rejection of the *amparo* appeal for the sole non-compliance with the statutory time-limit would need to be based on adequate reasoning (see, *mutatis mutandis*, *Paun Jovanović v. Serbia*, no. 41394/15, § 110, 7 February 2023). Within this particular context, it was essential for the Constitutional Court to explain whether (i) section 42 was applicable to a situation concerning inaction or an omission and a continuous and continuing situation, (ii) the three-month time-limit was applicable and if so, how it was to be calculated and (iii) the rationale for the approach to be adopted (see also paragraphs 51 and 52 above; also compare *Franquesa Freixas v. Spain* (dec.), no. 53590/99, 21 November 2000, and *Moragon Iglesias v. Spain* (dec.), no. 48004/99, 19 November 2002).

146. While putting forward, as *dies a quo*, two dates related to distinct events – the date of expiry of the mandate of the previous composition of the GCJ and a date related to the most recent election to Parliament – the Constitutional Court omitted to put forward even a basic justification for the relevance of those dates *vis-à-vis* the scope of the *amparo* appeal before it. In the absence of any reasoning from the Constitutional Court it is difficult to see the rationale as to why the date of 4 December 2019 (that is, the date of the opening of 14th legislature) had to be taken, in a foreseeable manner, into account as *dies a quo*.

147. In view of the lack of supporting reasoning, the Constitutional Court's reference to the date of 4 December 2018 (when the mandate of the previous composition of the GCJ had expired) was not foreseeable. The Court observes in this regard that the thrust of the *amparo* appeal concerned the claim about the subsequent – continuous and continuing – delay (lasting some two years already, at the time) in convening a plenary session in order that a vote could be taken on the basis of the list.

148. The Court concludes that the unforeseeable interpretation and application of section 42 of Law no. 2/1979 and the resulting adverse impact on a fundamental safeguard of access to a court for the protection of the applicants' arguable civil right, which was closely connected with the observance of the legal procedure for renewing the composition of the governing body of the judiciary and with the proper functioning of the justice system, impaired the very essence of their right of access to a court, given the circumstances of the case (compare *Gajtani*, §§ 75-76, and *Gloveli*, § 59, both cited above).

149. There has therefore been a violation of Article 6 § 1 of the Convention in respect of each applicant.

III. ARTICLE 8 OF THE CONVENTION

150. In so far as it can be considered that the applicants have also raised, in substance, a complaint under Article 8 of the Convention, the Court considers that, in view of the nature and scope of its findings under Article 6 of the Convention, it has examined the main issue in the present case and that it is not necessary to pursue its examination under Article 8 of the Convention (see, *mutatis mutandis*, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

151. 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

152. Each applicant claimed one euro (EUR) in respect of non-pecuniary damage.

153. The Government contested the claim.

154. The Court considers that the finding of a violation under Article 6 of the Convention constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicants.

B. Costs and expenses

155. Each applicant claimed, respectively EUR 2,000 and 6,500 for lawyer's fees incurred before the Constitutional Court and this Court. The applicants also claimed EUR 674 for translation costs.

156. The Government contested the claims as excessive and lacking any proof of payment.

157. 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. Having regard to the documents in its possession and to its case-law (see *Vegotex International S.A. v. Belgium* [GC], no. 49812/09, §§ 167-68, 3 November 2022, and *Beeler*, cited above, § 128), the Court rejects the claims.

FOR THESE REASONS, THE COURT

1. *Decides*, unanimously, to join the applications;

2. *Declares*, by a majority, the complaint under Article 6 of the Convention admissible;

3. *Holds*, by four votes to three, that there has been a violation of Article 6 of the Convention in respect of each applicant;

4. *Holds*, by four votes to three, that there is no need to examine the matter under Article 8 of the Convention;

5. *Holds*, by four votes to three, that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicants;

6. *Dismisses*, unanimously, the applicants' claim for costs and expenses.

Done in English, and notified in writing on 22 June 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik	Carlo Ranzoni
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Elósegui;
(b) dissenting opinion of Judges Ranzoni, Guyomar and Gnatovskyy.

C.R.
V.S.

CONCURRING OPINION OF JUDGE ELÓSEGUI

I. INTRODUCTION

1. First of all, I agree fully with all the conclusions and affirmations of the present judgment. The goal of this concurring opinion is to reaffirm some of the points of its reasoning and to stress "*a fortiori*" the necessity of the Court's ruling in this matter. In sum: (i) the Court is fulfilling its function under the Convention; (ii) there is ample case-law applicable to this situation (see paragraphs 82-93 of the judgment); (iii) we are dealing here with the applicants' individual rights; (iv) Article 6 § 1 of the Convention is applicable; and (v) there has been a violation of Article 6 § 1 of the Convention.

2. It can be observed that in recent years the Court has received a huge quantity of applications made by judges seeking to have their rights protected. For instance, in an article written by K. Aquilina in 2021 in the *Liber amicorum* for Judge Vincent De Gaetano, she cited 39 judgments[1]. In the last two years many more complaints have arrived at the Court. It is a sign that the Court has to continue paying attention to this phenomenon. Many observers of democracy in Europe worry about the symptoms of a reverse of democracy and the rule of law and a lack of separation of powers, not only in democracies in transition but also in the old Western democracies[2].

3. The present complaint, even though it addresses a question about the functioning of the General Council of the Judiciary ("the GCJ") in Spain, goes much further because it touches on the very essence of the independence of the judiciary. It is clear that the Venice Commission accepts that there are different ways of appointing the GCJ (see paragraph 61 of the judgment), that is, the body that administers the judiciary, and that intervention by Parliament is among the possibilities. However, the Spanish Parliament has only an instrumental function, and the decision on these appointments is not a legislative act properly speaking (see paragraph 96 of the judgment). Moreover, it is mandatory. Hindering the renewal of the GCJ's membership for four years because of a lack of agreement between the political parties, and not proceeding to put the list of candidates already approved on the agenda to be voted on in Parliament, amounts to a blockade that is unprecedented in the last forty-eight years of democracy in Spain, since 1975.

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[1] Aquilina, K. "The Independence of the Judiciary in Strasbourg: Judicial Disciplinary Case Law: Judges as applicants and national judicial council as factotums of respondent states", in de Albuquerque P.P., Wojtyczek K. (eds) *Judicial power in a globalized world. Liber Amicorum Vincent De Gaetano*, Springer, Heidelberg, 2019.

[2] See, for instance, the repeated warnings of Judge Harutyunyan in Harutyunyan, A. "The Independence of Judiciary Within the Political Dimension", in Elósegui, M., Miron, A. and Motoc, I (eds), *The Rule of Law in Europe. Recent Challenges and Judicial Responses*, Springer, Heidelberg, 2021, pp. 61-68.

II. THE RIGHT OF THE APPLICANTS TO A DECISION ON THEIR APPOINTMENT TO THE GCJ

4. The judgment finds that persons on the approved list of candidates to be members of the GCJ have the right to a decision on their appointment to the GPJ on the competition for those positions, a process which is still ongoing today. The fact that Parliament has a margin of discretion in relation to the results and the fact that this choice is not based only on criteria of capability and merit, but on the assessment of other capacities which the political parties see fit to include, does not mean that the blocking of those appointments is in accordance with the law, because the renewal of this body is mandatory under the Constitution and the Institutional Law on the Judiciary (see paragraph 34 of the judgment).

III. THE APPLICANTS' RIGHT TO HAVE ACCESS TO A COURT TO DEFEND THEIR RIGHTS AS CIVIL SERVANTS FACING A DEADLOCK OF PARLIAMENT

5. The Court recognises that the Spanish legislative framework must offer a protective mechanism for candidates who have put themselves forward, and that in the event of a deadlock or failure to respond they must have access to a court in order to protect their right to see the competition finalised and the membership of the Council renewed. The Court also recognises that the deadline for taking into account possible omissions is open-ended, and continues until such time as the outcome of the competition is resolved. It is clear from the applicants' *amparo* appeal that their claim was directed against Parliament and its organs. The applicants specifically referred to an alleged violation of specific duties incumbent on the organs of Parliament (see paragraphs 1, 34, 54, 55 and 98 of the judgment). The claim was not related to Parliament's legislative function or any act of Parliament or omission to legislate.

6. The positions of judges in the Spanish General Council of the Judiciary (who must comprise twelve of the twenty members who make up that body, plus the president of the GCJ who is at the same time president of the Supreme Court, elected subsequently by these twenty members in a free vote) are filled by a public call for applications and their function is a public office, exercised in their capacity as judges and civil servants and involving technical duties; therefore, it is part of their professional career and is not a political office (see paragraphs 34 and 121 of the judgment). In fact, in Spain judges are prohibited from belonging to political parties while in office (see paragraph 31 of the judgment) (unlike in other countries such as Germany, Austria,

Liechtenstein and France[3]). Furthermore, in Spain, access to these administrative bodies is governed by the principles of equality and merit, and the procedures have to be conducted in accordance with the requirements determined by law (see paragraph 28 of the judgment). The procedure for appointment to the Spanish GCJ concerned the progress of the applicants' professional careers as legal professionals (see paragraphs 42, 43, 56 and 57 of the judgment). In addition, this fundamental right is protected by the legal system itself, which regulates the avenues of appeal available in the event of irregularities in these processes. As regards access to membership of the GCJ, the process is provided for by the Constitution itself and by an Institutional Law, and thus also forms part of the system of fundamental rights under the Constitution. In consequence, the body with competence to protect those rights is the Constitutional Court.

IV. THE CONSEQUENCES OF THE DYSFUNCTIONAL LACK OF RENEWAL OF THE GCJ

7. The consequences arising from the dysfunction in the renewal of the GCJ are enormous as regards the ordinary functioning of the judiciary. A chain of disruption to the whole judicial system can be observed. Today, of the twenty-one members who made up the GCJ five years ago in 2018, only seventeen remain, on an interim basis (one has reached the age of retirement, another has passed away, the president resigned last year, and another member resigned on 13 March 2023). The president *ad interim* ended up accepting this last resignation under section 582(1) of the Institutional Law on the Judiciary, according to which members only cease their positions after the five years for which they were appointed, or by means of a resignation accepted by the president of the judges' governing body.

8. Moreover, this administrative body is in charge of appointments to the Supreme Court and the appointment of the presidents of the High Courts of Justice (judicial bodies of each Autonomous Community, of which there are 17) and of the provincial courts (*Audiencias Provinciales*) (see paragraphs 40-41 of the judgment); as of today, of the 79 positions of judge of the Supreme Court, 22 are vacant (see paragraph 59 of the judgment). In total, there are 80 vacancies in these higher courts. In addition, the GCJ is in charge of the normal competitions for access to the judiciary. It is an objective fact that there is an enormous excess workload caused, among other reasons, by retirements that are not being covered. Currently there are 563 vacancies for judges. Although 382 new judges are expected to take up their functions between now and the end of December 2023, 181 positions will still be vacant. The judges have threatened to embark on a strike, which is unusual in

[3] See Seibert-Fohr, A. "Judges' Freedom of Expression: An Ambivalent Relationship", in Elósegui, M., Miron, A. and Motoc, I. (eds), *The Rule of Law in Europe. Recent Challenges and Judicial Responses*, Springer, Heidelberg, 2021, pp. 89-110.

the history of Spain (and the law does not provide for such a right). Spanish lawyers recently conducted two months of indefinite strike action until the Ministry of Justice agreed to a salary increase.

V. THE APPLICABILITY OF ARTICLE 6 § 1 OF THE CONVENTION TO THE PRESENT CASE, AND THE COURT'S PREVIOUS CASE-LAW

9. In the present judgment the Court reiterates that the right of access to a court under Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which, in its relevant part, declares the rule of law to be part of the common heritage of the Contracting States. In order for national legislation excluding access to a court to have any effect under Article 6 § 1 in a particular case, it should be compatible with the rule of law (see *Grzęda v. Poland* [GC], no. 43572/18, § 299, 15 March 2022). The Court's examination has taken due account of the fact that the applicants' claim before the Constitutional Court concerned the selection process for the GCJ, a constitutional body that plays a central role in ensuring the proper functioning of the justice system and that also contributes to the safeguarding of the independence of courts and judges.

10. In the Grand Chamber's judgment in *Grzęda*, cited above, the Court set out very clearly a series of principles regarding the functioning of judicial councils that are equally applicable to this Spanish case. In the case of *Grzęda* the matter concerned the removal of the president of the Polish judicial council. In that judgment (cited above, §§ 325-26), the Court considered that the applicant's position as an elected judicial member of the National Council of the Judiciary, the body with constitutional responsibility for safeguarding judicial independence, had been prematurely terminated by operation of law in the absence of any judicial oversight of the legality of that measure. The applicant was excluded from access to a court, a fundamental safeguard for the protection of an arguable civil right closely connected with the protection of judicial independence.

11. In the present Spanish case the matter concerns a four-year stoppage in the resolution of an appointment process that was already under way. Nonetheless, this does not imply any difference in the substance of the right protected by the Convention. In fact, the Spanish Government have not convincingly explained why the dispute – arising from the manifestly prolonged, and prima facie unlawful and unjustified, failure to take certain actions with a view to pursuing the process of choosing the judicial members of the governing body of the judiciary – did not merit judicial protection (see, *mutatis mutandis*, *Grzęda*, cited above, § 296).

12. In its complicated test based on the *Vilho Eskelinen* criteria, in short, the Court concludes that there was available amparo appeal to the Constitutional Court and the applicants tried to use it. That means that the

Constitutional Court hindered the possibility of delving into the substance of the complaint, using an unconvincing formalistic argument and rejecting the case on the grounds that the complaint was submitted out of time. In addition, although the judgment clearly concludes that there has been a procedural violation of Article 6 of the Convention, in so far as the applicants were unable to access a court in order for the appointment procedure to take place, in reality it is clear that what is in issue is the infringement of a substantive fundamental and constitutional right, as the candidate judges have the right to a decision on their appointment to the GCJ regarding the outcome of the competition in which they participated, in accordance with the provisions of the law.

VI. THE COURT'S ROLE IN PROTECTING THE RULE OF LAW, DEMOCRACY AND THE SEPARATION OF POWERS

13. It is part of the role of the European Court of Human Rights to perform its functions in these situations of frontal attack on the Convention, the rule of law, democracy and the separation of powers. The Court has established its competence on numerous occasions to act when the matter concerns individuals whose rights are not being protected and who are not allowed access to the courts to defend themselves. The non-observance of the legal procedure for renewing the composition of the governing body of the judiciary may have – in view of that body's functions concerning, in particular, judicial appointments – a significant impact on the functioning of the justice system and the respondent State's compliance with its above-mentioned responsibilities within the Convention system.

14. The *raison d'être* of the Spanish GCJ as the governing body of the justice system and its contribution to the safeguarding of judicial independence require that the GCJ enjoy autonomy *vis-à-vis* the political branches of State power. The situation complained of in the present case at the very least had the potential to adversely affect the GCJ's mission, and this would raise serious rule-of-law issues – including those pertaining to the safeguarding of rights enshrined in and protected by the Convention (see paragraphs 38, 62 and 63 of the judgment).

15. The Court notes that the material available to it (see paragraphs 39 and 61-63 of the judgment) discloses that the functioning of judicial councils and, in particular, matters relating to the procedures for selecting their members, are considered essential for the proper functioning of national justice systems; stalemates, deadlocks and other omissions affecting the renewal of the composition of those institutions are regarded as particularly worrying, in particular from a rule-of-law perspective.

VII. THE LINK BETWEEN THE AUTONOMOUS FUNCTIONING OF THE GCJ AND THE INDEPENDENCE OF THE JUDICIARY FROM THE OTHER STATE POWERS

16. Even though the matter at issue relates to the functioning of the administrative body which governs judicial appointments and disciplinary procedures, there is a link between this body and the independence of the judiciary itself. As explained above, in Spain this body is in charge of many judicial appointments to the higher courts and of organising competitions for judges of the ordinary courts. GRECO, the Venice Commission and the European Commission have all stressed the necessity of reinforcing the independence of the judiciary in Spain. The judiciary has a special role in society as the guarantor of justice, a fundamental value in a State governed by the rule of law; it must enjoy public confidence if judges are to be successful in carrying out their duties. This consideration has been found to be relevant in relation to the right of access to a court for judges in matters concerning their status or career. 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, the Court must be particularly attentive to the protection of members of the judiciary against measures that can threaten their judicial independence and autonomy (see *Grzęda*, cited above, § 302 with further references).

17. Under the relevant Council of Europe standards, a judicial council's autonomy in matters concerning judicial appointments must be protected from encroachment by the legislative and executive powers, and its independence must be guaranteed. As the Government mentioned, in accordance with the principle of the autonomy of Parliament, widely recognised in the member States of the Council of Europe, Parliament is entitled, to the exclusion of other powers and within the limits of the constitutional framework, to regulate its own internal affairs (see *Karácsony and Others v. Hungary* [GC], nos. 42461/13 and 44357/13, § 142, 17 May 2016).

18. The Convention does not prevent States from taking legitimate and necessary decisions to reform the judiciary (see *Gumenyuk and Others v. Ukraine*, no. 11423/19, § 43, 22 July 2021). However, any reform of the judicial system or, as in the present case, any manifestly prolonged and prima facie unlawful and unjustified failure to exercise a mandatory non-legislative function vested in Parliament concerning the judiciary (namely, the selection process in respect of judicial members of the governing body of the judiciary) should not undermine its functioning and legitimacy, the proper functioning of the justice system (in particular, as regards the appointment process of judges) or public confidence in the constitutional institutions, in this case Parliament and the GCJ (see, *mutatis mutandis*, *Grzęda*, cited above, § 302).

19. Finally, in relation to the margin of appreciation allowed to Spain as a member State of the Council of Europe, and the execution of judgments of the Court, the Spanish legislation has provided since 2015 for an appeal before the Supreme Court for review of the Strasbourg Court's judgments. That procedure remains open to applicants and the Court does not need to mention it explicitly in each judgment. In this connection, monitoring the execution of the judgment is the task of the Committee of Ministers, but it is up to the applicants in their turn to make use of the remedy provided for in the Spanish legislation itself. In fact, several judgments of this Court against Spain have already been reviewed by the Supreme Court at the request of the applicants. Accordingly, this avenue of appeal reinforces the margin of appreciation of the States since, depending on the type of violation that has occurred, affording redress for the violation of the Convention may once again be in the hands of the domestic courts.

JOINT DISSENTING OPINION OF JUDGES RANZONI, GUYOMAR AND GNATOVSKYY

1. We regret to be unable to follow the majority in finding that there has been a violation of Article 6 of the Convention in respect of each applicant in the present case. While we find the situation that gave rise to the applicants' complaints most deplorable and regard it as negatively affecting the functioning of the Spanish judiciary, we consider that Article 6 § 1 of the Convention is not applicable in the circumstances of this case.

2. The case concerns the applicant candidates' right of access to a court given the failure, for five years, by the Spanish Parliament to convene a plenary session to select members of the General Council of the Judiciary (GCJ) – a situation that "has been described by key stakeholders as unsustainable and anomalous" (see paragraph 63 of the judgment). Inasmuch as the thrust of the applicants' complaints appears to oppose this deliberate inaction by the legislature, their efforts are certainly laudable. However, we consider that a situation of this nature cannot be resolved by instrumentalising the mechanism of human rights protection created by the European Convention on Human Rights, and, in particular, with reliance on the right to a fair trial provided for by its Article 6.

3. As correctly summarised in paragraph 77 of the judgment with reference to the recent Grand Chamber judgment in *Grzęda v. Poland* (no. 43572/18, 15 March 2022), for Article 6 § 1 of the Convention under its civil limb to be applicable, there must be a genuine and serious dispute over a "right" that can be said, at least on arguable grounds, to be recognised under domestic law, and the result of the proceedings must be directly decisive for the right in question. In our view, these elements are absent in the present case.

4. The Court's case-law has already gone quite far in recognising the existence of a "right" under the civil limb of Article 6 by developing a wider approach, according to which the "civil" limb has covered cases which might not initially appear to concern a civil right but which may have direct and significant repercussions on a private pecuniary or non-pecuniary right belonging to an individual (see *Denisov v. Ukraine* [GC], no. 76639/11, § 51, 25 September 2018). Most notably, the Court has done so in order to oppose any attacks on the rule of law by protecting judges in matters such as judicial discipline, employment disputes, salary, retirement benefits and so on.

5. The present judgment clearly goes even further by suggesting that when a parliament is entrusted with electing members of a judicial council and fails to do so because of a political deadlock or for some other reason, Article 6 § 1 would require candidates for that judicial council to have individual access to a court. To reach such a conclusion, the majority have gone very deeply into the interpretation of the domestic law, in particular Article 23 § 2 of the Constitution in the light of the exercise of the right under section 573

of Law no. 6/1985 (see paragraph 103 of the judgment). Such interpretation is, as a matter of principle, not the Court's task. In the present case we find such an interpretation, which is, moreover, not based on any decisions of domestic courts, wholly unconvincing.

6. As mentioned in paragraphs 26–28 of the present judgment, Article 23 § 2 of the Spanish Constitution provides that citizens "have the right of access on equal terms to public functions and positions, in accordance with the requirements determined by law", i.e. here the procedure relevant to the election of judges to the GCJ established by Law no. 6/1985 (see paragraphs 34 *et seq.* of the judgment). It seems to be rather evident that the applicants' complaint has nothing to do with the principle of equal access to public positions. Instead, the real issue at stake is the inaction of Parliament. To find in these circumstances the existence of a "civil right" and, in any event, a right of individual access to a court is a far cry from any direct and significant repercussions on a private pecuniary or non-pecuniary right belonging to the applicants.

7. Furthermore, we are unable to agree with the conclusion that challenging parliamentary inaction could be understood as a "genuine and serious" dispute, or with the assessment that the outcome of the *amparo* proceedings before the Constitutional Court would be "directly decisive" for the appointment of the applicant candidates to the GCJ. Even assuming that the applicants may have had a judicial remedy in respect of procedural irregularities arising during the process resulting in the shortlisting of candidates for the GCJ, that remedy would relate only to the first stage of the process, but not to the second stage, after the setting-up of a list, namely the selection process by Parliament on the basis of that list. The choice of the Spanish legislator to vest Parliament with the remit of electing members of the GCJ means that there is an inevitable political element in the taking of this decision. In other words, even if the outcome of the *amparo* proceedings had been positive for the applicants, they could not possibly have been directly decisive for the right in question, as no court could oblige members of Parliament to vote at all, let alone in support of any of the applicants.

8. By way of conclusion we would like to emphasise that excessive use of the line of argument as to the applicability of the civil limb of Article 6, as summarised most recently in *Grzęda* (cited above), in order to address any dysfunction related to the judiciary, can hardly be considered an appropriate exercise of the powers of the Court.

APPENDIX

List of cases:

No.	Application no.	Case name	Lodged on	Applicant Year of Birth Place of Residence	Represented by
1.	53193/21	Lorenzo Bragado v. Spain	22/10/2021	**Juan Luis LORENZO BRAGADO** 1962 Santa Cruz de Tenerife	Vicente Jesús TOVAR SABIO
2.	53707/21	Jaén Vallejo v. Spain		**Manuel María JAÉN VALLEJO** 1953 Madrid	
3.	53848/21	Garcia de Yzaguirre v. Spain		**Mónica GARCIA DE YZAGUIRRE** 1962 Las Palmas de Gran Canaria	
4.	54582/21	Estevez Benito v. Spain		**Rafael ESTÉVEZ BENITO** 1973 Caceres	
5.	54703/21	Tardon Olmos v. Spain		**Maria TARDON OLMOS** 1957 Madrid	
6.	54731/21	Baena Sierra v. Spain		**Jose Antonio BAENA SIERRA** Malaga	