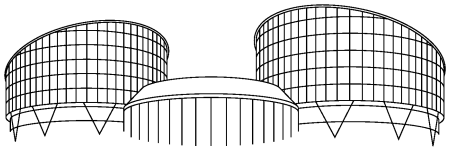

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF AVISO ZETA AG v. AUSTRIA

(Application no. 5734/14)

JUDGMENT

STRASBOURG

21 June 2018

This judgment is final but it may be subject to editorial revision.

In the case of Aviso Zeta AG v. Austria,

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

Yonko Grozev, *President,*
Gabriele Kucsko-Stadlmayer,
Lado Chanturia, *judges,*
and Milan Blaško, *Deputy Section Registrar,*

Having regard to the above application lodged on 14 January 2014,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant company,

Having deliberated in private on 29 May 2018,

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

PROCEDURE

1. The case originated in an application (no. 5734/14) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Aviso Zeta AG ("the applicant company"), on 14 January 2014.

2. The applicant company was represented by Jank Weiler Rechtsanwälte OG, a company of lawyers practising in Vienna. The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry for Europe, Integration and Foreign Affairs.

3. The applicant company alleged that there had been a breach of the principle of impartiality under Article 6 § 1 of the Convention in proceedings before the Supreme Court.

4. On 9 February 2016 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant company is a bank with its registered office in Vienna. According to the information available to the Court, the applicant company has been in liquidation since November 2016 and the proceedings have not yet been terminated.

A. Background to the case

6. The applicant company purchased and kept shares in deposit, predominantly shares in the IF company (hereafter – "IF"), for third parties. The applicant company and IF were related to each other; the management board partly consisted of the same persons and staff employed by the applicant company were provided to IF. The A. company, an investment advisor, functioned as an important distribution partner of the applicant company.

7. Due to a significant, successive loss in value of the shares purchased in IF, starting from the second half of 2007, numerous court proceedings were instituted against the applicant company.

B. The civil proceedings at issue

8. Following consultations with the A. company, F.M. and H.H. ordered the applicant company, between 2006 and 2008, to purchase and keep IF shares in deposit.

9. In 2009 F.M and H.H. filed a civil action against the applicant company and requested the annulment of their share purchase. IF joined the proceedings as an intervening party (*Nebenintervenientin*) on the side of the applicant company.

10. On 6 April 2012 the Vienna Commercial Court (*Handelsgericht Wien*) granted the action and ordered the applicant company to repay F.M. and H.H. the amount invested in exchange for the shares acquired by them. The Commercial Court found that F.M. and H.H. had not been adequately informed about the risks of such a share purchase by the A. company and that the applicant company was to be held accountable for the inadequate information given, having regard to the close professional ties between these two companies.

11. On 20 September 2012 the Vienna Court of Appeal (*Oberlandesgericht Wien*) granted the applicant company's appeal, finding in essence that any inadequate advice given to F.M. and H.H. by employees of the A. company could not be attributed to the applicant company.

12. Thereupon, F.M. and H.H. filed an ordinary appeal on points of law (*ordentliche Revision*).

13. On 17 June 2013 the Supreme Court (the Second Section), sitting as a five-judge panel, granted the ordinary appeal on points of law and restored the Commercial Court's judgment of 6 April 2012. It considered that due to the close professional ties, the applicant company had had a significant interest in selling IF shares. For that reason, employees of the A. company had been provided with inadequate information material. The Supreme Court hence found that the applicant company had been liable for the inadequate advice given to F.M. and H.H.

14. On 12 August 2013 the applicant company filed an action for nullity (*Nichtigkeitsklage*) under section 529 of the Code of Civil Procedure (see paragraph 25 below). It claimed that Judge N., who had been one of the five judges sitting on the Supreme Court's panel, had been biased because he had himself purchased shares in IF whose value had dropped, following advice by the A. company. Moreover, Judge N. had previously declared himself biased in comparable cases concerning the purchase of shares in IF. The Supreme Court had accepted Judge N.'s withdrawal from all these cases. According to the respective decisions, Judge N. had even considered filing an action on account of the losses he had suffered due to his acquisition of the shares, with the applicant company being one of the parties against whom such an action might potentially be introduced. He had thus been subjectively and objectively biased, which constituted a reason for challenge under section 19 § 2 of the Act on Exercise of Jurisdiction (*Jurisdiktionsnorm*) (see paragraph 21 below). As Judge N. had not withdrawn from the case at hand, there had been a breach of Article 6 § 1 of the Convention.

15. The applicant company further explained that it had only learned about the composition of the panel – and thus the involvement of Judge N. in the proceedings at issue – when the Supreme Court's judgment had been served on the applicant company. It had thus not been possible for the applicant company to challenge Judge N. for bias prior to the delivery of the Supreme Court's judgment.

16. On 4 September 2013 the Supreme Court (the Seventh Section) excluded Judge N. from taking part in the proceedings concerning the applicant company's action for nullity.

17. On 27 November 2013 the Supreme Court (the Second Section) decided on the applicant company's action for nullity. It confirmed that Judge N. had purchased shares in IF prior to their decrease in value. In 2009 Judge N. had offered his shares to a litigation funder (*Prozessfinanzierer*) in order to introduce possible actions against IF or other persons and entities involved. For this reason Judge N., even though he had not considered himself personally biased, had withdrawn from at least two cases concerning IF shares (see the Supreme Court's decisions of 14 May 2010, 9 Nc 13/10a, and of 26 November 2012, 9 Nc 38/12f). However, after the litigation funder had terminated the contract with Judge N., the latter had decided not to pursue any claims against IF and had, furthermore, no longer considered it necessary to withdraw from cases dealing with these shares.

18. Following these explanations, the Supreme Court rejected the applicant company's action for nullity, holding that a decision which had become final could only be contested under section 529 of the Code of Civil Procedure on the ground that a judge who had taken part in the decision had been excluded by law from exercising his or her office (see paragraph 25 below). In contrast, bias of a judge (referring to its decision of 13 November

2013, 7 Nc 19/13y, see paragraph 20 below) did not constitute a ground for nullity. The Supreme Court pointed out that it had recently held, in a case concerning arbitration law, that only in particularly grave cases, where the reason for challenge came close to a reason for exclusion under section 20 of the Act on Exercise of Jurisdiction, could an exception be made (see paragraph 27 below). In the present case, however, no such particularly grave reason had been shown, since the participation of a judge who had in the past considered filing an action against one of the parties to the proceedings was not comparable to a ground enumerated in section 20 of the Act on Exercise of Jurisdiction (see paragraph 21 below). Lastly, the Supreme Court held that no issues arose under Article 6 of the Convention.

C. Other proceedings against the applicant company

19. In other proceedings concerning an action brought against the applicant company (by a different person) in connection with the purchase of shares in IF, the applicant company filed an extraordinary appeal against a judgment of the Court of Appeal of 29 November 2012 with the Supreme Court and subsequently challenged Judge N. for bias in those proceedings.

20. On 13 November 2013 the Supreme Court (the Seventh Section, 7 Nc 19/13y) granted the applicant company's challenge and declared Judge N. biased, since his impartiality could appear open to doubt. The fact that Judge N. had in the past withdrawn from two comparable cases due to the acquisition of shares in the same company gave rise to doubts as to his impartiality, notwithstanding that he no longer intended to file any civil action in this regard. The fact that he had withdrawn of his own motion from previous cases increased fears as to Judge N.'s impartiality and rendered such doubts objectively justified, even if he did not consider himself personally biased.

II. RELEVANT DOMESTIC LAW AND PRACTICE

21. The relevant provisions of the Act on Exercise of Jurisdiction (*Jurisdiktionsnorm*) read, in so far as relevant, as follows:

Section 19

"In civil proceedings a judge may be challenged:

1. if he or she is excluded by law from exercising his or her office in the proceedings at issue;

2. if there are legitimate reasons to raise doubts as to his or her impartiality."

Section 20

"(1) In civil proceedings, judges are excluded from their office:

1. if they are a party to the proceedings or if they are jointly entitled, co-obligated or liable to recourse to a party to the proceedings;

2. in proceedings concerning their spouses, registered partners, persons related (by marriage) by lineal descent or related up to the fourth degree in the collateral line or if related by marriage up to the second degree, as well as in proceedings concerning their partners and persons to whom they are related by lineal descent or up to the second degree in the collateral line;

3. in proceedings concerning their adoptive or foster parents or children or persons in their care;

4. in proceedings in which they were or are appointed as a representative of one of the parties;

5. in proceedings in which they participated in the delivery of a judgment or a decision at a court of lower instance.

..."

Section 21

"(1) The right to challenge a judge may be exercised by any party to the proceedings and regardless of whether the challenging party or the opposing party is viewed to be affected by the alleged bias.

(2) A party to the proceedings may no longer challenge a judge for fear of bias if he or she, being aware of the reason for challenge, took part at trial or filed requests.

..."

22. With regard to the limitation for parties to challenge a judge, as provided for in section 21 § 2 of the Act on Exercise of Jurisdiction, the Supreme Court has held that the precondition for exercising the right to challenge a judge was the party's knowledge of the person acting as a judge in the respective case; the fact that the party ought to have known the person (*Kennenmüssen*) was not sufficient (see its judgment of 27 March 1995, 1 Ob 5/95, with further references).

23. Furthermore, the Supreme Court found in its judgment of 27 April 2001, 7 Ob 90/01p, that the circumstance that the claimant could have known about the participation of the challenged judge at the time of filing the appeal, namely by consulting the appellate court's rules on the distribution of cases, did not justify the allegation that she had waived her right in the sense of section 21 § 2 of the Act on Exercise of Jurisdiction.

24. Section 22 of the Courts Act (*Gerichtsorganisationsgesetz*) provides, in so far as relevant, as follows:

"(1) A judge or court clerk (*richterlicher Hilfsbeamter*) who becomes aware of circumstances that exclude him or her from exercising his or her office in the proceedings at issue, must report this to the court's President (at the Public Prosecutor's Office to the superior civil servant) without delay. (...)

(2) Judges and court clerks who are entrusted with adjudicating civil cases must similarly report reasons that may justify their withdrawal or challenge (*Ablehnung*) on the grounds of fear of bias.

(3) Following such a report, a judicial decision on the existence of a reason for exclusion or bias (sections 44 and 45 of the Code of Criminal Procedure; sections 23 to 25 of the Act on Exercise of Jurisdiction) must be obtained."

25. Section 529 of the Code of Civil Procedure (*Zivilprozessordnung*) regulates the action for nullity and reads as follows:

"(1) A decision that had become final may be contested by filing an action for nullity:

1. if a judge adjudicating the case was excluded by law from exercising his or her office in the proceedings at issue;

2. if a party to the proceedings was not represented at all or if, in case the party lacked legal capacity, was not represented by a legal representative, unless the proceedings were retroactively authorised.

(2) An action for nullity may not be filed if the reason for exclusion (1.) or the lack of legal capacity or legal representation (2.) had been unsuccessfully raised, either in a challenge, in a request to declare the proceedings null and void or in an appeal, before the decision had become final.

(3) Further, a decision may not be declared null and void if the party to the proceedings could have raised the reason for exclusion (1.) at an earlier stage or in an appeal."

26. According to the Supreme Court's consistent case-law, section 529 § 1 (1) of the Code of Civil Procedure required that the adjudicating judge had been excluded by law to exercise his or her office in the proceedings at issue; bias was not a sufficient reason for filing an action for nullity (see, for example, its judgments of 15 December 1987, 5 Ob 379/87, of 11 November 1998, 7 Ob 299/98s and, more recently, of 28 October 2013, 8 ObA 65/13m).

27. In the context of annulment proceedings (*Aufhebungsverfahren*) in arbitration law, the Supreme Court held that reasons for challenging an arbitrator (*Ablehnungsgründe*) may generally not be relied on in annulment proceedings and that exceptions could only be made in particularly grave cases, for example in cases where the reason for challenge came close to a reason for exclusion under section 20 of the Act on Exercise of Jurisdiction (see its judgments of 17 June 2013, 2 Ob 112/12b, and of 5 August 2014, 18 ONc 1/14p).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

28. The applicant company complained under Article 6 § 1 of the Convention that the Supreme Court had not been impartial because of the

participation of Judge N. in the proceedings at issue and that it had not been able effectively to raise this complaint at domestic level.

29. Even though the application was communicated under Articles 6 § 1 and 13 of the Convention, the Court considers it appropriate to examine this complaint solely under Article 6 § 1 of the Convention, of which the relevant parts read as follows:

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

A. Admissibility

1. The parties' submissions

30. The Government argued that the applicant company had not exhausted all domestic remedies as required by Article 35 § 1 of the Convention, since it had failed to challenge Judge N. for bias according to section 19 § 2 of the Act on Exercise of Jurisdiction prior to the delivery of the Supreme Court's judgment. As soon as the ordinary appeal on points of law had been submitted to the Supreme Court, the applicant company had had the opportunity to ask the Supreme Court's registry for the file number under which the case had been registered. As these file numbers indicated to which Section the case in question had been allocated, the applicant company could have found out about the composition of the panel sitting on its case and had had to assume that the respective Section would sit in its regular composition, as provided for in the publicly available rules on the distribution of cases (*Geschäftsverteilung*). Had the applicant company wanted to challenge Judge N. for bias, it ought to have done so in advance, especially since it had been aware that Judge N. had withdrawn from comparable cases in the past and had even challenged him for bias in comparable proceedings (see paragraph 19 above).

31. The Government further argued that since the applicant company had failed to challenge Judge N. for bias in due time, that is prior to the delivery of the Supreme Court's judgment, it had not made use of an accessible and effective remedy. Therefore it had to be assumed that the applicant company had waived its right to challenge the alleged bias of Judge N.

32. The applicant company argued that the procedure suggested by the Government (namely to ask for the file number at the Supreme Court's registry to find out to which Section the respective case was allocated in order subsequently to challenge a judge for bias) was neither foreseen by law nor reasonable. Judges were legally obliged to report any reasons that might justify fear of bias, without any delay. A party to the proceedings, however, could not be requested to enquire, without any indication as to the

identity of the judges that would sit on the respective case, whether possible reasons for bias existed. According to the Supreme Court's case-law, a party was obliged to raise a possible reason for bias as soon as it had actually become aware of it and not when it ought to have become aware of it (see paragraph 22 above); knowledge of the court's rules on the distribution of cases was explicitly not required. It further explained that, unlike in other cases where the Supreme Court itself decided on the admissibility of an appeal before issuing a decision on the merits (see paragraph 19 above), no prior decision had been taken by the Supreme Court in the present case since the lower instance had already granted the applicant company leave to appeal on points of law. Lastly, the applicant company submitted that it had not waived its right to have its case heard by an impartial tribunal since it had lacked the knowledge with regard to the participation of Judge N. prior to the delivery of the Supreme Court's judgment.

2. The Court's assessment

33. The Court reiterates that the purpose of Article 35 § 1 of the Convention is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to it (see, among other authorities, *Civet v. France* [GC], no. 29340/95, § 41, ECHR 1999-VI). Thus, the complaint to be submitted to the Court must first have been made to the appropriate national courts, at least in substance, in accordance with the formal requirements of domestic law and within the prescribed time-limits (see *Micallef v. Malta* [GC], no. 17056/06, § 55, ECHR 2009, with further references). Nevertheless, the only remedies that must be exhausted are those that are effective and capable of redressing the alleged violation. More specifically, the only remedies which Article 35 § 1 of the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient; the existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness. It falls to the respondent State, if it pleads non-exhaustion of domestic remedies, to establish that these various conditions are satisfied (see, for example, *Paksas v. Lithuania* [GC], no. 34932/04, § 75, ECHR 2011 (extracts) with further references).

34. The Court observes that the applicant company had not challenged Judge N. before the Supreme Court delivered its judgment, the reason being that it had no prior knowledge of the composition of the Supreme Court panel sitting on its case. This was not disputed by the Government. The Court thus fails to see how the applicant company could have challenged Judge N. for bias according to section 19 § 2 of the Act on Exercise of Jurisdiction in practical terms. Furthermore, it considers that requiring the applicant company to make enquiries with the Supreme Court's registry in order to find out the composition of the respective Supreme Court panel that

was to sit on its case, as suggested by the Government, was not provided by law and could not be deemed reasonable in the circumstances of the case. The Government have not shown that these steps were commonly used by parties to Supreme Court proceedings or that domestic case-law required such conduct from parties who may challenge a judge for bias in due time (compare paragraph 23 above). Furthermore, the Court notes that there is a general legal provision, section 22 § 2 of the Courts Act, which requests judges to report reasons that may justify a withdrawal or challenge on the grounds of fear of bias of their own motion (see paragraph 24 above), (see also *Pescador Valero v. Spain*, no. 62435/00, § 24, ECHR 2003-VII). In this context, the Court further observes that Judge N. had in fact withdrawn of his own motion in previous comparable cases (see paragraph 17 above), so that it could have reasonably be assumed that Judge N. would report his possible incompatibility on the grounds of fear of bias in the present case as well. Lastly, the Court notes that in another case, where the Supreme Court interacted with the parties prior to the delivery of its judgment and where the applicant company thus had prior knowledge of the respective case's file number, the applicant company did – successfully – exercise its right to challenge Judge N. for bias in due time (see paragraph 19 above). In view of the above considerations, the Court concludes that in the circumstances of the case the applicant company cannot be reproached for not having challenged Judge N. before the Supreme Court delivered its judgment and that the applicant company lacked the necessary knowledge unequivocally to waive its right under Article 6 § 1 of the Convention (see also *Golubović v. Croatia*, no. 43947/10, § 39, 27 November 2012).

35. It follows that the Government's objection as to the non-exhaustion of domestic remedies must be dismissed. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant company

36. The applicant company explained that Judge N., who had been part of the Supreme Court's five-judge panel sitting on the case, had been advised by the A. company to purchase shares in IF and had subsequently assigned any claims possibly arising from inadequate counselling against, *inter alia*, the applicant company to a litigation funder. For this reason, Judge N. had on several occasions withdrawn of his own motion from previous cases concerning possible claims resulting from inadequate advice

given by the A. company on such share purchases. It was therefore evident that Judge N. did not appear impartial in the proceedings at issue.

37. The fact that Judge N. – a competent judge who was perfectly able to assess accurately the consequences of initiating proceedings – had intended to file an action against the applicant company, indicated that he was of the opinion that the applicant company was to be held liable for misconduct. Further, it had not been Judge N. who had terminated the contract but the litigation funder; it had thus not been Judge N.'s decision to refrain from filing a claim against the applicant company. Besides, the termination of the contract with the litigation funder did not mean that Judge N. did not or would not otherwise assert his claims.

38. It was not possible to ascertain in how far Judge N. had influenced the outcome of the proceedings since the Supreme Court's panel had deliberated in private. However, given that the panel consisted of five judges with every vote carrying equal weight, it went without saying that every vote was decisive.

(b) The Government

39. The Government argued that Judge N. – when withdrawing from previous similar cases – had never declared himself personally biased but had only pointed out that there might be an appearance of bias due to the financial losses he himself had suffered from the share purchase in question. Even though the Supreme Court had accepted Judge N.'s withdrawal from all of these cases, it had never assumed that Judge N. had been personally biased, but excluded him from sitting on those cases due to the mere appearance of bias.

40. In the proceedings under consideration, Judge N. had no longer considered it necessary to withdraw from the case since he had, following the termination of the contract with the litigation funder, decided not to pursue any claims in this respect. The appearance of a lack of impartiality would not persist indefinitely. If circumstances fundamentally changed, such as in the present case, a judge's personal bias in a different set of proceedings must not necessarily be assumed. Judge N., as well as the Supreme Court's panel deciding on the applicant company's action for nullity, had been of the opinion that the mere financial loss resulting from the share purchase had not by itself rendered Judge N. biased. As Judge N. had no longer intended to take any legal action in this respect, there had been no reason for him to withdraw for fear of bias.

41. Judge N. had not presided over the five-judge panel but had only been an "ordinary" member and had thus not led the deliberations and the vote. There was no indication that he had acted towards the applicant company in any way that could suggest personal bias and the outcome of the proceedings did not indicate any lack of impartiality either.

2. The Court's assessment

(a) General principles

42. The Court reiterates that impartiality normally denotes the absence of prejudice or bias, and its existence or otherwise can be tested in various ways. According to the Court's settled case-law, the existence of impartiality for the purposes of Article 6 § 1 of the Convention must be determined according to 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 also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (see *Morice v. France* [GC], no. 29369/10, § 73, ECHR 2015).

43. In the vast majority of cases raising impartiality issues, the Court has focused on the objective test (see *Micallef v. Malta*, cited above, § 95). However, there is no watertight division between subjective and objective impartiality since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of his or her personal conviction (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 *Morice*, cited above, § 75).

44. As to the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his or her impartiality. This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge or a body sitting as a bench lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (ibid., § 76).

45. 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" (see *De Cubber v. Belgium*, 26 October 1984, § 26, Series A no. 86). What is at stake is the confidence which the courts in a democratic society must inspire in the public (see *Castillo Algar v. Spain*, 28 October 1998, § 45, *Reports of Judgments and Decisions* 1998-VIII). Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see *Micallef*, cited above, § 98).

(b) Application of those principles to the present case

46. As to the subjective test, the Court has consistently held that the personal impartiality of a judge must be presumed until there is proof to the contrary (see *Kyprianou v. Cyprus*, cited above, § 119). In the present case, the applicant company has adduced no evidence to suggest that Judge N. was personally prejudiced or biased.

47. The case must therefore be examined from the perspective of the objective impartiality test, and more specifically it must address the question of whether the applicant company's concerns, stemming from the specific situation, may be regarded as objectively justified in the circumstances.

48. The Court observes that the applicant company's fear of lack of impartiality lay in the fact that Judge N., who was one of the five Supreme Court judges sitting on the case, had intended to file an action against, *inter alia*, the applicant company for financial losses suffered from a similar share purchase and that he had, moreover, withdrawn of his own motion from comparable cases for that reason.

49. First, the Court accepts that the fact that Judge N. had offered his shares to a litigation funder in order to bring possible claims against the applicant company could raise doubts as to his impartiality in the present case. The argument that Judge N. had subsequently changed his mind and had decided to abstain from filing a civil action in this respect, as stated by the Government as well as the Supreme Court in its decision of 27 November 2013 (see paragraph 17 above), is in the Court's view not sufficient to dispel these doubts, especially as the Supreme Court itself, by decision of 13 November 2013, that is only two weeks earlier, dismissed that very argument and hence declared Judge N. biased in another comparable case (see paragraph 20 above).

50. Moreover, the Court places emphasis on the fact that Judge N. had previously reported his possible incompatibility on the grounds of fear of bias in at least two comparable cases, upon which the Supreme Court declared Judge N. biased and excluded him from sitting on those cases. In the Court's view, this should have alerted Judge N. to the possibility that his impartiality might appear to be in doubt in the case under consideration and regardless of whether he, personally, no longer saw the need to declare himself biased.

51. Given the importance of appearances, the Court further notes that the Government's argument that Judge N. did not preside over the five-judge panel is not decisive for the objective impartiality issue under Article 6 § 1 of the Convention. Given that the Supreme Court decided in a closed meeting, it is impossible to ascertain the actual influence of Judge N. on the outcome of the proceedings (see *Morice*, cited above, § 89).

52. In the Court's view, the foregoing considerations are sufficient to enable it to conclude that the composition of the Supreme Court was not such as to guarantee its impartiality and that it failed to meet the Convention standard under the objective test.

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

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

54. 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

55. The applicant company sought compensation for pecuniary damage caused by the fact that the Supreme Court had found against it. It thus claimed the sum it had had to pay to F.M. and H.H., namely 26,388.46 euros (EUR), under this head.

56. The Government disputed the claim, arguing that there was no causal link between the alleged violation and the pecuniary damage claimed, since it was not clear whether the Supreme Court would have ruled differently if Judge N. had not sat on the case under consideration. Furthermore, the finding of a violation of the Convention would constitute sufficient redress.

57. The Court reiterates that it cannot speculate as to what the outcome of the proceedings at issue might have been if the violation of the Convention had not occurred (see, for example, *Chmelíř v. the Czech Republic*, no. 64935/01, § 74, ECHR 2005-IV). It therefore makes no award under the head of pecuniary damage.

B. Costs and expenses

58. The applicant also claimed EUR 49,716.02 for the costs and expenses incurred before the domestic courts (EUR 21,399.81 for lawyers' fees and EUR 28,316.21 for procedural costs) and EUR 5,000 for those incurred before the Court.

59. The Government contested these claims and asserted that none of the procedural steps taken by the applicant company in the domestic proceedings stood in connection with the alleged violation of the Convention, given that the present case dealt with the participation of an allegedly biased judge in proceedings before the *highest* court. As regards

the claim for costs incurred in the Convention proceedings, the Government asserted that it was excessive.

60. The Court, in accordance with its case-law, will consider whether the costs and expenses claimed were actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and were reasonable as to quantum (see, among many other authorities, *Wettstein v. Switzerland*, no. 33958/96, § 56, ECHR 2000-XII). In the present case, the Court notes that this would only correspond to the costs for the action for nullity lodged by the applicant company with the Supreme Court (see paragraph 14 above). According to the bill of fees submitted by the applicant company the costs for this action amounted to EUR 2,220.19 plus VAT. The Court awards this sum, plus any tax that may be chargeable to the applicant company on this amount.

61. In respect of the Convention proceedings, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 5,000, plus any tax that may be chargeable to the applicant company on this amount.

62. In sum, the Court awards the applicant company EUR 7,220.19 under the head of costs and expenses, plus any tax that may be chargeable to the applicant company on this amount.

C. Default interest

63. 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 application admissible;

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

3. *Holds*

(a) that the respondent State is to pay the applicant company, within three months, EUR 7,220.19 (seven thousand two hundred and twenty euros nineteen cents), plus any tax that may be chargeable to the applicant company, 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 amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 21 June 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško	Yonko Grozev
Deputy Registrar	President