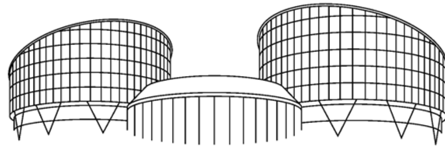

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

DECISION

Application no. 39852/16
Sulejman ALIJEVSKI
against North Macedonia

The European Court of Human Rights (First Section), sitting on 29 September 2020 as a Chamber composed of:
Ksenija Turković, *President,*
Krzysztof Wojtyczek,
Linos-Alexandre Sicilianos,
Aleš Pejchal,
Pauliine Koskelo,
Tim Eicke,
Jovan Ilievski, *judges,*
and Abel Campos, *Section Registrar,*
Having regard to the above application lodged on 7 July 2016,
Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,
Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Sulejman Alijevski, is a Macedonian/citizen of the Republic of North Macedonia, who was born in 1956 and lives in Bitola. He is represented before the Court by Ms P. Zefikj, a lawyer practising in Skopje.
2. The Government of North Macedonia Government ("the Government") are represented by their Agent, Ms D. Djonova.
3. The facts of the case, as submitted by the parties, may be summarised as follows.
4. In reply to written notifications in 2014 by the head of the prosecutor's office in which the applicant worked as a public prosecutor, the State Public Prosecutor ("the chief prosecutor") set up a three-member working group to "investigate" allegations that the applicant had not been

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diligent in handling cases assigned to him and had accordingly committed the disciplinary offence of "unlawful, belated and negligent exercise of office" under section 71(2) of the Public Prosecutor's Office Act ("the Act", see paragraph 21 below). The group communicated the results of the audit to the chief prosecutor.

5. On 31 October 2014 the chief prosecutor requested that the Commission for determination of a violation of disciplinary rules and unprofessional and unconscientious exercise of office by a public prosecutor (*Комисија за утврдување дисциплинска повреда и нестручно и несовесно вршење на функцијата јавен обвинител* – "the Commission"), whose members he had appointed in November 2013, initiate disciplinary proceedings against the applicant on "reasonable suspicion" that "he had handled cases assigned to him negligently and belatedly". The chief prosecutor sought the applicant's dismissal from office in accordance with sections 68(1) and 73 of the Act (see paragraphs 20 and 23 below).

6. The Commission was composed of five members. Two were public prosecutors from the State Public Prosecutor's Office, one was a public prosecutor from the Skopje Higher Public Prosecutor's Office, and two were public prosecutors at first instance. They were appointed for a term of four years.

7. On 4 November 2014 the Commission communicated the chief prosecutor's request to the applicant, who responded in writing. By a decision of 19 November 2014 it initiated disciplinary proceedings against him. The Commission held three oral hearings, which the applicant attended. In the proceedings, he presented his arguments orally and in writing. The chief prosecutor, as the complainant (*подносител на барањето*), did not attend any of the hearings despite the fact that he had been properly summoned. The Commission also heard oral evidence from other individuals concerned.

8. On 12 February 2015 the Commission found the applicant guilty of professional misconduct and imposed, under section 73 of the Act (see paragraph 23 below), a salary reduction of 30% for six months. A transcript of the decision was served on the applicant, the chief prosecutor and the applicant's prosecutor's office.

9. The applicant challenged (alleging that the "prosecution" against him had been time-barred; that there had been errors on the facts and law; and that the Commission had failed to provide sufficient reasons) the decision before the State Board of Prosecutors ("the SBP"), which was competent to hear appeals in such cases (see section 72(2) of the Act, paragraph 22 below). By a decision of 7 May 2015, the SBP upheld the Commission's findings of fact and law, but replaced the penalty with a salary reduction of 15% for three months. According to the minutes of the SBP's meeting, the latter was attended by nine out of eleven of its members, but not the chief

prosecutor, who was, as specified in section 6 of the State Board of Prosecutors Act, an *ex officio* member.

10. The applicant challenged the SBP's decision by means of an administrative-dispute claim (*тужба за управен спор*) at two levels of administrative court. He reiterated the allegations raised against the Commission's decision (see paragraph 9 above) and further complained that, *inter alia*, "the disciplinary proceedings [had not been] conducted by an independent and impartial body ... [in that] the chairman and members of the Commission [had been] appointed by the complainant – the chief prosecutor ..."

11. With a decision of 10 November 2015 rendered pursuant to, *inter alia*, section 37 of the Administrative Disputes Act (see paragraph 17 below), the Administrative Court dismissed the applicant's claim and confirmed the SBP's decision. It referred to the procedural steps taken in the proceedings and found no violation of the rules of procedure as specified in the Act and the Rules by either the Commission or the SBP (paragraphs 21-30 below). It found that the Commission had correctly assessed the evidence; had established the relevant facts and had imposed a disciplinary penalty which the SBP had amended in accordance with the law. The court further held that the Commission had analysed the applicant's complaints and given adequate and sufficient reasons.

12. In an appeal against this decision, the applicant reiterated his earlier complaints (see paragraph 9 above) and added that, *inter alia*, neither the SBP nor the Administrative Court had examined his allegations that the disciplinary proceedings had not been conducted by an independent and impartial body (see paragraph 10 above). He also complained that the lower court had failed, contrary to section 37 of the Administrative Disputes Act, to examine the lawfulness of "the disputed administrative decision" (referring to the SBP's decision) within the limits of the claim. With a decision of 15 December 2015, the Higher Administrative Court dismissed the applicant's appeal finding no grounds to depart from the established facts and the law applied by the lower authorities.

RELEVANT LEGAL FRAMEWORK

I. ADMINISTRATIVE DISPUTES ACT (*ЗАКОН ЗА УПРАВНИТЕ СПОРОВИ,* OFFICIAL GAZETTE NO. 62/2006 AND 150/2010)

13. Under section 1 of the Administrative Disputes Act, the Administrative Court provided judicial protection of the rights and interests of legal and physical persons in administrative disputes against decisions by, *inter alia*, State bodies in individual administrative matters.

14. An administrative-dispute claim could be lodged against an administrative decision taken at second instance (final administrative decision)(section 8(1)).

15. Section 10(1) provided that an administrative decision could be challenged, *inter alia*, in the event of errors of fact, incorrect application of the law, or if the proceedings were not conducted in accordance with the rules of procedure.

16. Under section 36, the court decided an administrative dispute on the basis of the facts established in the administrative proceedings, or on the facts that it established itself. If the court found that the dispute could not be decided on the basis of the facts established in the administrative proceedings or if the rules of procedure were not complied with, it would set aside the contested decision by a judgment. The body concerned was required to act in accordance with the judgment and issue a new decision. If setting aside the contested administrative decision and reopening the proceedings led to irreparable damage for the complainant, or if the facts were obviously different from those established by the administrative authorities, or if the administrative body failed to act in accordance with the previous judgment, the court could establish the facts of the case and decide the matter by a judgment or decision.

17. Under section 37, the court limited its examination of the lawfulness of the contested administrative decision to the scope of the complaint, but was not bound by the reasons set out therein.

18. Under section 40, the court was entitled to decide the administrative matter on the merits if appropriate. This section further set forth the circumstances under which the court was required to do so. In such circumstances, the court's judgment replaced the administrative decision.

II. PUBLIC PROSECUTOR'S OFFICE ACT (*ЗАКОН ЗА ЈАВНОТО ОБВИНИТЕЛСТВО*, OFFICIAL GAZETTE NO. 150/2007 AND 111/2008 – "THE ACT")

19. Under section 6 of the Act, the public prosecutor's office was organised according to the principles of hierarchy and subordination. These principles should not endanger the autonomy and responsibility of each public prosecutor in the exercise of his or her office.

20. Under section 68(1) of the Act, a public prosecutor could be dismissed for unprofessional and unconscientious (*несовесно*) exercise of office.

21. In accordance with section 71(2) of the Act, unlawful, belated and negligent exercise of office was regarded as professional misconduct by a public prosecutor.

22. Proceedings for unprofessional and unconscientious exercise of office were conducted by a five-member Commission set up by the chief

prosecutor. The State Board of Prosecutors heard appeals against decisions of the Commission. A decision of the State Board of Prosecutors could be challenged before the competent court by means of an administrative-dispute claim (section 72 of the Act).

23. Section 73 of the Act provided that the following penalties could be issued in the event of a violation of disciplinary rules by a public prosecutor: a written reprimand; a public reprimand; a salary reduction of between 15% and 30% for one to six months; suspension; and dismissal from office.

24. Under section 74(1) of the Act, proceedings for determination of a violation of disciplinary rules and unprofessional and unconscientious exercise of office could be instituted by the chief prosecutor (for public prosecutors of all ranks) and by a higher public prosecutor (for public prosecutors at first instance).

III. RULES GOVERNING DISCIPLINARY PROCEEDINGS AGAINST PUBLIC PROSECUTORS (*ПРАВИЛНИК ЗА УРЕДУВАЊЕ НА ПОСТАПКАТА ЗА УТВРДУВАЊЕ НА ОДГОВОРНОСТ НА ЈАВНИОТ ОБВИНИТЕЛ,* OFFICIAL GAZETTE NO. 72/2010 – “THE RULES”)

25. Under section 2 of the Rules, proceedings for determination of a violation of disciplinary rules and unprofessional and unconscientious exercise of office were conducted by the Commission, whose five members were appointed by the chief prosecutor.

26. The term of office of the members of the Commission was four years. The chief prosecutor appointed the registrar of the Commission (section 6 of the Rules).

27. The chief prosecutor decided requests for the withdrawal or exclusion of a member and the chairman of the Commission. If a member or the chairman of the Commission was unable to sit, the chief prosecutor appointed a replacement (section 7 of the Rules).

28. Under section 9(2), the Commission was required, before it initiated proceedings, to ask that the public prosecutor against whom the request was submitted to respond to the allegations in writing without delay.

29. If the Commission found the request well founded, it would initiate, by means of a separate decision, disciplinary proceedings. A transcript of the decision was served on the public prosecutor against whom the request was submitted and the complainant (*подносител на барањето*) (section 11(1) and (2) of the Rules).

30. Section 12 of the Rules provided that the Commission held a hearing (*води расправа*) at which the complainant and the public prosecutor concerned argue their position regarding the relevant facts and evidence. The hearing would take place in the absence of the parties, if they were

properly summoned. The Commission collected and inspected the relevant material and took other measures in order to establish the facts regarding the allegations of a violation of disciplinary rules or unprofessional and unconscientious exercise of office. It also provided the parties with the opportunity to comment on all the evidence and facts.

31. Section 16 of the Rules provided that the public prosecutor against whom disciplinary proceedings were launched and the complainant could challenge a decision of the Commission before the State Board of Prosecutors.

COMPLAINT

32. The applicant complained under Article 6 of the Convention that neither the Commission nor the State Board of Prosecutors had been "independent and impartial" given the involvement of the chief prosecutor in the proceedings in a different capacity, in that he had set in motion the impugned proceedings; had appointed the members of the Commission; and had been *ex officio* member of the SBP.

THE LAW

33. The applicant complained that the multiple role of the chief prosecutor in the disciplinary proceedings against him had been incompatible with the principle of a fair trial set forth in Article 6 § 1 of the Convention, which in so far as relevant, reads as follows:

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

A. The parties' submissions

1. The Government

34. The Government submitted that the principles of hierarchy and subordination on which the public prosecutor's office was based had been reflected in the disciplinary proceedings at issue. The chief prosecutor had lodged the request in respect of the applicant only after the allegations had been confirmed. The members of the Commission had been appointed for a term of four years. The Commission had jurisdiction to hear all disciplinary cases. It was not an *ad hoc* body set up for the purposes of the proceedings at issue. They were public prosecutors which, according to the Government, was a strong indicator of impartiality (*Oleksandr Volkov v. Ukraine*, no. 21722/11, § 109, ECHR 2013). An additional factor showing their impartiality was the fact they had been employed in different public

prosecutor's offices and had been of different ranks. Furthermore, they had not been involved in the applicant's case before the chief prosecutor had lodged the request. Moreover, the chief prosecutor had neither attended any of the hearings held before the Commission nor participated in its work. Regarding the alleged lack of impartiality of the SBP, the Government objected that the applicant had not exhausted domestic remedies since he had failed to raise that complaint before the administrative courts. In any event, the chief prosecutor had not taken part in the decision against the applicant.

35. Lastly, the Government argued that the impugned decisions had been subject to judicial review by two levels of administrative court, which had satisfied the requirements of impartiality and independence under Article 6 of the Convention.

2. *The applicant*

36. The applicant submitted that his claim before the administrative courts concerned the SBP's decision, which had been a final administrative decision within the meaning of the Administrative Disputes Act. Accordingly, his complaints of a lack of impartiality had concerned both disciplinary bodies that had decided his case, namely the Commission and the SBP. In any event, the administrative courts had been entitled to establish the facts (section 36(1) of the Administrative Disputes Act) and, by virtue of section 37 of that Act, had not been prevented from examining that issue of their own motion. He further maintained that the Commission could not be considered an independent and impartial because its members, all public prosecutors, had been hierarchically subordinate to the chief prosecutor who had initiated the impugned proceedings. They had been directly answerable to the chief prosecutor and could be found guilty of professional misconduct and ultimately dismissed. The fact that the chief prosecutor had been the complainant in the impugned proceedings, taken together with his superior position in the public prosecutor's office, cast doubt on the impartiality and independence of the members of the Commission. The chief prosecutor also had been an *ex officio* member of the SBP and had contaminated the proceedings notwithstanding the fact that he had not taken part in the SBP's decision regarding his appeal.

3. *The Court's assessment*

(a) Applicability of Article 6 of the Convention

37. The Court considers it important to address the issue of the applicability of Article 6 to the proceedings in question.

38. In this connection, it points out that disciplinary proceedings in which the right to continue to exercise a profession is at stake, notwithstanding the actual sanction imposed (see *Marušić v. Croatia* (dec.),

no. 79821/12, § 72, 23 May 2017)), give rise to “*contestations*” (disputes) over civil rights within the meaning of Article 6 § 1. This principle has been applied with regard to proceedings conducted before various professional disciplinary bodies, such as those within a medical association (see *Gautrin and Others v. France*, 20 May 1998, § 33, *Reports of Judgments and Decisions* 1998-III), an international sports association in anti-doping proceedings (see *Mutu and Pechstein v. Switzerland*, nos. 40575/10 and 67474/10, § 58, 2 October 2018), a professional Chamber (see *Philis v. Greece* (no. 2), 27 June 1997, § 45, *Reports* 1997-IV) and a lawyers’ bar association (see *Müller-Hartburg v. Austria*, no. 47195/06, §§ 39 and 40, 19 February 2013). The Court also held that Article 6 protection encompasses cases of the dismissal of a judge in which the first condition of the *Eskelinen* test (see *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, § 62, ECHR 2007-II), that is, whether national law “expressly excluded” access to a court, was not fulfilled, because it found that the applicant was able to seek a review of the decision or measure in question before a tribunal (see *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, §§ 112 and 120, 6 November 2018; *Oleksandr Volkov*, cited above, § 91; *Harabin v. Slovakia*, no. 58688/11, 20 November 2012; and *Olujić v. Croatia*, no. 22330/05, §§ 31-45, 5 February 2009).

39. The present case concerns disciplinary proceedings against the applicant, a public prosecutor, which relied on allegations of unprofessional and unconscientious exercise of office. In this regard, the Court accepts that the proceedings in question were decisive for a “right” of the applicant in so far as they could have, under sections 68 and 73 of the Act, led to dismissal from office, as initially sought by the chief prosecutor (see paragraph 5 above).

40. As to the nature of that right, the Court notes that domestic law did not classify the proceedings in issue as criminal. Furthermore, they were conducted in accordance with the rules of administrative procedure and the offences of which the applicant was accused were purely disciplinary rather than criminal in nature. Lastly, the final penalty imposed on the applicant (15% reduction of his salary for three months, see paragraph 9 above) was not severe enough to bring the offence into the criminal sphere. For these reasons, the Court considers that the disciplinary proceedings against the applicant did not concern the determination of a criminal charge within the meaning of that Article. Accordingly, Article 6 is not applicable under its criminal head (see *Ramos Nunes de Carvalho e Sá*, cited above, §§ 122-27). On the other hand, it observes that the first condition of the above-mentioned *Eskelinen* test was not met, as domestic law – in the form of section 72 of the Act (see paragraph 22 above) – made provision for persons with an interest to lodge an administrative-dispute claim with the Administrative Court challenging a decision by the SBP to impose a

disciplinary penalty on a public prosecutor, which the applicant had in fact done. Accordingly, the Court considers that Article 6 is applicable under its civil head.

(b) Independence and impartiality of the Commission and the SBP

41. The Court notes that the disciplinary proceedings against the applicant were initially conducted before two disciplinary bodies that operated within the prosecutor's office, namely the Commission and the SBP. The parties have neither argued nor submitted evidence that these bodies were judicial in nature. Moreover, the applicant seems to accept that these bodies and the decisions they had taken in the disciplinary proceedings in question were administrative in nature (see paragraphs 12 and 36 above). The Court finds no reason to hold otherwise.

42. The way the applicant has formulated his complaint means that it is directed at a functional defect in the proceedings before these bodies. The relevant Convention principles for the issues under this head have been summarised in its judgment in the case of *Denisov v. Ukraine* [GC], no. 76639/11, §§ 60-65, 25 September 2018.

43. The Court notes that under the then applicable legislation (see paragraphs 22-30 above), the Commission was composed of five members appointed by the chief prosecutor for four years. All members were public prosecutors who, as confirmed by the Government (see paragraph 34 above) and the applicable rules (see paragraph 19 above), were subordinate in rank to the chief prosecutor and were answerable to him in the exercise of their office. Having regard to the chief prosecutor's entitlement to institute disciplinary proceedings, the members of the Commission could themselves be subjected to such proceedings and ultimately dismissed by the SBP in which the chief prosecutor was an *ex officio* member.

44. Having regard to the procedural rules described above and the facts of the case, the Court considers that in the present case against the applicant, the chief prosecutor had rights as a party to the impugned proceedings. His request set in motion the proceedings, to which he submitted evidence and arguments in support of the allegations of professional misconduct on the applicant's part. A transcript of the Commission's decision was served on him, as the complainant in the proceedings. He was entitled to challenge it before the SBP. Accordingly, the chief prosecutor acted as "prosecutor" in respect of the applicant, the "defendant" in the impugned proceedings. The fact that he did not attend the hearings before the Commission, despite being properly summoned, is insufficient to alter that finding. In such circumstances, the Court considers that the Commission could not be regarded independent and impartial *vis-a-vis* the chief prosecutor who although entitled, did not participate in the SBP's decision in respect of the applicant (see paragraph 9 above).

(c) Review conducted by the administrative courts

45. The Court reiterates its settled case-law according to which, even where an administrative (adjudicatory) body determining disputes over "civil rights and obligations" does not comply with Article 6 § 1 in some respect, no violation of the Convention can be found if the proceedings before that body are "subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 § 1", that is, if any structural or procedural shortcomings identified in the proceedings before an administrative authority are remedied in the course of the subsequent control by a judicial body that has full jurisdiction (see *Ramos Nunes de Carvalho e Sá*, cited above, § 132; *Letinčić v. Croatia*, no. 7183/11, § 46, 3 May 2016; and *Oleksandr Volkov*, cited above, § 123).

46. In the present case, domestic law offered the possibility, of which the applicant availed himself, of obtaining a judicial review of the SBP's decision by means of an administrative-dispute claim before the Administrative Court, subject to a further appeal before the Higher Administrative Court. It is common ground between the parties that no issue arises as to the impartiality of the administrative courts. For its part, the Court also finds nothing that casts doubt on the independence and impartiality of the administrative courts. It remains for the Court to ascertain whether the administrative courts had "full jurisdiction" when they reviewed the applicant's administrative-dispute claim against the decisions of the internal disciplinary bodies of the prosecutor's office, within the meaning of the Court's case-law (see *Ramos Nunes de Carvalho e Sá*, cited above, §§ 177-86).

47. In this connection, it observes that under the Administrative Disputes Act, an administrative decision could be challenged, *inter alia*, in the event of errors of fact, incorrect application of the law, or procedural flaws (see paragraph 15 above). The Court notes that in the judicial review proceedings before the administrative courts the applicant complained, *inter alia*, about errors of fact and law and further alleged that "the disciplinary proceedings had not been conducted by an independent and impartial body" (see paragraphs 9 and 10 above).

48. The Court further observes that, under the applicable rules, the administrative courts were competent to consider these complaints. They could set aside the impugned decision and remit the case to the administrative authorities for fresh consideration. They were also entitled to establish the relevant facts themselves and decide the matter on the merits instead of the administrative authority (see paragraphs 16-8 above). Accordingly, they had broad fact-finding powers (including the possibility of substituting their assessment for that of the disciplinary body) and decision-making (see, conversely, *Ramos Nunes de Carvalho e Sá*, cited above, §§ 204 and 212). The Court is satisfied that the scope of the judicial review conferred on the administrative courts was "sufficient" and could

neutralise any adverse effects of the above-mentioned defects (see paragraphs 43 and 44 above) at the previous stages of the disciplinary proceedings. In the present case, both levels of the administrative courts, ruling within the limits of their jurisdiction as defined by domestic law, found no procedural flaws and accepted the facts established by the Commission (previously upheld by the SBP), as well as the disciplinary penalty amended by the SBP (see paragraphs 11 and 12 above).

49. In view of the foregoing, the Court considers that the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 22 October 2020.

Abel Campos Registrar	Ksenija Turković President