Practical instructions

The challenge of judges1

I. Context

1. To ensure respect for the rule of law, the protection of human rights and the proper administration of justice, it is crucial to preserve the independence and impartiality of judges. These also represent one of the fundamental principles which characterize the procedure before the European Court of Human Rights, a principle enshrined in several legally binding provisions.

2. Under Article 21 of the Convention, judges may not, during their mandate, undertake any activity incompatible with their independence or impartiality.

3. For the purposes of the clear and transparent application of the requirement set out in Article 21 of the Convention, the Court updated in June 2021 the resolution on judicial ethics, which sets out a set of rules on the integrity, independence and impartiality of judges, and imposes on them certain limits in terms of freedom of expression, secondary activities and acceptance of favors, advantages, decorations and distinctions. According to point III of this resolution, judges are impartial and ensure that their impartiality is reflected in the exercise of their functions, they ensure to avoid any conflict of interest as well as any situation, within the Court and in apart from this, which could reasonably be perceived as generating a conflict of interest, they do not participate in any matter which could be of personal interest to them, and they refrain from any activity, any comment or any association that could be interpreted as being likely to harm the confidence that the public must have in their impartiality. Different provisions of the resolution also apply to former judges.

4. Other guarantees relating to independence and impartiality are found in Article 26 § 3 of the Convention and Article 27A § 3 of the Rules of Court. Thus, a judge cannot rule as a single judge on a request directed against the Contracting Party in respect of which he was elected or of which he is a national. Furthermore, Article 13 of the Rules provides that judges may not preside in a case involving a Contracting Party of which they are nationals or in respect of which they were elected. Under Article 24 § 5 c) of the Rules, a judge elected in respect of a Contracting Party concerned by a request for referral to the Grand Chamber or a national of such a Party may not sit on the panel when the latter examines the request.

5. The material criteria rendering a judge unfit to sit in a given case, as well as the essential procedural framework which must be applied uniformly by all formations of the Court in all cases, are set out in Article 28 of the Rules, which aims to ensure rigorous application of the principle of impartiality of judges. The Plenary Court modified and further improved this article in December 2023.

6. The aim of this Practical Instruction is to specify the modalities provided for by this article to ensure, among other things, the practical and effective possibility for the parties to the procedure to express possible concerns regarding the impartiality of a judge, as well as the procedure to follow in such case.

1. Practical Instruction issued by the President of the Court under Article 32 of the Rules of Court on January 22, 2024.

II. Deportation of the judge

7. Whether a judge sits in a case is not his or her own choice; it is for him an obligation. Article 28 § 1 of the Rules of Court therefore recalls that each judge is required, in principle, to sit in the cases assigned to him.

8. The reasons why a judge cannot sit in the case are set out in Article 28 § 2 of the Rules. They include, in particular, cases where the judge may have a personal interest in the case (due for example to a marital, parental or other relationship), the fact that he has previously intervened in the case (somewhat title whether: judge, party, counsel or other), or the fact that he has publicly expressed an opinion on the case.

9. When a judge considers that, for one of the reasons set out in Article 28 § 2 of the Rules, he cannot sit in a given case, he informs the president of the section / the president of the Grand Chamber, explaining why. It is up to the section president/president of the Grand Chamber to determine whether the situation gives rise to the appearance of bias and, if so, to grant the judge's request for removal. In case of doubt, the section president / the president of the Grand Chamber may submit the question to the chamber / the Grand Chamber, which will decide after debate (article 28 § 3 of the rules).

III. External request for recusal

10. The Court's consistent practice is to allow parties to the proceedings (applicant party as well as respondent government(s)) to challenge the impartiality of a judge designated to sit in the case1 . In accordance with this practice, Article 28 § 4 of the Rules of Court now clearly states that the parties to the proceedings (i.e. the applicant and the respondent government(s)) may request the recusal of a judge of the Court designated to sit in their case (external request). Third parties to the case (individuals, States, legal entities) cannot submit a request for recusal of a judge – which does not mean that information to this effect which comes to the attention of the Court will not be examined. if the situation warrants it.

11. If the judge whose impartiality is called into question by one of the parties accepts the reasons given in the external request for recusal and immediately wishes to withdraw from the case, the procedure provided for in the event of a request for withdrawal will be applied. of a judge (see point II. above).

12. In all other cases, external requests for recusal are decided as follows.

13. For cases assigned to a committee or a chamber, a chamber of the section to which the case has been assigned hears the judge concerned on the request for recusal. Then it deliberates and votes on the request, in the absence of the judge whose impartiality is called into question.

14. Likewise, in Grand Chamber cases, the Grand Chamber formation concerned first hears the judge whose impartiality is called into question, then it deliberates and votes on the request for recusal in the absence of the judge.

15. In cases involving a single judge formation, requests for disqualification are decided by the Presidency of the Court, that is to say by the authority which designates the judges to sit as single judge for one or more Contracting Parties.

16. In all cases, the party who requested the challenge is informed in writing of the decision of the Court when the time comes, and a mention of the decision relating to the challenge if there was one is made in the judgment or decision of the Court on the case.

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1. See, for example, *Cyprus v. Turkey* [GC], no. 25781/94, § 8, ECHR 2001-IV; *Lekiÿ v. Slovenia* [GC], no. 36480/07, § 4, December 11, 2018; *Rustavi 2 Broadcasting Company Ltd and Others v. Georgia,* no. 16812/17, § 6, July 18, 2019.

17. The Court further maintains a list of cases in which a judge has withdrawn and of cases where an external request for recusal has been received, mentioning the decision taken in each case.

IV. Form and deadlines for the challenge request

18. Any external request for recusal must be duly reasoned and submitted to the Court in writing in one of the official languages, in accordance with Article 34 of the Rules. The request must be made as soon as the party concerned becomes aware of the existence of one of the reasons rendering a judge unfit to sit set out in Article 28 § 2 of the Rules.

19. There is no deadline for the submission of these external requests, the Court having clarified that the responsibility for the application of Article 28 of the Regulation and, in particular, of the principle of objective impartiality, cannot be left to the sole initiative of the parties1 . However, even if a certain flexibility may be allowed when the particular circumstances of the case justify it, the Court will ensure that abusive use is not made of the challenge procedure (see also below).

20. For applicants, this will normally mean submitting their challenge request as soon as possible. They may also request recusal at a later stage in the procedure, for example if a new judge takes office, or if an *ad hoc* judge is appointed to sit in their case. The respondent government should ideally express its possible fears of bias at the time it submits its observations to the Court, and only exceptionally thereafter.

V. Composition of the panel ruling on the case

21. For the parties to the procedure to have a real and effective opportunity to express possible concerns about the impartiality of a given judge before their case is examined, they must be able to know what the judges who are likely to sit in the case. Due to the volume of cases that the Court has to deal with, and the working methods it applies, it is not possible to inform the parties in advance of the names of the judges called to sit in each case. Concretely, such notification cannot be made and is only made systematically in Grand Chamber cases.

22. However, in order to make the judicial proceedings conducted before it as transparent and accessible as possible, the Court has posted online complete lists of the different judicial formations sitting in each of its five sections, including the list of single judges designated for each state, which allows parties to know in advance in most cases which judges will most likely sit in their case.

23. This means in practice that all applicants can consult the list of single judges designated to sit in cases brought against the different Contracting Parties. They are thus able to determine in advance which judge would sit in their case if it were not communicated to the defendant Contracting Party under Article 54 § 2 b) of the Rules of Court.

24. When cases are communicated to the respondent Contracting Party under Article 54 § 2 b) of the Regulations, it is at that time at the latest that the parties are informed of the allocation of their case to such or such section. They can then consult the public lists of chamber and committee formations of the section concerned, in order to become aware of the composition of the different formations likely to examine their case. If they consider that, for one of the reasons set out in Article 28 of the Rules, a particular judge should not participate in the examination of their case, they may request his recusal, duly motivating their request.

1. See *X c. Czech Republic* (revision), no. 64886/19, § 15, March 30, 2023.

25. When an *ad hoc* judge has been appointed to sit in a case against a given Contracting Party, the parties shall be informed by letter immediately. They may then request the recusal of the *ad hoc* judge for the reasons and according to the procedure set out in Article 28 of the Regulation.

VI. Exceptional courses of action after the case has been decided

26. There may be very rare cases in which the parties objectively did not have the possibility of knowing which judges would sit in their case.

27. When it concerns a judgment, Article 80 of the Rules of Court allows the parties to request review of it in the event of discovery of a fact which, by its nature, could have exerted an influence decisive on the outcome of the case and which, when the judgment was rendered, was unknown to the Court and could not reasonably have been known to the party invoking it. However, the judgments rendered by the Court becoming final under the conditions provided for in Article 44 of the Convention and since the revision – a procedure which was not provided for by the Convention and which was created by the Rules of Court – postpones question their definitive character, it must retain an exceptional character. Requests for review of a judgment are therefore subject to very strict control *(Pardo v. France* (revision – admissibility), July 10, 1996, § 21, Collection of judgments and decisions 1996-III). As recent case law of the Court attests, a possible cause for review is the existence of concerns about the impartiality of a judge (see *X v. Czech Republic* (revision), no. 64886/19, §§ 7- 21, 30 March 2023). The imperative of rigorously applying the principle of objective impartiality may exceptionally require reviewing the Court's judgment when it has been demonstrated that there were reasons rendering a judge unfit to sit in the case.

28. However, it is not possible to request the review of a decision of inadmissibility, this type of decision being by nature final and not subject to appeal. In such a case, the Court may nevertheless reopen the case. Although neither the Convention nor the Regulation expressly provides for such reopening, it appears from the Court's case-law that, in completely exceptional cases, in the presence of a manifest error of fact or of assessment of the conditions admissibility, the Court has intrinsic jurisdiction, in the interests of justice, to reopen a case declared inadmissible and to rectify the errors noted (see, for example, *Boelens and Others v. Belgium* (dec.), nos. 20007/09 and al., § 21, September 11, 2012). It cannot be excluded that such errors concern the impartiality of a judge.

29. It is important to emphasize, however, that none of these avenues of action constitute a means of appeal against the judgments and decisions of the Court. As explained above, they are only to be borrowed in extremely rare and exceptional cases where the parties had no way of knowing that a particular judge would sit in their case, and that, for one of the reasons set out in Article 28 of the rules, he should not have sat there. The Court will consider very carefully any application raising questions of impartiality that is submitted after the case has been decided. It will ensure that no abusive, frivolous, vexatious or unfounded complaint in this area is examined (see, *mutatis mutandis,* Article 36 § 4 b) of the Regulation).