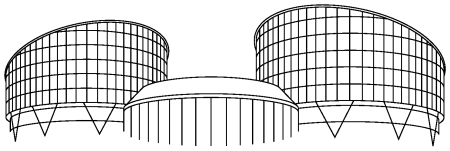

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF ERMÉNYI v. HUNGARY

(Application no. 22254/14)

JUDGMENT

STRASBOURG

22 November 2016

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 Erményi v. Hungary,

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

Vincent A. De Gaetano, *President,*
András Sajó,
Nona Tsotsoria,
Paulo Pinto de Albuquerque,
Egidijus Kūris,
Iulia Motoc,
Marko Bošnjak, *judges,*

and Marialena Tsirli, *Section Registrar,*

Having deliberated in private on 11 October 2016,

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

PROCEDURE

1. The case originated in an application against Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Hungarian national, Mr Lajos Erményi ("the applicant"), on 20 June 2012. The application had initially been brought, by the applicant and several other Hungarian judges, in respect of both the reduction of their mandatory retirement age and the applicant's dismissal from his position of Vice-President of the Supreme Court. On 19 March 2014 the Court disjoined from the initial application the applicant's complaint concerning the termination of his mandate as Vice-President and registered it as a separate application (no. 22254/14). The present case concerns the latter complaint only.

2. The applicant was represented by Mr A. Cech, a lawyer practising in Budapest. The Hungarian Government ("the Government") were represented by Mr Z. Tallódi, Agent, Ministry of Justice.

3. The applicant died on 6 January 2015. On 6 February 2015 his heirs, Ms Éva Koczka (the applicant's widow) and Ms Kinga Erményi and Mr Csaba Erményi (the applicant's children) applied to pursue the application before the Court in his stead and retained the same lawyer to represent them.

4. The applicant complained of the premature termination of his mandate as Vice-President of the Supreme Court (hereinafter "Vice-President"), in breach of his Convention rights.

5. On 21 May 2014 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1950 and lived in Budapest.

7. Having been a judge since 1 January 1978 and a member of the Supreme Court since 1 March 1994, on 15 November 2009 he was appointed Vice-President for a six-year term by the President of the Republic, after being proposed for the post by the President of the Supreme Court.

8. The mandate of the President of the Supreme Court was prematurely terminated, upon the entry into force of the Fundamental Law on 1 January 2012, in reaction to his criticisms and publicly expressed views regarding proposed judicial reforms (see *Baka v. Hungary* [GC], no. 20261/12, § 151, 23 June 2016).

9. In connection with these events, a proposal for the termination of the applicant's mandate as Vice-President was submitted to Parliament on 23 November 2011, and was adopted on 28 November 2011 in the form of section 185 of Act no. CLXI of 2011 on the Organisation and Administration of the Courts ("the AOAC") (see *Baka*, cited above, § 30). Accordingly, as of 1 January 2012, the applicant was removed from his position as Vice-President, three years and ten months before the scheduled expiry of his mandate. He remained in office as president of one of the Civil Law division benches of the *Kúria* (the historical appellation by which the Supreme Court was renamed in 2012).

10. On 7 February 2012 the applicant lodged a constitutional complaint with the Constitutional Court challenging the termination of his position. In its judgment no. 3076/2013. (III. 27.) AB, adopted by eight votes to seven, the Constitutional Court rejected the constitutional complaint. It held that the premature termination of the applicant's term of office as Vice-President had not violated the Fundamental Law, since it had been sufficiently justified by the full-scale reorganisation of the judicial system and important changes made in respect of the tasks and competences of the President of the *Kúria*. It noted that the *Kúria*'s tasks and competences had been broadened, in particular with regard to the supervision of the legality of municipal council regulations (for the relevant parts of the Constitutional Court's judgment see *Baka*, cited above, § 55).

Seven judges dissented and considered that the changes concerning the judicial system, the new *Kúria* and the person of its president had not fundamentally affected the status of the Vice-President. The position of the Vice-President within the organisation of the supreme judicial instance had not changed. Under the Act LXVI of 1997 on the Organisation and Administration of the Courts, the Vice-President was already entitled to act in the stead of the President of the Supreme Court only with regard to

managerial tasks at the Supreme Court, but not with regard to his or her functions as President of the National Council of Justice (see *Baka*, cited above, § 56). The dissenting judges concluded that the premature termination of the applicant's term of office had not been sufficiently justified by the reorganisation of the judicial system; and that it had weakened the guarantees in respect of the separation of powers, had been contrary to the prohibition on retroactive legislation, and had breached the principle of the rule of law and the right to a remedy.

11. On 6 July 2012, as a consequence of the lowering of the judges' mandatory retirement age pursuant to section 90 (ha) of Act no. CLXII of 2011 on the Legal Status and Remuneration of Judges ("the ALSRJ") (see *Baka*, cited above, § 52), the President of the Republic released the applicant from his duties as a judge with effect from 31 December 2012.

12. In its judgment no. 33/2012. (VII. 17) AB of 16 July 2012, the Constitutional Court declared unconstitutional and consequently annulled the provisions on the compulsory retirement age of judges (see *Baka*, cited above, § 53). On the basis of that judgment, the Budapest Labour Court found, in a first-instance judgment of 21 March 2013, that the termination of the applicant's judicial service had been unlawful and reinstated him – without, however, ordering his reinstatement in his previous position as president of one of the Civil Law division benches of the *Kúria*.

13. Following the Constitutional Court's judgment of 16 July 2012, Parliament adopted a modified scheme governing the reduction of judges' compulsory retirement age and provided different options for those who had already been affected by the unconstitutional legislation (see Act no. XX of 2013 referred to in *Baka*, cited above, § 54). The applicant opted not to be reinstated and received lump-sum compensation for the termination of post as a judge.

II. RELEVANT DOMESTIC LAW AND PRACTICE, AND INTERNATIONAL AND COUNCIL OF EUROPE MATERIALS

14. The relevant domestic law and international and Council of Europe materials on the independence of the judiciary and on restrictions on the removal of judges are outlined in paragraphs 38, 41, 50, 51 and 72 to 87 of the judgment in *Baka* (cited above).

15. Section 135 of the ALSRJ, which was not cited in the *Baka* case, contains generally applicable rules governing the liability of judges' employers. It provides, as relevant:

> "(1) The employer is fully liable, regardless of its degree of culpability, for any damage caused to a judge in connection with his or her judicial service ...
>
> (2) The employer is exempted from such liability if it succeeds in proving that the damage ... in question resulted from an unavoidable cause falling outside its scope of activity ..."

16. Citing that provision, the *Kúria* held, in a judgment of 16 April 2014, that the employer of a dismissed and later reinstated judge was liable for the damage resulting from such a dismissal – even if that dismissal had been compulsory under the stringent new rules concerning the lowering of judges' mandatory retirement age.

The underlying reason was that, on the strength of the Constitutional Court's judgment no. 33/2012. (VII. 17) AB of 16 July 2012 (see paragraph 12 above), any release from his duties as a judge on the basis of the unconstitutional and overturned section 90 (ha) of the ALSRJ was to be considered unlawful within the meaning of section 135 of the same Act (see paragraph 15 above). The *Kúria* was of the view that although the stringent legislation rendered the unlawful dismissal unpreventable by the employer, the termination of the employment relationship nevertheless fell within its scope of activity and this fact excluded the application of the exemption rule contained in section 135 (2) of the ALSRJ. Considering that a person's work or professional activity was a manifestation of utmost importance of his or her personality, the *Kúria* took the stance that a judge's unlawful dismissal also violated his or her human dignity and personality rights, as protected by section 75 of the Civil Code. On the basis of that reasoning, it confirmed a judgment under which the employer was to pay 1 million Hungarian forints (approximately 3,300 euros (EUR)) to the judge concerned in non-pecuniary damages.

THE LAW

I. PRELIMINARY QUESTION

17. As a preliminary point, the Court takes note of the death of Mr Lajos Erményi on 6 January 2015 and of the wish expressed by his heirs, namely, his widow and his children, to continue the application before the Court in his stead (see paragraph 3 above). In accordance with its case-law and considering that the present application involves an important question of general interest, namely, the compatibility with the Convention of the dismissal of the Vice-President of a high national court, the Court finds that the heirs have standing to continue the application in the applicant's stead (see, for instance and *mutatis mutandis*, *Karner v. Austria*, no. 40016/98, §§ 25-26, ECHR 2003-IX; *Koryak v. Russia*, no. 24677/10, § 68, 13 November 2012; and *Romankevič v. Lithuania*, no. 25747/07, § 16, 2 December 2014).

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

18. The applicant complained that he had been dismissed from his position of Vice-President, three years and ten months before the statutory date of his term's expiry, by means of an *ad hominem* legislative measure. In the initial application of 20 June 2012 he invoked Articles 6, 13 and 14 of the Convention, as well as Article 1 of Protocol No. 1, and contended, in particular, that his dismissal had ruined his career and reputation as well as his social and professional relationships and had also resulted in his unjustified deprivation of the peaceful enjoyment of the benefits that would have been due to him during his term of office. In a memorial summarising his arguments following the disjoinder, on 19 March 2014, of the present complaint from the initial application (see paragraph 1 above), the applicant also invoked Article 8 of the Convention and explicitly argued that the termination of his mandate had violated his right to respect for private life, including the development of relationships of a professional nature.

19. The Court reiterates that since it is master of the characterisation to be given in law to the facts of the case, it does not consider itself bound by the characterisation given by an applicant or a government. By virtue of the *jura novit curia* principle, it has, for example, considered of its own motion complaints under Articles or paragraphs not relied on by those appearing before it. A complaint is characterised by the matters alleged in it and not merely by the legal grounds or arguments relied on (see, *mutatis mutandis*, *Powell and Rayner v. the United Kingdom*, judgment of 21 February 1990, Series A no. 172, § 29; *Guerra and Others v. Italy*, judgment of 19 February 1998, Reports 1998-I, § 44; *Berktay v. Turkey*, no. 22493/93, § 167, 1 March 2001; *Eugenia Lazăr v. Romania*, no. 32146/05, § 60, 16 February 2010; and *Samachişă v. Romania*, no. 57467/10, § 43, 16 July 2015). Having regard to the facts of the present application, the Court considers it appropriate to examine the applicant's complaint solely from the standpoint of Article 8 of the Convention, which, in so far as relevant, provides:

> "1. Everyone has the right to respect for his private ... life ... .
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. The parties' submissions

1. The Government

20. The Government raised preliminary objections relating, on one hand, to the applicant's loss of victim status and, on the other hand, to his failure

to exhaust domestic remedies, as required by Article 35 § 1 of the Convention.

21. As regards the first objection, the Government argued that the applicant's complaint was incompatible *ratione personae* with the provisions of the Convention, since on the strength of his having accepted lump-sum compensation for his dismissal he had ceased to have victim status within the meaning of Article 34 of the Convention.

22. As regards the second objection, they contended that the applicant had not exhausted an available domestic remedy, namely an action for damages, as referred to in paragraphs 15 and 16 above, which could have provided full compensation in respect of any of his claims that might remain after the disbursement of the lump-sum compensation.

23. Concerning the merits of the case, the Government acknowledged that the impugned measures constituted an interference with the applicant's rights, as guaranteed by Article 8 of the Convention. They nevertheless argued that the interference had been prescribed by law and had formed part of a series of measures aimed at eliminating certain anomalies in the Hungarian pension system with a view to creating a fair scheme that would apply to all categories of public servants in a uniform manner. They further submitted that the interference had been necessary following the full-scale reorganisation of the justice system in 2012, which had significantly modified the legal position of the President of the Supreme Court and that of his deputy. In their view, the interference was not disproportionate, taking into account the generous reparations stipulated by Act no. XX of 2013 (see paragraph 13 above).

2. The applicant

24. The applicant argued that given that he had brought the substance of his complaint before the Constitutional Court, the domestic authorities had been afforded an opportunity to provide redress for the interference he had been subject to. He had thus duly exhausted the available domestic remedies and was not required to pursue other legal avenues. He also stressed that the *Kúria*'s judgment referred to in paragraph 16 above had concerned a judge's dismissal from his post as a judge, a subject matter entirely different from the subject of his complaint.

Similarly, the lump-sum compensation he had received related to the termination of his judicial service, pursuant to the amended rules on judges' mandatory retirement age. Therefore, the fact that he had received such compensation could not deprive him of his status as the victim of another interference, namely his dismissal from his position as Vice-President.

25. In the applicant's view, the legislative measure terminating his mandate as Vice-President had not met the requirements of foreseeability and compatibility and the principle of the rule of law. Nor had it been based on a legitimate aim or been necessary in a democratic society. He argued, in

particular, that the legal provision applied to him, although couched in terms of a legislative act, was nothing less than an individual decision on his dismissal. He also contended that two of the judges who had voted in favour of the Constitutional Court's judgment dismissing his constitutional complaint should have been excluded from adjudicating on the case on account of the fact that, as former members of parliament, they had previously taken part in the preparation of the legislative measure under the Constitutional Court's scrutiny.

B. The Court's assessment

1. Admissibility

26. At the outset, the Court finds it important to note the difference between the legal basis for the termination of the applicant's mandate as Vice-President (section 185 (1) of the AOAC – see paragraph 9 above, as well as *Baka*, cited above, §§ 30 and 50) – and for the applicant's subsequent release from his duties as a judge under section 90 (ha) of the ALSRJ (see paragraph 11 above, as well as *Baka*, cited above, § 52).

27. The Court considers that both the reparatory scheme (including the lump-sum compensation referred to by the Government – see paragraph 21 above) and the legal avenue allegedly providing a remedy based on the objective liability of a judge's employer (cited in paragraph 22 above) were related to judges' dismissals from judicial service on account of their age pursuant to section 90 (ha) of the ALSRJ, which had been found unconstitutional and unlawful.

28. As regards the termination of the applicant's mandate as Vice-President – the issue before the Court in the present case – the Government did not demonstrate that, apart from the constitutional complaint that he had lodged (to no avail), any form of remedy had been available to the applicant or could have deprived him of his status as a victim for the purposes of Article 34 of the Convention. In particular, the Government failed to show how an action for damages, without a preliminary finding of unconstitutionality or unlawfulness in respect of the applicant's dismissal, could have been successful in the light of the domestic case-law, according to which damage potentially resulting from legislation does not create a relationship of civil-law liability between the lawmaker and the alleged victim (see *Vékony v. Hungary*, no. 65681/13, § 17, 13 January 2015).

Therefore, the Government's preliminary objections as to the applicant's loss of victim status and non-exhaustion of domestic remedies must be dismissed.

29. 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.

2. Merits

(a) Whether there has been an interference

30. The notion of "private life" within the meaning of Article 8 of the Convention encompasses the right for an individual to form and develop relationships with other human beings, including relationships of a professional or business nature. Article 8 thus protects the right to personal development and the right to establish and develop relationships with other human beings and the outside world and does not exclude in principle activities of a professional or business nature because it is in the course of their working lives that the majority of people have a significant opportunity to develop relationships with the outside world (see *Oleksandr Volkov v. Ukraine*, no. 21722/11, § 165, ECHR 2013-I, with further references). Dismissal from office has been found to interfere with the right to respect for private life (see *Özpınar v. Turkey*, no. 20999/04, §§ 43-48, 19 October 2010).

31. In the present case, it was not in dispute between the parties that the termination of the applicant's mandate as Vice-President constituted an interference with his right to respect for his private life. The Court finds no reason to hold otherwise.

It remains to be examined whether that interference was justified under Article 8 § 2.

(b) Whether the interference was justified

(i) Lawfulness

32. The expression "in accordance with the law" requires, firstly, that the impugned measure should have some basis in domestic law. Secondly, it refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and be compatible with the rule of law (see, among other authorities, *Kopp v. Switzerland*, 25 March 1998, § 55, *Reports of Judgments and Decisions* 1998-II). This latter concept, which is expressly mentioned in the Preamble to the Convention and is inherent in all the Articles of the Convention, requires, *inter alia*, that any interference must in principle be based on an instrument of general application (see, in relation to Articles 6 § 1 and 10 of the Convention, *Baka*, cited above, §§ 117 and 154).

33. Although the applicant argued that the individualised manner in which the provision terminating his mandate had been phrased had violated the requirements of the rule of law (see paragraph 25 above), the Court will

nevertheless proceed on the assumption that the interference was "in accordance with the law" for the purposes of Article 8 § 2, as in any event the impugned interference breaches Article 8 for other reasons.

(ii) Legitimate aim

34. The Court reiterates that the enumeration of the exceptions to the individual's right to respect for his private life, as listed in Article 8 § 2, is exhaustive and that their definition is restrictive. For it to be compatible with the Convention, a limitation of this freedom must, in particular, pursue an aim that can be linked to one of those listed in this provision (*Parrillo v. Italy* [GC], no. 46470/11, § 163, ECHR 2015).

35. The Government submitted that the termination of the applicant's judicial status was aimed at eliminating certain anomalies in the Hungarian pension system – a consideration which may obviously be linked to the aim of protecting "the economic well-being of the country" (see paragraph 23 above). However, the Court reiterates that the interference which it is called to examine in the present case is the applicant's dismissal from his position as Vice-President, rather than his release from his duties as a judge altogether.

As regards the termination of the applicant's mandate as Vice-President, the Government only referred to the full-scale reorganisation of the justice system, which had allegedly rendered the impugned measure inevitable. However, they did not demonstrate any link between the applicant's dismissal from his position and the aims exhaustively listed in Article 8 § 2.

36. Furthermore, the Court already held that the alleged changes in the competences of the supreme judicial body did not appear to be of such a fundamental nature that they could or should have prompted the premature termination of its President's mandate (see *Baka*, cited above, § 150). The same necessarily holds true for the applicant in the present case, whose dismissal was a corollary to that of the Supreme Court's President (see paragraphs 43 and 44 of the Constitutional Court's judgment no. 33/2012. (VII. 17) AB of 16 July 2012, quoted in *Baka, cited above*, § 55).

37. It follows that the Court cannot accept that the interference complained of pursued any of the legitimate aims enumerated in Article 8 § 2.

38. Where it has been shown that an interference did not pursue a "legitimate aim" it is not necessary to investigate whether it was "necessary in a democratic society" (see, for instance and *mutatis mutandis*, *Khuzhin and Others v. Russia*, no. 13470/02, §§ 117-118, 23 October 2008).

Nor does the Court find it necessary to examine the applicant's allegations as to the unlawful participation of certain judges in the adjudication of his case before the Constitutional Court (see paragraph 25 above).

(iii) Conclusion

39. The foregoing considerations are sufficient to enable the Court to conclude that the termination of the applicant's mandate as Vice-President of the Supreme Court did not meet the requirements of Article 8 § 2 of the Convention.

40. There has therefore been a violation of Article 8 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

41. 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

42. The applicant claimed that as a result of the premature termination of his mandate as Vice-President he had lost his salary and other benefits attached to that position. He provided a detailed calculation of his claim for pecuniary damage, which amounted to 106,900 euros (EUR).

43. The applicant also claimed that as a consequence of the premature termination of his mandate, his professional career and reputation had been damaged and he had suffered considerable frustration. He sought an award of just satisfaction in respect of non-pecuniary damage in the amount of EUR 90,000.

44. The Government found those claims excessive.

45. Without speculating on the exact amount of the salary and the benefits which the applicant would have received if the violation of the Convention had not occurred and if he had been able to remain in the post of Vice-President of the Supreme Court until the end of his term, the Court observes that the applicant incurred pecuniary loss. It also considers that the applicant must have sustained non-pecuniary damage which the finding of a violation of the Convention in this judgment does not suffice to remedy. Making an assessment on the basis of equity and in the light of all the information in its possession, the Court considers it reasonable to award the applicant an aggregate sum of EUR 20,000 for all heads of damage combined, plus any tax that may be chargeable on that amount (see, *mutatis mutandis*, *Baka*, cited above, § 191).

B. Costs and expenses

46. The applicant also claimed EUR 11,315 for the costs and expenses incurred before the Court. This sum corresponds to 51 hours of legal work, charged at an hourly rate of EUR 190, and 25 hours of paralegal work, charged at an hourly rate of EUR 65, to be billed by his lawyer.

47. The Government contested this claim.

48. 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 5,000 for the costs and expenses incurred before it.

C. Default interest

49. 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,

1. *Holds*, unanimously, that Mr Lajos Erményi's heirs have standing to continue the present proceedings in his stead;

2. *Declares*, by a majority, the application admissible;

3. *Holds*, by six votes to one, that there has been a violation of Article 8 of the Convention;

4. *Holds*, by six votes to one,
   (a) that the respondent State is to pay the applicant's heirs (see paragraph 3 above), jointly, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 20,000 (twenty thousand euros), plus any tax that may be chargeable, in respect of pecuniary and non-pecuniary damage;
      (ii) EUR 5,000 (five thousand euros), plus any tax that may be chargeable to the applicant's heirs, 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*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 22 November 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli
Registrar

Vincent A. De Gaetano
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Kūris is annexed to this judgment.

V.D.G
M.T.

DISSENTING OPINION OF JUDGE KŪRIS

1. There are many ways in which law can move towards alienation from those who have to live under it. One of them is the overly discretionary interpretation of a legal provision and its application contrary to what that provision explicitly states, or in such an expansive manner that its boundaries become blurred and its content inflated. This particular judgment is a vivid manifestation of such inflation. In it, Article 8 of the Convention is interpreted so broadly that it is capable of covering almost anything, including those fields of life which have until now been conventionally perceived as belonging exclusively or at least primarily to the public domain. Article 8 was intended to protect private life. However, as a result of this and other judgments of the Court in which its applicability has been significantly expanded, it seems to have become all-embracing, because the notion of "private life" has itself become all-embracing.

2. Article 8 provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

3. Paragraph 19 of the judgment, wherein Article 8 is quoted, resourcefully omits the "family", "home" and "correspondence" elements as irrelevant to the case and reduces the provision of the first paragraph of Article 8, under which the applicant's case was communicated to the parties, to one single element, namely "respect for [one's] private life". Thus, the notion of "private life" appears to be not necessarily and/or not always related to "family", "home" or "correspondence" and in this sense to have a somewhat autonomous content. I agree with the majority that, as a matter of principle, the notion of "private life" encompasses much more than "family", "home" and "correspondence". But I strongly disagree with the approach underlying this judgment, namely that the notion of the "right to respect for [one's] private life" extends so far as to include one's right not to be dismissed, without the guarantees provided for in the second paragraph of Article 8, from such a post as that of Vice-President of the Supreme Court. I find it more than difficult to accept that holding such a *public* post (at least until the standard expiration of the term of office) falls within the sphere of *privacy*. Hence, I could not vote with the majority in finding a violation of Article 8.

4. This is not to say that Mr Erményi's dismissal from that post was lawful or that it pursued a legitimate aim. In *Baka v. Hungary* ([GC],

no. 20261/12, ECHR 2016), much was revealed of the (to put it mildly) dubious legality of the re-organisation of the Hungarian judicial system in 2011–2012, including the premature termination, *inter alia* through *ad hominem* legislative measures, of the mandates of judges, as well as the mandates of the persons holding the leading judicial posts in the Supreme Court (re-organised under the new name of *Kúria*) or in other courts. There is no need to repeat this assessment here.

However, the fact that the "interference complained of" did not pursue "any of the legitimate aims enumerated in Article 8 § 2" (see paragraph 37 of the judgment), which is perhaps impossible to dispute, does not in and of itself imply that it was specifically the applicant's right *under Article 8* which was interfered with. In fact, the "interference *complained of*" (emphasis added) was under Articles 6, 13 and 14 of the Convention, as well as Article 1 of Protocol No. 1 (see paragraph 18). This was so until the Court requalified the applicant's complaint – as early as the stage of communicating the case to the parties.

5. The applicant himself *did not invoke Article 8*. It was *this Court* which invoked it. The Chamber legitimately mentions, in paragraph 18, that the applicant initially invoked other Articles (see § 4 above), but also that he "contended ... that his dismissal had ruined his career and reputation as well as his social and professional relationships". The Chamber also mentions that "following the disjoinder ... of the present complaint from the initial application", the applicant "also invoked Article 8 ... and explicitly argued that the termination of his mandate had violated his right to respect for private life, including the development of relationships of a professional nature" (ibid.). What the Chamber does *not* state is that the applicant "also invoked Article 8" *following not only* the "disjoinder of the present complaint from the initial application" *but also the communication* of this complaint to the respondent Government (and to the applicant) by the Court, not under the Articles initially invoked by the applicant, but under Article 8 – to be precise, under its first paragraph. The applicant "also invoked Article 8" *because* it had already been invoked by the Court.

Thus, it was *this Court* which sent a message to the applicant that his case was to be examined "solely" under Article 8, and not under the Articles initially relied upon by the applicant himself. It would have been strange had the applicant, having received such a message from the Court, still claimed that his application was to be examined under these other Articles, given that the Court had already requalified these complaints as being presented under the "wrong" Articles. It would have been no less strange had the applicant disputed the examination of the case under Article 8, when the Court had expressed its position that it was Article 8 which was applicable to his case.

One could probably wonder why the Hungarian Government did not argue that Article 8 was inapplicable *to this particular complaint* by the

applicant – in contrast to his other complaint, which pertained to the termination of this applicant's judicial mandate (and those of a number of his co-applicants) and from which the present complaint was disjoined. Let us be realistic. Such a hypothetical contention would hardly have been meaningful, given that the Court had *a priori* flagged that, as a matter of principle, the question of the applicability of Article 8 had been resolved. *Roma locuta, causa finita est.*

6. In view of all this, the following conclusion by the Chamber (in paragraph 31) turns the whole thing inside out:

> "In the present case, it was not in dispute between the parties that the termination of the applicant's mandate as Vice-President constituted an interference with his right to respect for his private life. The Court finds no reason to hold otherwise."

The name for such an argument is *misrepresentation*. Placed in the factual context outlined in § 5 above, this "conclusion" appears to state that the Court finds no reason to hold otherwise than the parties, which earlier found no reason to hold otherwise than the same Court which, even earlier, had taken a position different from that of the applicant and requalified his initial complaint. In other words, the Court finds no reason to find otherwise than it itself had found and authoritatively imposed on the parties.

7. In substantiating the requalification of the applicant's initial complaint to one under Article 8 and "solely" under it, the Chamber states that the Court, being "master of the characterisation to be given in law to the facts of the case", "does not consider itself bound by the characterisation given by an applicant or a government" and, "[b]y virtue of the *jura novit curia* principle, it [can consider] of its own motion complaints under Articles or paragraphs not relied on by those appearing before it", because a "complaint is characterised by the matters alleged in it and not merely by the legal grounds or arguments relied on". Having stated this, the Chamber goes on to conclude that "[h]aving regard to the facts of the present application, the Court considers it appropriate to examine the applicant's complaint solely from the standpoint of Article 8 of the Convention" (see paragraph 19 of the judgment).

This explains little, if anything at all. All these arguments are but one lengthy paraphrase of the *magister dixit* thesis. But no one contests that the Court is a "master of the characterisation to be given in law to the facts of the case". No one doubts the *jura novit curia* principle. It is also true that the Court is "not ... bound by the characterisation given by an applicant or a government". And it is no less true that a "complaint is characterised by the matters alleged in it and not merely by the legal grounds or arguments relied on". So what? It does not follow at all from all these general premises that the applicant's complaint *in this particular case* has to be examined specifically "from the standpoint of Article 8", nor, moreover, that it has to be examined "solely" from that standpoint.

8. In the same line, while agreeing with the majority that the termination of the applicant's mandate as Vice-President of the Supreme Court served no legitimate aim (paragraph 37), I cannot agree that this in and of itself enables one to conclude that it is Article 8 which has been violated (see paragraphs 39 and 40 of the judgment; see also § 4 above).

9. The application of Article 8 *to this particular complaint* by the applicant is far-fetched. It is based on the following doctrinal statement, mechanically and uncritically imported (to paragraph 30 of the judgment) from the earlier case-law:

> "The notion of 'private life' within the meaning of Article 8 of the Convention encompasses the right for an individual to form and develop relationships with other human beings, including relationships of a professional or business nature. Article 8 thus protects the right to personal development and the right to establish and develop relationships with other human beings and the outside world and does not exclude in principle activities of a professional or business nature because it is in the course of their working lives that the majority of people have a significant opportunity to develop relationships with the outside world (see *Oleksandr Volkov v. Ukraine*, no. 21722/11, § 165, ECHR 2013-I, with further references). Dismissal from office has been found to interfere with the right to respect for private life (see *Özpınar v. Turkey*, no. 20999/04, §§ 43-48, 19 October 2010).

Thus, according to the Court's established case-law "Article 8 ... *does not exclude in principle* activities of a professional or business nature because it is in the course of their working lives that the *majority* of people have a *significant* opportunity to develop relationships with the outside world" (emphasis added). This is a very general statement – and a cautious one, which *allows* for the invocation of Article 8 under certain circumstances *which have to be established*, but does not lend itself to indiscriminate application under any factual circumstances, irrespective of what these may be. A non-mechanistic, non-formalistic – that is, *not blindly dogmatic* – application of this most general doctrinal provision would require that what is "not excluded in principle" and hence may be *closer to an exception* is not automatically transformed into a *rule*, by implying that whenever a person is dismissed from employment or from another *official* – which by definition amounts to *public* – position, let alone deprived of an function that is "additional" to his or her principal occupation, that person's *private* life is *always* interfered with. In the present case, for a fair and careful application of the said doctrinal provision it would have been required that the Court (as a minimum) looked into whether the applicant really belonged to the aforementioned "majority" whose "relationships with the outside world" were "significant[ly]" developed *particularly on account of* his holding the post of Vice-President of the Supreme Court and that the dismissal from that post "significant[ly]" severed his opportunity to develop the said relationships.

10. I do not believe that the applicant's "relationships with the outside world", his social life or even his professional relations were dependent to such an extent on that post, which was only an additional function to his judicial service and status as a judge of the Supreme Court. The termination of the applicant's judicial mandate was another matter; to argue that here there has not been an unlawful interference with the applicant's rights under Article 8 would run counter to the Court's most clear case-law as consolidated in *Oleksandr Volkov v. Ukraine* (referred to in § 9 above). With regard to *this* applicant, however, that issue (dismissal from the judicial service as such) was settled at the national level (see paragraph 11 of the judgment). As to the termination of the applicant's mandate as Vice-President of the Supreme Court, this dismissal could and most probably did bring about some undesirable consequences in his relations with other judges, other legal professionals or other State officials, and perhaps also with certain other people, but my imagination fails to see these developments as a genuine or powerful intrusion into this applicant's *private* life – of course, if private is still considered as something essentially different from (even if not always unrelated to) what is public. Most important is that *the applicant himself did not think so*. And he was right: a person's private life would really be poor, feeble and sorrowful if his or her "relationships with the outside world" depended, mainly or to a considerable extent, on him or her holding a certain official position within the administration, irrespective of what branch of power that administration belonged to. Let it be repeated once again that the applicant (as well as his co-applicants) did not initially invoke Article 8. He did not do so until this Court, at the stage of communicating the case, presented him with an *either/or alternative*: either his case is examined under Article 8, or it is not examined at all.

On this occasion it should be noted that the applicant's contention in his initial application (and that of another twenty-six persons) "that his dismissal had ruined his ... reputation as well as his social and professional relationships", a contention to which the Chamber refers (see § 5 above), must be interpreted in the light of two circumstances. The first is that the said "dismissal" encompassed the applicant's "dismissal" not only from the post of Vice-President of the Supreme Court, but also from the judicial service as such (i.e. from his post as a judge of that court); only later were the applicant's two complaints pertaining to the two "dismissals" disjoined by the Court. The second circumstance to be taken into account is that this contention was indeed not the applicant's complaint "proper", but the joint complaint of as many as twenty-seven co-applicants, only some of whom had previously held, in addition to their judicial function, the posts of court president, vice-president, head or deputy head of division of some court.

11. The judgment attempts to create the impression that it is a logically consequent continuation of the Court's case-law, as enshrined in *Oleksandr Volkov v. Ukraine* and *Baka v. Hungary* (both cited above). It is not. There are essential, even crucial differences between these two cases and the present one. To begin with, *Baka* was not an Article 8 case. In that case, the violations found were those of Articles 6 § 1 and 10, and not of Article 8. And the applicant in *Oleksandr Volkov*, in which a violation of Article 8 was indeed found (alongside numerous violations of Article 6 § 1), had been dismissed from the post of a judge of the Supreme Court (and only *per extentionem* from the function of President of the Military Chamber of that court, this latter function being mentioned in passing only once in the entire judgment adopted in that case (see *Oleksandr Volkov*, cited above, § 11)). (The applicant in *Özpınar v. Turkey* (referred to in § 9 above), where a violation of Article 8, taken alone and in conjunction with Article 13, was found, was also a "mere" judge.) One can put and turn and mix things as one likes, and still these two cases, *Oleksandr Volkov* and *Baka*, even taken together (or perhaps especially taken together), do not suggest in the least that the premature termination of the applicant's function as Vice-President of the Supreme Court, which in this applicant's case preceded his dismissal from judicial service as such, amounted to interference with his rights *under Article 8*.

12. Again, I must underline that this disagreement with the majority in no way whitewashes the impugned re-organisation of the Hungarian judicial system in 2011–2012, including *ad hominem* legislative measures aimed at the premature termination of the mandate of a judge and/or certain related functions (see also § 4 above). If, however, a violation of the Convention has taken place with regard to *the dismissal in question*, it must have been a violation not of Article 8, but of some other provision(s) of the Convention. But from the outset, as far back as the stage of communication of the case, the Court rejected the possibility of examining this case from a different standpoint, including that of the Articles initially invoked by the applicant.

13. I find it disconcerting that through judgments such as the present one the scope of Article 8 risks becoming inflated (if this has not already occurred). In order to save time and space, I shall not provide in this opinion examples of the other (unfortunately, quite numerous) cases where the boundaries of the notion of "private life" have been expanded so widely and so far that (as I have already hinted in § 1 above) this notion tends to embrace almost everything, including many things which are public in their nature and have only a distant relation to privacy. (Admittedly, there is also an opposite tendency in the Court's case-law, namely where personality rights, which should be effectively protected by Article 8, happen to be ignored when set against the media's rights under Article 10 – but to enter into these matters would entail discussion of a completely different topic; see my joint dissenting opinions with Judge Wojtyczek in *Fürst-Pfeifer*

v. Austria (nos. 33677/10 and 52340/10, 17 May 2016) and *Ziembiński v. Poland (no. 2)* (no. 1799/07, 5 July 2016).)

14. The perspective of examining privacy in terms of the right and value protected by Article 8 must be returned to its natural angle. To present it graphically, 8 should indeed be seen as

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and not – as increasingly tends to be the case – like the sign of infinity:

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15. This case merits re-examination by the Court's Grand Chamber. It meets both criteria indicated in Article 30 of the Convention: (i) it raises a serious question affecting the interpretation of the Convention; and (ii) the resolution of the question before the Chamber has brought about a result that is inconsistent with the Court's case-law. If such re-examination does not take place, this judgment will become the valid jurisprudential law of the Convention, which will then be referred to and followed in subsequent cases. Yes, a risk does indeed exist that it will be followed in an indiscriminate and mechanistic manner, just as this judgment itself is based on an indiscriminate and mechanistic application of a certain doctrinal provision (see § 9 above).

I shall not speculate on the possible ramifications of such a development. Still, one outcome is very predictable. It is trivialisation of the notion of "private life" to such an extent that *virtually any* act by the authorities of a member State *vis-à-vis* an individual, as a participant in the labour market or as a holder of a profession or any other *official* function, could be assessed as an interference with that person's right to respect for *private* life, protected by Article 8.

By (as I want to hope they will) requesting a referral of this case to the Grand Chamber, the Government would do a service not only – and not even predominantly – to "their" own case, but also to the more far-reaching development of the Court's case-law. On the other hand, having already accepted, albeit upon the Court's most authoritative suggestion at the communication stage (see § 5 above), that Article 8 is applicable to the applicant's dismissal from the post of Vice-President of the Supreme Court, the Government, if they request such a referral, will have to be quite inventive.

Still, I am not overly optimistic that the Government will attempt this avenue. If they do not, we will all have to live – at least until some other case makes its way, at last, to the Grand Chamber and that composition of

the Court reviews the doctrine consolidated in the present case – with case-law in which the notion of "private life" is amalgamated with the notion of what is "public". The (further) fusion of these two notions would indeed be foreign to the manner in which they have, until now, been perceived by the majority of people, who naturally "feel" the essential difference between the two notions and that (even if "in principle" situations where the two notions come together cannot be "excluded") each of them makes any sense only in opposition to the other, that is to say that what is "public" is "public" because and so long as it is not "private", and what is "private" is "private" because and so long as it is not "public". Such case-law, a result of what is sometimes called the "fallacy of legal thinking", would re-affirm the Court's militant rejection of the conventions underlying the use of certain language in legal texts, including the Convention. On a broader scale, it would represent law which has taken a further regrettable step towards its greater estrangement and alienation from those who are required to follow and respect it.