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Not Just a Simple Civil Servant: The Right of Access to a Court of Judges in the Recent Case Law of the ECtHR

Mathieu Leloup | ORCID: 0000-0002-3477-6347
Assistant Professor in Constitutional and Administrative Law, Tilburg University, Tilbug, the Netherlands
Postdoctoral Researcher, the Judicial Studies Institute, Masaryk University, Brno, Czech Republic
m.r.g.leloup@tilburguniversity.edu

Abstract

This article discusses the right of access to a court in the most recent case law of the European Court of Human Rights, more particularly the application of the so-called *Eskelinen*-test in the context of cases concerning domestic Judges. The Court appears to have established a new approach to this test, which considerably raises the bar to exclude Judges from access to a court when disputes about their status or career are concerned. First, the article discusses this new approach, suggesting that the reason for it can be found in the current rule of law landscape in Europe and highlighting its potential for future rule of law related cases. Yet, it equally points out how the test gives the final say in disputes about the status or career of Judges to Judges themselves, which creates potential issues of internal judicial independence, and may skew sensitive systems of balance of powers.

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Keywords

right of access to a court – domestic judiciary – Eskelinen-test – judicial independence – rule of law – separation of powers

1 Introduction

At this stage, it is kicking at an open door to say that the principles of the rule of law and judicial independence have taken centre stage in the last couple of years. The developments in a number of countries have firmly put the spotlight on the judiciary and its relationship to the political branches of government. In recent European case law, much attention has been given to issues of judicial independence and its substantive contents, such as on issues such as judicial discipline,[1] the irremovability of Judges,[2] or closely connected issues such as Judges' freedom of expression[3] or their right to liberty.[4]

Such issues and the recent jurisprudential evolutions that have taken shape there are undoubtedly of fundamental importance. Yet, the protection of Judges cannot be limited only to substantive issues. Just as important are questions concerning the procedural protection of Judges, such as their right of access to judicial protection.

On that point as well, some major jurisprudential developments have taken shape over the last few years. Probably the most well-known is the European Court of Justice's (ECJ, Luxembourg Court) bold approach under Article 19(1)(2) Treaty on European Union (TEU), which has created an autonomous ground for the protection of the right to effective judicial protection.[5] This ground, combined with the preliminary ruling procedure under Article 267 Treaty on the Functioning of the European Union (TFEU), has provided all domestic

1 For example, Case C-791/19 *Commission v Poland* (*Régime disciplinaire des juges*) (ECJ, 15 July 2021).

2 For example, *Baka v Hungary* [GC] 20261/12 (ECtHR, 23 June 2016); Case C-619/18 *Commission v Poland* (*Independenc of the Supreme Court*) (ECJ, 24 June 2019).

3 For example, *Guz v Poland* 965/12 (ECtHR, 15 October 2020).

4 For example, *Turan and Others v Turkey* 75805/16 and others (ECtHR, 23 November 2021); *Tercan v Turkey* 6158/18 (ECtHR, 29 June 2021); *Alparslan Altan v Turkey* 12778/17 (ECtHR, 16 April 2019).

5 For some of the many contributions on this issue, see, C Rizcallah and V Davio, 'L'article 19 du Traité sur l'Union européenne: sésame de l'Union de droit' (2020) *Revue Trimestrielle des Droits de l'Homme* 156; M Bonelli and M Claes, 'Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary' (2018) 14(3) *European Constitutional Law Review* 622.

courts[6] with a lifeline to the Luxembourg Court,[7] allowing them to ask whether specific measures violate the right to effective judicial protection.[8]

Yet, in its most recent case law, the European Court of Human Rights (ECtHR, Court) has equally taken an important step forward on the issue of the right of access to a court of domestic Judges.[9] The case law of the Court has been particularly lively on that point, with a string of important judgments in the span of a little over a year, including the recent Grand Chamber judgment of *Grzęda*. In those judgments, the Court seems to have significantly altered its application of the so-called *Eskelinen*-criteria. Since the 2007 Grand Chamber judgment of *Vilho Eskelinen*,[10] a dispute between civil servants – including Judges – and the state is in principle presumed to be of a civil nature, and thus fall within the scope of Article 6(1) European Convention on Human Rights (ECHR), unless the Contracting Party can fulfill two cumulative conditions. First, it must show that access to a court was expressly excluded in the case at hand, and second, that this exclusion was justified by objective reasons in the state's interests. In its most recent case law, the ECtHR seems to interpret the second of those *Eskelinen*-criteria in such a way that it is difficult – if not nearly impossible – for the Contracting Parties to still exclude domestic Judges from the right of access to a court in matters that concern their status or career. Thus, while the test in itself has not been abandoned, the Court has made it significantly more difficult for states to exclude disputes about the status and career of Judges from the protection of Article 6(1) ECHR, thereby increasing the procedural protection of domestic Judges. The starting point for this

6 To be perfectly precise, Article 19(1)(2) TEU is applicable to all courts that act within the fields covered by EU law. In practice, this includes all courts that may at one point be asked to apply or interpret EU law. As noted many times, it is difficult to imagine a domestic court that does not fit this description.

7 On this, see, S Platon, 'Court of Justice Preliminary References and Rule of Law: Another Case of Mixed Signals from the Court of Justice Regarding the Independence of National Courts: *Miasto Lowicz*' (2020) 57(6) *Common Market Law Review* 1843.

8 The ECJ has nonetheless made clear that there must be a sufficiently close connection between the measures that are being questioned by the domestic Judge and the case that is pending before it. See, in particular: Case C-558/18 *Miasto Łowicz* (*Régime disciplinaire concernant les magistrats*) [2020] OJ C215/10.

9 For the sake of clarity, it is reiterated here that since the judgment in *Golder* (*Golder v the United Kingdom* 4451/70 (ECtHR, 21 February 1975)), the Court has argued that it would be inconceivable that Article 6(1) ECHR describes in such detail the procedural guarantees that are afforded to parties, without first protecting the access to a court itself. This basic point has been repeated countless times in later case law. See, recently, for example, *Kooperativ Neptun Servis v Switzerland* 40444/17 (ECtHR, 23 November 2021) para 77; *Ali Riza v Switzerland* 74989/11 (ECtHR, 13 July 2021) para 72; *Voronkov v Russia* (*No 2*) 10698/18 (ECtHR, 2 March 2021) para 30.

10 *Vilho Eskelinen v Finland* [GC] 63235/00 (ECtHR, 19 April 2007).

development, it is argued, can be found within two judgments of March 2021 lodged against Turkey, namely *Bilgen*[11] and *Eminağaoğlu*[12] (the Turkish cases), and has since been confirmed in several later cases.

As this article will show, this new approach may have some important consequences. Nevertheless, this development has so far remained under the radar. It has received no attention in legal scholarship and has barely even been acknowledged by the Court itself. The goal of this article is thus twofold. A first, more descriptive aim is to examine this new strand of case law in detail, to situate it within the broader body of the Court's jurisprudence and to explain what the effects of that new approach will be. A second, analytical aim is to contextualise and problematise this new strand of case law. It suggests that one of the reasons for this development can be found in the current context of democratic decay and the many rule of law cases pending before the Court. By strengthening the right of domestic Judges to challenge measures that affect their status or career, the Court offers them an extra avenue of procedural protection. In doing so, the Court has immediately also strengthened the potential effectiveness of the Convention in the fight against rule of law backsliding. Nevertheless, the article equally points out how this strand of case law can be understood to empower the judiciary vis-à-vis the political branches, and can thereby – perhaps unintentionally – tilt the national balance of powers and create potential dangers of internal independence.

In order to do this, the article will proceed as follows. Section 2 will discuss the two Turkish cases in more detail, examining the Court's reasoning and explaining at length the new approach that it puts forward in those judgments. Section 3 will then delve into the subsequent case law in which the Court has applied that same approach. The in-depth overview provided by sections 2 and 3 will then provide the basis for a more overarching analysis of this strand of case law. Section 4 will look into the general importance of this new approach and situate it within the broader issues of judicial independence, rule of law, and domestic separation of powers. Section 5 will consider whether there are still any limits to Judges' right of access to a court after this new approach, or if it may in fact be extended further still. Section 6 will conclude.

11 *Bilgen v Turkey* 1571/07 (ECtHR, 9 March 2021).

12 *Eminağaoğlu v Turkey* 76521/12 (ECtHR, 9 March 2021). On those judgments, see also, M Leloup, 'Another Step Enhancing the (Procedural) Protection for Judges: *Eminağaoğlu v Turkey* and *Bilgen v Turkey*' (Strasbourg Observers, 1 April 2021): <https://strasbourgobservers.com/2021/04/01/another-step-enhancing-the-procedural-protection-for-judges-eminagaoglu-v-turkey-and-bilgen-v-turkey/>.

2 The Turkish Cases: a New Approach to Applying the *Eskelinen*-Test

2.1 *The Eskelinen-Test*

Before we can delve into the two recent Turkish cases, some general background information may be useful. The right of access to a court is not the clearest strand of case law in the Court's jurisprudence and is at times rather technical. Particularly the right of access to a court for civil servants, a category which is understood to include Judges,[13] has been a particularly complex issue in the Court's case law. The difficulty lay in deciding whether the dispute between civil servants and the government could be characterised as civil in nature, thereby falling within the scope of Article 6(1) ECHR. It took the Court quite a while to come up with a workable test in this regard. In its older case law, the basic principle was that disputes relating to the recruitment, careers, and termination of service of civil servants were outside of the scope of Article 6(1) ECHR, though exceptions to that general rule had been allowed.[14] In 1999, in the case of *Pellegrin*, the Grand Chamber wanted to put an end to that uncertainty and set forth a functional criterion based on the nature of civil servants' duties and responsibilities.[15] Article 6(1) ECHR should only remain inapplicable in disputes which were raised by public servants whose duties typify the specific activities of the public service, in so far as they were acting as the depositary of public authority responsible for protecting the general interests of the state or other public authorities.[16] The Grand Chamber was categorical in its wording. As soon as the applicant belonged to a category like the one just mentioned, all disputes were excluded from Article 6(1) ECHR, irrespective of their nature. Nevertheless, a few years later in *Vilho Eskelinen*, the Court – again in its Grand Chamber formation – concluded that the functional criterion had not simplified the analysis of whether Article 6(1) ECHR should apply to a dispute concerning a civil servant and further developed the case law. The new test that it then set out (the *Eskelinen*-test) essentially established a presumption that Article 6(1) ECHR applies to a dispute between a civil servant and the state. However, this presumption can be rebutted if the state fulfils two cumulative conditions. It must first demonstrate that the civil servant was expressly excluded from access to a court for the dispute in

13 *Baka* (n 2) para 104.

14 See the cases mentioned in, *Pellegrin v France* [GC] 28541/95 (ECtHR, 8 December 1999) para 59.

15 Ibid 64.

16 Ibid 66.

question and, second, that this exclusion was justified by objective reasons in the state's interest.[17]

Overall, the presumption that was established in *Vilho Eskelinen* has proven to be a strong one. There are not that many cases in which the Court has found both of its criteria to be fulfilled. In fact, in most cases the first criterion is already not fulfilled.[18] In many cases concerning Article 6(1) ECHR, the Court found this provision to be applicable because the domestic legal framework had not, at least not expressly, excluded access to a court for the civil servant in question.[19]

2.2 *The Turkish Cases*

The new strand of case law that constitutes the main subject of this article concerns the application of the *Eskelinen*-test to domestic Judges. The main claim that is made here is that the Court, in its most recent judgments, interprets the second *Eskelinen*-criterion in such a way that it will be very difficult for a state to convince the Court that the exclusion in question can be justified. The starting point of that new approach can be found in two judgments by the Court's second section of 9 March 2021 against Turkey, *Bilgen* and *Eminağaoğlu*. It is no accident that both judgments came out on the same day, since the underlying issues in both cases were largely the same. Both cases stem from decisions by the Turkish High Council of Judges and Prosecutors. In *Bilgen,* it was a decision to transfer the applicant Judge to another court in a lower ranking judicial district far away against his will. In *Eminağaoğlu*, it concerned a disciplinary sanction imposed on the applicant Judge by the High Council as a consequence of critical statements that they had made concerning a series of high-profile cases. For both Judges, the measure in question could thus be understood to raise a potential issue regarding their independence. In both cases, the Judges could not appeal the measure in question, since Article 159 of the Turkish Constitution, as it was then, clearly stated that decisions by the High Council were not amenable to judicial review. Both Judges complained before the Court that this state of affairs violated their right of access to a court.

In what follows, the Court's reasoning will be set forth in detail. Focus will be placed on the case of *Bilgen*, as the reasoning in that case more clearly

17 *Vilho Eskelinen* (n 10) para 62.

18 The Court says so itself. See, *Baka* (n 2) para 113.

19 See, among many others: *Buzoianu v Romania* 44595/15 (ECtHR, 2 November 2021) para 39; *Kövesi v Romania* 3594/19 (ECtHR, 5 May 2020) paras 122–123; *Frezadou v Greece* 2683/12 (ECtHR, 8 November 2018) para 32; *Saghatelyan v Armenia* 7984/06 (ECtHR, 20 October 2015) para 33.

shows the new approach of the Court. Where relevant, reference will also be made to *Eminağaoğlu*. Since the applicability of Article 6(1) ECHR is the most salient part of the judgments for the purposes of this article, the discussion on the merits will be kept to a minimum.

The Court started its reasoning by recapitulating the basic principles on the applicability of Article 6 ECHR under its civil head. According to long-standing case law there must be a genuine and serious dispute over a 'right' which can be said, at least on arguable grounds, to be recognised under domestic law.[20] Article 6 ECHR does not guarantee any particular content for rights and obligations, and as such may not create rights that have no basis in the legal system of the Contracting Party.[21] This first hurdle already proved difficult in the case of *Bilgen*, since the applicant complained of his allegedly arbitrary transfer to another court, something that was not clearly governed by Turkish law. According to the Court, the case concerned, from the standpoint of Article 6(1) ECHR, the right of access to a court and the right to a fair procedure of a member of the judiciary in order to complain in relation to the legitimacy of a non-consensual transfer. As such, the issue was not whether a Judge could make a claim to have a position in a specific court, but rather whether there was an arguable basis on which the right to be protected against an arbitrary transfer could be claimed.[22]

Drawing inspiration from other strands of case law,[23] the Court pointed to the special position that the judiciary holds in society and the public confidence that this branch of power must enjoy as the guarantor of justice. Given the growing importance attached in the Court's case law to matters of separation of powers and to the necessity of safeguarding the independence of the judiciary, it found that it needed to be particularly attentive to the protection of Judges against measures that may affect their status or career, which can threaten their independence and autonomy.[24]

It is with those considerations in mind that the Court looked at the case of *Bilgen*. It pointed first to Article 140 of the Turkish Constitution, which provides that changes in the posts or places of duty of Judges should be regulated by legislation in accordance with the principle of independence. The domestic

20 *Bilgen* (n 11) para 47.
21 Ibid para 48.
22 Ibid para 57.
23 In particular, the freedom of expression of Judges (with reference to *Guz* (n 3)) and the right to liberty of Judges (with reference to *Alparslan Altan* (n 4) and *Baş v Turkey* 66448/17 (ECtHR, 3 March 2020)).
24 *Bilgen* (n 11) para 58.

legislation also limited the power of the High Council of Judges and Prosecutors to specific situations, none of which seemed to apply in the case of *Bilgen*. In a rather rare, but not unprecedented move,[25] the Court examined whether the interpretation of domestic law as to the existence of a certain right could be enhanced by relying on principles of international law or the common values within the Council of Europe. It referred to the recent judgment of *Guðmundur Andri Ástráðsson,* in which the Grand Chamber had relied on a wealth of international non-binding texts which pointed out the importance of an objective and transparent appointment system of Judges.[26] In *Bilgen*, the Court considered that these principles were equally valid in the case of transfers. Furthermore, relying on the European Charter on the Statute for Judges and a report by the European Network of Councils of the Judiciary, it came to the conclusion that members of the judiciary do indeed have a right to protection against arbitrary transfer or appointment for the purposes of Article 6(1) ECHR.[27]

In a next step, the Court then had to decide whether this right was of a civil nature. Applying the *Eskelinen*-test, it thus had to ascertain whether the access to a court had expressly been excluded in this case, and, if so, whether this exclusion was justified.

As to the first of the two *Eskelinen*-criteria, the Court concluded that it had been met. The Turkish Constitution very clearly stated that decisions by the High Council were not amenable to review by any other body. Furthermore, the High Council itself could also not be seen as a court or tribunal in the sense of Article 6(1) ECHR. While the body had exclusive jurisdiction and power of decision in matters concerning the career of Judges and prosecutors, its proceedings were not prescribed by a set of procedural rules, did not provide for an adversarial process, it did not hold hearings, and also did not state reasons for its decisions.[28]

The next question was then whether this exclusion could be justified on objective grounds in the state's interest. The Court acknowledged that it had

25 See, in particular: *Enea v Italy* [GC] 74912/01 (ECtHR, 17 September 2009) para 101; *Boulois v Luxembourg* [GC] 37575/04 (ECtHR, 3 April 2012) paras 91 and 101–102; *Naït-Liman v Switzerland* [GC] 51357/07 (ECtHR, 15 March 2018) para 108.

26 *Guðmundur Andri Ástráðsson v Iceland* [GC] 26374/18 (ECtHR, 1 December 2020) paras 218–234.

27 *Bilgen* (n 11) paras 62–64.

28 Ibid paras 70–75. In *Eminağaoğlu*, the Court noted that a constitutional reform had introduced a right of appeal against the sanction of dismissal imposed by the High Council. As such, it could no longer be claimed that Judges were absolutely excluded from judicial review in such circumstances. However, the Court did not find it necessary to decide whether the first criterion was fulfilled since the second one was, in any event, not fulfilled (*Eminağaoğlu* (n 12) para 71).

only had a few cases in which it had to examine the second *Eskelinen*-criterion. In those cases, it deemed this criterion fulfilled, since they concerned people that were clearly linked to the executive branch, such as an army officer or a high-ranking civil servant.[29] This meant that there was a clear bond of trust and loyalty between the person concerned and the state.[30] The case of *Bilgen*, by contrast, concerned a member of the judiciary. In its judgment, the Court spent ample time reasoning why this was an important difference. The special bond of loyalty and trust that can be required from civil servants to the executive branch cannot easily be squared with the requirement of independence of the judiciary. The role of the latter is to provide a check on government wrong-doing and abuse of power. They are loyal only to the rule of law and democracy, not to the holders of state power. Their employment relationship with the state must therefore be understood in light of the specific guarantees essential for judicial independence. This makes it necessary for members of the judiciary to be sufficiently distanced from the other branches of power, so that they can render decisions on the basis of law and justice, without fear or favour. According to the Court, it would be a fallacy to assume that Judges can uphold the rule of law and give effect to the Convention rights if domestic law deprives them of the guarantees of the Articles of the Convention on matters that touch directly upon their individual independence and impartiality. Members of the judiciary should enjoy protection against arbitrariness from the executive and only oversight by an independent judicial body of the legality of such a removal decision can render such a right effective.[31] Due to this, the Court did not consider it justified to exclude members of the judiciary from the protection of Article 6(1) ECHR in matters concerning the conditions of their employment on the basis of the special bond of loyalty and trust to the state.[32] This finding was reinforced by the fact that the High Council did not provide reasons as to Bilgen's transfer, nor were there compelling reasons to justify this decision in the interest of the state.[33] The second *Eskelinen*-criterion had thus not been fulfilled.

Since the second *Eskelinen*-criterion had not been fulfilled, the dispute was considered to be of a civil nature, rendering Article 6(1) ECHR and the right of access to a court applicable. The merits of the complaint were dealt

29 *Suküt v Turkey* 59773/00 (ECtHR, dec, 11 September 2007); *Spūlis and Vaškevičs v Latvia* 2631/10 and 12253/10 (ECtHR, dec, 18 November 2014).

30 *Bilgen* (n 11) paras 77–78.

31 With reference to *Kövesi* (n 19).

32 *Bilgen* (n 11) para 79. The Court gave identical reasoning in *Eminağaoğlu* (n 12) para 78.

33 *Bilgen* (n 11) para 80.

with quite briefly. The Court reiterated the importance that is attached to the separation of powers and judicial independence, and mentioned once again that it is imperative that there exist procedural safeguards to ensure that the judicial autonomy is not jeopardised by undue external or internal influences. In matters concerning the career of Judges, there should be weighty reasons exceptionally justifying the absence of a judicial review, which had not been provided in that case. As such, the Court found that the lack of access to a court did not pursue a legitimate aim and held that the essence of that right had been impaired, finding a violation of Article 6(1) ECHR.[34]

2.3 *The Right of Access to a Court and Domestic Judges: the Eskelinen-Test Fine-Tuned Further*

As mentioned above, the importance of the judgments in the Turkish cases lies not so much in the eventual finding of a violation, but rather in the route that the Court took to get there, particularly concerning the admissibility of Article 6(1) ECHR. The *Bilgen* and *Eminağaoğlu* judgments clearly show how far the Court's case law has evolved in applying the *Eskelinen*-criteria when Judges are concerned. When one looks at the evolution of the Court's case law on the applicability of Article 6(1) ECHR in disputes concerning civil servants, one can see a clear trend towards an increasingly broad understanding of what type of disputes are deemed to be civil in nature. In fact, the Court already interpreted the first *Eskelinen*-criterion in such a way that it was not easy for contracting states to cross this hurdle. Now, with the Turkish cases, the Court has also adopted a flexible approach under the second limb of the test, at least when domestic Judges are concerned. In what follows, an overview will be given of the current state of affairs under the *Eskelinen*-test, the effect that the two Turkish cases have had in this regard, and how it will be very difficult for Contracting Parties to still pass the *Eskelinen*-test in the future.

To reiterate, under the first *Eskelinen*-criterion, the Contracting Party has to expressly exclude the access to a court for the post or category of staff in question. However, as the Court pointed out in *Bilgen*, it has developed a more nuanced approach to determine whether this first criterion had been met. The mere fact that the decision of the competent domestic body was excluded from further judicial review does not necessarily mean that the national law excluded access to a court.[35] In fact, this already became apparent in the very first case in which the Court applied the *Eskelinen*-criteria in a case concerning a Judge. In *Olujić*, the applicant complained about a disciplinary sanction

34 Ibid paras 92–97. See also, *Eminağaoğlu* (n 12) paras 92–105.
35 *Bilgen* (n 11) para 71.

imposed by the Croatian National Judicial Council. Even though the legislation expressly excluded judicial protection in connection with disciplinary proceedings against Judges, the Court looked at the procedures and competences surrounding the judicial council itself, in order to conclude that it had all the hallmarks of a tribunal within the meaning of Article 6(1) ECHR. Due to this, the domestic legislative framework could not be understood as expressly depriving the applicant of access to a court and Article 6(1) ECHR applied also to the disciplinary proceedings before the National Judicial Council.[36] The Court did something similar in subsequent cases. In *Oleksandr Volkov*,[37] the Court noted that, even though the decision of the High Council of Justice – the body that imposed the disciplinary sanction – had been reviewed by the Higher Administrative Court, the High Council had itself performed a judicial function. In a subsequent step, it then assessed whether that Council had fulfilled the requirements under Article 6(1) ECHR. In *Sturua* and *Di Giovanni*, it held that the Georgian and Italian judicial councils had acted like a tribunal under Article 6(1) ECHR, and thus held that the first *Eskelinen*-criterion had not been met.[38] A similar approach was adopted in the more recent judgment of *Xhoxhaj*.[39] Probably the most explicit acknowledgment of this more nuanced approach under the first *Eskelinen*-criterion can be found in *Kamenos* and *Bilgen*, where the Court indicated that the mere fact that a further judicial review of a body's decision was not permitted under domestic law should not be understood to mean that the national law excluded access to a court if that body itself can be understood as a tribunal in the sense of Article 6(1) ECHR.[40]

In its case law, the Court thus clearly adopts a substantive, rather than a formal assessment of the first condition of the *Eskelinen*-test.[41] Such a substantive understanding will often already suffice to conclude that the first

36 *Olujić v Croatia* 22330/05 (ECtHR, 5 February 2009) paras 37–43.

37 *Oleksandr Volkov v Ukraine* 21722/11 (ECtHR, 9 January 2013) paras 87–91.

38 *Sturua v Georgia* 45729/05 (ECtHR, 28 March 2017) para 27; *Di Giovanni v Italy* 51160/06 (ECtHR, 9 July 2013) para 37.

39 *Xhoxhaj v Albania* 15227/19 (ECtHR, 9 February 2021) paras 236–239.

40 *Kamenos v Cyprus* 147/07 (ECtHR, 31 October 2017) para 74; *Bilgen* (n 11) para 71.

41 This substantive, rather than formal, assessment of the first criterion leads to a paradox in the application of the right of access to a court. For the defending government, at the admissibility phase it will be required, as a consequence of the Court's substantive understanding, to claim that the applicant was expressly excluded any access to a court and that the body that took the measure in question also did not constitute a tribunal in the sense of Article 6(1) ECHR. However, at the merits phase, it has to completely change this point of view and seek to argue that the applicant did in fact have access to a court. For the applicants, the same holds true but in the opposite way. At the admissibility phase, they will have to argue that they had access to a body that at least substantively can be

Eskelinen-criterion has not been met. This is particularly the case for certain kinds of measures, such as disciplinary sanctions. Most often, such sanctions are imposed after some form of adversarial proceedings, in which evidence may be submitted and perhaps heard by the Judge in question, ultimately leading to a reasoned decision. For the Court, that appears to be enough to qualify the body in question as a tribunal within the sense of Article 6(1) ECHR, thereby failing the first *Eskelinen*-criterion.[42]

Yet, the judgments in the Turkish cases have shown that such a more flexible approach is now also adopted with regard to the second criterion. Indeed, when one reads the Court's reasoning in those cases, it would seem difficult for a Contracting Party to still convince the Court that the exclusion of Judges from access to a court could be justified on objective grounds in the state's interests.[43] The crucial position that Judges play in a system of domestic checks and balances, and the independence that they require in this regard preclude a bond of loyalty and trust between the judiciary and the state. Rather, Judges are beholden only to the rule of law and democracy. Thus, after the substantive rather than formal application of the first *Eskelinen*-criterion, the Turkish cases have considerably raised the bar for the second criterion to be met as well.

All of this leads us to the conclusion that it will be very difficult – if not near impossible – for any of the Contracting Parties to make sure that both *Eskelinen*-criteria are still fulfilled when Judges are at issue.[44] In this regard, the Turkish cases constitute the most recent step in an evolution that has been visible in the Court's case law for a while now.

2.4 *The Reasons for this Evolution*

The question arises where this evolution may stem from. In its older, albeit rather limited, case law, the Court saw no problem in finding the second *Eskelinen*-criterion fulfilled on account of the specific position of the domestic

seen as a tribunal, only to then try to persuade the Court in the merits phase that there was no access to a court. For a similar criticism, see, *Broda and Bojara v Poland* 26691/18 and 27367/18 (ECtHR, 29 June 2021) Dissenting Opinion of Judge Wojtyczek, para 3.3. In this regard, it is interesting to see that in *Xhoxhaj*, the Court decided that since it had to determine whether a specific Albanian body could be seen as a tribunal established by law, it should join the applicability of Article 6(1) ECHR under the first *Eskelinen*-criterion to the merits. See, *Xhoxhaj* (n 39) para 239.

42 See, *Kamenos* (n 40) para 86; *Di Giovanni* (n 38) para 37. See also, *Eminağaoğlu* (n 12) para 99.

43 For a similar statement, see, *Loquifer v Belgium* 79089/13, 13805/14 and 54534/14 (ECtHR, 20 July 2021) Concurring Opinion of Judge Pavli, para 7.

44 See for a similar conclusion, J Sillen, '*Bilgen t. Turkije* (EHRM, nr. 1571/07) – De toegang tot de rechter voor rechters' (EHRC Updates, 26 April 2021): <https://www.ehrc-updates.nl/commentaar/211407?skip_boomportal_auth=1#_ftnref26>.

judiciary.[45] In *Özpinar* and *Apay*, two cases concerning Judges, the Court held that justice is not an ordinary public service insofar as it constitutes one of the essential expressions of sovereignty. By its very nature, the office of magistrate involves the exercise of prerogatives that are inherent in the sovereignty of the state and was therefore directly related to the exercise of public power, thereby fulfilling the second criterion.[46] In *Nazsiz,* the Court concluded in a similar manner.[47] In that case, disciplinary and criminal proceedings were initiated against a Turkish public prosecutor, who was suspected of forgery and accepting bribes. Here, the Court again argued that Article 6 ECHR was not applicable since Turkish law expressly excluded access to a court and the subject of the dispute related to the exercise of state power. Since the Court does not explain why it changed its approach, we are left to guess the reason(s).[48]

One possible explanation may be found in the broader context of the changing legal landscape in Europe.[49] It has been noted countless times in recent years that the rule of law and the independence of the judiciary are under threat in several European countries. In such circumstances, the procedural protection of domestic Judges, for example via their right of access to a court, becomes all the more important. A solid domestic institutional framework that guarantees the independence of its Judges is, furthermore, crucial for the faithful application of ECHR standards.[50] By strengthening the procedural

45 See also, the judgment of *Pitkevich v Russia* 47936/99 (ECtHR, dec, 8 February 2001), where the Court did not find Article 6(1) ECHR applicable to disputes between a Judge and the state. However, this judgment stems from before the *Vilho Eskelinen* judgment, and was thus decided on the basis of the stricter test of *Pellegrin* (n 14).

46 *Apay v Turkey* 3964/05 (ECtHR, dec, 11 December 2007); *Özpinar v Turkey* 20999/04 (ECtHR, 19 October 2010). See, however, the Separate Opinion of Judges Sajó and Popovic in *Özpinar*.

47 *Nazsiz v Turkey* 22412/05 (ECtHR, dec, 26 May 2009).

48 See also, *Broda and Bojara* (n 41) Dissenting Opinion of Judge Wojtyczek, criticising that there are in fact two different strands of case law applying the *Eskelinen*-criteria in opposing ways. As opposed to the *Bilgen* judgment, in *Eminağaoğlu* the Court does mention the older Turkish cases in which it did accept that the second *Eskelinen*-criterion had been met. It does, however, not explicitly explain if and why it departs from this older case law. Rather, it only points to the fact that the Turkish case law has changed since the 2010 constitutional reform and emphasises the special role in society that the judiciary plays as guarantor of justice. See, *Eminağaoğlu* (n 12) paras 73–76.

49 For another author who argues that the reason for the new strand of case law in the Turkish cases must probably be found in the Polish rule of law crisis, see, J Sillen, 'Straatsburg, Luxemburg en twee perspectieven op rechterlijke onafhankelijkheid' (2021) *SEW. Tijdschrift voor Europees en Economisch Recht* 628, 637.

50 R Spano, 'The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law' (2018) 18(3) *Human Rights Law Review* 473, 493. Importantly, this same idea has recently been mentioned by the Court's Grand Chamber. See, *Grzęda v Poland* [GC] 43572/18 (ECtHR, 15 March 2022) para 324.

safeguards that Judges enjoy on the domestic level, the Court would indirectly contribute to the conscientious application of the Convention rights.[51] This then ties into a third, related point. By now, the so-called rule of law crisis in Europe has found its way to the Court. With a small delay vis-à-vis the ECJ, the ECtHR has stepped into the ring as well, and is regularly issuing important judgments on issues of the rule of law and judicial independence, mostly concerning Poland.[52] Yet, many such cases, sometimes raising very difficult new questions, are still pending.[53] The Court's case law is not always equipped to easily deal with those questions, not least because domestic Judges are not in a position to enforce their own independence before the Court.[54] The Court is, of course, well aware of the cases on its docket, and may have introduced its new approach in the Turkish cases, with a view of its future application to the pending cases.[55] Even though there can be no certainty in that regard, it does not seem entirely unlikely that the above considerations were present in the back of the minds of the Strasbourg Judges when deciding on the Turkish cases.

51 R Spano, 'The Rule of Law as the Lodestar of the European Convention on Human Rights: The Strasbourg Court and the Independence of the Judiciary' (2021) 27 *European Law Journal* 13; A Tsampi, 'Separation of Powers and the Right to a Fair Trial Under Article 6 ECHR: Empowering the Independence of the Judiciary in the Subsidiarity Epoch', in *Fair Trial: Regional and International Perspectives. Liber Amicorum Linos-Alexandre Sicilianos*, R Spano and others (eds), (Anthemis 2021) 693, 706.

52 See, against Poland: *Xero Flor w Polsce sp z o o v Poland* 4907/18 (ECtHR, 7 May 2021); *Reczkowicz v Poland* 43447/19 (ECtHR, 22 July 2021); *Dolínska-Ficek and Ozimek v Poland* 49868/19 and 57511/19 (ECtHR, 8 November 2021); *Advance Pharma sp z oo v Poland* 1469/20 (ECtHR, 3 February 2022). There are also examples of other countries. See, for example, recently, *Tercan* (n 4).

53 The most recent judgment against Poland mentions that there are 94 more cases pending. See, *Advance Pharma sp z oo* (n 52) para 226.

54 On this issue: M Leloup, 'Who Safeguards the Guardians? A Subjective Right of Judges to their Independence Under Article 6(1) ECHR' (2021) 17(3) *European Constitutional Law Review* 394; P Ducoulombier, 'Le droit subjectif au juge à la protection de son indépendance: chaînon manquant de la protection de l'État de droit en Europe?', in *Fair Trial: Regional and International Perspectives. Liber Amicorum Linos-Alexandre Sicilianos*, R Spano and others (eds), (Anthemis 2021) 153; Tsampi (n 51).

55 Such strategic judicial behaviour is not unprecedented. It is, for example, difficult to imagine that the Grand Chamber's *Guðmundur Andri Ástráðsson* judgment (*Guðmundur Andri Ástráðsson* (n 26)), in which the Court held for the first time that the right to a tribunal established by law encompassed the appointment procedure for Judges, was not issued with the pending Polish cases in mind. Furthermore, this is corroborated by the immediate application of that new principle in several high-profile Polish cases concerning the rule of law, such as *Xero Flor* (n 52) (concerning the Polish Constitutional Tribunal), *Reczkowicz* (n 52) (concerning the Polish Disciplinary Chamber of the Supreme Court), and *Dolínska-Ficek and Ozimek* (n 52) (concerning the Polish Extraordinary Affairs Chamber of the Supreme Court).

Another, perhaps somewhat more speculative, reason, may be found in the Court's relationship with the Luxembourg Court in the protection of judicial independence. As indicated above, both European Courts have been issuing important judgments on the matter,[56] often in synergetic fashion by relying on each other's case law.[57] The ECJ in particular has taken great strides in the last couple of years when it comes to the protection of the domestic judiciary. Individual Judges are now in a position to ask the ECJ, via the preliminary ruling procedure, whether certain national laws, practices, or measures are in conformity with the principle of judicial independence, enshrined in Article 19(1)(2) TEU and Article 47 of the Charter. As evidenced by the case law,[58] many Judges make use of this lifeline and are increasingly looking to Luxembourg to uphold some minimum level of judicial independence within European countries. One related reason for the ECtHR's new approach in the Turkish cases might be that it would allow the Court to better keep pace with Luxembourg in its protection of national Judges and to remain an important actor in the ongoing judicial dialogue in the European sphere.

3 Subsequent Judgments: the New Approach Confirmed

It did not take long for the new approach that was expounded in the Turkish cases to be applied in subsequent judgments. At the time of writing, there have been five – or six, depending on how one interprets the *Loquifer* judgment – such cases. This section will briefly discuss those cases in chronological order. It will not delve into the specifics of all of those cases, but will more generally outline the context of each of them and the way in which the *Eskelinen*-criteria were applied. This overview will then help to inform the discussion on the importance and limits of this new strand of case law in the following two sections of this article.

56 For an overview, see, L Pech and D Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments Since the Portuguese Judges Case* (SIEPS 2021); I Jelić and D Kapetanakis, 'European Judicial Supervision of the Rule of Law: The Protection of the Independence of National Judges by the CJEU and the ECtHR' (2021) 13(1) *Hague Journal on the Rule of Law* 45.

57 In similar sense, Spano mentions the symbiotic relationship between the two Courts: Spano (n 51).

58 See, among many examples already: Case C-55/20 *Minister Sprawiedliwości* [2022] OJ C109/5; Case C-564/19 *IS* (*Illégalité de l'ordonnance de renvoi*) (ECJ, 23 November 2021); Case C-748/19 *Prokuratura Rejonowa w Mińsku Mazowieckim* [2021] OJ C24/3.

A little over a month after the *Bilgen* and *Eminağaoğlu* judgments, the first section of the Court rendered its judgment in the case of *Broda and Bojara v Poland*. In this case, two Polish Judges complained about the decision of the Minister of Justice, dismissing them from their mandate as court vice president. That power had been granted to the minister by a 2017 legislative amendment, which stated that they did not have to give reasons for such decisions and that no appeal lay open against them. In its judgment, the Court first established that there was a dispute about a right. At the time that the two Judges were appointed as court vice president, the applicable legislation clearly stated that such mandates lasted six years and according to the Court a later law could not retroactively wipe out such a right.[59] This right was, moreover, of a civil nature. As far as the first *Eskelinen*-criterion was concerned, the Court raised doubts whether the domestic legislation 'expressly' precluded the domestic Judges' access to a court, but it held that this issue did not need to be decided since, in any case, the second criterion had not been met.[60] It then went on to recall – at certain paragraphs verbatim – the basic points that it had raised in *Bilgen* and *Eminağaoğlu*. It reiterated the important position that Judges take up in the domestic constitutional framework as checks on the political branches and the concomitant need to safeguard their independence. In that light, it did not consider that the exclusion of the Judges of access to a court, whether or not it be express, could be justified on the basis of objective grounds in the state's interests.[61] Consequently, Article 6(1) ECHR was applicable to the case at hand. Since, like in the Turkish cases, the Judges had had no possibility of raising their complaints before a national court, the Court found a violation of that provision.

One month later, the Court's fifth section ruled in the case of *Gumenyuk v Ukraine*.[62] This case concerned changes in the Ukrainian judicial system. In 2016, the Ukrainian government introduced a law that imposed large-scale reform of the judicial system, by, among others, liquidating the then Supreme Court of Ukraine and establishing a new Supreme Court. As a consequence of this, the sitting Judges of the previous Supreme Court could no longer perform their function, albeit according to the law they kept the status, rights, and guarantees of Judges. Several of those Judges brought a complaint before the Court, claiming, among other things, a violation of Article 6(1) ECHR since they did

59 *Broda and Bojara* (n 41) paras 104–109.
60 Ibid paras 114–116.
61 Ibid paras 117–124.
62 *Gumenyuk v Ukraine* 11423/19 (ECtHR, 22 July 2021).

not have access to a court to challenge the alleged unlawful prevention from exercising their judicial function as a result of the legislative amendments.

As to the existence of a right, the Court noted that the Ukrainian constitution entitled the Judges to remain in post until their retirement. According to the Court, this gave the applicants at least an arguable basis on which they could claim a right against arbitrary removal from judicial duties. Similar to what it did in *Bilgen*, the Court drew inspiration from the principles of international law and common values of the Council of Europe. Given those documents, there was no doubt in the Court's eyes that Judges may claim, on the basis of the professional guarantees afforded to them, that the principles of independence of the judiciary and the security of tenure should be fully complied with in the context of measures that affect their status or career. On the basis of those considerations, it found that the applicants could rely on a right within the meaning of Article 6(1) ECHR.[63] The question of whether this right was of a civil nature was dealt with in a similar fashion as in *Broda and Bojara*. While the Court in this case appeared to be quite convinced that the law expressly excluded a right of access to a court, it considered it unnecessary to give a conclusive opinion on this issue, since the second criterion was, in any event, not met. It then essentially reiterated the same arguments as in *Bilgen*, *Eminağaoğlu,* and *Broda and Bojara* to conclude that the exclusion could not be justified, thereby finding Article 6(1) ECHR applicable.[64]

The third case that will be mentioned here is *Loquifer v Belgium*, rendered by the Court's third section.[65] In this case, a member of the Belgian High Council of Justice complained in relation to the lack of recourse to challenge a measure suspending them from the Council. According to Article 151(2) of the Belgian Constitution, the High Council is composed of an even number of judicial members – to wit Judges and prosecutors – who are appointed by their peers, and non-judicial members who are appointed by the Senate. Loquifer, though a former Judge, belonged to the latter, non-judicial category. A few months after their appointment, they were charged with forgery and the use of forged documents for acts that they had allegedly committed whilst they were president of a first instance court. The general assembly of the High Council decided to suspend Loquifer from all of their functions as long as the investigation was underway. Loquifer complained before the Court that they could not challenge this suspension measure.

63 Ibid paras 50–56.
64 Ibid paras 61–67.
65 *Loquifer* (n 43).

Remarkably, the Belgian government did not contest the applicability of Article 6(1) ECHR in this case.[66] Nevertheless, since questions concerning the applicability of Convention rights denote the Court's jurisdiction, it examined such issues *ex officio*.[67] As to the existence of a right, the Court pointed to the Belgian judicial code, which states that members of the High Council are appointed for a renewable mandate of four years. In the same vein, as it did in *Broda and Bojara*, the Court interpreted this in such a way that Loquifer in principle had a right to finish this mandate.[68] Turning then to the question as to whether this right was of a civil nature, the Court again applied both *Eskelinen*-criteria. As to the first of these criteria, the Court was not convinced that it was fulfilled. Even though it did not want to delve too deeply into the intricacies of the Belgian legislation, it followed the reasoning of the Belgian government that the law did not expressly preclude the access to a court for people like Loquifer.[69] However, yet again the Court left this point somewhat in the middle, since the second criterion was in any case not met. Without reference to any previous case law, including the cases that were mentioned above, the Court noted that the government had not invoked the existence of a special bond of trust between Loquifer and the state, which could have justified the exclusion of the access to a court. Since the Court could also not see such a bond, the second criterion had not been met and Article 6(1) ECHR applied. The Court thus appears to have adopted the same approach as it had done in the other cases that are mentioned in this article – which is the reason why it is included here. Yet, it should be reiterated that in this case, Loquifer was a non-judicial member of the Belgian High Council and in that regard, it may be telling that the Court did not rely on any of those previous judgments in its reasoning.

In March 2022, the Grand Chamber of the Court issued its judgment in the case of *Grzęda v Poland*.[70] In essence, the case concerned the immediate

66 The defence by the Belgian government may be seen as a case in point of the paradoxical logic in the application of the first *Eskelinen*-criterion (see, n 40). It simply acknowledged the applicability of Article 6(1) ECHR and tried to argue that the applicant did in fact have access to a court.

67 See recently, *Ekimdzhiev and Others v Bulgaria* 70078/12 (ECtHR, 11 January 2022) para 253; *Loquifer* (n 43) para 29.

68 *Loquifer* (n 43) para 33.

69 The point of contention concerned article 259bis3 of the Belgian judicial code. Paragraph 4 of that provision states that the General Assembly can lift the mandate of one of its members for serious reasons, a decision against which there is no appeal. The question was whether this provision was applicable to a mere suspension as well.

70 *Grzęda* (n 50).

removal *ex lege* of the former members of the Polish National Council of the Judiciary and the impossibility of those members to challenge this measure. While a lot can be said on this (arguably overly long and not very well-structured) judgment,[71] this article is not the best place to do so. For the purposes of this piece, it suffices to point out the following. First, it is worth noting that the considerations in *Bilgen* and *Eminağaoğlu* concerning the employment relationship between the Judge and the state, and the absence of a bond of loyalty and trust to the holders of government powers, are mentioned by the Grand Chamber under the heading of general principles on Article 6(1) ECHR.[72] This shows that those considerations may now be understood as established and binding principles in the case law. Second, as to the case at hand, the Grand Chamber relied – similar to *Loquifer* and *Broda and Bojara* – on Article 187(3) of the Polish Constitution to conclude that there was an arguable right for the members of the judicial council to finish their four-year term. As far as the first *Eskelinen*-criterion was concerned, the Court held – once again – that that question could be left open, since in any case, the second criterion had not been met.[73] When it turned to the second criterion, the Grand Chamber spent many paragraphs on the rule of law, the importance of judicial independence, the existing international standards in that regard, the legislative amendments in Poland, and the judgments of the Polish Supreme Court and Constitutional Court. Yet, in what can arguably be seen as the key paragraphs in its reasoning, the Court referred to the special role in society of the judiciary and the importance of protecting the right of access to a court for Judges in matters

71 One can read the much more succinct and sharply formulated Concurring Opinion of Judge Lemmens for criticism in this regard (see, ibid Concurring Opinion of Judge Lemmens). For a critical comment regarding the judgment, see also, D Kosař and M Leloup, 'Saying Less is Sometimes More (Even in Rule-of-Law Cases): *Grzęda v Poland*' (EU Law Live, 31 March 2022): https://eulawlive.com/grzeda-v-poland-by-david-kosar-and-mathieu-leloup/; M Leloup and D Kosař, 'Sometimes Even Easy Rule of Law Cases Make Bad Law: *Grzęda* v *Poland*' (2022, forthcoming) *European Constitutional Law Review*.

72 *Grzęda* (n 50) para 264.

73 Ibid para 294. In an unexpected twist, the Grand Chamber decided to use this case to further develop the first criterion. It held that the first condition can also be met, even where the domestic law does not expressly exclude access to a court, if there is an implicit exclusion, which stems from a systemic interpretation of the domestic legal framework or the whole body of legal regulation (para 292). In doing so, the Grand Chamber nuanced – or perhaps overturned – years of established case law. It is very difficult to understand why the Grand Chamber took the time to belabor this point, only to then conclude that it did not have to rule on this issue since in any case the second condition had not been met. In doing so, it also completely neglects to give the domestic courts – or the other sections in the Court for that matter – any guidance on how to apply this new understanding.

that concern their status or career. It then held that, given the important role played by judicial councils, similar considerations should apply as regards the judicial members who are elected for them because of their status and in view of the need to safeguard judicial independence.[74] As a result of this, the second criterion had not been fulfilled and Article 6(1) ECHR must be understood to apply in its civil limb.

A few weeks later, the Court's fifth section issued its judgment in *Gloveli v Georgia*.[75] In that case, a former Judge complained in relation to their inability to have recourse to judicial review of a decision refusing to appoint them to a judicial post. According to the Court, what was at issue in this case was not the right to be appointed to judicial office, but rather the right to a fair procedure during the examination of an application by a former Judge for a judicial post. The Court pointed out that the Georgian Constitution contained a right of equal access to public service, which was interpreted by the Constitutional Court as including the procedural right of access to a court, also in judicial appointment procedures. Accordingly, the applicant had an arguable right to a fair procedure in the examination of their application.[76] As to the *Eskelinen*-criteria, the Court first noted that it could not conclude that the domestic legal framework actually excluded access to a court for the applicant. However, it once again sidestepped the issue and held that it still had to assess whether the second criterion was satisfied. It then repeated the basic considerations from the abovementioned cases and found that, in view of the importance of the protection of judicial independence, the fact that the applicant had not been able to challenge the refusal for the judicial position in question could not be regarded as being in the interest of a state governed by the rule of law, thereby failing the second criterion.[77]

Finally, in June 2022, the Court's first section ruled in the case of *Żurek v Poland*.[78] The case was essentially a carbon copy of the *Grzęda* judgment. Here as well, the applicant complained about having lost his mandate as a judicial member of the Polish National Council of the Judiciary due to the legislative reform. Unsurprisingly, the Court followed the approach set out in the Grand Chamber judgment and – albeit in a much more succinct manner than in *Grzęda* – found that there was an arguable right, and that the second *Eskelinen*-criterion had not been met. Since there had not been any possibility of judicial

74 *Grzęda* (n 50) paras 302–303.
75 *Gloveli v Georgia* 18952/18 (ECtHR, 7 April 2022).
76 Ibid paras 36–41.
77 Ibid paras 43–52.
78 *Żurek v Poland* 39650/18 (ECtHR, 16 June 2022).

review open for the applicant Judge, the Court concluded that the very essence of his right of access to a court had been impaired, finding a violation of Article 6(1) ECHR.

To conclude, it should be pointed out that the approach that was established in the two Turkish cases has later been applied, at times verbatim, by various other sections within the Court and even by the Grand Chamber, overall with very little opposition.[79] As such, this approach may at this point be understood as constituting an established strand of case law within the Strasbourg jurisprudence, thereby also implicitly overruling the approach that was adopted in earlier cases, such as *Özpinar* and *Apay*.

4 The Importance and Consequences of the New Approach

Now that the new approach that was introduced in the Turkish cases and its application in later judgments has been set forth in more detail, we can take a step back to see why exactly it is important. A first remark in this regard should be that the relative weight of the *Eskelinen*-criteria seems to have shifted when the case at hand concerns Judges. The Court's approach in assessing the admissibility of Article 6(1) ECHR has changed since the Turkish cases. Whereas it still held in *Bilgen* that it rarely had to look beyond the first criterion,[80] now the focus rather seems to lie on the second one. This becomes readily apparent from a number of cases, which were addressed above. The Court now often avoids taking a clear stance on the first criterion, stating that it is not necessary to establish whether the Judges in question were expressly excluded from the access to a court, since, in any case, such an exclusion could not be justified.[81]

As a second remark, it should be pointed out that the most immediate consequence of this new approach is that it has strengthened any claim for the admissibility of Article 6(1) ECHR in disputes about the status and career of Judges. As mentioned above, while the test itself has not been abandoned, it seems difficult for states to convince the Court that both *Eskelinen*-criteria have been fulfilled in such a context. A similar stance has been taken by Judge Pavli in his concurring opinion in the *Loquifer* judgment, claiming that:

79 The only explicit criticism is to be found in *Broda and Bojara* (n 41) Dissenting Opinion of Judge Wojtyczek, relying on the judgment of *Apay* (n 46). See, more indirectly, *Loquifer* (n 43) Dissenting Opinion by Judge Zünd.

80 *Bilgen* (n 11) para 70.

81 *Eminağaoğlu* (n 12) para 71; *Broda and Bojara* (n 41) para 116; *Gumenyuk* (n 62) para 64. See also, *Loquifer* (n 43) para 40.

> there exists a presumption that the second *Eskelinen*-criterion does not apply *and cannot apply* to disputes about the employment condition of judges and prosecutors, who should benefit from the right of access to a court in such circumstances.[82]

Similarly, Judge Lemmens mentioned in his concurring opinion in *Grzęda* that, because of the loyalty that Judges are beholden to the rule of law and democracy rather than the holders of state power, 'it is not justified to exclude members of the judiciary from the protection of Article 6 of the Convention in matters concerning the conditions of their employment on the basis of the special bond of loyalty and trust within the state'.[83] From the few existing cases in which the new approach has been applied, it would indeed seem as though the Court does not accept that the second *Eskelinen*-criterion is fulfilled when the dispute in question may affect the status and career of Judges.[84] The above-mentioned case law already proves that this is the case for disciplinary sanctions (*Eminağaoğlu*), the involuntary transfer to a different court (*Bilgen*),[85] the dismissal from certain mandates such as court (vice) president (*Broda and Bojara*), appointment decisions (*Gloveli*), the discontinuation of the judicial function (*Gumenyuk*), and even ancillary functions, such as membership of a judicial council (*Grzęda*). Yet, it would appear that other measures, such as the transfer to a different chamber within the same court, decisions about the promotion of Judges, the lowering of wages of Judges,[86] or the secondment of Judges,[87] may just as well fall within that same category. At the time of writing,

82 *Loquifer* (n 43) Concurring Opinion of Judge Pavli (author's translation and emphasis added).

83 *Grzęda* (n 50) Concurring Opinion of Judge Lemmens, para 12.

84 See also, *Dolínska-Ficek and Ozimek* (n 52) para 228, where the Court held that it must be particularly attentive to the protection of members of the judiciary against measures affecting their status or career that can threaten their judicial independence and autonomy.

85 See also, the recent judgment of *WZ*, in which the Luxembourg Court also held that there must be a right to judicial review in case of involuntary transfer of Judges (Case C-487/19 *WZ* (ECJ, 6 October 2021) para 118).

86 Whereas the ECJ has clearly established that a level of remuneration commensurate with the importance of the judicial function is an essential guarantee to judicial independence (Case C-49/18 *Escribano Vindel* [2019] OJ C131/13 para 66), such a link between remuneration and independence has so far not been made in the case law of the ECtHR.

87 See, *Prokuratura Rejonowa* (n 58). In this judgment (para 83), the ECJ established that a judicial review should be present in case of involuntary termination of secondment.

there are several cases pending that will allow the Court to further develop its case law in this regard.[88]

The fact that Article 6(1) ECHR will apply to disputes about such measures, means that in turn these disputes must be handled in a way that conforms to the standards set out in that provision. In essence, this can go one of two ways: either the body that takes the measure in question itself satisfies the requirements of Article 6(1) ECHR, or – when that is not the case – this measure is amenable to review by a body that does fulfil those requirements and has sufficient jurisdiction.[89] It is important to stress in this regard that Article 6(1) ECHR does not require a court of law of the classic kind, integrated within the standard judicial machinery of the country.[90] Rather, the Court has consistently understood the term 'tribunal' in a substantive sense by its judicial function. This means that a tribunal is any body that determines matters within its competence on the basis of legal rules and after proceedings conducted in a prescribed manner.[91] Importantly, it should also satisfy a series of further requirements, such as independence, impartiality, and the duration of its members' terms of office.[92] From the existing case law, the requirement of independence should not be taken to mean that each and every member of a certain body must be a Judge before it can be seen as a tribunal in the sense of Article 6(1) ECHR. In its case law concerning disciplinary sanctions for Judges, for example, the Court has indicated that a body is deemed independent as long as a majority of its members consists of Judges appointed by their peers.[93]

88 For some examples of pending cases that may offer the Court such chances, see, *Alkan v Turkey* 24492/21 (ECtHR) (concerning the lack of judicial review against a decision by the Turkish High Council of Judges and Prosecutors to not appoint the applicant to judicial office); *Parpalac and Others v Moldova* 24998/15 and others (ECtHR) (concerning Judges who were dismissed by the Moldovan judicial council). See also, *Andrias v Moldova* 57590/14 (ECtHR); *Davchev v Bulgaria* 39247/14 (ECtHR); *Munteanu v Moldova* 25423/18 (ECtHR).

89 This is well-established case law: *Loquifer* (n 43) para 56; *Edizioni Del Roma Società Cooperativa ARL and Edizioni Del Roma SRL v Italy* 68954/13 and 70495/13 (ECtHR, 10 December 2020) para 66; *Eminağaoğlu* (n 12) para 94; *Di Giovanni* (n 38) para 52. Recently, see also, *Grosam v the Czech Republic* 19750/13 (ECtHR, 23 June 2022) para 115.

90 For example, *Ali Riza v Turkey* 30226/10 and 5506/16 (ECtHR, 28 January 2020) para 173; *Beg SPA v Italy* 5312/11 (ECtHR, 20 May 2021) para 126.

91 *Guðmundur Andri Ástráðsson* (n 26) para 219; *Xero flor* (n 52) para 194; *Xhoxhaj* (n 39) para 282.

92 *Belilos v Switzerland* 10328/83 (ECtHR, 29 April 1988) para 64.

93 See, *Oleksandr Volkov* (n 37) para 109. Later confirmed in: *Denisov v Ukraine* [GC] 76639/11 (ECtHR, 25 September 2018) paras 68–71. See also, *Xhoxhaj* (n 39) para 299. More recently, the Court has also referred to this standard, though in the form of a recommendation, in a case where the judicial council had competence in appointing Judges rather than disciplinary powers. See, *Grzęda* (n 50) para 305.

The Contracting Party will thus comply with Article 6(1) of the Convention if the measure that affects the status or the career of the Judge is either taken by a body that complies with the Court's substantive understanding of the notion of tribunal or is amenable to review by such a body. Exactly which of those two roads is taken is up to the discretion of the Contracting Parties; the Convention does not impose anything in that regard. This means that the Contracting Parties can choose how they amend their legal system in order to comply with the Convention standards. Let us look at the cases of *Bilgen* and *Eminağaoğlu* as an example. As mentioned already, the issue there was that the High Council of Judges and Prosecutors could not be seen as a tribunal and that no appeal lay open against its decisions. In order to comply with those judgments, Turkey can either choose to reorganise the High Council in such a way that it conforms to the standards of Article 6(1) ECHR or open its decisions up to a review.[94] Similarly, after *Loquifer*, the Belgian government has the option to amend the Belgian High Council of Justice in such a way that it constitutes a tribunal or to subject its decisions to a review.[95] In other cases, there may not be much of a choice. If, for example, a country is set on giving the power to transfer Judges or to decide on specific judicial mandates to a member of the executive, like Poland in the *Broda and Bojara* case, then the only remaining option is to allow for a review of such decisions.

The broadened applicability of Article 6(1) ECHR as a consequence of the approach that was set forth in the Turkish cases may thus have rather far-reaching effects, even of an institutional nature. In general, with this strand of case law the Court indicates that for those measures that affect the career and status of Judges, it should be Judges themselves that have the last word. The question whether this is a good or bad thing is anything but a simple one and is much too broad to discuss here in detail. As is often the case, there are pros and cons, and one may legitimately discuss this issue. In what follows, this article will first discuss the strengthening effects of this new approach in terms of judicial independence vis-à-vis the political branches. Then, it will point to its broader – perhaps unforeseen – potential consequences in terms of internal judicial independence and domestic balance of power.

94 Given Turkey's clear choice to exclude the decisions by the High Council from any kind of review and the fact that the Council was mainly defective as to the procedural safeguards it offered (see on this, *Eminağaoğlu* (n 12) para 99), the former seems like the most likely scenario.

95 In fact, in an action plan submitted in May 2022, the government seems to have chosen the second option. See, Committee of Ministers, 'Communication from Belgium Concerning Loquifer v Belgium' (11 May 2022) DH-DD(2022)528.

On the one hand, it is undisputable that this approach aids in safeguarding Judges from undue pressures coming from the political branches. It is not difficult to see that if a member of the executive has the unchecked power to transfer, sanction or dismiss Judges, or strip them from certain mandates, this would lead to a chilling effect that is irreconcilable with the idea of an independent judiciary. In this sense, the Court strengthens the common understanding of the separation of powers by better protecting Judges from undue interference by the political branches, or at least requiring judicial review of such interference.

As such, the Court's new approach may also have some important applications in future cases addressing rule of law backsliding. Contracting Parties are now no longer able to immunise measures that may affect the status and career of Judges from any form of judicial review. In this sense, it greatly increases the procedural protection that domestic Judges enjoy and offers them chances to enforce their rights on the domestic level. Furthermore, it provides domestic Judges with a much-needed chance to get some kind of vindication before the ECtHR in the absence of such national avenues. This was already evidenced by the *Broda and Bojara* judgment. As mentioned above, the current case law does not allow domestic Judges to rely on a subjective right to judicial independence before the Court. Other provisions might be relied on to bring cases before the Court, such as Article 8 or Article 10 ECHR, but those are more context specific and would, in all likelihood, not have helped Broda and Bojara in their case. The same could be said in the cases of *Gumenyuk* and *Grzęda*. The new approach offers Judges in such circumstances a new complaint that they can bring before the Court in order to get some form of satisfaction. Perhaps the Court even thought that this new approach was the best course of action to offer domestic Judges more procedural protection, without having to introduce a major overhaul of its jurisprudence, such as by establishing a subjective right of independence for Judges.[96]

With the two Turkish cases, the Court thus seems to have transformed the right of access to a court into a – perhaps somewhat unlikely – new weapon in the arsenal for the fight against rule of law backsliding. Furthermore, due to the nature of that right, the onus will be on the national authorities to allow for the necessary domestic remedies and bring the domestic legal system more in line with the requirements of the rule of law. A conscientious application of the principles underlying those judgments should thus in principle lead to more structural improvements in the domestic legal system. As such, what

96 On this, see, Leloup (n 54).

can at first glance seem like a rather technical and small development in the Court's case law may prove to pack quite a punch in the overall rule of law case law of the Court.[97] In fact, one can already see that this new approach is being relied on in several newly communicated cases.[98]

The above shows that the new approach in the Court's case law has positive effects. Yet, on the other hand, there may also be reason for caution in putting the final word concerning disputes about the careers and status of Judges within the hands of Judges themselves. There is growing proof that so-called judicial self-governance may come with its own problems, such as the risk of patronage and corruption, and thus may equally entail risks for the independence of Judges.[99] In Slovakia, for example, a judicial elite has managed to get a strong grip on the judiciary at large via a system of carrots for their allies and sticks for those who oppose them.[100] Even in Belgium, a country that ordinarily does not raise many alarms in terms of judicial independence, instances have been documented in which a court president threatened hierarchically lower Judges with disciplinary proceedings if they did not follow a specific interpretation of the law that the court president adhered to.[101] Moreover, recent experiences in some European countries have shown that threats to the independence of Judges may just as well come from inside the judiciary as soon as some strategic judicial actors have been captured.

97 See, for some pending cases in which it may prove important: *Hejosz v Poland* 46854/20 (ECtHR) (complaint concerning the revocation by the Minister of Justice of a delegation of a Judge to a higher court without any reasoning and on the basis of unknown criteria); *Gyulumyan and Others v Armenia* 25240/20 (ECtHR) (complaint concerning the lack of access to a court to challenge the termination of their position as Constitutional Court Judges and -for one of the applicants- their mandate as President of the Constitutional Court); *Jezierska v Poland* 43949/19 (ECtHR) (complaint concerning the lack of access to a court to challenge the mandatory lowering of the retirement age for Polish Judges); *Pająk and Others v Poland* 25226/18 and others (ECtHR) (complaint concerning the lack of access to a court to challenge the decision of the Polish judicial council not to prolong the applicant's mandate as a Judge to the age of 70).

98 *Lorenzo Bragado v Spain* 53193/21 (ECtHR); *Kurtoğlu Karacık v Turkey* 62622/15 (ECtHR); *Vanchev v Bulgaria* 28003/15 (ECtHR).

99 See, on a general level, with more references: K Šipulová, S Spáč, D Kosař, T Papoušková, and V Derka, 'Judicial Self-Governance Index: Towards Better Understanding of the Role of Judges in Governing the Judiciary' (2022) *Regulation and Governance*; D Kosař, *Perils of Judicial Self-Government in Transitional Societies* (Cambridge University Press 2016).

100 On this, see, S Spáč, K Šipulová, and M Urbániková, 'Capturing the Judiciary from Inside: The Story of Judicial Self-Governance in Slovakia' (2018) 19(7) *German Law Journal* 1741.

101 A Billiet, 'Rechtsprekende onafhankelijkheid: ook een uitdaging voor uw verbond' (2016) *Tijdschrift voor Vrederechters* 507, 509.

Essentially, the point that is being made here boils down to the following: the inherent pressure on Judges – and the potential interference with their independence – that stems from actors being able to take decisions that affect their status and career does not disappear by putting it in the hands of members of the judiciary; rather, it simply moves from an actor outside of the judiciary, to one inside.[102] The potential issue thus becomes one of internal judicial independence. The Court has, to its credit,[103] already developed a basic jurisprudence on that topic.[104] Yet, this is to little avail for domestic Judges, since the Court's case law only allows potential issues of internal independence – just like complaints about external independence – to be raised by parties to the dispute, and not by Judges themselves. Put differently, while the Court's new jurisprudence may help in lowering the potential risk of pressure coming from the political branches, that same risk may now come from within the judiciary. While it is hardly surprising that the ECtHR, which has for decades now been dealing with cases concerning the independence of the judiciary towards the political branches, focuses more on the former of those two, it should not be unaware of those possible negative effects as well.

On a more general level, the new approach may be seen as another instance in which the Court empowers the domestic judiciary vis-à-vis the political branches of government, thereby skewing the domestic balance of powers. As the Court itself regularly mentions,[105] the principle of separation of powers has been increasingly prominent in its case law.[106] Generally speaking, its case law has the consequence of strengthening the position of the domestic judiciary

102 See, for a similar statement: F Wittreck, 'German Judicial Self-Government – Institutions and Constraints' (2019) 19(7) *German Law Journal* 1931, 1941.

103 In the case law of the ECJ, this issue is essentially non-existent. See, Case C-357/19 and others *Euro Box Promotion* (ECJ, 4 March 2021), Opinion of AG Bobek, para 142.

104 For overview of this case law, see, J Sillen, 'The Concept of 'Internal Judicial Independence' in the Case Law of the European Court of Human Rights' (2019) 15(1) *European Constitutional Law Review* 104.

105 For some examples, *Svilengaćanin and Others v Serbia* 50104/10 and others (ECtHR, 12 January 2021) para 64; *Anželika Šimaitienė v Lithuania* 36093/13 (ECtHR, 21 April 2020) para 78; *Thiam v France* 80018/12 (ECtHR, 18 October 2018) para 62.

106 For an overview of the relevant case law, see, M Leloup, 'The Impact of the Fundamental Rights Case Law of the European Court of Human Rights and the European Court of Justice on the Domestic Separation of Powers' (PhD Thesis, University of Antwerp 2021); A Tsampi, *Le principe de séparation des pouvoirs dans la jurisprudence de la Cour européenne des droits de l'homme* (Pedone 2019).

against the legislature and the executive.[107] In the past, the Court has been reproached for this judicial empowerment, by pointing out – not incorrectly – that by strengthening the national Judges, the Court was mainly indirectly strengthening its own position.[108] Without necessarily wanting to go that far, it is pointed out here that this tendency of the Court to empower domestic Judges does come with its pitfalls. What is important to recall is that the new approach of the Court may stretch beyond the more basic tenets of judicial independence – such as the appointment or irremovability of Judges – into the more nuanced areas of the career and status of Judges. Those areas may, however, be part of a delicate system of checks and balances between the judiciary, the political branches, and perhaps other (independent) actors.[109] Such systems are crucial, not only to safeguard independence, but also for fostering oversight and accountability. By broadening the applicability of Article 6(1) ECHR, the Court has extended its reach over those areas. The consequences thereof, as discussed above, will likely be that Judges themselves get a decisive say in those matters. As such, a – possibly unforeseen and perhaps even unwanted – consequence of this strand of case law seems to be that it might upset those carefully struck balances and tilt them decisively in favour of the judiciary. In this sense, it certainly seems possible that some states may challenge this new approach.

Again, it can certainly be understood that a Court that is tasked with safeguarding the right to an independent judiciary, and which has conscientiously been doing so for decades, may be predisposed to value that independence over other values, such as (democratic) accountability of Judges and the avoidance of corporatist reflexes. Yet, the further that the Court ventures into the more complex issues of checks and balances, the more important a balanced view of such – at times competing – values becomes. As of yet, there are not many signs in the case law that the Court actually takes such other values into

107 In such sense, see, L Milano, 'La séparation des pouvoirs et la jurisprudence de la Cour européenne des droits de l'homme sur le droit à un procès équitable' (2019) 2(3) *Titre VII* 60; N Le Bonniec, 'L'appréhension du principe de la séparation des pouvoirs par la Cour européenne des droits de l'homme' (2016) *Revue française de droit constitutionnel* 335.

108 In such sense, see, D Kosař and L Lixinski, 'Domestic Judicial Design by International Human Rights Courts' (2015) 109(4) *American Journal of International Law* 713, 755.

109 For example, in some countries judicial councils are composed partly of lawyers or law professors. See, among others: Article 153 Serbian Constitution; Article 65 French Constitution; Article 159 Turkish Constitution.

account.[110] All of this leads to the conclusion that the Court should be mindful of the effects that its case law has on very complex and at times nuanced issues of separation of powers and checks and balances, and should be careful to deal with them in an equally sensitive and nuanced way.

The above considerations should certainly not be interpreted as being unduly critical against the Court's jurisprudence and the approach set out in the two Turkish cases. All of this raises very complex issues of judicial independence, judicial accountability, and separation of powers, which are highly dependent on the domestic institutional system and the formal and informal power relationships that function within. That is a daunting arena to step foot in, particularly for a supranational court. One can also not lose sight of the fact that this new approach adopted by the Court – presumably as a reaction to the current rule of law landscape in Europe – undoubtedly strengthens the independence of the judiciary vis-à-vis the political branches, and thereby contributes to the respect for the rule of law in Europe. However, that should not lead us to ignore the potential dangers, in terms of internal independence, judicial accountability, and separation of powers, that come with it. So far, the Court has given little indication that it takes on board such other considerations. Nevertheless, in the long run, a one-sided focus on separation of powers and judicial independence, without regard to the broader institutional balance, may prove more harmful. It will be up to the Court in the future to prove that it can safeguard the one without foregoing the other.

5 The Limits to the New Approach

Now that the relevance of the new approach has been discussed, this final substantive section will examine whether there are any limits to it. It will discuss three points: the fact that there still needs to be a right upon which the Judge can rely; the question whether the presumption of applicability under Article 6(1) ECHR is still rebuttable when Judges are concerned; and whether this new approach may be applied also to people that are not Judges.

110 Perhaps one recent example can indirectly be found in the judgment of *Xhoxhaj* (n 39). The case concerned a vetting process for Judges, which had been introduced in response to the widespread perception of corruption and a lack of public trust in the national judicial system. The Court attached importance to the accountability of Judges and held that the new vetting system responded to the urgent need to combat alarming levels of corruption. Due to this, it found that the vetting system responded to a pressing social need.

A first important point to make here is that there still needs to be a right on which the Judge in question relies. The aim of the *Eskelinen*-test is to determine whether the right in question is civil in nature, for the purposes of Article 6(1) ECHR. Logically, this still presupposes the existence of a right in the domestic legal order on which the Judge can rely. According to well-established case law, the Court may not interpret Article 6(1) ECHR in such a way that it creates a substantive right which has no legal basis in the domestic legal order.[111] This is a considerable hurdle for the topic of this article. When we are talking about the status and career of Judges, often there are no clear subjective rights involved. A Judge may not always have a clear right to be promoted or to get a mandate like court president, or have a right not to be transferred to another jurisdiction.

Two important nuances need to be made here. First, the effect of this limitation greatly varies between legal orders, depending on their legislation. In some Contracting Parties, this hurdle may be easier to overcome than in others. A recent example of that can be found in the judgment of *Dolińska-Ficek and Ozimek v Poland*. In this case, two Polish Judges had applied for vacant judicial posts in other courts but were not recommended for those posts by the National Council of the Judiciary. They complained that their appeal against that decision before the Extraordinary Review and Public Affairs Chamber of the Supreme Court had not been examined by an independent and impartial tribunal established by law. In its assessment of whether the applicant could rely on a right, the ECtHR pointed out that Article 60 of the Polish Constitution grants the right of equal access to public service and also requires judicial review of the observance of that right. On that basis, the Court held that there could be no doubt that there was a right within the meaning of Article 6(1) ECHR.[112] In the subsequent case of *Gloveli*, a similar provision existed in the Georgian Constitution, which equally led the Court to acknowledge the existence of a right.[113]

Second, even in the absence of such a domestic provision, the Court has shown great flexibility – perhaps even willingness – in accepting the existence of a right when domestic Judges are concerned. One can already see this in the cases of *Broda and Bojara* and *Baka*, where the Court relied on the constitutionally protected principles of judicial independence and the irremovability

111 For recent authorities, see, *Károly Nagy v Hungary* [GC] 56665/09 (ECtHR, 14 September 2017) para 61; *Denisov* (n 93) para 45; *Regner v Czech Republic* [GC] 35289/11 (ECtHR, 19 September 2017) para 100.

112 *Dolínska-Ficek and Ozimek* (n 52) paras 230–231.

113 *Gloveli* (n 75) para 38.

of Judges in order to conclude that, since the applicants in question were appointed for a mandate of a specific duration, in principle they had a right to finish that mandate.[114] Even more significant are the cases of *Bilgen* and *Gumenyuk*, where the Court relied on international – non-binding – standards to enhance the interpretation of domestic law as to the existence of a given right. Again referring to the prominent place of the domestic judiciary in a system of separation of powers and checks and balances, the Court pointed to the importance of procedural safeguards for domestic Judges, as also protected under these international documents.[115] While such reference to international sources in order to establish whether there existed a right is not unprecedented in the Court's case law,[116] it is also decidedly not a common practice and arguably stretches Article 6(1) ECHR to its limits.[117] It can be seen as a telling sign of the Court's willingness to protect domestic Judges.[118]

A second point that should be mentioned here is that, in principle, the *Eskelinen*-test established a presumption that Article 6(1) ECHR applies in disputes between civil servants and the state. As mentioned before, this presumption is rebuttable: the Contracting Party can deny the applicability of Article 6(1) ECHR if it fulfils both *Eskelinen*-criteria, meaning that the domestic legislation expressly excluded access to a court for the post or category of staff in question and that this exclusion was justified on objective grounds in the state's interest. According to the Grand Chamber in *Vilho Eskelinen*, in order for the exclusion to be justified, it is not enough for the state to establish that the civil servant in question participates in the exercise of public power or that there exists a special bond of trust and loyalty between the civil servant and the state. It is also for the state to show that the subject matter of the dispute at issue is related to the exercise of state power or that it has called into question the special bond.[119] Those same considerations are copied verbatim in many cases that were mentioned earlier in this article. While that is certainly a high

114 *Broda and Bojara* (n 41) paras 104–109; *Baka* (n 2) paras 107–109. See also, *Loquifer* (n 43) paras 32–35.

115 *Gumenyuk* (n 62) paras 52–54; *Bilgen* (n 11) paras 58–63.

116 See the sources cited above (n 25).

117 Again, raising the question as to exactly what place such non-binding instruments take within the Court's case law. On that issue, see, among others: L Glas, 'The European Court of Human Rights' Use of Non-Binding and Standard-Setting Council of Europe Documents' (2017) 17(1) *Human Rights Law Review* 97.

118 See, similarly also: *Guðmundur Andri Ástráðsson* (n 26), in which the Court relied on such non-binding international sources to expand its interpretation of Article 6(1) ECHR.

119 *Vilho Eskelinen* (n 10) para 62.

threshold to reach, it makes clear that the case law in principle does set limits to the presumption established in the judgment of *Vilho Eskelinen*. Yet, as mentioned above, from the available case law it seems difficult – if not impossible – that the Court still concludes that this threshold is met. This stance has been criticised by Judge Wojtyczek in the *Broda and Bojara* judgment. While he argued that it could not be contested that the object of the dispute in question – the decision by the Minister of Justice to dismiss the two applicants from their positions of court president – was linked to the exercise of state power,[120] the majority ruled that the Polish government had not proven that that was the case, nor that a special bond of trust between the state and the applicants justified the exclusion of their rights guaranteed by the Convention.[121] Given the context of disputes in cases like *Gumenyuk* and *Broda and Bojara*, it does indeed seem difficult to imagine areas where the Court would still be persuaded that the exclusion was linked to the exercise of state power, making the presumption of applicability virtually irrebuttable.

A third and final point that will be examined in this section is whether the approach that was established in the Turkish cases can be extended further. In the short time that has passed since the two Turkish cases, the case law has already made some important strides in that regard. In *Grzęda*, the Grand Chamber held that judicial independence should be understood in an inclusive manner, and thus should not only apply to Judges in their adjudicating role but also to other official functions that they may be called upon to perform that are closely connected with the judicial system.[122] The procedural protection that the applicant Judge should enjoy did not only concern his judicial position as such, but also his mandate as a judicial member of the Polish judicial council. Yet, such an inclusive vision of judicial independence goes further than the membership of a judicial council. There is a wide variety of functions that Judges may perform outside of their traditional adjudicatory role. With *Grzęda*, it seems that Judges must enjoy procedural protection for those more ancillary roles as well.

A different question is whether the approach established in the Turkish cases may also be extended to non-judicial actors. As far as this question is concerned, the case law is not clear. As was mentioned above, the Court does seem to apply a similar reasoning in the case of *Loquifer*. To reiterate, that case

120 *Broda and Bojara* (n 41) Dissenting Opinion of Judge Wojtyczek, para 3.4. For a similar criticism in a judgment that came out before the Turkish cases, see, *Kamenos* (n 40) Dissenting Opinion of Judge Pamballis.

121 *Broda and Bojara* (n 41) para 122.

122 *Grzęda* (n 50) para 303. See also, the later judgment of *Żurek* (n 78).

concerned the suspension of a member of the Belgian High Council of Justice. Yet, even though the person in question had previously been a Judge, they were appointed to the council as one of its non-judicial members. The fact that the Court found the second *Eskelinen*-criterion not to be fulfilled in this case because there was no discernible special bond of trust between Loquifer and the state, which could have justified the exclusion of the access to a court, may indicate that this strand of case law may be expanded to other actors beyond Judges. One can certainly think of other actors that find themselves in the public law sphere and are not tied to a certain bond of trust and loyalty to the state. This could, first of all, be non-judicial members of judicial councils, as was the case in *Loquifer*, but also, for example, ombudsmen or high-ranking members of independent administrative agencies.

Time will tell whether the Court will be willing to apply this strand of case law to other categories of persons and thereby also strengthen the claim for the applicability of Article 6(1) ECHR in such cases. The Court's approach in the *Loquifer* judgment could indeed be seen as a possible first step in such a direction. However, it is notable that the Court did not refer to any of the other cases that were mentioned in this article. The issue was also debated in the separate opinions attached to the judgment. In his concurring opinion, Judge Pavli expressly referred to the cases of *Bilgen* and *Eminağaoğlu*. He held that the *Loquifer* case offered the Court a good opportunity to examine whether the reasoning in those cases could also be applied to members of bodies of judicial administration, such as judicial councils. According to Judge Pavli, that was a small step, which could be justified by the fundamental role played by such bodies in protecting the structural independence of national judicial systems. The presumption of a right of access to a court for disputes about their status should, in his view, apply equally to the judicial as well as the non-judicial members of such bodies.[123] Judge Zünd took a different view in his dissenting opinion. He stressed the independent position of the Belgian High Council and argued that this provided a strong and objective reason to exclude the right of access to a court. If the decisions by the Council could later be challenged by an appeal before a court, this would endanger the authority and credibility of the institution.[124] These two opposing views in the same case highlight the sensitive nature of possibly applying the approach that was set forth in the two Turkish cases to categories other than Judges and the widened applicability of Article 6(1) ECHR that this would entail.

123 *Loquifer* (n 43) Concurring Opinion of Judge Pavli, para 8.
124 Ibid Dissenting Opinion of Judge Zünd, para 6.

6 Conclusions

After the *Vilho Eskelinen* judgment, two commentators wrote about the 'irresistible extension of the scope of application of Article 6(1) ECHR'.[125] A little over a decade later, that extension is still ongoing. With the two Turkish cases, the Court has introduced a new approach to the second *Eskelinen*-criterion, in cases in which the applicant in question is a domestic Judge. The Court relies on the important position that Judges take up in the domestic constitutional landscape as a check on the political branches of government and on their requisite independence in order to conclude that their exclusion of access to a court cannot be justified when the dispute in question relates to their career or status. With this new interpretation, it seems that it will become difficult, perhaps even impossible, for the Contracting Parties to convince the Court that both *Eskelinen*-criteria are met. As such, the Court has strengthened any claims for Article 6(1) ECHR to apply to disputes that concern the status and career of Judges.

It is this new approach, introduced by the cases of *Bilgen* and *Eminağaoğlu* and subsequently confirmed in several other judgments, both on Chamber and Grand Chamber level, that formed the subject of this article. The article set out to do two things: first, to analyse this new approach in detail and put it properly in the spotlight, and, second, to discuss its importance and consequences in the broader topics of judicial independence, rule of law, and separation of powers.

To do this, section 2 and 3 first discussed the two Turkish cases, the new approach that the Court has established in terms of the *Eskelinen*-test, and the subsequent case law that has since confirmed this approach. Section 5 considered whether there were still any limits to this new approach, or, to the contrary, if it could still be extended. Section 4 performed a more overarching analysis. It pointed first to the important step forward that this new approach means in terms of independence vis-à-vis the political branches. The article showed that it offers an extra level of procedural protection for Judges and that it is likely to play a crucial role in the many rule of law related cases that are still pending before the Court. In this sense, the Court may certainly be commended for this new strand of case law. However, the article equally pointed to the indirect, and perhaps unforeseen effects that the new approach may have on the balance of power in the Contracting Parties. By extending the scope of Article 6(1)

125 D Renders and D Caccamisi, 'L'irrésistible extension du champ d'application de l'article 6, § 1 er, de la Convention européenne des droits de l'homme' (2007) 126(31) *Journal des Tribunaux* 640.

ECHR in disputes about the career and status of Judges, the Court essentially gives the final say over such disputes to Judges themselves. However, such a state of affairs comes with its own pitfalls. It creates potential issues of internal judicial independence and overall interferes with the existing balance that is struck in the domestic systems of checks and balances. The Turkish cases are another example of how the Court, in its commendable willingness to protect the domestic judiciary, increasingly intervenes in sensitive areas like judicial governance, judicial independence, judicial accountability, and the separation of powers. On its shoulders rests the difficult task of not protecting one at the expense of the others.

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