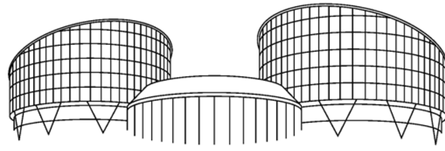

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF ALONSO SAURA v. SPAIN

(Application no. 18326/19)

JUDGMENT

Art 6 § 1 (civil) • Overall fair proceedings for the appointment of the President of the Murcia High Court of Justice, in which a candidate other than the applicant was chosen • Domestic decisions sufficiently reasoned

STRASBOURG

8 June 2023

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Alonso Saura v. Spain,

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

Georges Ravarani, *President*,
Carlo Ranzoni,
Mārtiņš Mits,
Stéphanie Mourou-Vikström,
Mattias Guyomar,
Mykola Gnatovskyy, *judges*,
Luis Jimena Quesada, *ad hoc judge*,
and Victor Soloveytchik, *Section Registrar,*

Having regard to:

the application (no. 18326/19) against the Kingdom of Spain lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Spanish national, Ms María Pilar Alonso Saura ("the applicant"), on 27 March 2019;

the decision to give notice to the Spanish Government ("the Government") of the complaints concerning Article 6 § 1 and Article 14 of the Convention and Article 1 of Protocol No. 12 to the Convention and to declare the remainder of the application inadmissible;

the parties' observations;

Considering that Ms Maria Elósegui, the judge elected in respect of Spain, was unable to sit in the case (Rule 28) and that the President of the Chamber decided to appoint Mr Luis Jimena Quesada to sit as an *ad hoc* judge (Rule 29);

Having deliberated in private on 2 May 2023,

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

INTRODUCTION

1. The case concerns the applicant's allegations under Article 6 § 1 and Article 14 of the Convention, as well as Article 1 of Protocol No. 12 that the domestic authorities did not give adequate reasons for choosing another candidate for the post of President of the Murcia High Court of Justice and that their decisions were arbitrary and discriminated against her on the basis of her gender.

THE FACTS

2. The applicant was born in 1952 and lives in Murcia. She was represented by Mr T.R. Fernández Rodríguez and Mr J.R. Fernandez Torres, lawyers practising in Madrid.

3. The Government were represented by their Agents, Mr A. Brezmes Martínez de Villarreal and Ms H.E. Nicolás Martínez, Representatives of the Kingdom of Spain to the European Court of Human Rights.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. By an Order of 14 October 2014 of the standing committee of the General Council of the Judiciary ("the Council"), a public competition was launched for the appointment of the President of the Murcia High Court of Justice for a five-year term. Under the applicable law, published in the Official State Gazette with the announcement of the competition, the Council enjoyed a discretion for its decision on the appointment, but it was at the same time subject to the rules set out in that law (see paragraph 22 below).

6. The President of the Murcia High Court of Justice holds both judicial and executive prerogatives, as his or her duties include the presidency of the Civil and Criminal Chambers of the High Court and of the court's Administration Chamber (*Sala de Gobierno*, in charge of the executive and administrative duties of that court), among other responsibilities.

7. Three judges applied for the post: the applicant, Mr M.P.H. and Mr A.P.G. All of the candidates submitted their applications with the required documents and made an oral presentation to the Council; the presentations were recorded and the recordings were submitted to the Court, as well as the documents concerning each candidate.

8. The applicant's achievements at the beginning of the appointment process, as stated by the applicant in the presentation, were as follows: thirty-one years and one month's service in the judiciary, of which twenty-six years and six months as senior judge; member of the Murcia *Audiencia Provincial* (appeal court) since 1991, also assuming the functions of the President of the Expropriation Jury, President of the Election Boards and judge in charge of prisons; Dean of the Courts of Vitoria for eight months and Dean of the Courts of Lorca for two years; member of the Administration Chamber of the Castilla La Mancha High Court for two months; and member of the Administration Chamber of the Murcia High Court of Justice since 2009. She was also a member of the Royal Academy of Legislation and Jurisprudence of Murcia, a board member of the Law Journal of Murcia, professor of legal practice in insolvency matters, the coordinator of judicial internships in the courts, the person responsible for the selection and dispatch of judgments to be incorporated in the national database, and the director of training for judges.

9. Mr M.P.H.'s achievements at the beginning of the appointment process, as stated by Mr M.P.H. in the presentation, were as follows: twenty-two years and eleven months' service in the judiciary, of which twenty-one years and two months as a senior judge; and a criminal court first-instance judge for the last fourteen years. He had previously been a public prosecutor for a year, and had been the Dean of the Courts of Murcia for six years, and

a member of the Administration Chamber of the Murcia High Court of Justice since 2009. He was also Head of the International Relations Service of the Council for three years, had been commissioned for international missions forty times, had a degree in strategic planning in the public sector, a master in management of public institutions, was a certified mediator, and had published several articles.

10. During the presentation, and with regard to the specific plans of each of the candidates for the Murcia High Court of Justice ("action plans"), the applicant made the following proposals: special consideration to be given to the balance between judges' private and family life and their work, additional resources for political corruption cases, reducing the workload of first-instance mixed courts through specialisation and encouraging mediation, improvements to the "new judicial office" (reform of the services working for judges) by several proposals regarding new technologies, coordination of the common services and deployment of this structure in the civil courts and the *Audiencia Provincial*, and as final proposals, coordination with other professionals before that court, transparency of judicial work, and training for judges as an essential activity.

11. M.P.H.'s proposals were titled "Sixty-two proposals for a presidency" and were divided into four categories. Under "governance proposals", he put forward a plan to include intermediate administrators in management, and to incorporate modern management tools and transversal reviews. Under "public service proposals", he suggested greater transparency and accountability, creating information offices and promoting good practices. Under "efficiency and efficacy proposals", he proposed exploring further specialisation in the courts, the reassignment of personnel and new ways of communication between judges. Lastly, under "innovation and modernisation proposals" he emphasised the role of mediation, in which he had personal involvement, and also proposed expanding the "new judicial office".

12. The Council, after receiving additional reports (three from chambers of the Council, one from the Administration Chamber of the Murcia High Court of Justice and another one from the Bar Association of Cartagena) and after the above-mentioned presentations with the candidates, decided on 29 January 2015 to appoint Mr M.P.H. as President of the Murcia High Court of Justice for a five-year term. The applicant, disagreeing with the majority decision, appealed to the Supreme Court.

13. By a judgment of 10 May 2016, the plenary Supreme Court upheld the applicant's appeal in part, quashed the decision taken by the Council and ordered it to issue a new decision, providing more detailed reasoning concerning the merits of the person to be appointed.

14. Following that judgment, the third candidate, Mr A.P.G., withdrew his application. On 26 May 2016 the Plenary of the Council, which is composed of twenty one members, again decided to appoint Mr M.P.H to the post. The reasoning of that decision started by considering three points.

Firstly, it was stated that the vacancy announcement did not state that any type of the candidates' merits was to be given preference and that it was for the Council to assess their merits, that it was not lawful to make any scale of the various merits, and that the constitutional role of the Council afforded it ample discretion in the appointments, and no third institution, whatever it may be, could infringe upon that constitutional function; all that, according to the Council, was perfectly compatible with the judgment of the Supreme Court.

15. The Council secondly stated that the most significant element for its decision was the presentations with the candidates, which were recorded. After reiterating that the applicant objectively had more merit, as the judgment of the Supreme Court of 10 May 2016 had already stated, in the third point of the decision the Council considered the proposals of each candidate (see paragraphs 10 and 11 above). The Council found that Mr M.P.H.'s proposals were far superior to those of the applicant. The difference between them in favour of Mr M.P.H. was characterised as "indisputable, obviously indisputable, overwhelming even". The proposals of the applicant were characterised as "sparse, generic and very trivial". In particular, the following three points of Mr M.P.H.'s proposals were considered outstanding: the deployment of the "new judicial office", the development of mediation, and the increase in the levels of management and transparency of the Murcia High Court of Justice. The remaining points of the decision assessed some of the merits of the candidates, such as the applicant's and Mr M.P.H.'s knowledge of the situation of the region's courts, the quality of the judgments submitted for evaluation by both candidates and their experience with the management of courts, among other things.

16. Five members of the Council expressed their dissent and argued that the applicant's merits were superior to those of the other candidate, referring, in particular, to the seniority, experience in adjudicating both civil and criminal-law cases, time spent working in collegiate bodies, and legal relevance and quality of the decisions each candidate had adopted in their judicial career.

17. The applicant appealed against that second decision of the Council. The Supreme Court, by a judgment of 27 June 2017, dismissed the applicant's appeal and upheld the Council's decision, by a majority of seventeen judges out of the thirty-two judges. Fifteen judges expressed dissenting opinions, and one expressed a concurring opinion.

The judgment stated that the Council's decision had complied with the previous judgment of the Supreme Court. It stressed that the case concerned a discretionary appointment in respect of which the Council had very broad powers of assessment and choice, which were further increased where, as in the case concerned, the post to be filled had a governmental component. The Supreme Court considered that the Council had duly reasoned the

appointment of the other candidate to the job, and that it had done so without bias or misuse of powers. In that respect the Supreme Court remarked that the Council had noted the objective requirements, in respect of which the applicant had scored favourably, those requirements being: seniority in the judiciary; having served on collegiate bodies; having practised as a judge not only in the criminal but also in the civil courts; and the number and type of judgments produced by her. The Council had then assessed the five subjective requirements and also made a special and extensive assessment of the action programme of each candidate.

The Supreme Court observed the following as regards the reasons provided by the Council for its choice of candidate.

It had described the action programme presented by the other candidate, which had covered sixty-two initiatives, organised in four sections which referred to: the quality of government management; the public service and orientation to the public, professionals and users; the effectiveness, efficiency and impact of judicial work; and the innovation, modernisation and excellence of the judiciary. The Supreme Court particularly appreciated the Council's explanation of three specific aspects of the action programme which the Council considered to be most important in the current judicial organisation, which were the deployment of the new judicial office, the promotion of intrajudicial mediation and the need to increase levels of efficiency in the management, transparency and accountability of the governmental activity of the governing bodies of the judiciary. The Council had made a comparison of the action programme presented by the other candidate with that of the applicant, including both their oral explanations, from which it had concluded that the one presented by the other candidate was notably superior. Hence, for the Supreme Court, the Council's decision contained assertions and value judgments which, as a reasonable expression of its discretionary powers, could not be substituted by those of the Supreme Court itself.

In addition to his action programme, the Council had also considered Mr M.P.H.'s experience and participation in the governing bodies of the judiciary and had stressed his service of almost three years as a lawyer in the Technical Office of the Council, as well as his extensive teaching and research activities.

As regards the knowledge of the situation of the jurisdictional bodies within the scope of the Murcia High Court of justice, the Council had pointed out that Mr M.P.H. had greater knowledge of this aspect as well, derived from his position as senior judge of the judicial district of Murcia.

As regards experience and aptitude for the direction, coordination and management of the human and material resources linked to the position, the Council had expressly addressed the reasons which supported its previous conclusions that the other candidate had "notable personal training and vital experience".

The Supreme Court further held that, even though the Council had accepted that the applicant had a more extensive body of previous work, that was not decisive and the Council's conclusion that Mr M.P.H.'s professional excellence was superior to that of the applicant was not arbitrary, given factors such as Mr M.P.H's extensive and up-to-date experience in the criminal courts, the quality of the judicial decisions he had drafted and his more than twenty-five years' experience in the judiciary.

The judgment also rejected the applicant's contention that there was sufficient similarity between the candidates which would justify a preference for the female candidate by the application of the legislation on gender equality.

The Supreme Court pointed out that the applicant had misinterpreted the meaning of some parts of its previous judgment. While it had required the Council to provide further motivation, this did not mean that some of the other candidate's previous work experience could not be taken globally under consideration.

18. Fifteen judges expressed their dissent in three different opinions and one judge submitted his concurring opinion. The dissenting opinions considered that the Council in its decision of 26 May 2016 had not complied with the Supreme Court's judgment of 10 May 2016 since the assessment of the merits of the two candidates was not in accordance with the statements in the Supreme Court's judgment. They also argued that the applicant's objective merits were superior to those of the other candidate.

19. The applicant lodged an *amparo* appeal. The Constitutional Court declared the *amparo* appeal inadmissible as there was manifestly no violation of any constitutional right, but it did so by way of a reasoned decision.

RELEVANT DOMESTIC LAW

20. The relevant provisions of the Spanish Constitution read as follows:

Article 24 § 1

> "Every person has the right to obtain the effective protection of the judges and the courts in the exercise of his or her legitimate rights and interests, and in no case may a person go undefended."

Article 117 § 3

> "The exercise of judicial authority in any kind of action, both in adopting a judgment and having judgments executed, lies exclusively within the jurisdiction of the courts and tribunals established by law, in accordance with the rules of jurisdiction and procedure which may be established therein."

Article 118

"It shall be compulsory to execute the sentences and other final judgments of judges and the courts, and to cooperate with them as they may require during the course of trials and execution of judgments."

Article 122 §§ 1 and 2

"1. The Institutional Law on the Judiciary shall determine the setting up, operation and control of the courts and tribunals as well as the legal status of professional judges and magistrates, who shall form a single body, and of the staff serving in the administration of justice.

2. The General Council of the Judiciary shall be the governing body. An institutional law shall set up its statutes and a system for managing conflicts of interest applicable to its members and their functions, especially in connection with appointments, promotions, inspection and the disciplinary system."

21. The relevant provisions of the Institutional Law on the Judiciary (*Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial*) read as follows:

Section 160 (duties of the presidents of the High Courts of Justice)

"The presidents shall perform the following duties:

(1) Convene, chair and direct the decisions of the Administration Chamber.

(2) Establish the agenda in sessions of the Administration Chamber which should include subjects proposed by at least two of its constituent members.

(3) Submit as many proposals as deemed appropriate in matters within the jurisdiction of the Administration Chamber.

(4) Authorise by signature the decisions of the Administration Chamber and ensure compliance with those decisions.

(5) Ensure compliance with the measures adopted by the Administration Chamber in order to correct any defects in the administration of justice if they are within its jurisdiction, and if not, make the appropriate proposals to the General Council of the Judiciary, with the agreement of the Administration Chamber.

(6) Dispatch any reports requested by the General Council of the Judiciary.

(7) When the urgency of a situation dictates, take the appropriate measures, providing information thereon at the next meeting of the Administration Chamber.

(8) Direct inspection of the courts and tribunals in the terms established by this law.

(9) Determine the distribution of cases between chambers of the court with the same jurisdiction and between their sections, in accordance with the rules approved by the Administration Chamber.

(10) Chair a daily meeting of the presidents of the chambers and senior judges and ensure that the composition of the chambers and sections is that indicated in section 198 of this Law.

(11) Exercise all the powers required for the correct functioning of the respective court or tribunal and the compliance by personnel with their duties.

(12) Inform the General Council of the Judiciary of judicial vacancies and of vacancies for auxiliary personnel of the relevant court or tribunal.

(13) Hear complaints of interested parties in trials or hearings, taking the necessary measures.

(14) Any other requirements stipulated by the law."

Section 632(1) and (2)

"(1) Reasons shall always be provided for the decisions of the bodies of the General Council of the Judiciary.

(2) In plenary sessions held to reach a decision on proposed appointments, the reasons for the decision shall be recorded, indicating the merits and capabilities that justify the selection of one applicant over the others."

22. The relevant part of the Order of 14 October 2014 of the standing committee of the General Council of the Judiciary, announcing the public competition for the appointment of the President of the Murcia High Court of Justice reads as follows:

"... The post to be advertised is a discretionary appointment of a governmental and judicial nature.

This vacancy is subject to the following rules:

...

For appointment to the advertised position, the following will be taken into account: length of active service in the judiciary, service in positions in the civil and criminal branches of the judiciary, length of service in collegiate judicial bodies and judicial decisions of special legal relevance and significant technical quality taken in the exercise of the jurisdictional functions. The following will also be assessed: aptitude for the direction, coordination and management of material and human resources linked to judicial and governmental posts, participation in the governing bodies of the judiciary, especially in the governing bodies of the courts, knowledge of the situation of the judicial bodies within the territorial area of the position advertised, and the action plan for the performance of the role. As complementary merits to the above, the exercise of non-judicial legal professions or performance of activities of similar relevance will be taken into account."

THE LAW

ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

23. The applicant complained that the decision of the Council of 26 May 2016 and the Royal Decree appointing the President of the Murcia High Court of Justice had not provided sufficient reasons for their choice of candidate and that the Council's decision had not complied with the judgment of the Supreme Court of 10 May 2016. She relied on Article 6 § 1 and Article 14 of the Convention, as well as on Article 1 of Protocol No. 12. The Court, being master of the characterisation to be given in law to the facts of the case (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12,

§§ 114 and 126, 20 March 2018), considers that the complaint is to be assessed solely under Article 6 § 1 of the Convention, the relevant part of which reads as follows:

Article 6 – Right to a fair trial

> “In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

A. Admissibility

1. Applicability of Article 6 § 1 of the Convention

24. The relevant general principles concerning the applicability of Article 6 of the Convention in the context of disputes concerning the appointment, career and dismissal of judges were summarised by the Court in the judgments in *Baka v. Hungary* ([GC], no. 20261/12, §§ 100-06, 23 June 2016) and *Grzęda v. Poland* ([GC], no. 43572/18, §§ 257-64, 15 March 2022; see also *Dolińska-Ficek and Ozimek v. Poland*, nos. 49868/19 and 57511/19, §§ 220-28, 8 November 2021; *Gumenyuk and Others v. Ukraine*, no. 11423/19, §§ 44-59, 22 July 2021; *Eminağaoğlu v. Turkey*, no. 76521/12, §§ 59-63, 9 March 2021; and *Bilgen v. Turkey*, no. 1571/07, §§ 47-52 and 65-68, 9 March 2021).

25. The Court has held that disputes concerning public servants fall in principle within the scope of Article 6 § 1 (see *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, § 62, ECHR 2007-II). The State cannot rely on an applicant’s status as a civil servant to exclude him or her from the protection afforded by Article 6 unless two conditions are fulfilled – that domestic law excludes access to a court for the post or category of staff in question and that the exclusion is justified on “objective grounds in the State’s interest” (ibid., § 62). If the applicant had access to a court under national law, Article 6 applies (ibid., § 63).

26. The Court has already accepted the applicability of Article 6 to proceedings concerning the appointment of judges (compare *Juričić v. Croatia*, no. 58222/09, §§ 7 and 53-56, 26 July 2011). As to the present case, the Court notes that Spanish law allows decisions of the Council on the election of judges to be challenged before the Supreme Court, and that the applicant in the present case did so. It follows that Article 6 of the Convention under its civil head is applicable in the present case (ibid., § 57, with further references).

2. Conclusion as to admissibility

27. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

28. The applicant argued that the Supreme Court's judgment of 10 May 2016 had compelled the Council to give a new decision that was "duly reasoned in the terms noted in the legal arguments set out in that judgment". The Council, in consequence, should not have carried out a new assessment of the candidates' merits, as it had done, but should only have explained why the assessment of the other candidate's action plan was in fact of more importance than the other criteria set out in the call for applications, to the extent that the latter had been set aside. She contended that compliance with the judgments of superior courts should be perfect and complete, referring to *Sabin Popescu v. Romania* (no. 48102/99, 2 March 2004). However, in the present case, the judgment of the Spanish Supreme Court of 10 May 2016 had been incorrectly executed by the Council in its decision of 26 May 2016.

29. The applicant maintained that the decision of 26 May 2016 of the Council had expressly departed from the findings of the Supreme Court and had made its own, incorrect, assessment of the merits of the candidates on points that had already been established by the Supreme Court. She contended that the execution of the judgment by the Council had been a "sham" and a "fake execution", which had in a way been confirmed by the Council's own view that no other institution could limit its discretion on the matter.

(b) The Government

30. The Government rejected the applicant's claims. First, the Government pointed out that the Court could not be used as a court of fourth instance, and it was not its role to substitute the facts as they had been established by the national courts, citing *Dombo Beheer B.V. v. the Netherlands* (27 October 1993, Series A no. 274) and *Perez v. France* ([GC], no. 47287/99, ECHR 2004-I), and that the interpretation and application of national law was primarily for the national courts (the Government again referred to *Perez*, cited above) and the role of the Court was only to verify if the effects of that interpretation were compatible with the Convention (the Government cited *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], no. 13279/05, 20 October 2011).

31. Considering all of the above, the Government pointed out that, in fact, in this case the very court which had decided the matter, namely the Supreme Court, had been called upon to assess whether its initial judgment had been complied with properly by the Council and had decided that it had been. The application before the Court contained no arguments regarding the unfairness or arbitrariness of the national court's decision, and merely repeated the allegations in the applicant's administrative appeal.

32. The Government contended that there had been no violation of Article 6 of the Convention, as the judgment of the Supreme Court had been fully complied with by the Council. The Council had been extremely prompt in complying with the judgment, as only sixteen days had passed between the date when the judgment of the Supreme Court had been delivered and the date when a fresh decision had been taken by the Council. The initial judgment of the Supreme Court had not ruled out Mr M.P.H.'s appointment as President of the Murcia High Court of Justice, but had merely ordered that the Council provide additional reasoning regarding the appointment, which had been fully addressed in the Council's decision.

33. The Government maintained that in its judgment of 27 June 2017, the Supreme Court, sitting in the same formation as the one which had adopted the judgment of 10 May 2016, had upheld the fresh decision of the Council, thus finding that its previous judgment had been correctly complied with. The Supreme Court's judgment had explained the scope of its previous judgment, and had examined in detail the fresh decision of the Council, concluding that the decision had executed the Supreme Court's order without any infringement. That conclusion had been shared by the Constitutional Court.

2. *The Court's assessment*

(a) General principles

34. The Court reiterates that according to its established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case (see *García Ruiz v. Spain* [GC], no. 30544/96, § 26, ECHR 1999-I). Without requiring a detailed answer to every argument advanced by the complainant, this obligation presupposes that parties to judicial proceedings can expect to receive a specific and explicit reply to the arguments which are decisive for the outcome of those proceedings (see, among other authorities, *Ruiz Torija v. Spain*, 9 December 1994, §§ 29-30, Series A no. 303-A, and *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 185, 6 November 2018).

35. The Court further reiterates that it is not its function to deal with alleged errors of law or fact committed by the national courts unless and in so far as they may have infringed rights and freedoms protected by the Convention (see *García Ruiz*, cited above, § 28), for instance where they can be said to amount to "unfairness" in breach of Article 6 of the Convention. The Court should not act as a fourth-instance body and will therefore not question under Article 6 § 1 the national courts' assessment, unless their findings can be regarded as arbitrary or manifestly unreasonable (see, for example, *Dulaurans v. France*, no. 34553/97, §§ 33-34 and 38, 21 March

2000; *Khamidov v. Russia*, no. 72118/01, § 170, 15 November 2007; *Anđelković v. Serbia*, no. 1401/08, § 24, 9 April 2013; and *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, §§ 64-65, ECHR 2015). A domestic judicial decision cannot be characterised as arbitrary to the point of prejudicing the fairness of proceedings unless no reasons are provided for it or if the reasons given are based on a manifest factual or legal error committed by the domestic court, resulting in a "denial of justice" (see *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, § 85, 11 July 2017).

(b) Application of those principles in the present case

36. Regarding the instant case, the Court notes in the first place that the first judgment of the Supreme Court of 10 May 2016 quashed the decision of the Council and ordered it to provide more detailed reasoning concerning the merits of the person to be appointed (see paragraph 13 above). In its fresh decision of 26 May 2016, the Council again appointed Mr M.P.H. and the applicant again appealed to the Supreme Court.

37. In its judgment of 27 June 2017, the Supreme Court analysed in great detail the second decision of the Council (see paragraph 17 above). It first held that the Council had complied with the Supreme Court's previous judgment and given sufficient reasons for its choice of Mr M.P.H. The Supreme Court then assessed different elements the Council had taken into consideration, such as the duration of the candidates' service in the judiciary, the nature of their work experience and its relevance for the post in question, their leadership skills and the action programme of each candidate. It accepted the Council's justifications for its choice of the other candidate. In that respect, the Supreme Court stressed the wide discretion the Council enjoyed as regards discretionary appointments, in particular where the post to be filled had a governmental component, as in the case in issue.

38. The Court notes that the applicant had the opportunity to present her points during the oral presentation with the Council. Furthermore, she was also able to challenge the Council's decision before the Supreme Court and to present all the arguments, factual and legal, she considered relevant in her appeal to that court. Those arguments were examined by the Supreme Court, which provided detailed reasons for dismissing the applicant's appeal. It ultimately accepted the Council's decision to appoint the other candidate and the reasons adduced in that respect. The Court also notes that the impugned decisions were reasoned as much by considerations of fact as by considerations of law. Both the Council and the Supreme Court made their assessment of the merits of both candidates, which appear sufficient, as well as their proposals. Giving preference to one of the candidates where both candidates have sufficient merits for the post in issue cannot in itself be regarded as contrary to the requirements of Article 6 § 1 of the Convention. In that connection, the Court also points to the Council's wide margin of discretion with regard to the weight it gave to the candidates' applications.

The Supreme Court accepted the decision of the Council, by properly reviewing the appointment process and the reasons adduced by the Council for its choice of candidate.

39. It has not been demonstrated that the findings of the Supreme Court were arbitrary or manifestly unreasonable to the point of prejudicing the fairness of the proceedings (see *Moreira Ferreira*, cited above, §§ 85 et seq.).

40. Having regard to the above considerations, the Court considers that, taken as a whole, the proceedings in issue were fair for the purposes of Article 6 § 1 of the Convention. It follows that there has been no violation of that Article.

FOR THESE REASONS, THE COURT,

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by six votes to one, that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 8 June 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik Registrar	Georges Ravarani President

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

(a) joint concurring opinion of Judges Ravarani and Mourou-Vikström;
(b) dissenting opinion of Judge Jimena Quesada.

G.R.
V.S.

JOINT CONCURRING OPINION OF JUDGES RAVARANI AND MOUROU-VIKSTRÖM

Together with our colleagues we voted in favour of finding no violation of Article 6 § 1 of the Convention. We found, in accordance with the principle of subsidiarity, that the national courts had validly ruled on the procedure for appointing the President of the Murcia High Court of Justice. Indeed, on 27 June 2017, the Supreme Court found that the General Council of the Judiciary ("the Council") had given sufficient reasons for its decision to appoint Mr M.P.H. as President and not the applicant. In doing so the Supreme Court validated, albeit by a narrow majority, the new and more thorough examination of the merits of the candidates which it had ordered the Council to provide. An international court can hardly call into question the assessment of the candidates' qualities made at national level, in particular after oral interviews, even if this assessment appears to be questionable.

In this regard, we believe that certain elements are worth noting.

It is true that the national law sought to provide a framework for the appointment of judges called upon to exercise management and supervisory functions, by establishing a number of cumulative criteria, some of them based on objective findings, in accordance with the international requirements and the case-law of the Court[1]. The aim was to achieve transparency in appointments and to avoid the politicisation of the composition of judicial councils and of the positions adopted by them[2]. This perfectly laudable objective is, however, qualified by the discretionary nature of the appointment decision which is retained in the domestic legislation. It should thus be stressed that the call for applications of 14 October 2014 announcing the public competition for the position of President of the Murcia High Court of Justice indicated that the appointment was discretionary while being subject to a list of criteria, some of which were strictly objective (for instance seniority, length of time in office in civil and criminal matters) while others required a far more subjective assessment (ability to exercise leadership and to manage human resources). In this context, we note that the law did not assign any order of preference to the different criteria (objective on the one hand or requiring a subjective assessment on the other). Is there not a contradiction or at least a difficulty in the relationship between these criteria, that is to say, in the discretionary nature of the decision combined with objective criteria? For as long as domestic law allows for a decision-making power that is in fact entirely discretionary, without any obligation to give real weight to objective factors, even if they are provided

[1] See *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, §§ 117 et seq., 1 December 2020.

[2] See *Grzęda v. Poland* [GC], no. 43572/18, §§ 301 et seq., 15 March 2022.

for by law, it will be virtually impossible to challenge the choices made, however questionable they may be.

It is true that discretionary power is subject to the principle of legality and must be distinguished from arbitrariness, understood as an absolute power which is subject only to the whims of its holder and which reflects a will that is unfettered and often unjust. However, discretionary power nevertheless entails almost total freedom to decide, and as long as domestic law allows judges to be appointed to high office on the basis of such power, it will be very difficult to challenge the decisions taken. To do so, it must be successfully demonstrated that the decision does not meet the legal requirements or is manifestly unreasonable.

We are of course aware of the need, in certain circumstances, to make an appointment dependent on a number of subjective criteria which allow the personal qualities of a candidate to be taken into account. This is without any doubt true with regard to the appointment to the office of president of a court, which requires, in addition to judicial skills, a vision of the role and the means of performing it, as well as skills in communicating with colleagues and the outside world, parties to judicial proceedings and the political authorities. An application for a position involving leadership and management of human resources cannot be assessed simply by examining the candidate's curriculum vitae, however prestigious and solid it may be, but must take into account his or her personality.

The problem is that in the present case the subjective criteria seem to have overshadowed the objective ones and apparently served as the only basis for the choice of candidate. In such a system, therefore, one subjective criterion can override all the objective criteria, thus making the whole process entirely discretionary.

How can this dilemma be resolved? How can discretionary power be circumscribed in order to avoid completely disregarding objective criteria while leaving a necessary space for subjective criteria? One solution could be to assign a coefficient to each criterion, thus making it possible to weight the various elements (objective on the one hand and requiring a subjective assessment on the other) to be taken into account in the selection process (seniority, posts previously held, variety of experience that could be relevant to the post applied for, vision and action programme for the post, etc.) and thus to avoid making the process entirely subjective.

DISSENTING OPINION OF JUDGE JIMENA QUESADA

1. I regret that I am unable to subscribe to the majority's opinion that there has been no violation of Article 6 § 1 of the Convention in this case. It seems to me that the admissibility of the application under Article 6 § 1 of the Convention is well argued. However, it is my understanding that the general principles set out in paragraphs 34 and 35 of the judgment have not been consistently applied in the present case and that, consequently, the Court should have found a violation of Article 6 § 1 of the Convention (A). Moreover, as I stated in our deliberations, the violation of Article 6 § 1 is even more obvious and pronounced in the light of Article 14 of the Convention and Article 1 of Protocol No. 12. From this point of view, I consider that in the instant case there has also been a violation of Articles 14 and 6 of the Convention taken together (B), as well as a violation of Article 1 of Protocol No. 12 taken together with Article 6 § 1 of the Convention (C).

2. With due respect to my colleagues, I have not been convinced by their approach to the case, since it is based on an unjustified and uncritical application of the national margin of appreciation doctrine in examining the two decisions of the General Council of the Judiciary (hereinafter "the Council") as well as the Supreme Court's judgment of 27 June 2017. By contrast, I note that the majority practically ignored the Supreme Court's judgment of 10 May 2016 (only briefly mentioned in paragraphs 13-15 and 36), which was essential in order to conduct a fair analysis as to whether the Convention rights at stake had been violated. In other words, it was inappropriate to address the two decisions of the Council and the Supreme Court's judgment of 27 June 2017 without any substantial reference to the previous Supreme Court judgment of 10 May 2016.

3. As a result, the Court's assessment could only be incomplete. Bearing this in mind, the circumstances of the case revealed a need for the Court to determine, going beyond a concrete comparison between the merits of the applicant and Mr M.P.H. in a way that would suggest that the Court was acting as a fourth-instance body (as in paragraphs 8 to 11 or 17 of our judgment), whether there was in fact a systemic situation (in terms of arbitrariness in applying objective criteria in the selection and career of judges, politicisation of the judiciary, or gender discrimination in public appointments made by the Council) which our international court must intervene to redress, given its problematic nature as regards the State's Convention commitments. In this respect, as I intend to argue in the following paragraphs, I have the sincere impression that the Court missed a crucial opportunity to adopt a pilot solution aimed at improving the Spanish judicial system and bringing it into line with Article 6 § 1 of the Convention.

A. Violation of Article 6 § 1 of the Convention

4. Concerning the violation of Article 6 § 1 of the Convention, the majority reiterate in paragraph 35 that "[t]he Court should not act as a fourth-instance body and will therefore not question under Article 6 § 1 the national courts' assessment, unless their findings can be regarded as arbitrary or manifestly unreasonable" or "unless no reasons are provided for it or if the reasons given are based on a manifest factual or legal error committed by the domestic court, resulting in a 'denial of justice'." In my opinion, unfortunately, the findings included in the Supreme Court's judgment of 27 June 2017 (and upheld in Constitutional Court Order No. 119 of 13 November 2018) lack adequate legal support, in so far as they endorsed an arbitrary and manifestly unreasonable decision of the Council (its approval decision of 26 May 2016) which clearly and undisguisedly decided not to give effect to the Supreme Court's judgment of 10 May 2016 (adopted by twenty-three votes to ten, with one dissenting opinion signed by ten judges and one concurring opinion signed by two judges).

5. In order to understand the circumstances of the case and the terms of this controversy, it is important to highlight the fact that the Supreme Court's judgment of 10 May 2016 (see the fifth legal ground) quashed the Council's first decision of 29 January 2015 on the basis of two considerations:

- firstly, the Council had ignored the relevance of the four objective merits in respect of which the applicant's *curriculum vitae* was clearly superior to that of the candidate (Mr M.P.H.) appointed as President of the Murcia High Court of Justice. These were: seniority in the judiciary (with a difference of more than a thousand positions in the ranking system between the applicant and Mr M.P.H.); practice as a judge in the civil and criminal courts (Mr M.P.H.'s lack of practical experience in the civil courts); judicial experience in collegiate judicial bodies (more than two decades in the applicant's case as opposed to no experience in Mr M.P.H.'s case); and relevant judicial decisions in the civil and criminal courts (fifty-one for the applicant as judge rapporteur in both types of court, in collegiate bodies, as opposed to only five decisions for Mr M.P.H. as a judge in a single-person judicial body);
- secondly, the Council had given exaggerated and unexplained weight to two of the five subjective merits (aptitude for the direction, coordination and management of material and human resources; participation in governing bodies of the judiciary; knowledge of the situation of the courts in the territorial area concerned; action programme for performance of the role advertised; and complementary legal merits not having a judicial character, including academic activities) which were more favourable to Mr M. P.H. (complementary merits and, above all, the action programme).

6. In short, in its judgment of 10 May 2016 the Supreme Court called into question the Council's first decision of 29 January 2015 in so far as:

- on the one hand, no reasons had been given as to why the impact of the four objective criteria had been disregarded (clear superiority of the applicant);

- on the other hand, no reasons had been given as to why, given that the subjective merits of both candidates were quite similar, one of these subjective merits (the action programme, more favourable to Mr M.P.H.) had been given decisive weight in the overall assessment.

7. In addition, the Supreme Court's judgment of 10 May 2016 strongly criticised the laudatory assessment of Mr M.P.H.'s merits, stating that:

- the action programme had already received the highest possible rating (*una valoración máximamente favorable*);

- this highly favourable assessment of the action programme and its oral presentation, ignoring the other criteria (and particularly the objective ones), was unreasonable, as attributing such decisive weight to an "interview" would open the door to complete arbitrariness.

8. Since, as indicated above, the majority virtually ignored the Supreme Court's judgment of 10 May 2016 (whose existence is mentioned in paragraphs 13-15 and 36), in spite of its relevance in the instant case, it is worth citing the content of the following substantial part of the sixth legal ground:

> "... the laudatory assessment of the merits of [Mr M.P.H.] contained in the impugned appointment decision clearly provides only weak support for the decision ultimately adopted. ... In fact, the only truly relevant information (of the information set out in the contested plenary resolution) that could be specifically applicable to [Mr M.P.H.] and not to the plaintiff is that concerning the assessment of the so-called 'action project', which, it is clear, secured the highest possible rating from the majority of the Plenary Council.
>
> Nevertheless, however much the aforementioned margin of appreciation of the selection body on this specific point is highlighted and respected, this factor alone cannot carry the weight that is being attributed to it. After all, if this information were capable, on its own and independently of the other factors, of substantiating the final decision, it would really be unnecessary to analyse the other assessment criteria. It would be sufficient to ask potential applicants to provide an action project and then invite them to an interview to present and discuss it, without the need to assess any other issues. ... [W]hen, as has happened here, the weight of the decision is placed on the most purely subjective considerations and criteria, to the detriment of the objective parameters outlined in the call for applications itself, this can and should be fully explained in order to dispel any suspicion of possible arbitrariness or misuse of power, in an area such as this in which even appearances are important and what is at stake is the public's confidence in the proper assignment of senior judicial posts."

9. However, in its second decision (dated 26 May 2016), the Council not only failed to give reasons why the impact of the objective criteria had been disregarded and preference had been given to some of the subjective criteria, but it also insisted on extolling the subjective merits of Mr M.P.H., in terms of both quantity (more than five pages for Mr M.P.H. and less than one page

for the applicant) and quality (with highly laudatory remarks concerning Mr M.P.H. and pejorative ones concerning the applicant, see *infra*).

10. Despite this, the Supreme Court held in its judgment of 27 June 2017 that this second decision of the Council was correctly reasoned and complied with the previous Supreme Court judgment of 10 May 2016. On this point, it is worth emphasising that the judgment of 27 June 2017 was adopted by seventeen votes to fifteen (as indicated in paragraph 18 of our judgment). Similarly, Constitutional Court Order No. 119 of 13 November 2018 (which upheld the Supreme Court's judgment of 27 June 2017) was adopted by six votes to five (four judges expressed their dissent in three separate opinions). By the way, no reference is made in our judgment to the content of the dissenting opinions appended to that order of the Constitutional Court (comprising almost one hundred pages) (see, by contrast, *Muñoz Díaz v. Spain*, no. 49151/07, §§ 17-20, 8 December 2009, with reference to a dissenting opinion appended to the relevant Constitutional Court judgment adopted by five votes to one – that dissenting opinion was then somehow endorsed by the Court in finding a violation of the Convention by six votes to one).

11. In this context, I feel that the Court has paradoxically acted as a fourth-instance body in upholding the findings contained in the Supreme Court's judgment of 27 June 2017, which at the same time endorsed the exclusive focus on the subjective criteria (mainly on the action programme) by the Council in its second decision (as shown in the lengthy paragraph 17, in conjunction with paragraph 37, of our judgment). In particular, the Supreme Court's judgment of 10 May 2016 (fifth legal ground) examined in detail all nine merits (objective and subjective) with regard to both the applicant and Mr M.P.H. and, as a result, it did not require the Council to revise its decision on the subjective merits but rather to give reasons why the objectives merits had been set aside, in order to avoid arbitrariness (sixth legal ground). From this point of view, I find that the Supreme Court's judgment of 27 June 2017 was not consistent with the previous Supreme Court judgment of 10 May 2016. Of course, national courts enjoy considerable flexibility in selecting the arguments and reasons they deem essential for the cases before them, but the gap between the objective merits of the applicant and the subjective merits of Mr M.P.H. was more than obvious (in favour of the applicant) and, consequently, the Court's international supervision had to be exercised.

12. As regards Article 6 § 1 of the Convention, it is evident that in the present case the *disregarding* of the objective criteria (clearly favourable to the applicant), in contrast to the preference given to, and exaltation of, the subjective criteria (in favour of Mr M.P.H.), was based on an arbitrary and manifestly unreasonable selection of arguments and, accordingly, a finding was required to the effect that that provision had been violated. From this perspective, without prejudice to the Contracting Parties' margin of

appreciation as regards the system of judicial appointments in which discretion plays an important role, the Court's case-law stressing the need to place greater emphasis on objective criteria so that the selection and career of judges are based on merit and ability should not be overlooked (see *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, §§ 117-29 and 221-22, 1 December 2020). That is also the philosophy behind Regulation No. 1/2010 of the plenary Council regulating the assignment of discretionary posts in the judiciary. Article 3 of that Regulation provides that "the proposals for appointment to posts of a discretionary nature shall be adjusted to take account of the principles of merit and aptitude for the exercise of the judicial function and, where appropriate, for the governmental function of the post in question" (paragraph 1), and that the appointment procedure "shall, on the basis of objectiveness and transparency, guarantee equality of access to [these posts] for those persons who meet the necessary conditions and possess the necessary abilities" (paragraph 2).

13. This case-law, alongside the international standards in this field which the Court takes into account (especially those of the Council of Europe, the European Union and the United Nations), should lead States Parties to the Convention to establish such criteria for judicial selection and careers with greater objectivity in the relevant rules and calls for candidates; thus, the rulings of the national courts (some of which are extremely attached to traditional parameters of "technical discretion" which inhabit the fine line between discretion and arbitrariness, making it difficult to control the latter) should be consistent with these same objective criteria. This is irrespective of the fact that each State can foresee that the reviewing court (in the instant case, the Supreme Court), by virtue of the margin of appreciation, "must have the power to quash the impugned decision, and either take a fresh decision or remit the case to the same body or a different body" (see *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13, 57728/13 and 74041/13, §184, 6 November 2018; see also *Oleksandr Volkov v. Ukraine*, no. 21722/11, § 125, 9 January 2013).

14. In the present case, the Supreme Court's severe criticism (again, in the fifth and sixth legal grounds of its judgment of 10 May 2016) in relation to the Council's first decision and the consequent quashing of that decision could apparently have been accompanied by the adoption of the eventual solution by the national court itself (awarding the post directly to the applicant, as advocated by the two judges who signed a concurring opinion appended to the Supreme Court's judgment of 10 May 2016) instead of the case being remitted to the Council. Furthermore, such an approach by the Supreme Court would have been more consistent with the adoption of a judicial decision within a reasonable time under Article 6 § 1 of the Convention. Having failed to do so, the Supreme Court was confronted with a new Council decision (the contested one of 26 May 2016) in respect of which the review exercised by the Supreme Court itself (judgment of 27 June

2017) and then by the Constitutional Court (Order No. 119 of 13 November 2018) was manifestly insufficient, as it failed to fulfil the obligation to state reasons deriving from Article 6 § 1 of the Convention (see *Ruiz Torija v. Spain*, no. 18390/91, § 29, 9 December 1994, and *Hiro Balani v. Spain*, no. 18064/91, § 27, 9 December 1994).

15. Hence, both the national highest courts (Supreme Court and Constitutional Court) resigned themselves to endorsing the Council's decision, since they did not exercise the full control required by Article 6 § 1 of the Convention despite the Council's defiant tone. In particular, that second Council decision contained some preliminary considerations (briefly mentioned in paragraph 14 of our judgment, but without any inferences being drawn) that actually anticipated a declaration of intent not to accept the jurisdictional control of the Supreme Court (as a "third body", see *infra*) or to comply with the judgment of 10 May 2016. It is worth citing this preliminary remark from the Council:

> "This Council considers that in no circumstances can it be accepted that where the legislature does not limit discretion, or where the Council does not impose limits on itself, a third body, whatever it may be, can arrogate constitutional functions that are outside its remit by depriving and degrading the constitutional body on which that function is conferred to the point of rendering its function indistinguishable and unrecognisable from that of a simple administrative body".

16. Admittedly, the Court recognised the particular importance of the responsibilities entrusted to the Council by the Constitution in a key area from the perspective of the rule of law and the separation of powers (see, *mutatis mutandis*, *Ramos Nunes de Carvalho e Sá*, cited above, § 195). However, in its decision of 26 May 2016 the Council adopted a stance that is hardly compatible with the requirements of the rule of law and the judicial review to which the acts of the Council itself are subject (see sections 1(3)(b) and 12(1)(b) of the Judicial Administrative Proceedings Act). The aforementioned statements of the Council do not stand up to the slightest criticism under Article 6 § 1 and the entire European Convention architecture that underpins the Council of Europe. Quite rightly, the dissenting opinions (fifteen out of thirty-two judges) appended to the Supreme Court's judgment of 27 June 2017 criticised this behaviour by the Council (which sought to set itself up as a "*solutus judice*") from a rule-of-law perspective.

17. In this sense, looking beyond the resolution of the specific case, the usefulness of the Convention mechanism consists in establishing elements likely to reinforce the three pillars of the Council of Europe (rule of law, democracy and human rights) and ensuring that they permeate the functioning of the judicial systems of its member States. This consideration is not negligible, since the Council's supposed strength in resisting the jurisdictional control of the Supreme Court may paradoxically become its weakness, viewed from the same perspective of the rule of law and the separation of powers. In effect, a judicial council with such an "absolute"

configuration is likely to be more vulnerable to politicisation, given that political parties may be tempted to enact legislation, notably in matters concerning judicial appointments, that would make councils of the judiciary less autonomous in the face of possible encroachment by the legislative and executive powers (see *Grzęda v. Poland* [GC], no. 43572/18, § 346, 15 March 2022).

18. In this regard, the Court takes into consideration the Plan of Action adopted by the Committee of Ministers (1253rd meeting of the Ministers' Deputies) on 13 April 2016 on Strengthening Judicial Independence and Impartiality, the first line of action of which postulates that "measures should be taken to de-politicise the process of electing or appointing persons to judicial councils, where they exist, or other appropriate bodies of judicial governance. Members should not represent political factions or be politically partisan in the performance of their functions. They should also not be subject to, or be susceptible to, political influence either from the executive or legislature" (see *Grzęda*, cited above, § 125). In the same vein, the 2022 Rule of Law Report (Country Chapter on the rule of law situation in Spain) from the European Commission emphasised that "the fact that the renewal of the Council for the Judiciary is pending since December 2018 remains a concern" and that "there have been further calls to modify the Council's appointment system in line with European standards" (Luxembourg, 13 July 2022, SWD(2022) 509 final). Regrettably, the instant case is no stranger to this problematic context.

19. For these reasons, in the light of the circumstances of the case, I consider that the Court should have found a violation of Article 6 § 1 of the Convention.

B. Violation of Articles 14 and 6 § 1 of the Convention taken together

20. As I have already said, I believe that the Court should have found not only an autonomous violation of Article 6 § 1 of the Convention, but also a violation of Article 14 taken together with Article 6 § 1 of the Convention. The reasons for this are twofold.

21. Firstly, in view of the applicant's manifestly superior merits with regard to all the objective criteria, compared with the more advantageous position of the male candidate (Mr M.P.H.) only with regard to some of the subjective criteria, it cannot be accepted that there were objective and reasonable circumstances to justify making that distinction in favour of the latter by giving him preference for appointment to the post of President of the Murcia High Court of Justice. On the contrary, that favourable treatment was based on subjective and unreasonable considerations which were given disproportionate weight. The prohibition enshrined in Article 14 encompasses differences of treatment based on an identifiable characteristic, or "status" (see *Fábián v. Hungary* [GC], no. 78117/13, § 113, 5 September

2017). For the purposes of Article 14, a difference in treatment based on a prohibited ground is discriminatory if it “has no objective and reasonable justification”, that is, if it does not pursue a “legitimate aim” or if there is no “reasonable relationship of proportionality between the means employed and the aim sought to be realised” (see *Mazurek v. France*, no. 34406/97, §§ 46 and 48, 1 February 2000).

22. In the present case, despite the fact that the differential in favour of the applicant in terms of objective merits was clearly greater than the differential in favour of the other candidate regarding the subjective merits, the difference in treatment to the detriment of the applicant was not objectively and reasonably justified in the specific circumstances, and thus amounted to discrimination against the applicant on grounds of sex. As a matter of fact, the infringement of Article 14 taken in conjunction with Article 6 § 1 is even more obvious when account is taken of the fact that only one woman, as opposed to sixteen men, held the presidency of one of the seventeen High Courts of Justice in Spain, so that Article 14 actually entailed a positive obligation to make a distinction in favour of the applicant. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States, without an objective and reasonable justification, fail to treat differently persons whose situations are significantly different (see *Thlimmenos v. Greece* [GC], no. 34369/97, § 44, 6 April 2000; *Runkee and White v. the United Kingdom*, no. 42949/98, § 35, 10 May 2007; and *D.H. and Other v. the Czech Republic* [GC], no. 57325/00, § 175, 13 November 2007). The prohibition deriving from Article 14 will therefore also give rise to positive obligations for the Contracting States to make necessary distinctions between persons or groups whose circumstances are relevantly and significantly different (see *J.D. and A. v. the United Kingdom*, nos. 32949/17 and 34614/17, § 84, 24 October 2019).

23. Secondly, the violation of Articles 14 and 6 of the Convention taken together also occurred in so far as both the Supreme Court in its 2017 judgment and the Constitutional Court in its 2018 order upheld statements by the Council which reflect a pattern of gender inequality with regard to the applicant. In particular, in comparing the action programme of the male candidate (Mr M.P.H.) with the applicant’s action programme, the Council referred to “the paucity of the action programme” submitted by the applicant, which, it claimed, contained “sparse, generic and very trivial proposals” and found that, as a result, the difference between both candidates was “indisputable, obviously indisputable, overwhelming even” (*indiscutible, rabiosamente indiscutible, avasalladora incluso*) in favour of Mr M.P.H., who had “a vision and understanding of the organisational challenges of the Murcia High Court of Justice far superior” to that of the applicant, as well as “a level of preparation commensurate with that superiority.” Regarding this issue, our judgment observes that the Council “stated that the most significant

element for its decision was the presentations with the candidates, which were recorded" (see paragraph 15). Nonetheless, the call for candidates for the post of President of the Murcia High Court of Justice issued by the Council on 14 October 2014 referred in its sixth point to an "appearance" at a "public hearing" (*comparecencia en audiencia pública*) although, in reality, there was only an oral presentation of the action programme and proposals without any questions being put to the candidates. In other words, no real interview took place, since the Council did not put any questions enabling it to seek clarifications if, for example, it considered that some of the proposals were "sparse, generic and very trivial", etc.

24. These are undoubtedly statements and adjectives (as also mentioned in paragraph 15 of our judgment, but again without any inferences being drawn) which are hardly acceptable or identifiable in the practice of administrative selection procedures for the civil service, even when subjective merits are being compared and, logically, even more so when objective merits are being compared. Given that, in comparing the respective action programmes of both candidates, the Council's subjective assessment contained these pejorative adjectives relating to the applicant, we should ask: would it be acceptable for the Council to have used similar, or even stronger, adjectives in relation to the male candidate (Mr M.P.H.), in ascertaining that he did not possess one of the objective merits (for example, not having served on collegiate bodies), that he lacked practical experience in relation to one of those objective merits (practice in the civil courts), or that there was a very wide gap separating him from the applicant with regard to other objective merits (seniority in the judiciary and number and type of judgments)? The question is recurrent, and the answer is obvious.

25. In my view, not only was the applicant assessed unfairly in terms of merit and ability in the process of appointment to the post of President of the Murcia High Court of Justice (despite the discretionary nature of the selection procedure for a post with a judicial and governmental component), without this having been corrected by the national courts in the light of Article 6 § 1 of the Convention, but she also suffered a kind of secondary victimisation on account of the Council's statements referred to above (and especially the words "indisputable, obviously indisputable, overwhelming even") in its second decision (see, *mutatis mutandis*, *J.L. v. Italy*, no. 5671/16, § 142, 27 May 2021).

26. This should have led the Court to find a violation of Article 14 in conjunction with Article 6 § 1 of the Convention.

C. Violation of Articles 1 of Protocol No. 12 and 6 § 1 of the Convention taken together

27. Finally, in the present case, I consider that there has also been a violation of Articles 1 of Protocol No. 12 and 6 § 1 of the Convention taken

together. Indeed, the violation of Article 14 in conjunction with Article 6 § 1 (see *supra*) is even more marked in the light of Protocol No. 12 when we take into consideration the fact that the national legislation requires "a balanced representation of women and men in appointments" (see section 16 of Organic Law 3/2007 of 25 February 2007 on effective equality between women and men), as well as the implementation of "measures favouring the promotion of women of merit and ability" (Article 3(1) *in fine* of Regulation No. 1/2010, cited above). This is consistent with Protocol No. 12, the Preamble to which provides that "the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures."

28. In principle, the Court has held that "the same standards developed by the Court in its case-law concerning the protection afforded by Article 14 are applicable to cases brought under Article 1 of Protocol No. 12" (see, for example, *Napotnik v. Romania*, no. 33139/13, § 70, 20 October 2020, and *Negovanović and Others v. Serbia*, nos. 29907/16 and 3 others, § 75, 25 January 2022). Nevertheless, "[t]he Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify different treatment. The scope of the margin of appreciation will vary according to the circumstances, the subject matter and the background ... Irrespective of this scope, however, the final decision as to the observance of the Convention's requirements rests with the Court itself" (see *Paun Jovanović v. Serbia*, no. 41394/15, § 77, 7 February 2023). Lastly, the margin of appreciation has manifested itself precisely in terms of anti-discriminatory judicial policy in favour of women in situations of comparable merits and ability (see, again, section 16 of Organic Law 3/2007 and Article 3 of Regulation No. 1/2010). Consequently, in the present case, there was a failure on the part of the national courts to implement the undisputed interpretation of the existing legislation on this matter (see *Paun Jovanović*, cited above, § 92).

29. In order to understand the gender equality background to the present case under Article 1 of Protocol No. 12, we could hypothetically swap the positions of the applicant and the male candidate. That is to say: suppose the differential in terms of the male candidate's objective merits had been greater and the differential in terms of the applicant's subjective merits had been smaller. In such a case: would the Council have given preference to the female candidate? Again, the question is recurrent, and the answer obvious. In any event, without recourse to such a hypothesis, the actual situation (higher objective differential in favour of the applicant compared with the lower subjective differential in favour of the male candidate) should have led to the conclusion that, if the existing legislation on effective equality were implemented, the applicant would have been appointed to the post. Nonetheless, no reasons were given by the Council (or by the Supreme Court

in its 2017 judgment or the Constitutional Court in its 2018 Order endorsing the Council's final decision) as to why, even though the gap between the objective merits of the applicant and the male candidate (Mr M.P.H.) was much wider than the gap between the male candidate and the applicant in terms of subjective merits, the national rules on effective equality were not applied. Those rules should have been applied, *a fortiori*, in order to avoid a kind of unlawful reverse discrimination in favour of the male candidate.

30. In conclusion, there has also been a violation of Article 1 of Protocol No. 12 in conjunction with Article 6 § 1 of the Convention.