Astradsson v Iceland

Oral Submissions of Government of Iceland

The Attorney General: Fanney Rós Þorsteinsdóttir

Mr President, members of the Court.

The Government emphasises at the outset its profound respect for the role of this Court and the rule of law. The Government has repeatedly responded in a responsible and constructive manner to decisions of the Court, even where very substantial disruption and cost in implementation has been involved, and the institution of the Court of Appeal, the subject of these proceedings, was itself established in response to an earlier judgment of this Court.

In the present context, and consistent with the rule of law, the domestic Courts have provided full access to court for those judicial candidates who were disappointed by the appointment process and, where the Supreme Court has granted damages to those individuals, the Government has complied fully with the Supreme Court's rulings. Furthermore, since the Chamber Judgment, neither

Judge AE, nor any of the three judges who were appointed at the same time and were not among the 15 whom the Evaluation Committee had suggested, have sat in any Court of Appeal proceedings.

But this state of paralysis cannot, it is submitted, be allowed to continue and the Government contends that the Grand Chamber should now bring it to an end by finding that whatever test is applied to the meaning of "established by law", on the facts of this case there is no violation of the Convention.

This should be the outcome having regard to the principle of subsidiarity, to the lack of substantive merit in the Applicant's complaints, and to the fundamental principles of judicial security of tenure and legal certainty.

Mr President, Mr Otty will address the law, but before he does so I would like to emphasise 12 central elements of the factual background to this case, and to respond to the Court's most recent questions.

First, there is no doubt that the Court of Appeal, which determined the Applicant's proceedings, has a clear and express foundation in Icelandic law *as*

an institution. It was established by a law which came into force in June 2016 and the Court formally came into being on 1 January 2018.

Second, this being a new Court, there was no established precedent as to how the appointment process governing proposals to Parliament should proceed, or as to how Parliament should vote on such proposals. See documents 2, 3 and 24.

Third, the Minister of Justice who proposed Judge AE for appointment was not, as a matter of law, bound to propose the first 15 candidates identified by the Evaluation Committee. It was, instead, open to her to propose to Parliament other individuals who had the requisite qualifications, such as AE.

Fourth, in making her proposals the Minister placed weight on judicial experience and gender balance. These were two objectively legitimate factors endorsed both by the Icelandic Association of Judges, and by all party leaders, when they made it clear to the Minister that the Committee's original proposals could not pass through Parliament without amendment, because of issues of gender equality. See Documents 25 a-b and 26-28.

Fifth, there was complete transparency when the Minister set out her position, and the key criteria she was applying, in memoranda to Parliament. She engaged in detailed discussions with the Constitutional Supervisory Committee of Parliament, and she had guidance from external experts. See Documents 28 and 63.

Sixth, Judge AE was fully qualified for appointment as a judge to the Court. She had an exemplary record as an associate judge for more than 10 years, a District Court Judge for 14 years and the Chief Judge of the Labour Court for 7 years. The independent Evaluation Committee had found her to be fully eligible for appointment, and she had *more* judicial experience than any of the candidates excluded from the Minister's list. This is document 4.

Seventh, Parliament retained full oversight, and it approved the appointment of all 15 Judges proposed, including AE. Although complaint is now made that this approval was conferred by a single collective vote, this was a procedure proposed by the Speaker of Parliament, and approved as lawful by the independent Secretariat of Parliament. It had also been adopted for other matters in the past, and it was not opposed by a single MP, *whether Government or opposition*, despite their being told of their ability to request individual votes. See Documents 2 and 24.

Eighth, prior to that vote, it had been made apparent in conversations between the Speaker and all parliamentary groups, that *all* MPs would vote in the same manner on every individual identified in the Minister's proposals, whether in one collective vote or individually.

Ninth, Judge AE was appointed by the President of Iceland in June 2017, and her appointment took effect with the new Court on 1 January 2018. Following her appointment, she became formally, and fully, vested with the powers of a judge of the Court of Appeal, and she became entitled under Article 61 of the Constitution to full security of tenure.

Tenth, Judge AE's conduct since her appointment has continued to be exemplary. There is no evidence of any public concern about her good faith, professional integrity or competence, or of that of any of her colleagues, and there is no evidence of any pattern of inappropriate Executive interference with judicial appointments in Iceland.

Eleventh, the only two defects identified in the appointment process by the domestic Courts were of a technical nature. No domestic Court has ever suggested

that either defect made any difference to AE's appointment, none of the unsuccessful candidates has ever suggested AE's appointment should be invalidated, and the Supreme Court has rejected the Applicant's central case - that AE's appointment should be treated as a nullity - finding the defects to be of no significance in this regard.

And finally, the extraordinary allegations of bad faith now made by the Applicant are not open to him in circumstances where they were not advanced before the domestic courts and they in any event have no evidential foundation whatever, as confirmed by Documents 21, 30 and 59-64.

I turn next to the Court's three questions of 20 December 2019.

As to the first question, although the appointment process was novel, it *would* have been open to Parliament to respond to the motion before it, by rejecting certain candidates, and by requiring only that some positions be made the subject of subsequent proposals. Parliament would not have been required to repeat the whole procedure regarding all 15 candidates.

As to the second question, the Minister explained to Parliament that she considered that 24 candidates were eligible. She presented the 15 candidates

which she did having regard *both* to the work of the Evaluation Committee *and* her own judgment based on the issues of judicial experience - a matter she considered of paramount importance - and gender balance. These matters were reflected in the Minister's letter to Parliament of 29 May 2017, and her Memorandum of 30 May 2017, as well as in the observations she made when appearing before the Constitutional Committee. The relevant Documents are 8 to 10, 43 and 63.

As to the third question, a violation of Article 6 of the Convention does not automatically lead to the re-opening of criminal proceedings, but it may provide a foundation for doing so, if the conditions set in Article 228(1) of the Code of Criminal Procedure are met. One example, where re-opening was granted, is provided by a decision of 13 June 2012. Another, where relief was refused, by a decision of 21 May 2019. The Government is of course ready to provide both decisions if that would assist. In the present case – as Document 21 shows - the Applicant's principal claim before the Supreme Court was that the judgment in his case should be overturned and referred back to the Court of Appeal, or, as an alternative claim, that he be granted a complete acquittal, by reference to his Article 6 arguments. This illustrates again the issues of legal certainty that his arguments may give rise to.

Mr President, I now hand over to Mr Otty to address the Government's case on the law.

Tim Otty QC

Mr. President the Government makes three core submissions.

The first is that the Applicant's case involves a breach of the principle of subsidiarity. It requires the Court to disregard the express findings of the Supreme Court without any justification.

The primary Supreme Court decision in this regard is that from the Applicant's own case dated 24 May 2018. This is Document 20.

The Supreme Court made five key findings all set out on page 7.

First the fact that Parliament did not hold individual votes was not a defect which carried any weight or significance, or which rendered the appointment of AE null and void. That finding was unsurprising given previous parliamentary practice and the advice of the independent Secretariat, given the indications to the Speaker

in advance that all MPs would vote the same way, whether voting on a collective or individual basis, and given the opportunity provided to all MPs to ask for individual votes, an option not taken up by any of them.

Second the earlier defect in the process adopted by the Minister did not undermine the appointments of AE or her colleagues either. As the Supreme Court stated "*As regards the consequences of the said shortcomings in the procedure on behalf of the Minister .... what matters is that the appointment of all the 15 judges ..... for indefinite term, which in no instance has been invalidated by a Court, was realised upon the signing of their letters of appointment*".

Third, all of the individuals appointed – including AE - were adequately qualified by reference to what the Supreme Court described as their "*professional experience and legal knowledge*".

Fourth, on appointment, AE and her colleagues enjoyed full security of tenure under Article 61 of the Constitution, and none of them could be discharged from office other than by judicial decision.

And fifth, on appointment, AE and her fellow Judges acquired judicial powers, and became "*obliged … to exercise independence in their judicial work and never to act under instructions from others*".

These five factors meant that, from the Supreme Court's perspective, the Court of Appeal which heard the Applicant's case had to be treated as "*established by law*", and as having fully respected Article 6.

In taking this course, the Supreme Court was also following four earlier decisions. In the two December 2017 Judgments at Document 19, the Court had recorded the fact that *all* parliamentary groups and MPs had informed the Speaker that they would vote the same way. Furthermore at pp. 11-12 – in passages apparently overlooked by the Chamber – the Court had expressly treated the parliamentary process as failing to cure the *earlier* Ministerial defect, *rather than* as being a significant defect in its own right. And in the two July 2017 decisions at p. 4 of Document 16 it was acknowledged by the Claimants, and by the Supreme Court, that complaints at deficiencies in the Minster's decision making did *not* invalidate the appointment of *any* of the 15 individuals appointed.

A total of 5 separate Supreme Court decisions therefore treated AE's appointment as valid and effective as a matter of law, with the inevitable logical consequence that if the procedural defects identified had no implications or significance for AE, they could not do so for the Applicant. That is an insurmountable obstacle for the Applicant's case, if subsidiarity is to be respected.

In addition, the remoteness of the relationship between the defects and the Applicant's own case underscores the lack of merit in the Applicant's arguments from the perspective of all relevant ECHR and EU or EFTA case law. All of the Strasbourg case law shows that a central question will be whether the legal defect relied upon in any given case, has any relevance to any of the substantive protections of fairness, independence and impartiality in that case. As to the EU and EFTA case law it concerned the conduct of EU or EFTA institutions, and so in contrast to this case no issue of subsidiarity arose. It dealt with a different context of cases where the legal defect went to the heart of issues of impartiality, because it related to security of tenure, mandate and lack of qualification, or because it involved *deliberate* breach of the legal framework. No such issues are in play here. And, finally the EU case law has also now been described as manifestly wrongly decided by the Advocate General in the *Simpson* case, where a far more nuanced approach is advocated.

The Government's second core submission is that the Applicant's complaint is technical in the extreme, and lacks any substantive merit, even if issues of subsidiarity are entirely set to one side.

Aside from the fact that he pleaded guilty at first instance, and now has no complaint at the Court of Appeal's substantive approach in his case, his position becomes even less meritorious when one looks again at the nature of the procedural defects he relies on.

The first defect in time concerned what the Supreme Court described as the absence of data indicating a sufficiently full comparative exercise by the Minister before her *partial* departure from the approach of the Evaluation Committee, but this takes the Applicant nowhere in seeking to establish that his appeal tribunal was not established by law: first the Constitution protects Judges from removal from office once appointed. That meant that as a matter of domestic law the defect had no effect on the judicial powers or status of AE or her colleagues when they presided over the Applicant's case; secondly the legal obligations AE owed to act in an impartial and independent manner further protected all parties from any risk of executive interference; third there is no evidence of bad faith on the Minister's part, and the factors she had regard to carried with them no suggestion whatever of executive interference; fourth there is no suggestion that AE herself was to

blame for what occurred, and fifth, as Documents 14 and 21 show, before the domestic courts, even the Applicant acknowledged that AE could have been properly proposed by the Minister, even if all aspects of the procedure had been followed entirely correctly.

The second defect, relating to the collective vote held by Parliament also goes nowhere: first this was the first time this appointment process was being followed; second as the Secretary General of Parliament confirmed in correspondence with the President, collective votes were not unprecedented and this one was considered lawful by the Secretariat; third all MPs were given the opportunity to seek individual voting, and none did so, indicating instead that they would vote the same way; and fourth there is no evidence whatever to support the Applicant's extraordinary theory that this manner of voting was part of some kind of conspiracy to force through the appointment of AE, and there is no evidence to indicate that had individual voting occurred the result would have been any different.

Before turning to the Government's third core submission it is important to address the Chamber's flagrant breach test directly.

In the Chamber the Majority saw the determinative question in these proceedings as being whether there had been a "*flagrant breach*" of Icelandic law in the process which preceded the appointment of AE more than 6 months prior to the Applicant's case.

That was a approach for which there was no authority or adequate foundation. The material question, instead, was that raised by the Applicant *himself* at the domestic level at p. 4 of Document 21: whether, by virtue of the defects identified AE's appointment was to be treated as a nullity, such that she was not the holder of judicial power, and her acts were a "*dead letter*". If AE's appointment *was* a nullity then when she came to sit on the Applicant's appeal, she would not have been vested with judicial power at all, and the Court could not be said to be "*established by law*". If on the other hand her appointment remained valid and effective, then the opposite conclusion would follow. The Court as an institution had been established by law since January 2018, and all the judges sitting on the Applicant's panel were Judges formally vested by law with judicial powers and obligations. In every respect the tribunal would therefore be "established by law", leaving questions as to fairness, impartiality and independence to be considered by reference to those express terms in Article 6.

But even setting all this to one side, *if* it were the right question to ask whether there had been a flagrant breach of domestic law, the answer would have to be that the breaches here were not flagrant.

First the conclusion of the domestic Courts was to the opposite effect. They described the defects as not significant and expressly left open the prospect that precisely the same outcome in terms of AE's appointment might have occurred had all procedures been correctly followed. Second, as the appointment process was unprecedented, any errors *later* identified were never likely to be easily characterised as "*flagrant*", unless bad faith could be shown. Third the Minister's criteria were transparent and objectively legitimate, even if the procedure for their deployment was later found to be flawed. Fourth even in the earlier proceedings where the defects were eventually identified, the first instance District Court had found no breach of the law, so further indicating that any error was less than flagrant. And fifth the domestic courts have *made no finding at all* of bad faith against the Minister, and they have made *no finding* that she knew her course of action was unlawful. On the contrary, and as she explained to the domestic courts, and has emphasised in her statement at Document 63, the Minister took external expert advice in adopting the approach she did. As to the issue of good faith the Grand Chamber also now has the positive evidence of Mr Níelsson, at Document 64. The allegations against the Minister and Mr Níelsson make no chronological

sense and there is a complete *absence* of material to support the Applicant's other allegations against the very wide range of other persons and institutions he now criticises. The fact that none of those allegations were made at the domestic level also means that the principles of both exhaustion of domestic remedies, and subsidiarity prevent the Applicant from raising them now.

The Majority Judgment does not engage with any of these arguments.

It addresses the question of flagrant breach at paragraphs 108 to 123. But most of those paragraphs do no more than recite the fact that there were defects of domestic law in the two respects mentioned. That of course does not answer the question whether they are properly to be characterised as flagrant.

The Majority instead rests the conclusion of flagrant breach on three points: first what is said to be the receipt by the Minister of "*expert advice*" in emails sent to her, and alleged findings about this by the Supreme Court in its December judgments (paragraph 117); second the Minister's disregard for the danger to the reputation of the other candidates, by reference to their exclusion from the nominees presented to Parliament (118); and third the fact that the judicial

appointments system was intended to limit the discretion of the executive, and to require the active participation of Parliament (119-121).

None of these points can withstand scrutiny, or begin to justify a finding of flagrant breach of the law.

As to expert advice the Majority overstates the significance of the emails referred to, and it makes a basic error in its description of what the Supreme Court found. The first email – Document 5 - was 5 lines long and advocated only that the Minister include reference to the competence and career achievements of those she was proposing to include in her letter to Parliament. This is something she in fact did as Document 9 shows. The second email – Document 6 – contained no definitive legal advice at all, it did not contend that the Minister's proposed course was unlawful. It simply flagged questions that might arise. Importantly the Majority also made a basic error of fact in stating that the Supreme Court judgments of December 2017 had made findings about these emails, and that it had characterised them as "*expert advice*". The judgments did not in fact refer to the emails *at all* as Document 19 shows.

As to the danger to the reputation of other unsuccessful candidates the Majority takes the findings by the domestic courts out of context, and it misunderstands them in consequence. Those were findings relevant to whether damages should be awarded by reference to conventional questions of foreseeability and remoteness of loss. They had no relationship at all to any question of deliberate breach of the law, and, on the contrary, at page 13 of Document 19 the Supreme Court made it explicit that it was *not* finding that the Minister had deliberately set out to harm anyone's reputation, and it made no finding of deliberate breach of the law at all.

And as to the third point, the question of limitations on the discretion of the executive, and the requirement for parliamentary scrutiny, there is nothing in the facts here to suggest that anything that occurred went against that basic approach, let alone to a standard of flagrancy. As a matter of law, the Minister was not bound by the views of the Evaluation Committee. The Association of Judges had endorsed the relevance of the criteria she applied. Her additional nominees were all endorsed as eligible and qualified by the Evaluation Committee and, as the Attorney General has pointed out, all the four candidates added, including AE, had more judicial experience than those four that the Minister replaced. It was also clear that Parliament simply would not vote for the proposals of the Committee without some amendment so as to achieve greater gender balance.

And Parliament *did* of course then have the opportunity to scrutinise the Minister's proposals, both through the extensive discussion with the Constitutional Committee, and in full session.

So *even if* flagrant breach of domestic law were the correct test to apply it could *never* be satisfied on the facts of this case. For a Convention violation to be flagrant it must involve the complete destruction of the essence of the right. That is simply not this case.

I turn finally then to the Government's third core submission of law. It is that far from safeguarding the rule of law, and the principle of judicial independence, the Applicant's approach fundamentally weakens both concepts.

On the Applicant's case *any* clear defect in an appointment process, however historic in nature, can place the position of an individual judge in jeopardy, even where the process under scrutiny was novel, even where all concerned in the process have acted in good faith, even where the criteria applied are objectively reasonable, even where the Judge themselves had no involvement whatever in such a defect, and even where the Judge is manifestly qualified.

That approach is irreconcilable with the need for judicial security of tenure, both as a matter of basic principle, and as reflected in Article 61 of the Constitution, and it is striking that the Majority Judgment's reasoning contains no reference at all to this principle or to Article 61.

But the serious policy issues go even further than this.

The rule of law also depends, of course, on legal certainty, and on parties, and society at large, understanding that decisions made by Courts are final in nature.

On the Applicant's approach there can never be such certainty, as at any point in time a defect in an appointment process might be identified and alleged to be flagrant. That could lead not only to the effective removal from office of a Judge who had done nothing wrong, but also to the invalidation of every decision that Judge had participated in, and even, potentially, to every decision made by other Judges appointed at the same time. That would undermine the core values of the Convention, and the rule of law. Again, it is notable that – as with the principle of judicial security of tenure - the Majority Judgment fails even to refer to the principle of legal certainty, let alone to consider the implications of its reasoning for that principle.

It should also be emphasised that this case *could not* be more different from the kind of situation addressed by the Interventions before the Court. In contrast to the alleged situation in Poland or Georgia, the approach of the Icelandic authorities, as evidenced in the present case, poses no conceivable threat to judicial independence. On the contrary, it ***supports*** that independence by insisting on judicial security of tenure, by insisting on proper constitutional protections for the status of judges, and by protecting judges from unmeritorious attacks on their status, based upon technical errors for which others have been inadvertently responsible.

It may well be that ***in the future***, whether in relation to Poland, Georgia or another State, this Court will be called upon to assess the implications of judicial appointment processes or disciplinary measures where questions of fairness, independence and impartiality genuinely arise because, for example, of a lack of qualification on the part of those appointed, or because of a lack of adequate security of tenure, clearly evidenced politicisation of the process, or deliberate breaches of the law.

But that is emphatically *not* this case and in truth the central principles of law set out in all four Interventions are *inconsistent* with the approach of the Majority Judgment. The core test that is proposed in the submissions of the Government of Poland, the Helsinki Foundation and the Public Defender of Georgia is that a defect in appointment *which all the circumstances of the case show to have adverse implications for impartiality and independence, or which affect the legal powers of the judge concerned,* may lead to a finding of a violation of Article 6. But if – as here - no such implications arise, and the defects are of a technical nature, with no discernible impact on either outcome of appointment, judicial powers or tenure, or trial process, and no objective indication of politicised intent, no such violation should be found.

To accept the Applicant's arguments would be to bring the Convention system of oversight into disrepute, and it would render the Convention of far less value for those cases which may arise in the future where the intervention of the Court may be needed.

The endorsement of a test as vague as that contended for by the Applicant would be dangerous enough. But a finding that it was *satisfied* in a case as technical as the Applicant's would also create precisely the lack of legal certainty and legal chaos that the Polish Commissioner for Human Rights warns against in his

intervention. It would be to open the Pandora's Box described in the powerful Dissenting Opinion of Judge Lemmens and Judge Gritco before the Chamber.

Mr President for all these reasons the Grand Chamber should dismiss the Applicant's complaints.