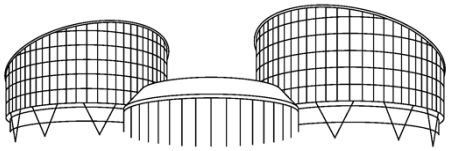

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF GRACE GATT v. MALTA

(Application no. 46466/16)

JUDGMENT

STRASBOURG

8 October 2019

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

In the case of Grace Gatt v. Malta,

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

Georgios A. Serghides, *President,*
Vincent A. De Gaetano,
Paulo Pinto de Albuquerque,
Alena Poláčková,
María Elósegui,
Gilberto Felici,
Erik Wennerström, *judges,*
and Stephen Phillips, *Section Registrar,*

Having deliberated in private on 10 September 2019,

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

PROCEDURE

1. The case originated in an application (no. 46466/16) against the Republic of Malta lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Maltese national, Ms Grace Gatt ("the applicant"), on 5 August 2016.

2. The applicant was represented by Dr J. Brincat, a lawyer practising in Marsa. The Maltese Government ("the Government") were represented by their Agent, Dr P. Grech, Attorney General.

3. The applicant alleged, in particular, that disciplinary proceedings had not been heard by an independent and impartial tribunal.

4. On 4 September 2018 notice of the application was given to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1968 and lives in Naxxar.

A. Background to the case

6. The applicant joined the Malta Police Force on 14 June 1990.

7. On an unspecified date her son fell seriously ill and needed to be flown to the United Kingdom several times. For this purpose the applicant and some of her colleagues organised a collection of funds in respect of which no permission had been requested. As a result, in February 1999 (or 28 May or 2 June 2001), the applicant was suspended from her duties.

8. On 30 July 2001 her request to the Permanent Secretary of the Office of the Prime Minister for her to travel abroad in connection with her son's illness was accepted.

1. Criminal proceedings (first set)

9. In view of the above, on 15 February 2001 the applicant was charged before the Court of Magistrates as a court of criminal judicature of fraud and fund collection without prior authorisation. On an unspecified date she was found guilty of the latter, but not the former and was put on probation (an order requiring the offender to be under the supervision of a probation officer for a specified period) for six months.

10. During these proceedings the applicant often requested the court to grant leave for her to leave the country in connection with her son's illness and was granted permission.

2. Subsequent events

11. Given the precarious financial situation which ensued following the applicant's suspension (between June 2001 and November 2005 she was only receiving half her salary), she started working, *inter alia*, as a private investigator, without requesting permission from the Permanent Secretary of the Ministry. Nor had she requested authorisation to leave the country.

12. Amongst the cases she was working on was a case concerning the daughter of a Maltese woman who had been kidnapped and taken to Syria. The applicant had flown to Syria and managed to trace them and brought them back to Malta. In this connection the applicant gave various interviews to the papers and also on one occasion, on 6 January 2006, participated in a television programme. Another police officer had also been present on the television programme (at the request of the Commissioner of Police "CoP"). The scope of the interview was to raise awareness about the problems faced by Maltese women who marry in a culture different to theirs. According to the applicant during the interview she did not speak as a member of the Police Force.

3. Criminal proceedings (second set)

13. A week after the television interview the applicant was arrested for having acted as a private investigator without the relevant licence. By a judgment of 23 May 2007, following her guilty plea, she was found guilty as charged, aggravated by the fact that she was a police officer, and was given a suspended sentence of one year's imprisonment.

Her appeal was dismissed on 20 September 2007.

4. Disciplinary proceedings

14. In the meantime, two weeks after the interview (in January 2006) the applicant was notified that disciplinary proceedings were being brought against her for having i) brought the Police Force into disrepute; ii) gone abroad without permission from the Public Service Commission (Regulation 12 (10) of the Public Service Procedure and Discipline Regulations); iii) undertaken private work without permission contrary to Article 7.3 of the Public Service Management Code; iv) appeared on television without the permission of the CoP contrary to his circular GHQ/47/2002. She was informed that the disciplinary offences were contrary to Articles 1 (g) and 3 (a) of the Third Schedule to the Police Act and that in the CoPs view they could lead to dismissal. She was given ten days to make submissions.

15. The CoP informed her that an Internal Board of the Police (hereinafter "the Board") would be convened to examine the charges against her, and that the Board's report would be sent to the Public Service Commission (hereinafter 'the PSC') to take a decision on the matter. The applicant complained to the CoP that the members of the Board he was appointing could not be impartial or independent given that they were his subordinates. Nevertheless, the Board was convened.

16. A written objection to that effect, on the basis that the Board's loyalty was inclined towards the CoP was raised before the Board who, in turn communicated the issue to the Chairman of the PSC. On an unspecified date, without giving reasons, the Chairman of the PSC rejected her request, and informed the CoP, as Head of Department, that proceedings could commence.

17. Thereafter, the Board heard the case, and following the advice of a legal expert to whom they had entrusted the legal matters raised by the applicant, rejected her objections and found the applicant, who had been legally represented throughout the proceedings, guilty of the disciplinary charges brought against her. According to the applicant, the case before the Board had focused on the fact that the applicant had been abroad without the permission of the PSC.

18. The Board's report was passed on to the PSC, before which fifteen witnesses were heard. On an unspecified date, the PSC made a recommendation to the Prime Minister that the applicant should be dismissed. On 21 December 2006 the Prime Minister approved the dismissal with immediate effect and as a result of this decision the applicant lost half her salary for the duration of her suspension as well as any future salary.

19. On 22 October of an unspecified year the applicant requested that her case be revised, but the PSC rejected her request.

B. Constitutional redress proceedings

20. The applicant instituted constitutional redress proceedings complaining under Articles 10, 14 in conjunction with Article 6 and Article 13 of the Convention and the corresponding articles of the Constitution.

21. Under Article 10 of the Convention she complained about the circular or memo issued by the CoP requiring prior permission to attend a television programme, claiming that her right to freedom of expression had been breached as a result of the rules which had been applied to her while she was not on duty.

22. Relying on Articles 6 and 14 she complained about the unilateral decision to dismiss her while other police officers who had committed far worse crimes had solely been suspended and then reinstated.

23. Invoking Article 13 she complained that there was no remedy against the decision of the PSC save that of a constitutional nature.

24. Lastly, she requested the court to award her redress including a declaration that Regulation 12 [10] of the Public Service Procedure and Discipline Regulations (hereinafter "the Discipline Regulations") was in breach of the relevant articles of the Convention and the Constitution and to annul the decision in her regard.

1. First instance

25. By a judgment of 14 July 2015 the Civil Court (First Hall) in its constitutional competence rejected all her claims.

26. It considered that as from her enrolment into the Police Force the applicant voluntarily made herself subject to the Police Act and the Discipline Regulations. The latter also applied to police officers who had been suspended on half pay.

27. The court considered that the applicant was complaining under Article 6 of the impartiality and independence of the Board and the PSC. Having examined all the evidence produced, it found that although the proceedings before the Board could raise doubts as to impartiality ("*jbagħti fl-apparenza ta' mparzjalità*"), the proceedings before the PSC could not be in breach of Article 6 since they had respected the principle of *audi alteram parte*. Nor could it be said that the case had been examined in a hurry in that it focussed solely on whether or not the applicant had been abroad without permission. Although it was unfortunate that the members of the Board who investigated, heard and established facts were also police officers answerable to the CoP, these persons had taken an oath of impartiality before the Attorney General in respect of the specific appointments. The court noted that these were persons who usually would have a lot of experience and who were trusted by the members of the Police Force. As to the PSC, the court held that, although the Constitution provided that the

PSC was not obliged to give anyone before it a fair hearing and that the exercise of its functions was not questionable before any court, domestic case-law had established that the PSC immunity from judicial action was not absolute and that the PSC had a duty to comply with procedural rules and observe the principles of natural justice, and they could not act *ultra vires*. The case-law of the Court had also evolved, opening the applicability of Article 6 to police officers in certain cases. However, in the light of the principles established in *Vilho Eskelinen and Others v. Finland* ([GC], no. 63235/00, § 62, ECHR 2007-II), the present cases did not fulfil the two criteria necessary to make Article 6 applicable. Indeed the charges issued against the applicant called into question "that special bond of trust and loyalty" and the PSC's actions were not subject to any review, thus there was no violation of Article 6.

28. Under Article 14 the court found that the applicant had failed to give an example of a case with circumstances identical to hers. Moreover, unlawful acts could not be justified by claiming discrimination.

29. As to the incompatibility of Regulation 12 (10) of the Discipline Regulations with Article 44 of the Constitution and Articles 2 §§ 2 and 3 of Protocol No. 4 to the Convention, it noted that according to the Police Act and the Discipline Regulations a police officer was a public officer and Article 44 of the Constitution made specific restrictions in that case. Further, in the court's view requiring permission to travel was not equivalent to being denied the possibility to travel, it followed that the invoked provisions were not violated.

30. Similarly, Article 10 had not been violated as the applicant had not applied for permission to participate in the television programme as required by circular of the CoP GHQ/47/2002, which was different from being denied such permission.

31. As to Article 13, while the court sympathised with the applicant's ordeal, given that all her claims had not resulted in a violation, the court was of the view that there was no remedy which could be given to the applicant.

2. Appeal

32. The applicant appealed claiming i) a breach of Article 6 of the Convention in so far as there had not been an impartial tribunal to decide on the accusations raised against her; not only had the Board been subordinate to the CoP, but the CoP had put pressure on the Chairman of the Board to find for the dismissal of the applicant; ii) a breach of Article 14 in conjunction with Article 6 of the Convention, noting that her claim had referred to what constituted bringing the police in disrepute; iii) that Regulation 12 (10) of the Discipline Regulations was incompatible with Article 2 §§ 2 and 3 of Protocol No. 4 to the Convention, in so far as it required permission, as opposed to solely informing the authorities; and iv) that there had been a breach of Article 10 of the Convention in her

regard - the first court had neither examined the legitimate aim nor the proportionality of the measure. It had simply considered that the circular at issue was necessary in a democratic society; moreover, she had been dismissed without any examination of the content of the interview. She reiterated that she was seeking a remedy before the court, but that she would not insist on her Article 13 complaint.

33. By a judgment of 12 February 2016 the Constitutional Court dismissed the applicant's appeal.

34. It considered that Article 6 was not applicable to the Board that was not a tribunal whose decisions were directly decisive or final. Its function was solely limited to establishing facts and sending their conclusions to the Chief of the Department and the person charged. The Constitutional Court dismissed as unsubstantiated the claim of interference by the CoP with the Chairperson given that in its view his intervention had solely amounted to a piece of advice concerning procedures in disciplinary matters. Moreover, the applicant being a police officer given the bond of trust and loyalty attached to such a function Article 6 did not apply.

35. It confirmed the first-instance findings under Article 14 that the examples brought forward by the applicant were not similar to her situation and all those examples had specific situations, while the applicant had been repeatedly subject to disciplinary action. Moreover, the applicant had not linked her discrimination complaint to any personal characteristic.

36. As to the Protocol, the Constitutional Court considered that Regulation 12 [10] of the Discipline Regulations, which provided for the restriction, pursued a legitimate aim and was necessary in a democratic society in the interest of public order. A mere requirement that an officer who was suspended from office had to request permission to travel during the suspension - a rule the applicant was aware of when she joined the Police Force - could not be considered disproportionate.

37. Lastly under Article 10, the Constitutional Court reiterated that the applicant had failed to request the necessary permission under the written circular issued by the CoP, which he had the right to issue in accordance with Section 108 of the Police Act. According to the Constitutional Court, given the trust associated with the Police Force, the restriction had pursued nearly all the legitimate aims set out in Article 10 § 2. In particular prior authorisation was necessary to safeguard the reputation of the Police Force which was to keep out of public debate so to be consonant with what the Police Force represented. While it was not necessary to examine the content of the interview, a *prima facie* assessment of such content showed that it had not been consonant with the role of a police officer. In the Constitutional Court's view, when the applicant went to Syria to bring back the kidnapped child without the CoP's permission and while she was still a police officer, she had created a delicate situation which could have had

repercussions at an international level. Thus, even in the light of the content of the interview the interference in her case had been justified.

II. RELEVANT DOMESTIC LAW

A. The Constitution of Malta

38. Article 44 of the Constitution of Malta reads as follows:

"(1) No citizen of Malta shall be deprived of his freedom of movement, and for the purpose of this article the said freedom means the right to move freely throughout Malta, the right to reside in any part of Malta, the right to leave and the right to enter Malta. ...

(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this article to the extent that the law in question makes provision -

(*a*) for the imposition of restrictions that are reasonably required in the interests of defence, public safety, public order, public morality or decency, or public health and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society; ...

(*c*) for the imposition of restrictions upon the movement or residence within Malta of public officers; or"

39. Article 86 (1) of the Constitution reads as follows:

"Where by this Constitution the Prime Minister is required to exercise any function on the recommendation of any person or authority he shall exercise that function in accordance with such recommendation:

Provided that -

(*a*) before he acts in accordance therewith he may once refer that recommendation back for reconsideration by the person or authority concerned; and

(*b*) if that person or authority, having reconsidered the original recommendation under the preceding paragraph, substitutes therefor a different recommendation, the provisions of this sub-article shall apply to that different recommendation as they apply to the original recommendation."

40. Article 109 of the Constitution reads as follows:

"(1) There shall be a Public Service Commission for Malta which shall consist of a chairman, a deputy chairman and from one to three other members.

(2) The members of the Public Service Commission shall be appointed by the President, acting in accordance with the advice of the Prime Minister given after he has consulted the Leader of the Opposition.

(3) A person shall not be qualified to hold office as a member of the Public Service Commission if he is a Minister, a Parliamentary Secretary, a member of, or a candidate for election to, the House of Representatives, a member of a local government authority or if he is a public officer.

(4) A member of the Public Service Commission shall not, within a period of three years commencing with the day on which he last held office as a member, be eligible for appointment to or to act in any public office.

(5) Subject to the provisions of this article, the office of a member of the Public Service Commission shall become vacant -

(*a*) at the expiration of five years from the date of his appointment or at such earlier time as may be specified in the instrument by which he was appointed; or

(*b*) if any circumstances arise that, if he were not a member of the Commission, would cause him to be disqualified for appointment as such.

(6) A member of the Public Service Commission may be removed from office by the President, acting in accordance with the advice of the Prime Minister, but he may be removed only for inability to discharge the functions of his office (whether arising from infirmity of mind or body or any other cause) or for misbehaviour.

(7) If the office of a member of the Public Service Commission is vacant or if a member is for any reason unable to perform the functions of his office, the President, acting in accordance with the advice of the Prime Minister, given after he has consulted the Leader of the Opposition, may appoint a person who is qualified to be appointed to be a member to be a temporary member of the Commission; and any person so appointed shall, subject to the provisions of sub-articles (5) and (6) of this article, cease to be such a member when a person has been appointed to fill the vacancy or, as the case may be, when the member who was unable to perform the functions of his office resumes those functions."

41. Article 110 (1) of the Constitution reads as follows:

"Subject to the provisions of this Constitution, power to make appointments to public offices and to remove and to exercise disciplinary control over persons holding or acting in any such offices shall vest in the Prime Minister, acting on the recommendation of the Public Service Commission:

Provided that the Prime Minister may, acting on the recommendation of the Public Service Commission, delegate in writing, subject to such conditions as may be specified in the instrument of delegation, any of the powers referred to in this subarticle to such public officer or other authority as may be specified in that instrument."

42. Article 115 of the Constitution of Malta reads as follows:

"The question whether -

(*a*) the Public Service Commission has validly performed any function vested in it by or under this Constitution;

(*b*) any member of the Public Service Commission or any public officer or other authority has validly performed any function delegated to such member, public officer or authority in pursuance of the provisions of subarticle (1) of article 110 of this Constitution; or

(*c*) any member of the Public Service Commission or any public officer or other authority has validly performed any other function in relation to the work of the Commission or in relation to any such function as is referred to in the preceding paragraph,

shall not be enquired into in any court."

B. The Public Service Commission (Disciplinary Procedure) Regulations

43. Regulation 7 of the Public Service Commission (Disciplinary Procedure) Regulations 1999 ('the Disciplinary Regulations') provides that:

> "A Head of Department preferring charges of misconduct or breach of discipline against an officer shall be entitled to be represented by any person of his choice, at every stage of any hearing before a Disciplinary Board or before the Commission, including any hearing on appeal."

44. According to the text of law applicable at the relevant time Regulation 12 (10) of the Discipline Regulations, read as follows:

> "An officer who is under interdiction may not leave Malta without the written permission of the Head of the Public Service and any such officer who leaves Malta without such permission shall be liable to dismissal."

45. The composition of the Board emanates from the Discipline Regulations which provided in Regulation 21 (1) that:

> "(1) The Disciplinary Board for the purpose of regulation 20 (2) (e) shall be appointed by the Head of Department and shall consist of a Chairperson and two members appointed as follows –
>
> (a) The Chairperson shall be an officer of the department not below salary scale 10 and not connected with the case of discipline to be heard by the Board and not less than two salary scales above the officer charge[d], and not in the same grade as the officer charged,
>
> (b) Two other officers of the department not connected with the case of discipline and at least one salary scale above the officer charged, and not in the same grade as the officer charged:
>
> Provided that where the Head of Department has informed the officer that the alleged offence could lead to dismissal, the Chairperson of the Disciplinary Board shall be, at least an officer at Assistant Director level or analogous grade".

46. Regulation 21 (3) and (4) provided as follows:

> "(3)Where serious objections are raised by an officer charged or by his representative that the chairperson and, or any of the members of the Disciplinary Board are in some way prejudiced against him, the officer charged may petition the Commission and shall send a copy of the petition to his Head of Department. Pending the decision of the Commission on the petition, the disciplinary proceedings shall be suspended.
>
> If the Commission accepts the petition, it shall appoint a fresh Disciplinary Board or make appropriate changes to the Board. The officer and the Head of Department shall be informed accordingly."

47. Regulations 22 to 26 concern the procedure before the Board, as applicable at the relevant time, and read as follows:

> "22. (1) Every Disciplinary Board appointed under regulation 21 to investigate the case, shall establish the facts and communicate its findings to the Head of Department

and to the officer charged as early as practicable and in no case later than thirty working days from the date on which the case is referred to it.

(2) The Board shall have the power to seek expert advice whenever it considers such advice to be necessary or expedient, and to summon any person to appear before it and give evidence or to produce any document.

(3) The Board may direct that any evidence given before it be confirmed by an affidavit.

(4) The period of thirty working days specified in subregulation (1) of this regulation may on good cause being shown, be extended by the Head of Department up to a maximum of another thirty working days.

(5) Where serious and justifiable reasons exist which, in the opinion of the Head of Department, preclude the Board from making a report of its findings earlier than the prescribed period of thirty days and any extension thereof, the Head of Department shall refer the matter to the Commission for its direction.

23. (1) In exercising its functions under these regulations, a Disciplinary Board shall afford a fair opportunity to both sides to present their case, but shall dispense with all undue formalities and ensure that justice is done expeditiously and according to the substantive merits of the case.

(2) Notice of not less than ten working days shall be given of the time and place of the hearing to the Head of Department and to the officer charged. Every notice shall be signed by the chairperson and served by registered mail or by hand.

(3) If the Board is satisfied that notice of the hearing has been given, it may proceed with the case notwithstanding the absence of the officer charged if, taking all circumstances into account, including the requirements of regulation 22, the Board is of the opinion that it ought so to proceed with the case.

(4) The following procedure shall apply to the hearing by a Board –

(a) the hearing shall be held in private;

(b) the officer summoned to appear at the hearing shall be given full opportunity to defend himself and to produce witnesses;

(c) the officer or his representative may cross-examine the witnesses called in support of the case against him.

(5) Subject to this regulation the Board may regulate its own procedure at the hearing.

(6) The Board may seek the opinion of, or a directive by, the Commission on questions of procedure.

24. (1) Where a Disciplinary Board hearing evidence against an officer is of the opinion that such evidence discloses other *prima facie* misconduct or breach of discipline, the following procedure shall apply -

(a) the Disciplinary Board shall report the matter to the Head of Department and to the officer charged, and shall thereupon suspend its proceedings;

(b) if the Head of Department thinks fit to proceed against the officer charged on the additional grounds disclosed, the Head of Department shall furnish the officer with fresh charges and the procedure described in regulation 20(2) ... shall apply. ...

25. (1) At the conclusion of its investigation, the Board shall communicate its findings to the Head of Department and to the officer charged.

(2) A report on the findings shall comprise -

(a) a summary of such parts of the evidence as the Board considers relevant;

(b) the findings of the investigation on material questions of fact;

(c) a statement whether in the Board's opinion the accused officer has or has not committed the offence or offences charged and a brief statement of the reasons for that opinion;

(d) details of any matters which alleviate or aggravate the gravity of the case.

(3) The report of the Board shall not include any recommendation regarding the penalty that may be imposed.

26. ... (2) In the case of an offence where the Head of Department had given notice to the officer charged that the charges, if proved, could lead to dismissal, the following procedure shall apply –

(a) upon receipt of the Board's report, the Head of Department shall, as soon as practicable, send a copy of the report to the Commission;

(b) in giving consideration to the Board's findings, the Commission shall give an opportunity to the officer charged and to the Head of Department to make oral representations;

(c) after considering the findings of the Board and the representations made to it, the Commission shall make its recommendation to the Prime Minister both as to the guilt or otherwise of the officer charged and as to the penalty, if any."

C. The Police Act

48. At the relevant time, Section 8 of the Police Act read as follows:

"(1) Every member of the Force shall, in the execution of his duties, obey the lawful orders of his lawful superiors.

(2) An order given to a member of the Force by the lawful superior of that member shall be deemed to be lawful, unless it is manifestly contrary to an express provision of law or a Court order."

49. At the relevant time, Section 108 of the Police Act read as follows:

"The Commissioner may, subject to the provisions of this Act and to any regulations made by the Minister responsible for the Police, from time to time make standing orders for the general governance of police officers in relation to their leave, conditions of service, transfer (including expenses in connection therewith), training, arms and accoutrements, clothing and equipment, places of residence, classification and duties, as well as to their distribution and inspection, and such other orders as he may deem expedient to prevent negligence and for promoting efficient and discipline on the part of police officers in the discharge of their duties."

D. The Maltese reservation concerning the application of Article 10 to public officers

50. The reservation made at the time of signature, on 12 December 1966, and contained in the instrument of ratification of the Convention, deposited on 23 January 1967, by the Government of Malta reads as follows:

> "The Government of Malta, having regard to Article 64 of the Convention [Article 57 since the entry into force of the Protocol No 11], and desiring to avoid any uncertainty as regards the application of Article 10 of the Convention, declares that the Constitution of Malta allows such restrictions to be imposed upon public officers with regard to their freedom of expression as are reasonably justifiable in a democratic society. The Code of conduct of public officers in Malta precludes them from taking an active part in political discussions or other political activity during working hours or on official premises."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

51. The applicant complained that the Board which had found her "guilty of all charges" had not been independent and that the Commissioner of Police had put pressure on the Public Service Commission in connection with the appropriate punishment to be handed out, and thus could not be considered impartial as provided in Article 6 § 1 of the Convention, which reads as follows:

> "1. In the determination of his civil rights and obligations... everyone is entitled to a fair...hearing...by an independent and impartial tribunal established by law."

52. The Government contested that argument.

A. Admissibility

1. The parties' submissions

53. The Government submitted that the outcome of the disciplinary proceedings was directly decisive for the manner of the right in question, there was, therefore, a dispute over a right which the applicant could claim on arguable grounds under domestic law.

54. The Government noted that in the case of the applicant, the disciplinary proceedings were brought before the Board appointed in terms of Regulation 21 (1) of the Disciplinary Regulations (see paragraph 45 above). The Board by a report dated 7 July 2006 found the applicant guilty of the charges preferred against her and the applicant was informed that the PSC would give her the opportunity to make oral representations in terms of

Regulation 26 (2) (b) of Disciplinary Regulations before making its recommendation to the Prime Minister. The Government noted that the recommendation to the Prime Minister made by the PSC in accordance with Article 86 (1) of the Constitution read with Article 110 (1) of the Constitution (see paragraphs 39 and 41 above) had to be interpreted in the sense that the Prime Minister was obliged to follow the recommendation of the PSC. Therefore, the recommendation to dismiss the applicant from the service was final and the fact that there was no review available did not necessarily mean that the applicant did not have access to a court for the purposes of the *Eskelinen* test.

55. The Government noted that in line with the case-law, the Court, in deciding whether the first condition of the *Eskelinen* test has been met, should consider whether the disciplinary authority in question qualified as a 'court'. To that end, the Government submitted that, in accordance with the provisions of the Disciplinary Regulations, the proceedings before the Board and the PSC are of a judicial nature and the person concerned is entitled to be heard and to present his or her case. The practice and procedure to be followed in disciplinary proceedings were set out in detail in the Disciplinary Regulations. In particular the Board and the PSC hold hearings; the Board summons and hears witnesses, assesses evidence and decides the questions before it with reference to all issues raised including legal principles. Thus, in Government's view, the disciplinary proceedings were conducted before a court for the purposes of the *Eskelinen* test.

56. The Government contested the argument set out by the applicant at paragraph 57, given that the composition of the Board had been set out in the Regulations, and that once the Board was appointed it was to be considered as an extension of the PSC and not as subordinate to the CoP.

57. The applicant submitted that Article 6 was applicable, that a civil right was at play (as she did not wield part of the power of the State), however, she argued that there had been no tribunal established by law since the CoP appointed his subordinates who would solely endorse the charges made by their superior.

2. The Court's assessment

58. The Court notes that the proceedings at issue did not relate to the determination of a criminal charge, and for this reason the criminal limb of Article 6 § 1 does not apply (see, *mutatis mutandis*, *Denisov v. Ukraine* [GC], no. 76639/11, § 43, 25 September 2018).

59. However, the Court has consistently held that disciplinary proceedings in which the right to continue to exercise a profession is at stake give rise to "*contestations*" (disputes) over civil rights within the meaning of Article 6 § 1 (see, *inter alia*, *König v. Germany*, 28 June 1978, §§ 87-95, Series A no. 27 and *Di Giovanni v. Italy*, no. 51160/06, § 36,

9 July 2013). It has not been disputed that the dispute concerned a right recognised in domestic law.

60. In the light of the fact that the applicant was a police officer, the Court must, however, consider the civil nature of the dispute, in line with the test set out in *Vilho Eskelinen and Others v. Finland* ([GC], no. 63235/00, ECHR 2007-II). In brief, in order for the respondent State to be able to rely before the Court on the applicant's status as a civil servant in excluding the protection embodied in Article 6, two conditions must be fulfilled. Firstly, the State in its national law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the State's interest. The mere fact that the applicant is in a sector or department which participates in the exercise of power conferred by public law is not in itself decisive. There will, in effect, be a presumption that Article 6 applies. It will be for the respondent Government to demonstrate, firstly, that a civil-servant applicant does not have a right of access to a court under national law and, secondly, that the exclusion of the rights under Article 6 for the civil servant is justified (§ 62).

61. Firstly, the Court notes that the Government have admitted that the applicant has had access to court at the domestic level. It appears that despite the constitutional jurisdictions' conclusions to the contrary (the latter having dismissed the claim in brief statements) the Government appear to consider that the bodies involved in the disciplinary proceedings (the Board, the PSC and the Prime Minister) have, in combination, performed a judicial function (compare *Oleksandr Volkov v. Ukraine*, no. 21722/11, §§ 88-91, ECHR 2013, see also the considerations made in *Olujić v. Croatia*, no. 22330/05, §§ 37-42 5, February 2009 and *Kamenos v. Cyprus* no. 147/07, § 86, 31 October 2017 as well as in a number of other cases cited in the latter judgment § 79).

62. Moreover, the Court notes that the applicant has had access to the constitutional jurisdictions to challenge her dismissal under various aspects (of which she is again complaining before this Court), and those jurisdictions could have quashed the dismissal and remitted the case for decision (see, *mutatis mutandis*, *Olujić*, cited above, §§ 36-37).

63. Therefore, the Court finds that the applicant has had access to court and in consequence the first criterion of the *Eskelinen* test has not been met, therefore there is no reason to assess the second criterion. It follows that Article 6 in its civil head is applicable to the disciplinary proceedings against the applicant in the present case.

64. In so far as the applicant complains about the independence of the Board for the purposes of the establishment of it as a tribunal, the Court considers that this is a matter which concerns the merits of the complaint and will be dealt with at that stage.

3. Conclusion

65. The Court notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

66. The applicant submitted that the CoP was the 'convening officer' who brought the charges against her, and the Board appointed to hear her case were his subordinates, namely the Assistant CoP, a superintendent and an inspector. It followed that they were neither independent nor impartial. She relied on *Findlay v. the United Kingdom* (25 February 1997, § 78, *Reports of Judgments and Decisions* 1997).

67. She further noted that indisputably, in the present case, the CoP had intervened with the PSC, who, she considered, had accepted to give the punishment the CoP had wished, it was therefore possible that he also intervened with the Board made up of subordinates which he had appointed, who had to follow his orders in terms of law, namely Section 8 (1) and (2) of the Police Act (at the relevant time) (see paragraph 48 above). As to the PSC she considered that while they went through a whole procedure it was clear that the matter had already been determined 'behind the scenes' with the CoP's intervention, and the Prime Minister could do nothing but act on the recommendation made to him.

(b) The Government

68. The Government submitted that from the records of the Board's proceedings it transpired that the Board was chaired by an Assistant CoP. A Superintendent and an Inspector were the other members of the Board. The composition of the Board emanated from the Disciplinary Regulations (see paragraph 45 above) which made it clear that the persons appointed on the Board had to be individuals who do not have any connection with the case to be heard and that the officers so appointed had to be of a higher grade than the person so charged. The Government noted that once a Board is appointed in terms of the Regulations, the Board is accountable to and may request direction to the PSC if the need arises. The Board also has to take an oath with regard to the proper exercise of its functions. Moreover, if the person undergoing disciplinary proceedings has an objection relative to the members or Chairperson of the Board, a petition may be lodged to replace the Board (see paragraph 46 above).

69. The Government submitted that from the acts of the Board's proceedings and those of the PSC, it appeared that the applicant had objected in accordance with those provisions. The matter was then referred to the PSC who decided that the Board, as appointed by the CoP, was to commence with the case.

70. In line with the Regulations (see paragraph 43 above), as transpires from the acts of the proceedings, both the applicant and the representative were given equal opportunity to make written and oral submissions before the Board.

71. The Government submitted that the applicant was contesting the personal impartiality of the Board and the PSC. In so far as the objective test was concerned, the Government submitted that the applicant was served with a written notice of the allegations against her (via a communication of 13 March 2006 issued by the CoP) and was asked to submit, her position on the matter. Following this, "the Disciplinary Board and the Board" held sittings where the applicant was present with her legal representative. During the sittings fifteen witnesses were heard by the Board and the applicant was able to cross-examine these witnesses. The applicant decided not to testify. Written and oral submissions were made before the Board by the applicant. Before the PSC, the applicant also made her written and oral representations through her legal adviser.

72. Given that the charges were originally preferred by the CoP, as Head of Department, while the disciplinary proceedings were conducted before a Board, and the ultimate decision taken by the PSC, which was a separate and distinct constitutional body, it was in the Government's view, evident that the functions of bringing charges and those of determining the proceedings in this case were functions that were exercised by two separate bodies. Thus, it was the Government's view that in this case, the applicant had been granted a fair hearing before an independent and impartial tribunal as required by Article 6 § 1 of the Convention.

73. Lastly, the Government submitted that it had not been proven that the PSC had taken instructions from the CoP. Relying on the minutes of the hearings before the PSC, they considered that the recommendation of the PSC had been based exclusively on the acts of the disciplinary proceedings and the arguments made therein by the parties.

2. The Court's assessment

(a) General principles relating to the requirements of an "independent and impartial tribunal" at the stages of the determination and the review of the case

74. In determining whether a body could be considered "independent" in particular, from the executive and the parties to the case, the Court has in previous cases had regard to such factors as the manner of appointment of

the body's members, the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence (see *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, § 49, ECHR 2013 (extracts), with further references therein).

75. As a rule, impartiality denotes the absence of prejudice or bias. According to the Court's settled case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to (i) a subjective test, where regard must be had to the personal conviction and behaviour of a particular judge – that is, whether the judge held any personal prejudice or bias in a given case; and (ii) an objective test, that is to say, by ascertaining whether, quite apart from the personal conduct of any of its members, the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (see, among other authorities, *Micallef v. Malta* [GC], no. 17056/06, § 93, ECHR 2009, with further references).

76. However, there is no watertight division between subjective and objective impartiality, as the conduct of a judge may not only prompt objectively held misgivings as to the tribunal's impartiality from the point of view of the external observer (the objective test) but may also go to the issue of the judges' personal conviction (the subjective test) (see *Kyprianou v. Cyprus* [GC], no. 73797/01, § 119, ECHR 2005-XIII). Thus, in some cases where it may be difficult to procure evidence with which to rebut the presumption of the judge's subjective impartiality, the requirement of objective impartiality provides a further important guarantee (see *Pullar v. the United Kingdom*, 10 June 1996, § 32, *Reports* 1996-III and *Otegi Mondragon v. Spain*, nos. 4184/15 and 4 others, § 54, 6 November 2018).

77. In this respect, even appearances may be of a certain importance, or in other words, "justice must not only be done, it must also be seen to be done". What is at stake is the confidence which the courts in a democratic society must inspire in the public (see *Morice v. France* [GC], no. 29369/10, § 78, ECHR 2015).

78. Finally, the concepts of independence and objective impartiality are closely linked and, depending on the circumstances, may require joint examination (see, for example, *Cooper v. the United Kingdom* [GC], no. 48843/99, § 104, ECHR 2003-XII).

79. According to the Court's case-law, even where an adjudicatory body determining disputes over "civil rights and obligations" does not comply with Article 6 § 1 in some respect, no violation of the Convention can be found if the proceedings before that body are "subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 § 1" (see *Denisov*, cited above, § 65 and the case-law cited therein).

(b) Application of those principles to the present case

80. The Court notes that in the present case the disciplinary charges against the applicant were preferred by the CoP. They were examined by the Board, who found that there had been sufficient evidence to prove that the applicant had committed the offences, and those findings were confirmed by the PSC who recommended her dismissal, which was then confirmed by the Prime Minister. The applicant then instituted constitutional redress proceedings complaining of a number of breaches of human rights in relation with the disciplinary proceedings and requested those courts to annul the decision in her regard. Thus, in the present case the Court is called upon to examine firstly whether the requirements of an "independent and impartial tribunal" were complied with by the Board, the PSC and the Prime Minister. Secondly, if those requirements were not satisfied at that stage, it is necessary to determine whether the review of the case by the constitutional jurisdictions – whose independence and impartiality were not questioned in the present case – was "sufficient" to remedy any shortcomings identified and whether they had remedied any previous defects (compare, *Denisov*, cited above, § 67).

81. The Court observes that, in the present case the CoP decided which charges should be brought against the applicant and issued such charges. In accordance with the applicable law, he also decided who would sit on the Board to determine those charges and as a matter of fact he convened the Board and appointed its individual members. The Court has not been informed as to whether, as part of his functions, he undertook the "prosecution" himself, or whether he assigned a police officer to take charge of the proceedings, which is the most likely scenario. In any event, as transpires from Regulations 22 and 24 to 26 of the Disciplinary Regulations (see paragraph 47 above) which provide that the CoP, as Head of Department, was to be regularly informed of relevant findings, the Court considers that the CoP was central to the applicant's prosecution and closely linked to the prosecuting authorities.

82. The question therefore arises whether the members of the Board were sufficiently independent of the CoP and whether the organisation of the disciplinary proceedings offered adequate guarantees of impartiality.

83. In this respect the Court notes that while the appointments were in line with the law, the result was that all the members of the Board, appointed by the CoP, were subordinate in rank to him. All of them were directly or ultimately under his command. Moreover, they were appointed on a purely *ad hoc* basis which made the need for the presence of safeguards against outside pressures all the more important.

84. The Government relied on the possibility of the applicant to make submissions, which the Court considers is the most minimum of rights in such cases and is certainly not a relevant safeguard, as well as the fact that the Board has to take an oath with regard to the proper exercise of its

functions. While it has not been specified whether an oath was actually taken by the members of the Board in the present case - the Government having limited their observation to a general statement *in abstracto* - the Court considers that even if it were so, such a safeguard was insufficient to exclude the risk of outside pressure being brought to bear on the police officers who sat on the applicant's case. In particular, it appears that those officers had no specific legal training – indeed it transpires from the minutes of the hearing that the legal issues raised by the applicant and her representative had been sent to a lawyer, and the Board's decision to dismiss those legal arguments was solely based on the lawyer's views (see paragraph 17 above). Those police officers, despite their grade (in particular in relation to the Assistant CoP), remained subject to police discipline and punishment by the CoP for minor disciplinary breaches, as well as appraisal from their Head of Department, namely the CoP.

85. The Court reiterates that in order to maintain confidence in the independence and impartiality of the courts, appearances may be of importance. Since all the members of the Board which decided the applicant's case were subordinate in rank to the CoP and fell within his chain of command, the applicant's doubts about the Board's independence and impartiality could be objectively justified (see *Findlay,* cited above, § 78, and, *mutatis mutandis*, *Sramek v. Austria*, 22 October 1984, § 42, Series A no. 84). Indeed, the first-instance domestic court had itself expressed doubts as to the impartiality of the Board (see paragraph 27 above).

86. Those doubts could not be dispelled by the PSC, in particular given the undisputed factual situation, confirmed by the Constitutional Court (see paragraph 34 above), that the CoP had approached the PSC Chairman, at least concerning the appropriate punishment to be handed down. In this connection the Court notes that according to domestic law the Board's report should not include any recommendation concerning punishment and that it was for the PSC alone to recommend a penalty (see Regulations 25 (3) and 26 (2) (c) at paragraphs above). It follows that such an undisputed intervention was uncalled for and inappropriate, and the Court considers that the Chairman could possibly have been subjected to influence in the performance of his duty, which in itself can give rise to misgivings about his impartiality (see, *a contrario*, *Asadov and Others v. Azerbaijan*, (dec.) no. 138/03, 12 January 2006). In consequence, even assuming the PSC fulfilled other relevant requirements it could not have been considered impartial and capable of curing any prior defects.

87. In relation to the Prime Minister, the Court notes firstly that, he is not a judicial body that has full jurisdiction and that provides the guarantees of Article 6 § 1 (see paragraph 79 above). Secondly, while he could have referred that recommendation back for reconsideration (see paragraph 86), he did not.

88. Since the requirements of independence and impartiality were not satisfied at that pre-judicial stage, it is necessary to determine whether the review of the case by the constitutional jurisdictions was "sufficient" to remedy the shortcomings identified. In order to determine firstly whether such courts had "full jurisdiction", or provided "sufficiency of review" to remedy a lack of independence and impartiality at the earlier instances, the Court has considered that it is necessary to have regard to such factors as the subject matter of the decision appealed against, the manner in which that decision was arrived at and the content of the dispute, including the desired and actual grounds of appeal (see, *mutatis mutandis, Denisov*, cited above, § 73).

89. The Court notes that even accepting that the courts of constitutional competence had "full jurisdiction", namely that they could, as the applicant requested, uphold the relevant breaches and annul the impugned decision - because according to domestic case-law the immunity of the PSC was not absolute (see paragraph 27 above) - both at first and second instance, those courts failed to enter into the matter of the independence and impartiality of the Board and the PSC, having determined that the applicant, being a police officer, was not covered by the protection of Article 6. Therefore, the review of the applicant's case by the courts of constitutional competence was not sufficient. Accordingly, they were unable to remedy the defects regarding the independence and impartiality of the bodies which decided on the applicant's dismissal.

90. Given the limited submissions made by the parties in the present case, the Court will not delve into other possible relevant matters of its own motion. The foregoing considerations are sufficient to enable the Court to conclude that in the disciplinary proceedings against the applicant she did not benefit of an independent and impartial tribunal.

91. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

92. The applicant complained that her dismissal for participating in a television programme concerning problems arising for parents coming from different cultures had not pursued a legitimate aim, nor had it been proportionate. She relied on Article 10 of the Convention. She further complained of the fact that that her limitations on travel (which went beyond those imposed by the court of criminal jurisdiction) did not fall under any of the exceptions mentioned in the invoked provision, they were moreover disproportionate to any alleged aim. She relied on Article 2 of Protocol No. 4 to the Convention. Lastly, she also complained under Article 14 in conjunction with Article 6 that other police offers who had

committed worse actions than she had not been dismissed, nor had she been given the option to resign and preserve her pension rights.

93. Having regard to the facts of the case, the submissions of the parties and the Court's findings under Article 6 § 1 of the Convention, the Court considers that it has examined the main legal questions raised in the present application and that there is no need to give a separate ruling on the remaining complaints (see, among other authorities, *Kamil Uzun v. Turkey*, no. 37410/97, § 64, 10 May 2007; and *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

94. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

95. The applicant claimed 445,529 euros (EUR) in respect of pecuniary damage representing loss of salary form November 2006 to June 2015 amounting to EUR 160,779 and EUR 284,705 in lost pension entitlements, rounded down to 80% given the payment of a lump sum.

96. The Government considered the amount unfounded, and submitted that for a person to be awarded a service pension she or he had to be of good conduct which was not the applicant's case, given that she had been found guilty in twelve different disciplinary proceedings. In their view a finding of a violation sufficed as just satisfaction, and in any case the applicant should not be awarded more than EUR 1,500 in non-pecuniary damage.

97. The Court cannot speculate on the outcome of the disciplinary proceedings had they been heard by an impartial and independent tribunal, it therefore dismisses the applicant's claim for pecuniary damage without prejudice to any further remedies she may seek domestically.

98. The Court considers it, however, appropriate to award the applicant EUR 15,000 in respect of non-pecuniary damage.

B. Costs and expenses

99. The applicant also claimed EUR 9,058.81 (as per taxed bill of costs) for the costs and expenses incurred before the domestic courts and EUR 4,000 for those incurred before the Court.

100. The Government considered that the award for costs and expenses should not exceed EUR 1,500.

101. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 10,000 covering costs under all heads.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint concerning Article 6 § 1 of the Convention admissible;

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

3. *Holds* that there is no need to examine the admissibility and merits of the complaints under Articles 10 and 14 of the Convention and Article 2 of Protocol No. 4;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 15,000 (fifteen thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 8 October 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Registrar

Georgios A. Serghides
President