

CULEGERE DECIZII CEDO

ÎN MATERIE ELECTORALĂ 2010 - 2021



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# **THE RIGHT TO STAND AS A CANDIDATE**

## **CASE ÖZGÜRLÜK VE DAYANIŞMA PARTİSİ (ÖDP) v TURKEY**

*(Application no. 7819/03)*

JUDGMENT

STRASBOURG

10 May 2012

**FINAL**

*21/05/2012*

*This judgment has become final under Article 44 § 2 of the Convention.*

*In the case of Özgürlük ve Dayanışma Partisi (ÖDP) v. Turkey,*

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

*Françoise Tulkens, President,*

*Danutė Jočienė,*

*Dragoljub Popović,*

*András Sajó,*

*Işıl Karakaş,*

*Guido Raimondi,*

*Paulo Pinto de Albuquerque, judges, and*

*Stanley Naismith, Section Registrar,*

*Having deliberated in private on 4 October 2011 and 10 April 2012,*

*Delivers the following judgment, which was adopted on the last-mentioned date:*

**PROCEDURE**

The case originated in an application (no. 7819/03) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish political party, Özgürlük ve Dayanışma Partisi (the Freedom and Solidarity Party) (“the applicant party”), on 1 October 2002.

Before the Court, the applicant party was represented by Mr M. Bektaş, a lawyer practising in Ankara. The Turkish Government (“the Government”) were represented by their Agent.

The applicant party, which had been granted the right to take part in the next parliamentary elections, alleged that it had been discriminated against on account of the refusal of its application for the financial assistance to political parties available under the Constitution.

On 30 July 2007 the application was communicated to the Government. The Court also decided to rule on the admissibility and merits of the application at the same time.

**THE FACTS**

**THE CIRCUMSTANCES OF THE CASE**

The applicant party, Özgürlük ve Dayanışma Partisi (“the ÖDP”), is a Turkish political party based in Ankara.

By a decree of 28 November 1998, the Higher Electoral Commission published a list of the eighteen political parties authorised to participate in the parliamentary and municipal elections to be held on 18 April 1999. The ÖDP featured on the list. In order to be able to participate in the elections in question, the political parties had to have had, for at least six months prior to the elections, branches in no fewer than half the country’s provinces and to have already organised their party conference.

On 23 September 1998 the ÖDP applied to the Ministry of Finance for the financial assistance available to political parties under Article 68 of the Constitution.

By a decision of 23 November 1998, the Ministry of Finance refused the application on the ground that only political parties meeting the criteria laid down by Law no. 2820 on political parties were eligible for public funding.

On 29 December 1998 the ÖDP brought proceedings in the Ankara Administrative Court seeking the setting-aside of the decision of 23 November 1998. The ÖDP began by pointing out that the Constitution itself provided that “the State shall grant political parties sufficient and equitable funding” and that “the law shall define the principles applicable to party funding, members’ subscriptions and donations”. The applicant party observed in particular that the criteria laid down by the Law on political parties excluded parties which were not represented in Parliament from entitlement to State subsidies. Pointing to the difficulty of carrying out political activities and campaigning without the necessary financial resources, it contended that the statutory exclusion was unconstitutional and contrary to the principles of a democratic State, to the State’s duty to promote democratic rights and freedoms, and to the principle of non-discrimination. Furthermore, the provisions in question were in breach of international human rights protection instruments.

In a judgment of 29 September 1999, the Ankara Administrative Court rejected the application lodged by the ÖDP, on the ground that the latter did not satisfy the criteria laid down by Law no. 2820 on political parties. The court did not rule on the plea of unconstitutionality raised by the ÖDP.

The ÖDP lodged an appeal on points of law against the judgment of

29 September 1999, reiterating the arguments it had submitted at first instance.

In a judgment delivered on 25 April 2002 and served on the applicant party on 10 July 2002, the Supreme Administrative Court upheld the impugned judgment, which it found to be in accordance with the rules of procedure and law.

**RELEVANT LAW AND PRACTICE**

The national context

The Constitution

13. The final paragraph of Article 68 of the Constitution states that “the State shall grant political parties sufficient and equitable funding” and that “the law shall define the principles applicable to party funding, members’ subscriptions and donations”.

2. The Law on political parties

Under additional section 1 of Law no. 2820 on political parties, the State provides financial assistance (the overall amount of which represents 2/5000ths of its budget) to the political parties represented in Parliament, in proportion to the number of votes they obtained in the preceding parliamentary elections. Political parties that are not represented in Parliament are also entitled to this assistance, provided that they obtained at least 7% of the votes cast in the preceding election. Parties with at least three members of Parliament are also eligible, even if they did not participate in the last election.

The funding provided to political parties is tripled in a parliamentary election year and doubled in a municipal election year.

3. Constitutional case-law

By a judgment of 20 November 2008, the Turkish Constitutional Court dismissed by a majority a plea of unconstitutionality raised by the Ankara Administrative Court, which alleged that the statutory 7% threshold imposed on political parties in order to obtain State funding was discriminatory and therefore unconstitutional. In making its ruling, the Constitutional Court considered that one of the aims of political parties was to obtain electoral support with a view to participating in government and hence contributing to the expression of the opinion of the people. It concluded from this that parties which had not obtained a sufficient level of electoral support did not contribute to the expression of the opinion of the people to the same extent as political parties with broader popular support. It dismissed the argument that using the extent of parties’ contribution to democratic political life as the criterion for allocating State funding was not objective, equitable or proportionate.

A minority of the judges of the Constitutional Court took the view that the 7% threshold was too high (corresponding to almost three million votes in the 2007 referendum), that it gave an unfair advantage to political parties which exceeded it and that the criterion based on the “contribution to the expression of the opinion of the people” was subjective and in breach of the principle of the rule of law.

4. Direct funding of political parties and a brief overview of the elections in issue in the present case

The ÖDP obtained 0.8 % of the valid votes cast in the parliamentary elections of 18 April 1999, 0.34 % of the vote in the elections of 3 November 2002 and 0.15 % of the vote in the 2007 elections.

The parties that received funding prior to the elections in question had either won seats in the National Assembly in the preceding parliamentary elections or had obtained more than 7% of the valid votes cast in those elections.

Ahead of the 1999 general election, six political parties (including one that was not represented in Parliament) of the twenty-one parties fielding candidates received State financial assistance. Before the 2002 general election, six parties (including one not represented in Parliament) of the fifteen parties contesting the election received State funding. Prior to the 2007 election, funding was given to five of the fifteen parties fielding candidates; of the five parties concerned, three were not represented in Parliament. The ÖDP has never received State funding.

International instruments

The relevant passages of the Guidelines on political party regulation drawn up by the OSCE/ODIHR and the Venice Commission, and adopted by the Venice Commission at its 84th Plenary Session (Venice, 15-16 October 2010, CDL-AD(2010)024), read as follows.

“3. Public funding

Importance of public funding

Public funding and its requisite regulations (including spending limits, disclosure, and impartial enforcement) has been designed and adopted throughout the globe as a potential means of preventing corruption, to support the important role played by political parties and to remove undue reliance on private donors. Such systems of funding are aimed at ensuring that all parties are able to compete for elections in accordance with the principle of equal opportunity, thus strengthening political pluralism and helping to ensure the proper functioning of democratic institutions. Generally, legislation should attempt to create a balance between public and private contributions as the source for political party funding. In no case should the allocation of public funding limit or interfere with the independence of a political party.

The amount of public funding awarded to parties must be carefully designed to ensure the utility of such funding while not eradicating the need for private contributions or nullifying the impact of individual donations. While the nature of elections and campaigning in different States makes it impossible to identify a universally applicable amount of funding, legislation should put in place review mechanisms aimed at periodically determining the impact of public-finance systems and the need (as such exists) to alter financial-allocation amounts. Generally, subsidies should be set at a meaningful level to fulfil the objective of support, but should not be the only source of income and should not create conditions for over- dependency on State support.

Financial support

Legislation should explicitly allow that State support for political parties may be financial. The allocation of public money to political parties is often considered integral to respect the principle of equal opportunity for all candidates, in particular where the State’s funding mechanism includes special provisions for women and minorities. Where financial support is awarded to parties, relevant legislation should develop clear guidelines to determine the amount of such funding, which should be allocated to recipients in an objective and unbiased manner.

Other forms of public support

In addition to direct funding, the State may offer support to parties in a variety of other ways, including tax exemptions for party activities, the allocation of free media time, or the free use of public meeting halls for the purposes of campaign activities. In all such cases, both financial and in-kind support must be given on the basis of equality of opportunity to all parties and candidates (including women and minorities). While ‘equality’ may not be absolute in nature, a system for determining the proportional (or equitable) distribution of State support (whether financial or in- kind) must be objective, fair and reasonable.

...

Allocation of funding

183. The system for allocating public support to political parties should be determined by relevant legislation. Some systems allocate money prior to an election based on the results of the previous election or proof of minimum levels of support. [Other] systems provide payment after an election based on the final results. Generally, a pre-election disbursement of funds, or a percentage of funding, best ensures the ability of parties to compete on the basis of equal opportunity.

...

185. The allocation of funding may either be fully equal (‘absolute equality’) or proportionate in nature based on a party’s election results or proven level of support (‘equitable’). There is no universally prescribed system for determining the distribution of public funding. Some have argued that legislation for public funding is generally most effective at achieving political pluralism and equal opportunity by providing a combination of both absolute and equitable equality. Where minimum thresholds of support are required for funding, it should be considered that an unreasonably high threshold may be detrimental to political pluralism and small political parties. Further, it is in the interest of political pluralism to have a lower threshold for public funding than the electoral threshold for the allocation of a mandate in Parliament.

...

Legislation should ensure that the formula for the allocation of funding does not provide a monopoly or disproportionate amount of funding to one political party. Nor should the formula for allocation of funding allow the two largest political parties to monopolise the receipt of public funding.

Requirements to receive public funding

At a minimum, some degree of public funding should be available to all parties represented in Parliament. However, to promote political pluralism, some funding should ideally be extended beyond parties represented in Parliament to all parties representative of a minimum level of the citizenry’s support and presenting candidates in an election. This is particularly important in the case of new parties, which must be given a fair opportunity to compete with existing parties.

...

190. Public funding, by providing increased resources to political parties, can increase political pluralism. As such, it is reasonable for legislation to require a party to be representative of a minimum level of the electorate prior to receipt of funding. However, as the denial of public funding can lead to a decrease in pluralism and political alternatives, it is ... accepted good practice to enact clear guidelines for how new parties may become eligible for funding and to extend public funding beyond parties represented in Parliament. A generous system for the determination of eligibility should be considered to ensure that voters are given the political alternatives necessary for a real choice.”

**THE LAW**

**ADMISSIBILITY**

The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that it is not inadmissible on any other grounds. It must therefore be declared admissible.

**ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 3 OF PROTOCOL No. 1**

Relying on Articles 9, 10, 11 and 14 of the Convention, the applicant party alleged that, in refusing it the financial assistance granted to other parties, on the ground that it had obtained less than 7% of the vote in the preceding parliamentary elections, the State had discriminated against it, placing it at a disadvantage in the 1999, 2002 and 2007 election campaigns. It alleged that, in so doing, the State had infringed the free expression of the opinion of the people in the choice of the legislature.

The Court will begin by examining this complaint from the standpoint of Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1.

Article 14 of the Convention reads as follows:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

Article 3 of Protocol No. 1 provides:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

The parties’ submissions

The applicant party contended that the impugned refusal to grant it public funding had given rise to inequality between the various political parties contesting the parliamentary elections, by increasing the chances of success of the parties which were already represented in Parliament or had obtained more than 7% of the vote in the preceding elections. In the applicant party’s view, those parties had access to a substantial source of funds which gave them an unfair advantage (contrary, in particular, to the constitutional and treaty provisions prohibiting discrimination) compared with new parties contesting the elections, especially when it came to disseminating their opinions (since the funding increased their capacity to access the mass media) and to the organisation of various meetings and sociocultural events at national level.

The Government contested the applicant party’s argument. They observed that the distinction made between political parties with regard to public funding was based on the results of the preceding elections (in terms of the number of votes cast or parliamentary seats won following those elections). In other words, it was based on legitimate and objective grounds.

A refusal to grant State funding might be considered discriminatory if it was based on a party’s political views, but that was not the situation in the present case. Furthermore, States had a wide margin of appreciation when it came to laying down the minimum criteria to be met by political parties in order to qualify for State funding, provided that the parties’ right to participate in political life was not infringed.

Criteria employed by the Court in applying Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1

The Court reiterates that discrimination means treating differently, without an objective and reasonable justification, persons in similar situations. “No objective and reasonable justification” means that the distinction in issue does not pursue a “legitimate aim” or that there is not a “reasonable relationship of proportionality between the means employed and the aim sought to be realised” (see, among many other authorities, Sejdić and Finci v. Bosnia and Herzegovina [GC], nos. 27996/06 and 34836/06, § 42, ECHR 2009). The scope of a Contracting Party’s margin of appreciation in this sphere will vary according to the circumstances, the subject matter and the background (see Andrejeva v. Latvia [GC], no. 55707/00, § 82, ECHR 2009).

The Court further reiterates that Article 3 of Protocol No. 1 enshrines a characteristic principle of an effective political democracy and is accordingly of prime importance in the Convention system (see Mathieu-Mohin and Clerfayt v. Belgium, 2 March 1987, § 47, Series A no. 113). The role of the State, as ultimate guarantor of pluralism, involves adopting positive measures to “organise” democratic elections “under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature” (ibid., § 54).

Free elections and freedom of expression, and particularly the freedom of political debate, form the foundation of any democracy (ibid., § 47, and Lingens v. Austria, 8 July 1986, §§ 41-42, Series A no. 103). The “free expression of the opinion of the people in the choice of the legislature” is a matter on which Article 11 of the Convention also has a bearing, guaranteeing as it does the freedom of association, and thus indirectly the freedom of political parties, which represent a form of association essential to the proper functioning of democracy. Expression of the opinion of the people is inconceivable without the assistance of a plurality of political parties representing the currents of opinion flowing through a country’s population. By reflecting those currents, not only within political institutions but also, thanks to the media, at all levels of life in society, political parties make an irreplaceable contribution to the political debate which is at the very core of the concept of a democratic society (see Lingens, cited above, § 42; Castells v. Spain, 23 April 1992, § 43, Series A no. 236; United Communist Party of Turkey and Others v. Turkey, 30 January 1998, § 44, Reports of Judgments and Decisions 1998-I; and Yumak and Sadak v. Turkey [GC], no. 10226/03, § 107, ECHR 2008).

As the European Commission of Human Rights observed on a number of occasions, the words “free expression of the opinion of the people” mean that elections cannot be conducted under any form of pressure in the choice of one or more candidates, and that in this choice the elector must not be unduly induced to vote for one party or another (see X. v. the United Kingdom, no. 7140/75, Commission decision of 6 October 1976, Decisions and Reports (DR) 7, p. 95, at p. 96). The word “choice” means that the different political parties must be ensured a reasonable opportunity to present their candidates at elections (ibid.; see also X. v. Iceland, no. 8941/80, Commission decision of 8 December 1981, DR 27, p. 145, at p. 150, and Yumak and Sadak, cited above).

That being said, the rights enshrined in Article 3 of Protocol No. 1 are not absolute. There is room for “implied limitations”, and Contracting States must be given a wide margin of appreciation in this sphere (see, among other authorities, Matthews v. the United Kingdom [GC], no. 24833/94, § 63, ECHR 1999-I, and Labita v. Italy [GC], no. 26772/95, § 201, ECHR 2000-IV). As regards the right to stand as a candidate for election, that is, the so-called “passive” aspect of the rights guaranteed by Article 3 of Protocol No. 1, the Court has been even more cautious in its assessment of restrictions in that context than when it has been called upon to examine restrictions on the right to vote, the so-called “active” element of the rights under Article 3 of Protocol No. 1.

However, it is for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions imposed on the right to vote and to stand for election do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness (see Mathieu-Mohin and Clerfayt, cited above, § 52).

Application of the above-mentioned principles in the present case

Whether there was a difference in treatment

In the instant case the Court notes that the applicant party alleged that it had been placed at a disadvantage in the 1999, 2002 and 2007 parliamentary elections compared with the parties that received financial assistance from the State, since it had been refused funding on the grounds that it was not represented in Parliament (owing to a threshold of representation set at 10% of the vote nationwide) and that it had obtained less than 7% of the vote in the preceding parliamentary elections.

The Court notes that the ÖDP, which was founded in 1996, was unable to apply for financial assistance from the State until after the 1999 elections. The results it obtained in subsequent elections – 0.8% of the valid votes cast in the parliamentary elections of 18 April 1999, 0.34% in the elections of 3 November 2002 and 0.15% in the 2007 elections (see paragraphs 18-19 above) – fell below the 7% threshold laid down in the national legislation and rendered the party ineligible for the funding in question.

Nevertheless, the Court observes that, ahead of the 1999 general election, six political parties (one of which was not represented in Parliament) out of the twenty-one parties that contested the election received State funding. Prior to the 2002 general election, six parties (one of which was not represented in Parliament) out of the fifteen parties that fielded candidates received funding and, in the period preceding the 2007 elections, State funding was granted to five of the fifteen parties taking part in the election (including to three that were not represented in Parliament).

It is quite clear that the system of public funding for political parties applied in the instant case placed the ÖDP, which received no financial assistance, at a disadvantage compared with its rivals which received such assistance and were thus able to fund the nationwide dissemination of their opinions much more easily. Accordingly, the applicant party was treated differently in the exercise of its electoral rights under Article 3 of Protocol No. 1 as a result of the application of the system in question.

The Court must ascertain, in the light of the principles set forth above, whether the system in issue pursued a legitimate aim and whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. Applying these two criteria will enable it to establish whether the impugned measures amounted to discrimination contrary to Article 14 of the Convention and whether they impaired the very essence of the right to the free expression of the opinion of the people within the meaning of Article 3 of Protocol No. 1.

2. Whether the difference in treatment pursued a legitimate aim

As regards funding for political parties, the Court recognises that the subscriptions of party members, the traditional source of funding, are no longer sufficient to meet expenses, which are constantly on the rise against a background of political competition and complex and costly modern means of communication. It observes that in Europe, as in the rest of the world, State funding for political parties is aimed at preventing corruption and avoiding excessive reliance by parties on private donors. It follows that this funding is intended to strengthen political pluralism and contributes to the proper functioning of democratic institutions.

An examination of the systems in place in the majority of European countries reveals that there are no uniform rules in this sphere. In that regard, the Court observes that the funds allocated to political parties at election time are divided between the parties either in a strictly equal manner or on the basis of equitable distribution, that is, on the basis of their respective performances in the preceding elections.

It can also be observed that the national legislation in those Contracting States which have opted for a system of equitable distribution of public funds almost invariably requires a minimum level of electoral support. If no such minimum level were set, it is likely that the system in question would have the perverse effect of encouraging an upsurge in the number of candidacies, prompted by the desire to secure increased funding, thus resulting in a proliferation of candidates, since each vote obtained would translate into an annual sum by way of public funding.

In the member States other than Turkey, the minimum share of the vote a political party must obtain in order to qualify for public funding varies between 0.5% and 5% of the votes cast in the preceding election, and is often lower than the electoral threshold required in order to secure seats in Parliament. Hence, in addition to the parties represented in Parliament, new political parties which have a minimum level of support among citizens also receive public funding in proportion to their share of the vote.

The Court further notes that none of the instruments adopted by the institutions of the Council of Europe concerning political parties in a pluralist democratic regime finds to be unreasonable the requirement under national legislation for parties claiming public funding to enjoy a certain minimum level of electoral support, nor do those instruments lay down specific percentages in that regard. In that connection the Court refers to the observations of certain specialist institutions pointing to the need to avoid setting an excessively high threshold which may be detrimental to political pluralism and to small political parties (see paragraph 185 of the Guidelines on political party regulation drawn up by the OSCE/ODIHR and the Venice Commission and adopted on 15 and 16 October 2010 (CDL-AD(2010)024) paragraph 20 above), and stressing that the formula for the allocation of public funding should prevent the two largest political parties from monopolising the receipt of public funding (ibid., paragraph 187).

In view of the foregoing, the Court considers that the public funding of political parties on the basis of a system of equitable distribution requiring a minimum level of electoral support pursues the legitimate aim of enhancing democratic pluralism while preventing the excessive and dysfunctional fragmentation of candidacies, thereby strengthening the expression of the opinion of the people in the choice of the legislature (see, to similar effect, Fournier v. France, no. 11406/85, Commission decision of 10 March 1988, DR 55, p. 130, and, mutatis mutandis, Cheminade v. France (dec.), no. 31599/96, ECHR 1999-II, regarding a system of public funding which restricted the reimbursement of campaigning costs and deposit to candidates and lists that had obtained a certain percentage of the vote).

3. Whether the difference in treatment was proportionate

The Court notes that the minimum level of electoral support which parties claiming public funding must obtain in Turkey, namely 7% of the vote in the preceding parliamentary elections, is the highest in Europe (see paragraph 40 above). In order to satisfy itself that this threshold is not disproportionate, the Court will first assess the consequences it entails, before examining the corrective mechanisms which accompany it.

The Court observes at the outset that the 7% threshold is lower than the minimum level of electoral support required in order to win seats in the Turkish Parliament, which is set at 10% of the national vote. In the context of the parliamentary elections in issue in the present case, political parties not represented in Parliament which had attained the threshold of 7% of the votes cast were eligible to receive State funding ahead of the next elections. In the 1999 elections, one of the six parties that received public funding was not represented in Parliament. In the 2002 elections, the proportion was the same, and in 2007 three parties not represented in Parliament, and two parties that were, received public funds. In other words, during the periods in issue in the present case, the political parties represented in Parliament did not monopolise public funding, and neither did the party in power and the main opposition party.

The Court must also take into consideration the ÖDP’s performance in the parliamentary elections preceding the periods during which the public funding in question was granted. The number of votes obtained by the applicant party represented between 0.8% and 0.15% of the valid votes cast during those elections. These figures were substantially below the minimum level of electoral support required under the Turkish legislation in order to qualify for public funding, and would also have been deemed insufficient for the purposes of obtaining such funding in several other European countries. Although the applicant party’s complaint does not amount to an actio popularis, since the party was directly and immediately affected by the minimum level in question, the ÖDP has nevertheless not succeeded in demonstrating before the Court that the level of support it enjoyed made it representative of a significant portion of the Turkish electorate.

It must also be borne in mind that the State provides political parties with other forms of public support besides direct funding. The corrective mechanisms which accompany the system of public funding in force in Turkey, under which not all parties are entitled to receive direct subsidies, include tax exemptions on certain items of revenue and the allocation of broadcasting time during electoral campaigns. It was not disputed between the parties that the ÖDP had benefited from these alternative forms of public assistance.

In view of its findings regarding the ÖDP’s failure to secure a minimum level of support among citizens and the compensatory effect of other forms of public assistance which were available to the applicant party, the Court considers that the impugned difference in treatment was reasonably proportionate to the aim pursued.

The Court concludes that, in the circumstances of the present case, the refusal by the State to grant direct financial assistance to the ÖDP on the grounds that it had not obtained the 7% minimum share of the vote required by the law was based on objective and reasonable grounds, did not impair the very essence of the right to the free expression of the opinion of the people, and was therefore not contrary to Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1.

Accordingly, there has been no violation of those provisions.

**ALLEGED VIOLATION OF ARTICLES 9, 10 AND 11 OF THE CONVENTION**

The applicant party also complained of a violation of Articles 9, 10 and 11 of the Convention. As these complaints relate to the same set of facts examined from the standpoint of Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1, the Court considers that it is not necessary to examine them separately.

**FOR THESE REASONS, THE COURT**

Declares unanimously the application admissible;

Holds by five votes to two that there has been no violation of Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1;

Holds unanimously that it is not necessary to examine separately the complaints under Articles 9, 10 and 11 of the Convention.

Done in French, and notified in writing on 10 May 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith Françoise Tulkens

Registrar President

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

F.T. S.H.N.

## **CASE OF ABIL v. AZERBAIJAN**

*(Application no. 16511/06)*

JUDGMENT

STRASBOURG

21 February 2012

FINAL

*21/05/2012*

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*

In the case of Abil v. Azerbaijan,

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

Nina Vajić, *President,* Peer Lorenzen, Khanlar Hajiyev, Mirjana Lazarova Trajkovska, Julia Laffranque, Linos-Alexandre Sicilianos, Erik Møse, *judges,*  
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 31 January 2012,

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

**PROCEDURE**

1.  The case originated in an application (no. 16511/06) against the Republic of Azerbaijan lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Azerbaijani national, Mr Baybala Alibala oglu Abil (*Bəybala Əlibala oğlu Abil* – “the applicant”), on 15 April 2006.

2.  The applicant was represented by Mr I. Aliyev, a lawyer practising in Azerbaijan. The Azerbaijani Government (“the Government”) were represented by their Agent, Mr Ç. Asgarov.

3.  The applicant alleged, in particular, that his right to stand for election, as guaranteed by Article 3 of Protocol No. 1 to the Convention, had been infringed.

4.  On 27 June 2008 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

**THE FACTS**

**I.  THE CIRCUMSTANCES OF THE CASE**

5.  The applicant was born in 1952 and lives in Baku.

6.  The applicant stood for the elections to the National Assembly of 6 November 2005 **as an independent candidate.** He was registered as a candidate by the Constituency Electoral Commission (“the ConEC”) for the single-member Garadagh Electoral Constituency no. 11.

7.  On 28 October 2005 the ConEC held a meeting in the applicant’s absence and decided to apply **to the Court of Appeal with a request to cancel his registration as a candidate owing to reports of his engaging in activities incompatible with the requirements of the Electoral Code. In particular, the ConEC noted that it had received a number of written statements from voters claiming that the applicant had promised them money in exchange for their promise to vote for him. The ConEC forwarded a total of seventeen such statements to the Court of Appeal, enclosed with its request for the applicant’s disqualification.**

8.  On 29 October 2005 the applicant and his lawyer attempted to get a copy of the case file from the Court of Appeal, but were not allowed to do so.

9.  On 31 October 2005 the Court of Appeal examined the case and cancelled the applicant’s registration as a candidate, in accordance with Articles 88.4 and 113.2.3 of the Electoral Code. During the hearing, the applicant submitted that he had not been informed of the ConEC meeting of 28 October 2005 in advance and, therefore, had not been able to attend it. He denied all the accusations against him and asserted that they had been fabricated.

10.  The court heard oral testimonies of eight out of the seventeen persons who had submitted written statements to the ConEC accusing the applicant of attempting to bribe them. One of them, H., testified that the applicant had personally offered him money. The remaining seven testified that they had been approached by some unknown people who had offered them money if they promised to vote for the applicant. When asked in court whether, when offering money, those “unknown people” had inquired from them whether they had been registered as voters in the applicant’s constituency, these witnesses replied in the negative.

11.  The Court of Appeal considered the above evidence sufficient to find that the applicant had offered money to voters in exchange for their votes in his favour, thus breaching Article 88.4 of the Electoral Code.

12.  After the delivery of the Court of Appeal’s judgment, the applicant carried out an enquiry about the identity of the persons who had testified against him. He found out that four of the eight persons who had testified against him in court were not actually registered as voters in his constituency. Moreover, witness H. was not registered and did not actually reside at the address which, according to his submissions to the court, was his primary residence located in the applicant’s constituency. In the applicant’s opinion, this information gave rise to serious doubts as to the personal integrity of the witnesses and the truthfulness of their statements, because it showed that they had either lied about their personal details or made false accusations against him, as there was no reason or incentive for a candidate in a given constituency to attempt, either by means of legal campaigning or illegal methods, to secure the votes of persons who were registered to vote elsewhere and therefore could not vote for him anyway.

13.  The applicant lodged an appeal with the Supreme Court, arguing that the Court of Appeal’s judgment was arbitrary, that the evidence used against him had been fabricated, that the persons who had testified against him were false witnesses and that some of those persons were actually relatives of various officials of the local executive authorities. In support of his arguments, he submitted the information described in the above paragraph.

14.  On 3 November 2005 the Supreme Court dismissed the applicant’s appeal and upheld the Court of Appeal’s judgment of 31 October 2005. It found that the Court of Appeal had duly established the factual circumstances of the case.

15.  In the meantime, in September and October 2008 the applicant lodged several complaints with the ConEC and the Central Electoral Commission (“the CEC”) concerning various alleged irregularities in the election process in his constituency. However, according to the applicant, he did not receive any replies to his complaints.

16.  The applicant lodged an action with the Court of Appeal, complaining about the above-mentioned irregularities and asking the court to hold the Chairman of the CEC liable for the alleged failure to respond to his complaints. On 2 November 2005 the Court of Appeal dismissed the applicant’s claims as unsubstantiated. On 7 November 2005 the Supreme Court upheld that judgment.

**II.  RELEVANT DOMESTIC LAW**

**A.  Electoral Code**

17.  Article 88.4 of the Electoral Code of 2003 provides as follows:

“88.4.  Candidates ... are prohibited from gaining the support of voters in the following ways:

88.4.1.  giving money, gifts and other valuable items to voters (except for badges, stickers, posters and other campaign materials having nominal value), except for the purposes of organisational work;

88.4.2.  giving or promising rewards based on the voting results to voters who were involved in organisational work;

88.4.3.  selling goods on privileged terms or providing goods free of charge (except for printed material);

88.4.4.  providing services free of charge or on privileged terms;

88.4.5.  influencing the voters during the pre-election campaign by promising them securities, money or other material benefits, or providing services that are contrary to the law.”

18.  According to Articles 113.1 and 113.2.3 of the Electoral Code, the relevant electoral commission may request a court to cancel the registration of a candidate who engages in activities prohibited by Article 88.4 of the Code.

19.  Complaints concerning decisions of electoral commissions must be examined by the courts within three days (unless the Electoral Code provides for a shorter period). The period for lodging an appeal against a court decision is also three days (Article 112.11).

**B.  Code of Civil Procedure**

20.  Chapter 25 of the Code of Civil Procedure sets out rules for the examination of applications concerning the protection of electoral rights (or the right to participate in a referendum). According to Article 290, such applications must be submitted directly to the appellate courts in accordance with the procedure established by the Electoral Code.

21.  Applications concerning the protection of electoral (referendum) rights must be examined within three days of receipt of the application, except for applications submitted on election day or the day after election day, which must be examined immediately (Article 291.1). The court must hear the case in the presence of the applicant, a representative of the relevant electoral commission and any other interested parties. Failure by any of these parties to attend the hearing after due notification does not preclude the court from examining and deciding the case (Article 291.2).

22.  The appellate court’s decision can be appealed against to the higher court (the court of cassation) within three days. This appeal must be examined within three days, or immediately if submitted on election day or the next day. The decision of the court of cassation is final (Article 292).

**THE LAW**

**I.  ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL No. 1 TO THE CONVENTION**

23.  Relying on Article 3 of Protocol No. 1 to the Convention and Article 13 of the Convention, the applicant complained that his registration as a candidate for the parliamentary elections had been cancelled arbitrarily. The Court considers that this complaint falls to be examined only under Article 3 of Protocol No. 1 to the Convention, which reads as follows:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

**A.  Admissibility**

24.  The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

**B.  Merits**

1.  The parties’ submissions

25.  The Government submitted that the aim of Article 88.4 of the Electoral Code was to ensure equal and fair campaign conditions for all candidates. Disqualification of candidates who engaged in various forms of illegal vote-buying had the legitimate aim of protecting the free expression of the opinion of the people in elections.

26.   The Government maintained that the applicant had been disqualified because he had attempted to bribe voters. According to the Government, this fact had been sufficiently proved by the written statements made by a number of voters. They maintained that the applicant had been afforded an opportunity to fully and effectively defend his position in the relevant proceedings.

27.  Lastly, the Government noted that the electoral law prohibited “any abuse” with regard to any voter, irrespective of which constituency a particular voter was registered to vote in. For this reason, the Government considered irrelevant the applicant’s arguments that some of the persons who had accused him of bribery were not registered as voters in his electoral constituency.

28.  The applicant submitted that the decision to disqualify him had been arbitrary and based on tenuous, insufficient, unreliable and fabricated evidence. The content and form of the written statements by alleged voters accusing him of bribery, which had been later used as a basis for his disqualification, were extremely suspect. The fact of receipt of those statements was missing from the ConEC’s official register of incoming correspondence and complaints. Furthermore, most of those statements did not contain the relevant complainant’s address, telephone number or other personal information, which would enable easy identification of the complainant. Some of those statements had been signed by persons who had even failed to mention their full names, including their first name and patronymic. Ten of the seventeen statements were not dated. Moreover, the applicant claimed to have discovered that eight of the seventeen complainants were actually either relatives of, or otherwise personally dependent on, public officials of the local executive authorities.

29.  The applicant further claimed that some copies of the written statements which the Government had enclosed with their observations to the Court had been tampered with at a later date. Specifically, dates and the ConEC stamp had been added to them. According to the applicant, the fact of this document-tampering could be easily established by comparing the copies submitted by the Government with the copies of the same statements that the applicant had obtained immediately after the Court of Appeal hearing of 31 October 2005, which were missing a date and a stamp.

30.  The applicant further submitted that the manner in which the ConEC meeting of 28 October 2005 had been conducted had been in breach of several formal requirements of the Electoral Code, and that there were inconsistencies in the minutes of the ConEC meeting as to which specific ConEC members had been present and how they had voted. He further alleged that the domestic courts had relied on very dubious and contradictory evidence and had ignored information which had put the alleged complainants’ true identity and integrity into serious doubt. In particular, among other omissions, the courts had failed to give due consideration to the fact that a number of the alleged complainants were not even voters in the applicant’s constituency and that some of them had simply lied about their residence status in the constituency in question.

2.  The Court’s assessment

31.  The Court notes that the summary of its case-law on the right to effectively stand for election, as guaranteed by Article 3 of Protocol No. 1 to the Convention, can be found in, among many other judgments, *Orujov v. Azerbaijan* (no. 4508/06, §§ 40-42, 26 July 2011). On a more specific note, the Court also reiterates that, while the Contracting States enjoy a wide margin of appreciation in imposing conditions on the right to vote and to stand for election, it is for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate or arbitrary (see *Mathieu‑Mohin and Clerfayt v. Belgium*, 2 March 1987, § 52, Series A no. 113; *Gitonas and Others v. Greece*, 1 July 1997, § 39, *Reports of Judgments and Decisions* 1997-IV; and *Yumak and Sadak v. Turkey* [GC], no. 10226/03, § 109 (iii), 8 July 2008).

32.  **The Court notes that in the present case the applicant was disqualified as a candidate in accordance with Articles 88.4 and 113 of the Electoral Code, which provide for the possibility of disqualification of candidates who resort to unfair and illegal means of gaining voter support. Given that Article 3 of Protocol No. 1 does not contain a list of “legitimate aims” capable of justifying restrictions on the exercise of the rights it guarantees and does not refer to those enumerated in Articles 8 to 11 of the Convention, the Contracting States are free to rely on an aim not mentioned in those Articles, provided that it is compatible with the principle of the rule of law and the general objectives of the Convention** (see, for example, *Ždanoka v. Latvia* [GC], no. 58278/00, § 115, ECHR 2006-IV). The Court accepts the Government’s argument that the conditions set out in the above‑mentioned provisions of the Electoral Code pursue the legitimate aim of ensuring equal and fair conditions for all candidates in an electoral campaign and protecting the free expression of the opinion of the people in elections.

33.  **It remains to be determined whether there was arbitrariness or a lack of proportionality in the authorities’ decisions.**

**34.  The Court reiterates that its competence to verify compliance with domestic law is limited and that it is not its task to take the place of the domestic courts in such issues as the assessment of evidence or the interpretation of the domestic law. Nevertheless, for the purposes of supervision of the compatibility of the interference with the requirements of Article 3 of Protocol No. 1, the Court must scrutinise the relevant domestic procedures and decisions in detail in order to determine whether sufficient safeguards against arbitrariness were afforded to the applicant and whether the relevant decisions were sufficiently reasoned** (see, *mutatis mutandis*, *Melnychenko v. Ukraine*, no. 17707/02, § 60, ECHR 2004-X).

35.  Furthermore, **the Court notes that a finding that a candidate has engaged in unfair or illegal campaigning methods could entail serious consequences for the candidate concerned, in that he or she could be disqualified from running for the election. As the Convention guarantees the effective exercise of individual electoral rights, the Court considers that, in order to prevent arbitrary disqualification of candidates, the relevant domestic procedures should contain sufficient safeguards protecting the candidates from abusive and unsubstantiated allegations of electoral misconduct, and that decisions on disqualification should be based on sound, relevant and sufficient proof of such misconduct** (see *Orujov*, cited above, § 46).

36.  Turning to the present case, **the Court notes that only eight out of seventeen persons who had written complaints accusing the applicant of bribery were heard by the Court of Appeal. Seven of these eight persons testified that they had been offered money by some unknown people in exchange for a promise to vote for the applicant**. **The Court considers that this information, by itself, does not prove that the alleged offer of a bribe originated from the applicant or that those “unknown people” were acting on his instructions or otherwise had authority to act on his behalf. There existed no further evidence linking the applicant with the alleged actions of those “unknown people” who had allegedly offered bribes to voters. The mere fact that those persons allegedly mentioned the applicant’s name does not, in itself, mean that they acted on his instructions; nor does it prove that the applicant had any intention to buy votes or had taken any practical steps to put it into action.**

37.  **It is true that one person, H., testified in court that the applicant had offered him money personally. However, the Court notes that the applicant managed to verify that H. was not registered in the voter lists of his constituency and that he had lied in court about his registered address of primary residence.** The above information appears to be *prima facie* correct. Based on this information, the applicant put forward before the domestic courts a rather serious and arguable objection challenging H.’s personal integrity as a witness. **The Court considers that an adequate examination of this objection might have affected the assessment of the truthfulness of H.’s statements. However, this objection was ignored by the domestic courts. In such circumstances, the Court considers that witness H. and his statements were not assessed in a manner that could remove serious doubts as to their reliability.**

38.  For the reasons mentioned above, the Court considers that the applicant’s disqualification was based on irrelevant, insufficient and inadequately examined evidence.

39.  **Furthermore, the Court notes that the applicant was not afforded sufficient procedural safeguards against arbitrariness**. In particular, the ConEC did not inform the applicant about its hearing of 28 October 2005, depriving him of the possibility to defend his position at the ConEC level, and took the decision to request his disqualification without hearing the complainants or otherwise attempting to carry out a comprehensive assessment of the situation. Moreover, as mentioned above, the domestic courts failed to take into account, and provide any reasoned response to, the applicant’s objections and submissions.

40.  The foregoing considerations are sufficient to enable **the Court to conclude that the interference with the applicant’s electoral rights fell short of the standards required by Article 3 of Protocol No. 1. The applicant’s disqualification from running for election was not based on sufficient and relevant evidence, the procedures of the electoral commission and the domestic courts did not afford the applicant sufficient guarantees against arbitrariness, and their decisions lacked sufficient reasoning.**

41.  **There has accordingly been a violation of Article 3 of Protocol No. 1 to the Convention.**

**II.  OTHER ALLEGED VIOLATIONS OF THE CONVENTION**

42.  The applicant complained under Article 3 of Protocol No. 1 to the Convention that there had been a number of irregularities during the election process in his constituency and that the authorities had failed to duly examine his complaints concerning those irregularities. In conjunction with this complaint, he also complained under Article 14 of the Convention that independent candidates were at a disadvantage in comparison to candidates representing major political parties because, by law, the latter could conduct their campaign under more privileged terms, such as receiving free air time on State television and other forms of free campaigning.

43.  In the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

**III.  APPLICATION OF ARTICLE 41 OF THE CONVENTION**

44.  Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

**A.  Damage**

1.  Pecuniary damage

45.  The applicant claimed 13,600 Azerbaijani manats (AZN) in respect of pecuniary damage, consisting of the expenses borne during the electoral campaign.

46.  The Government contested this claim and maintained that it was largely unsupported by any documentary evidence.

47.  The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim.

2.  Non-pecuniary damage

48.  The applicant claimed 20,000 euros (EUR) in respect of non‑pecuniary damage.

49.  The Government considered that the amount claimed was excessive.

50.  The Court considers that the applicant suffered non-pecuniary damage which cannot be compensated solely by the finding of the violation of Article 3 of Protocol No. 1. Ruling on an equitable basis, the Court awards him the sum of EUR 7,500 in respect of non-pecuniary damage, plus any tax that may be chargeable.

**B.  Costs and expenses**

51.  The applicant also claimed approximately EUR 5,735 for the costs and expenses incurred before the domestic courts and the Court, including legal fees, translation costs and postal expenses.

52.  The Government argued that the amount claimed was excessive and unreasonable and was not actually incurred.

53.  According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,600 covering costs under all heads, plus any tax that may be chargeable to the applicant on that sum.

**C.  Default interest**

54.  The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

**FOR THESE REASONS, THE COURT UNANIMOUSLY**

1.  *Declares* the complaint under Article 3 of Protocol No. 1 to the Convention concerning the applicant’s disqualification from running for election admissible and the remainder of the application inadmissible;

2.  *Holds* that there has been a violation of Article 3 of Protocol No. 1 to the Convention;

3.  *Holds*

(a)  that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Azerbaijani manats at the rate applicable at the date of settlement:

(i)  EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii)  EUR 1,600 (one thousand six hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b)  that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4.  *Dismisses* the remainder of the applicant’s claim for just satisfaction.

Done in English, and notified in writing on 21 February 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen Nina Vajić   
 Registrar President

## **CASE OF KHANHUSEYN ALIYEV v. AZERBAIJAN**

*(Application no. 19554/06)*

JUDGMENT

STRASBOURG

21 February 2012

**FINAL**

***21/05/2012***

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*

In the case of Khanhuseyn Aliyev v. Azerbaijan,

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

Nina Vajić, *President,* Peer Lorenzen, Khanlar Hajiyev, Mirjana Lazarova Trajkovska, Julia Laffranque, Linos-Alexandre Sicilianos, Erik Møse, *judges,*  
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 31 January 2012,

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

**PROCEDURE**

1.  The case originated in an application (no. 19554/06) against the Republic of Azerbaijan lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Azerbaijani national, Mr Khanhuseyn Gulhuseyn oglu Aliyev (*Xanhüseyn Gülhüseyn oğlu Əliyev* – “the applicant”), on 2 May 2006.

2.  The applicant was represented by Mr E. Zeynalov. The Azerbaijani Government (“the Government”) were represented by their Agent, Mr Ç. Asgarov.

3.  The applicant alleged, in particular, that his right to stand for election, as guaranteed by Article 3 of Protocol No. 1 to the Convention, had been infringed.

4.  On 19 June 2008 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

**THE FACTS**

**I.  THE CIRCUMSTANCES OF THE CASE**

5.  The applicant was born in 1958 and lives in Baku.

6.  **The applicant stood for the elections to the National Assembly** of 6 November 2005 as a candidate of the opposition bloc YeS (*Yeni Siyasət*). He was registered as a candidate by the Constituency Electoral Commission (“the ConEC”) for the single-member Hajiqabul‑Kurdamir Electoral Constituency no. 58.

7.  On 24 October 2005 **the ConEC decided to apply to the Court of Appeal with a request to cancel the applicant’s registration as a candidate owing to the reports of his alleged involvement in activities incompatible with the requirements of the Electoral Code. According to the minutes of the ConEC meeting, seven members of the ConEC participated in the meeting. The applicant was not informed about this meeting in advance and was not invited to it. In support of its decision, the ConEC relied on three grounds, summarised below.**

8.  Firstly**, the ConEC noted that it had received written statements from four voters claiming that the applicant had either promised or given them money in exchange for their promise to vote for him.** Two of them claimed that they had each received 100,000 old Azerbaijani manats (at that time, a sum equivalent to slightly less than 20 euros) in cash from the applicant and, as a proof of this claim, handed in this cash to the ConEC. None of these voters were heard in person by the ConEC. The ConEC considered that such actions by the applicant were contrary to Article 88.4.1-5 of the Electoral Code concerning the illegal means of gaining voter support.

9.  **Secondly, relying on unspecified reports, the ConEC noted that the applicant had made public statements “against the constitutional foundations of the State” by advocating for the return to power of the Chairman of the Social Democratic Party and former President A. Mutalibov (who had been in exile for several years).**

10.  **Thirdly, the ConEC noted that on 24 October 2005 the applicant was planning to organise a demonstration in front of the ConEC building in order to protest against the cancellation of the registration of another candidate from the same constituency, which had taken place earlier.**

11.  On 26 October 2005 the Court of Appeal examined the case and cancelled the applicant’s registration as a candidate, in accordance with Articles 88.4 and 113.2.3 of the Electoral Code. During the hearing, the applicant denied all the accusations and argued that the case had been fabricated and that the allegations of bribery had not been proven. Having regard to the ConEC’s submissions, the written statements of the four voters, and several banknotes sealed in plastic bags (as “material evidence”), the Court of Appeal found that the applicant had offered money to voters in exchange for their votes in his favour, thus breaching Article 88.4 of the Electoral Code. It appears that the court considered that this was a sufficient ground for the cancellation of the applicant’s registration and did not examine the other two grounds mentioned in the ConEC’s request.

12.  According to the applicant, four members of the ConEC (two of whom had allegedly participated in the meeting of 24 October 2005) wrote affidavits, addressed to the Court of Appeal, in which they claimed that the alleged ConEC meeting of 24 October 2005 had actually not taken place and that the minutes of that meeting, submitted to the Court of Appeal, constituted a false document. These affidavits were not accepted by the Court of Appeal because they had not been notarised. Subsequently, three of the above ConEC members wrote similar notarised affidavits addressed to the Supreme Court, while one of them retracted his earlier statement.

13.  According to the Government, on 26 October 2005 one of the above‑mentioned ConEC members, S.Q., wrote another affidavit in which he retracted his previous statement and maintained that he had been forced by the applicant and his representatives to write a statement that there had been no ConEC meeting.

14.  The applicant lodged an appeal with the Supreme Court, arguing that the allegations against him had been fabricated and that the evidence used against him had been tenuous, uncorroborated and wrongly assessed. In support of his submissions he attached, *inter alia*, the above-mentioned affidavits by the ConEC members.

15.  On 2 November 2005 the Supreme Court dismissed the applicant’s appeal and upheld the Court of Appeal’s judgment of 26 October 2005. It refused to admit the documents submitted by the applicant, finding that the factual circumstances of the case had been duly established by the lower court and that it could examine the case only on points of law.

**II.  RELEVANT DOMESTIC LAW**

**A.  Electoral Code**

16.  Article 88.4 of the Electoral Code of 2003 provides as follows:

“88.4.  Candidates ... are prohibited from gaining the support of voters in the following ways:

88.4.1.  giving money, gifts and other valuable items to voters (except for badges, stickers, posters and other campaign materials having nominal value), except for the purposes of organisational work;

88.4.2.  giving or promising rewards based on the voting results to voters who were involved in organisational work;

88.4.3.  selling goods on privileged terms or providing goods free of charge (except for printed material);

88.4.4.  providing services free of charge or on privileged terms;

88.4.5.  influencing the voters during the pre-election campaign by promising them securities, money or other material benefits, or providing services that are contrary to the law.”

17.  In accordance with Articles 113.1 and 113.2.3 of the Electoral Code, the relevant electoral commission may request a court to cancel the registration of a candidate who engages in activities prohibited by Article 88.4 of the Code.

18.  Complaints concerning decisions of electoral commissions must be examined by the courts within three days (unless the Electoral Code provides for a shorter period). The period for lodging an appeal against a court decision is also three days (Article 112.11).

**B.  Code of Civil Procedure**

19.  Chapter 25 of the Code of Civil Procedure sets out rules for the examination of applications concerning the protection of electoral rights (or the right to participate in a referendum). According to Article 290, such applications must be submitted directly to the appellate courts in accordance with the procedure established by the Electoral Code.

20.  Applications concerning the protection of electoral (referendum) rights must be examined within three days of receipt of the application, except for applications submitted on election day or the day after election day, which must be examined immediately (Article 291.1). The court must hear the case in the presence of the applicant, a representative of the relevant electoral commission and any other interested parties. Failure by any of these parties to attend the hearing after due notification does not preclude the court from examining and deciding the case (Article 291.2).

21.  The appellate court’s decision can be appealed against to the higher court (the court of cassation) within three days. This appeal must be examined within three days, or immediately if submitted on election day or the next day. The decision of the court of cassation is final (Article 292).

**THE LAW**

**I.  ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL No. 1 TO THE CONVENTION**

22.  Relying on Article 3 of Protocol No. 1 to the Convention and Articles 11 and 13 of the Convention, the applicant complained that his registration as a candidate for the parliamentary elections had been cancelled arbitrarily. The Court considers that this complaint falls to be examined only under Article 3 of Protocol No. 1 to the Convention, which reads as follows:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

**A.  Admissibility**

23.  The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

**B.  Merits**

1.  The parties’ submissions

24.   The Government submitted that the aim of Article 88.4 of the Electoral Code was to ensure equal and fair campaign conditions for all candidates. Disqualification of candidates who engaged in various forms of illegal vote-buying had the legitimate aim of protecting the free expression of the opinion of the people in elections.

25.   The Government maintained that the applicant had been disqualified because he had attempted to bribe voters. According to the Government, this fact had been sufficiently proved by the written statements made by four voters. They maintained that the applicant had been afforded an opportunity to fully and effectively defend his position in the relevant proceedings.

26.  The Government further contested the veracity of the applicant’s allegation that the ConEC minutes of 24 October 2005 had been falsified and that no actual ConEC meeting had been held on that day. In this regard, the Government relied on the statement by ConEC member S.Q. (see paragraph 13 above).

27.  The applicant submitted that the decision to disqualify him had been arbitrary and based on tenuous, insufficient, unreliable and even fabricated evidence. Relying on the affidavits of several ConEC members (see paragraph 12 above), he insisted that no formal ConEC meeting had been held on 24 October 2005 and that the ConEC decision to request his disqualification had been nothing more than a sham.

28.  The applicant further asserted that he had been informed of this ConEC decision only on 26 October 2005, a very short time before the Court of Appeal hearing concerning this matter. For this reason, he had no time to prepare for the hearing, to hire a lawyer, to collect necessary documents and, in general, to effectively participate in the proceedings. The applicant further maintained that the Court of Appeal had relied on uncorroborated allegations and had failed to summon either the voters who had accused him of bribing them or any other witnesses. Neither had it summoned any of the ConEC members who had made claims about irregularities in connection with the alleged ConEC meeting of 24 October 2005.

29.  Lastly, the applicant contended that the Supreme Court had also failed to independently examine any relevant evidence and witnesses.

2.  The Court’s assessment

30.  The Court notes that the summary of its case-law on the right to effectively stand for election, as guaranteed by Article 3 of Protocol No. 1 to the Convention, can be found in, among many other judgments, *Orujov v. Azerbaijan* (no. 4508/06, §§ 40-42, 26 July 2011). On a more specific note, **the Court also reiterates that, while the Contracting States enjoy a wide margin of appreciation in imposing conditions on the right to vote and to stand for election, it is for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with**; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate or arbitrary (see *Mathieu‑Mohin and Clerfayt v. Belgium*, 2 March 1987, § 52, Series A no. 113; *Gitonas and Others v. Greece*, 1 July 1997, § 39, *Reports of Judgments and Decisions* 1997-IV; and *Yumak and Sadak v. Turkey* [GC], no. 10226/03, § 109 (iii), 8 July 2008).

31.  **The Court notes that in the present case the applicant was disqualified as a candidate in accordance with Articles 88.4 and 113 of the Electoral Code, which provide for the possibility of the disqualification of candidates who resort to unfair and illegal means of gaining voter support. Given that Article 3 of Protocol No. 1 does not contain a list of “legitimate aims” capable of justifying restrictions on the exercise of the rights it guarantees and does not refer to those enumerated in Articles 8 to 11 of the Convention, the Contracting States are free to rely on an aim not mentioned in those Articles, provided that it is compatible with the principle of the rule of law and the general objectives of the Convention** (see, for example, *Ždanoka v. Latvia* [GC], no. 58278/00, § 115, ECHR 2006-IV). The Court accepts the Government’s argument that the conditions set out in the above‑mentioned provisions of the Electoral Code pursue the legitimate aim of ensuring equal and fair conditions for all candidates in an electoral campaign and protecting the free expression of the opinion of the people in elections.

32**.  It remains to be determined whether there was arbitrariness or a lack of proportionality in the authorities’ decisions.**

33.  The Court reiterates that its competence to verify compliance with domestic law is limited and that it is not its task to take the place of the domestic courts in such issues as the assessment of evidence or the interpretation of the domestic law. Nevertheless, for the purposes of supervision of the compatibility of the interference with the requirements of Article 3 of Protocol No. 1, the Court must scrutinise the relevant domestic procedures and decisions in detail in order to determine whether sufficient safeguards against arbitrariness were afforded to the applicant and whether the relevant decisions were sufficiently reasoned (see, *mutatis mutandis*, *Melnychenko v. Ukraine*, no. 17707/02, § 60, ECHR 2004-X).

34.  Furthermore, **the Court notes that a finding that a candidate has engaged in unfair or illegal campaigning methods could entail serious consequences for the candidate concerned, in that he or she could be disqualified from running for the election. As the Convention guarantees the effective exercise of individual electoral rights, the Court considers that, in order to prevent the arbitrary disqualification of candidates, the relevant domestic procedures should contain sufficient safeguards protecting the candidates from abusive and unsubstantiated allegations of electoral misconduct, and that decisions on disqualification should be based on sound, relevant and sufficient proof of such misconduct** (see *Orujov*, cited above, § 46).

35.  In the present case**, the decision to disqualify the applicant was based on the written statements by four voters and “physical evidence” consisting of several banknotes. For the reasons specified below, the Court considers that this material, and the manner in which it was examined, did not amount to sound, relevant and sufficient proof of the allegation that the applicant had attempted to bribe voters.**

36**.  As to the banknotes, the Court notes that, in the absence of any special marks or a forensic report on the examination of fingerprints, these random banknotes, by themselves, could not constitute any kind of proof that they had been used as an instrument of bribery and had been given by the applicant to the voters. Accordingly, this so-called “physical evidence” was irrelevant.**

37**.  As to the written statements by four voters, the Court notes that none of those four persons were invited to be questioned in the relevant hearings by the electoral commission or the courts and no attempt was made to obtain any further information corroborating those statements. Given that there were so few complainants and that their brief written statements were the only relevant evidence used against the applicant, the questioning of those voters in person during the relevant hearings was crucial for the assessment of their personal integrity and the truthfulness of their statements. It would also have given the applicant an opportunity to fully exercise his right to defend himself against their accusations by means of confronting them in person and cross-examining them. In such circumstances, the Court considers that the evidence used against the applicant was not corroborated by further examination and was not assessed in a manner that would remove serious doubts as to its reliability.**

**38.  Furthermore, the Court takes the view that the applicant was not afforded sufficient procedural safeguards against arbitrariness.**

39.  In particular, **the ConEC did not inform the applicant about its hearing of 24 October 2005, did not invite and hear the complainants or otherwise attempt to carry out a comprehensive assessment of the situation, and took the decision to request the applicant’s disqualification in very questionable circumstances given that several members of the ConEC subsequently claimed that there had been no ConEC meeting on that date at all.**

**40.  Subsequently, upon the examination of the ConEC request by the Court of Appeal, the applicant was afforded little time to examine the material in the case file and to prepare arguments in his defence**, as he learned about the forthcoming judicial hearing shortly before it took place. The Court reiterates that considerations of expediency and the necessity for tight time-limits designed to avoid delaying the electoral process, although often justified, may nevertheless not serve as a pretext to undermine the effectiveness of electoral procedures (see, *mutatis mutandis*, *Namat Aliyev v. Azerbaijan*, no. 18705/06, § 90, 8 April 2010) or to deprive the persons concerned by those procedures of the opportunity to effectively contest any accusations of electoral misconduct made against them (see *Orujov*, cited above, § 56). In the present case, **it appears that the examination of the issue of the applicant’s disqualification took place without any reasonable advance notice, and as such caught him by surprise and left him unprepared for the hearing.**

41.  **Lastly, the Court observes that**, in addition to the above-mentioned failure to summon and hear the four voters who had accused the applicant in writing, **the domestic courts failed to assess the relevance of the applicant’s submissions**, such as the affidavits by several ConEC members concerning the alleged irregularities in the manner the ConEC decision of 24 October 2005 had been reached, **and failed to invite and question those ConEC members without any explanation.**

42.  The foregoing considerations are **sufficient to enable the Court to conclude that the interference with the applicant’s electoral rights fell short of the standards required by Article 3 of Protocol No. 1. In particular, the applicant’s disqualification from running for election was not based on sufficient and relevant evidence, the procedures of the electoral commission and the domestic courts did not afford the applicant sufficient guarantees against arbitrariness, and the domestic authorities’ decisions lacked sufficient reasoning and were arbitrary.**

**43.  There has accordingly been a violation of Article 3 of Protocol No. 1 to the Convention.**

**II.  ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION**

44.  In conjunction with the above complaint, the applicant complained that his disqualification was a discriminatory measure based on his affiliation with the political opposition. He relied on Article 14 of the Convention, which provides as follows:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

45.  The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

46.  However, having regard to its above finding in relation to Article 3 of Protocol No. 1, the Court considers that it is not necessary to examine whether in this case there has been a violation of Article 14.

**III.  APPLICATION OF ARTICLE 41 OF THE CONVENTION**

47.  Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

**A.  Damage**

48.  The applicant claimed 10,000 euros (EUR) in respect of non‑pecuniary damage.

49.  The Government considered that the amount claimed was excessive.

50.  The Court considers that the applicant suffered non-pecuniary damage which cannot be compensated solely by the finding of the violation of Article 3 of Protocol No. 1. Ruling on an equitable basis, the Court awards him the sum of EUR 7,500 in respect of non-pecuniary damage, plus any tax that may be chargeable.

**B.  Costs and expenses**

51.  The applicant also claimed EUR 1,000 for the costs and expenses incurred before the Court.

52.  The Government contested this claim, noting that it was not supported by any documentary evidence.

53.  The Court points out that under Rule 60 of the Rules of the Court, any claim for just satisfaction must be itemised and submitted in writing together with the relevant supporting documents, failing which the Court may reject the claim in whole or in part. The applicant failed to submit any documents in support of his claim for costs and expenses, such as a contract for legal services or invoices relating to other expenses. Therefore, the Court makes no award in respect of costs and expenses.

**C.  Default interest**

54.  The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

**FOR THESE REASONS, THE COURT UNANIMOUSLY**

1.  *Declares* the application admissible;

2.  *Holds* that there has been a violation of Article 3 of Protocol No. 1 to the Convention;

3.  *Holds* that there is no need to examine separately the complaint under Article 14 of the Convention;

4.  *Holds*

(a)  that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable, in respect of non‑pecuniary damage, to be converted into Azerbaijani manats at the rate applicable at the date of settlement;

(b)  that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5.  *Dismisses* the remainder of the applicant’s claim for just satisfaction.

Done in English, and notified in writing on 21 February 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen Nina Vajić   
 Registrar President

## **CASE OF KHANHUSEYN ALIYEV v. AZERBAIJAN**

*(Application no. 19554/06)*

JUDGMENT

STRASBOURG

21 February 2012

**FINAL**

*21/05/2012*

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*

In the case of Khanhuseyn Aliyev v. Azerbaijan,

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

Nina Vajić, *President,* Peer Lorenzen, Khanlar Hajiyev, Mirjana Lazarova Trajkovska, Julia Laffranque, Linos-Alexandre Sicilianos, Erik Møse, *judges,*  
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 31 January 2012,

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

**PROCEDURE**

1.  The case originated in an application (no. 19554/06) against the Republic of Azerbaijan lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Azerbaijani national, Mr Khanhuseyn Gulhuseyn oglu Aliyev (*Xanhüseyn Gülhüseyn oğlu Əliyev* – “the applicant”), on 2 May 2006.

2.  The applicant was represented by Mr E. Zeynalov. The Azerbaijani Government (“the Government”) were represented by their Agent, Mr Ç. Asgarov.

3.  The applicant alleged, in particular, that his right to stand for election, as guaranteed by Article 3 of Protocol No. 1 to the Convention, had been infringed.

4.  On 19 June 2008 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

**THE FACTS**

**I.  THE CIRCUMSTANCES OF THE CASE**

5.  The applicant was born in 1958 and lives in Baku.

6.  **The applicant stood for the elections to the National Assembly** of 6 November 2005 as a candidate of the opposition bloc YeS (*Yeni Siyasət*). He was registered as a candidate by the Constituency Electoral Commission (“the ConEC”) for the single-member Hajiqabul‑Kurdamir Electoral Constituency no. 58.

7.  On 24 October 2005 **the ConEC decided to apply to the Court of Appeal with a request to cancel the applicant’s registration as a candidate owing to the reports of his alleged involvement in activities incompatible with the requirements of the Electoral Code. According to the minutes of the ConEC meeting, seven members of the ConEC participated in the meeting. The applicant was not informed about this meeting in advance and was not invited to it. In support of its decision, the ConEC relied on three grounds, summarised below.**

8.  Firstly**, the ConEC noted that it had received written statements from four voters claiming that the applicant had either promised or given them money in exchange for their promise to vote for him.** Two of them claimed that they had each received 100,000 old Azerbaijani manats (at that time, a sum equivalent to slightly less than 20 euros) in cash from the applicant and, as a proof of this claim, handed in this cash to the ConEC. None of these voters were heard in person by the ConEC. The ConEC considered that such actions by the applicant were contrary to Article 88.4.1-5 of the Electoral Code concerning the illegal means of gaining voter support.

9.  **Secondly, relying on unspecified reports, the ConEC noted that the applicant had made public statements “against the constitutional foundations of the State” by advocating for the return to power of the Chairman of the Social Democratic Party and former President A. Mutalibov (who had been in exile for several years).**

10.  **Thirdly, the ConEC noted that on 24 October 2005 the applicant was planning to organise a demonstration in front of the ConEC building in order to protest against the cancellation of the registration of another candidate from the same constituency, which had taken place earlier.**

11.  On 26 October 2005 the Court of Appeal examined the case and cancelled the applicant’s registration as a candidate, in accordance with Articles 88.4 and 113.2.3 of the Electoral Code. During the hearing, the applicant denied all the accusations and argued that the case had been fabricated and that the allegations of bribery had not been proven. Having regard to the ConEC’s submissions, the written statements of the four voters, and several banknotes sealed in plastic bags (as “material evidence”), the Court of Appeal found that the applicant had offered money to voters in exchange for their votes in his favour, thus breaching Article 88.4 of the Electoral Code. It appears that the court considered that this was a sufficient ground for the cancellation of the applicant’s registration and did not examine the other two grounds mentioned in the ConEC’s request.

12.  According to the applicant, four members of the ConEC (two of whom had allegedly participated in the meeting of 24 October 2005) wrote affidavits, addressed to the Court of Appeal, in which they claimed that the alleged ConEC meeting of 24 October 2005 had actually not taken place and that the minutes of that meeting, submitted to the Court of Appeal, constituted a false document. These affidavits were not accepted by the Court of Appeal because they had not been notarised. Subsequently, three of the above ConEC members wrote similar notarised affidavits addressed to the Supreme Court, while one of them retracted his earlier statement.

13.  According to the Government, on 26 October 2005 one of the above‑mentioned ConEC members, S.Q., wrote another affidavit in which he retracted his previous statement and maintained that he had been forced by the applicant and his representatives to write a statement that there had been no ConEC meeting.

14.  The applicant lodged an appeal with the Supreme Court, arguing that the allegations against him had been fabricated and that the evidence used against him had been tenuous, uncorroborated and wrongly assessed. In support of his submissions he attached, *inter alia*, the above-mentioned affidavits by the ConEC members.

15.  On 2 November 2005 the Supreme Court dismissed the applicant’s appeal and upheld the Court of Appeal’s judgment of 26 October 2005. It refused to admit the documents submitted by the applicant, finding that the factual circumstances of the case had been duly established by the lower court and that it could examine the case only on points of law.

**II.  RELEVANT DOMESTIC LAW**

A.  Electoral Code

16.  Article 88.4 of the Electoral Code of 2003 provides as follows:

“88.4.  Candidates ... are prohibited from gaining the support of voters in the following ways:

88.4.1.  giving money, gifts and other valuable items to voters (except for badges, stickers, posters and other campaign materials having nominal value), except for the purposes of organisational work;

88.4.2.  giving or promising rewards based on the voting results to voters who were involved in organisational work;

88.4.3.  selling goods on privileged terms or providing goods free of charge (except for printed material);

88.4.4.  providing services free of charge or on privileged terms;

88.4.5.  influencing the voters during the pre-election campaign by promising them securities, money or other material benefits, or providing services that are contrary to the law.”

17.  In accordance with Articles 113.1 and 113.2.3 of the Electoral Code, the relevant electoral commission may request a court to cancel the registration of a candidate who engages in activities prohibited by Article 88.4 of the Code.

18.  Complaints concerning decisions of electoral commissions must be examined by the courts within three days (unless the Electoral Code provides for a shorter period). The period for lodging an appeal against a court decision is also three days (Article 112.11).

B.  Code of Civil Procedure

19.  Chapter 25 of the Code of Civil Procedure sets out rules for the examination of applications concerning the protection of electoral rights (or the right to participate in a referendum). According to Article 290, such applications must be submitted directly to the appellate courts in accordance with the procedure established by the Electoral Code.

20.  Applications concerning the protection of electoral (referendum) rights must be examined within three days of receipt of the application, except for applications submitted on election day or the day after election day, which must be examined immediately (Article 291.1). The court must hear the case in the presence of the applicant, a representative of the relevant electoral commission and any other interested parties. Failure by any of these parties to attend the hearing after due notification does not preclude the court from examining and deciding the case (Article 291.2).

21.  The appellate court’s decision can be appealed against to the higher court (the court of cassation) within three days. This appeal must be examined within three days, or immediately if submitted on election day or the next day. The decision of the court of cassation is final (Article 292).

**THE LAW**

**I.  ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL No. 1 TO THE CONVENTION**

22.  Relying on Article 3 of Protocol No. 1 to the Convention and Articles 11 and 13 of the Convention, the applicant complained that his registration as a candidate for the parliamentary elections had been cancelled arbitrarily. The Court considers that this complaint falls to be examined only under Article 3 of Protocol No. 1 to the Convention, which reads as follows:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

A.  Admissibility

23.  The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B.  Merits

1.  The parties’ submissions

24.   The Government submitted that the aim of Article 88.4 of the Electoral Code was to ensure equal and fair campaign conditions for all candidates. Disqualification of candidates who engaged in various forms of illegal vote-buying had the legitimate aim of protecting the free expression of the opinion of the people in elections.

25.   The Government maintained that the applicant had been disqualified because he had attempted to bribe voters. According to the Government, this fact had been sufficiently proved by the written statements made by four voters. They maintained that the applicant had been afforded an opportunity to fully and effectively defend his position in the relevant proceedings.

26.  The Government further contested the veracity of the applicant’s allegation that the ConEC minutes of 24 October 2005 had been falsified and that no actual ConEC meeting had been held on that day. In this regard, the Government relied on the statement by ConEC member S.Q. (see paragraph 13 above).

27.  The applicant submitted that the decision to disqualify him had been arbitrary and based on tenuous, insufficient, unreliable and even fabricated evidence. Relying on the affidavits of several ConEC members (see paragraph 12 above), he insisted that no formal ConEC meeting had been held on 24 October 2005 and that the ConEC decision to request his disqualification had been nothing more than a sham.

28.  The applicant further asserted that he had been informed of this ConEC decision only on 26 October 2005, a very short time before the Court of Appeal hearing concerning this matter. For this reason, he had no time to prepare for the hearing, to hire a lawyer, to collect necessary documents and, in general, to effectively participate in the proceedings. The applicant further maintained that the Court of Appeal had relied on uncorroborated allegations and had failed to summon either the voters who had accused him of bribing them or any other witnesses. Neither had it summoned any of the ConEC members who had made claims about irregularities in connection with the alleged ConEC meeting of 24 October 2005.

29.  Lastly, the applicant contended that the Supreme Court had also failed to independently examine any relevant evidence and witnesses.

2.  The Court’s assessment

30.  The Court notes that the summary of its case-law on the right to effectively stand for election, as guaranteed by Article 3 of Protocol No. 1 to the Convention, can be found in, among many other judgments, *Orujov v. Azerbaijan* (no. 4508/06, §§ 40-42, 26 July 2011). On a more specific note, **the Court also reiterates that, while the Contracting States enjoy a wide margin of appreciation in imposing conditions on the right to vote and to stand for election, it is for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with**; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate or arbitrary (see *Mathieu‑Mohin and Clerfayt v. Belgium*, 2 March 1987, § 52, Series A no. 113; *Gitonas and Others v. Greece*, 1 July 1997, § 39, *Reports of Judgments and Decisions* 1997-IV; and *Yumak and Sadak v. Turkey* [GC], no. 10226/03, § 109 (iii), 8 July 2008).

31.  **The Court notes that in the present case the applicant was disqualified as a candidate in accordance with Articles 88.4 and 113 of the Electoral Code, which provide for the possibility of the disqualification of candidates who resort to unfair and illegal means of gaining voter support. Given that Article 3 of Protocol No. 1 does not contain a list of “legitimate aims” capable of justifying restrictions on the exercise of the rights it guarantees and does not refer to those enumerated in Articles 8 to 11 of the Convention, the Contracting States are free to rely on an aim not mentioned in those Articles, provided that it is compatible with the principle of the rule of law and the general objectives of the Convention** (see, for example, *Ždanoka v. Latvia* [GC], no. 58278/00, § 115, ECHR 2006-IV). The Court accepts the Government’s argument that the conditions set out in the above‑mentioned provisions of the Electoral Code pursue the legitimate aim of ensuring equal and fair conditions for all candidates in an electoral campaign and protecting the free expression of the opinion of the people in elections.

32**.  It remains to be determined whether there was arbitrariness or a lack of proportionality in the authorities’ decisions.**

33.  The Court reiterates that its competence to verify compliance with domestic law is limited and that it is not its task to take the place of the domestic courts in such issues as the assessment of evidence or the interpretation of the domestic law. Nevertheless, for the purposes of supervision of the compatibility of the interference with the requirements of Article 3 of Protocol No. 1, the Court must scrutinise the relevant domestic procedures and decisions in detail in order to determine whether sufficient safeguards against arbitrariness were afforded to the applicant and whether the relevant decisions were sufficiently reasoned (see, *mutatis mutandis*, *Melnychenko v. Ukraine*, no. 17707/02, § 60, ECHR 2004-X).

34.  Furthermore, **the Court notes that a finding that a candidate has engaged in unfair or illegal campaigning methods could entail serious consequences for the candidate concerned, in that he or she could be disqualified from running for the election. As the Convention guarantees the effective exercise of individual electoral rights, the Court considers that, in order to prevent the arbitrary disqualification of candidates, the relevant domestic procedures should contain sufficient safeguards protecting the candidates from abusive and unsubstantiated allegations of electoral misconduct, and that decisions on disqualification should be based on sound, relevant and sufficient proof of such misconduct** (see *Orujov*, cited above, § 46).

35.  In the present case**, the decision to disqualify the applicant was based on the written statements by four voters and “physical evidence” consisting of several banknotes. For the reasons specified below, the Court considers that this material, and the manner in which it was examined, did not amount to sound, relevant and sufficient proof of the allegation that the applicant had attempted to bribe voters.**

36**.  As to the banknotes, the Court notes that, in the absence of any special marks or a forensic report on the examination of fingerprints, these random banknotes, by themselves, could not constitute any kind of proof that they had been used as an instrument of bribery and had been given by the applicant to the voters. Accordingly, this so-called “physical evidence” was irrelevant.**

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**38.  Furthermore, the Court takes the view that the applicant was not afforded sufficient procedural safeguards against arbitrariness.**

39.  In particular, **the ConEC did not inform the applicant about its hearing of 24 October 2005, did not invite and hear the complainants or otherwise attempt to carry out a comprehensive assessment of the situation, and took the decision to request the applicant’s disqualification in very questionable circumstances given that several members of the ConEC subsequently claimed that there had been no ConEC meeting on that date at all.**

**40.  Subsequently, upon the examination of the ConEC request by the Court of Appeal, the applicant was afforded little time to examine the material in the case file and to prepare arguments in his defence**, as he learned about the forthcoming judicial hearing shortly before it took place. The Court reiterates that considerations of expediency and the necessity for tight time-limits designed to avoid delaying the electoral process, although often justified, may nevertheless not serve as a pretext to undermine the effectiveness of electoral procedures (see, *mutatis mutandis*, *Namat Aliyev v. Azerbaijan*, no. 18705/06, § 90, 8 April 2010) or to deprive the persons concerned by those procedures of the opportunity to effectively contest any accusations of electoral misconduct made against them (see *Orujov*, cited above, § 56). In the present case, **it appears that the examination of the issue of the applicant’s disqualification took place without any reasonable advance notice, and as such caught him by surprise and left him unprepared for the hearing.**

41.  **Lastly, the Court observes that**, in addition to the above-mentioned failure to summon and hear the four voters who had accused the applicant in writing, **the domestic courts failed to assess the relevance of the applicant’s submissions**, such as the affidavits by several ConEC members concerning the alleged irregularities in the manner the ConEC decision of 24 October 2005 had been reached, **and failed to invite and question those ConEC members without any explanation.**

42.  The foregoing considerations are **sufficient to enable the Court to conclude that the interference with the applicant’s electoral rights fell short of the standards required by Article 3 of Protocol No. 1. In particular, the applicant’s disqualification from running for election was not based on sufficient and relevant evidence, the procedures of the electoral commission and the domestic courts did not afford the applicant sufficient guarantees against arbitrariness, and the domestic authorities’ decisions lacked sufficient reasoning and were arbitrary.**

**43.  There has accordingly been a violation of Article 3 of Protocol No. 1 to the Convention.**

**II.  ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION**

44.  In conjunction with the above complaint, the applicant complained that his disqualification was a discriminatory measure based on his affiliation with the political opposition. He relied on Article 14 of the Convention, which provides as follows:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

45.  The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

46.  However, having regard to its above finding in relation to Article 3 of Protocol No. 1, the Court considers that it is not necessary to examine whether in this case there has been a violation of Article 14.

**III.  APPLICATION OF ARTICLE 41 OF THE CONVENTION**

47.  Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A.  Damage

48.  The applicant claimed 10,000 euros (EUR) in respect of non‑pecuniary damage.

49.  The Government considered that the amount claimed was excessive.

50.  The Court considers that the applicant suffered non-pecuniary damage which cannot be compensated solely by the finding of the violation of Article 3 of Protocol No. 1. Ruling on an equitable basis, the Court awards him the sum of EUR 7,500 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B.  Costs and expenses

51.  The applicant also claimed EUR 1,000 for the costs and expenses incurred before the Court.

52.  The Government contested this claim, noting that it was not supported by any documentary evidence.

53.  The Court points out that under Rule 60 of the Rules of the Court, any claim for just satisfaction must be itemised and submitted in writing together with the relevant supporting documents, failing which the Court may reject the claim in whole or in part. The applicant failed to submit any documents in support of his claim for costs and expenses, such as a contract for legal services or invoices relating to other expenses. Therefore, the Court makes no award in respect of costs and expenses.

C.  Default interest

54.  The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

**FOR THESE REASONS, THE COURT UNANIMOUSLY**

1.  *Declares* the application admissible;

2.  *Holds* that there has been a violation of Article 3 of Protocol No. 1 to the Convention;

3.  *Holds* that there is no need to examine separately the complaint under Article 14 of the Convention;

4.  *Holds*

(a)  that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable, in respect of non‑pecuniary damage, to be converted into Azerbaijani manats at the rate applicable at the date of settlement;

(b)  that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5.  *Dismisses* the remainder of the applicant’s claim for just satisfaction.

Done in English, and notified in writing on 21 February 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen Nina Vajić   
 Registrar President

## **CASE OF ZORNIĆ v. BOSNIA AND HERZEGOVINA**

*(Application no. 3681/06)*

JUDGMENT

STRASBOURG

15 July 2014

FINAL

15/12/2014

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*

In the case of Zornić v. Bosnia and Herzegovina,

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

Ineta Ziemele, *President,* Päivi Hirvelä, George Nicolaou, Nona Tsotsoria, Zdravka Kalaydjieva, Krzysztof Wojtyczek, Faris Vehabović, *judges,*  
and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 24 June 2014,

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

**PROCEDURE**

1.  The case originated in an application (no. 3681/06) against Bosnia and Herzegovina lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a citizen of Bosnia and Herzegovina Ms Azra Zornić (“the applicant”), on 19 December 2005.

2.  The applicant was granted leave for self-representation. The Government of Bosnia and Herzegovina (“the Government”) were represented by their Deputy Agent, Ms Z. Ibrahimović.

3.  **The applicant complained of her ineligibility to stand for election** to the House of Peoples and the Presidency of Bosnia and Herzegovina **because she does not declare affiliation with any of the “constituent people”.** She relied on Article 3 of Protocol No. 1 to the Convention taken alone and in conjunction with Article 14 of the Convention, and on Article 1 of Protocol No. 12.

4.  On 14 March 2013 the application was communicated to the Government.

**THE FACTS**

**I.  THE CIRCUMSTANCES OF THE CASE**

5.  The applicant was born in 1957 and lives in Sarajevo.

6.  She actively participates in the political life of the country. Among other things, in 2002 she stood as a candidate of the Social Democratic Party of Bosnia and Herzegovina for election to the parliament of one of the Entities[[1]](#footnote-1).

7.  **As the applicant does not declare affiliation with any of the “constituent people” (namely, Bosniacs[[2]](#footnote-2), Croats[[3]](#footnote-3) and Serbs[[4]](#footnote-4)), but simply as a citizen of Bosnia and Herzegovina, she is ineligible to stand for election to the second chamber of the State parliament (the House of Peoples) and to the collective Head of State (the Presidency).**

**II.  RELEVANT DOMESTIC LAW AND PRACTICE**

8.  The relevant law and practice were outlined in *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, ECHR 2009. Notably, the Constitution of Bosnia and Herzegovina makes a distinction between “constituent peoples” (persons who declare affiliation with Bosniacs, Croats and Serbs) and “others” (members of ethnic minorities and persons who do not declare affiliation with any particular group because of intermarriage, mixed parenthood or other reasons).

9.  In the former Yugoslavia, a person’s ethnic affiliation was decided solely by that person, through a system of self-classification. Thus, no objective criteria, such as knowledge of a certain language or belonging to a specific religion were required. Moreover, there was no requirement of acceptance by other members of the ethnic group in question. Since the Constitution contains no provisions regarding the determination of one’s ethnicity it appears that it was assumed that the traditional self-classification would suffice.

10.  In accordance with the Constitution (Articles IV § 1 and V), only persons declaring affiliation with a “constituent people” are entitled to stand for election to the House of Peoples and the Presidency of Bosnia and Herzegovina.

11.  On 29 June 2010 the Constitutional Court of Bosnia and Herzegovina (“the Constitutional Court”) declared that it lacked jurisdiction to examine a discrimination complaint concerning the appellant’s ineligibility to stand for election to the Presidency on the ground of his ethnic origin (decision no. AP 1945/10). The appellant in that case directly relied on the *Sejdić and Finci* judgment.

**III.  RELEVANT INTERNATIONAL LAW DOCUMENTS**

12.  The Committee of Ministers of the Council of Europe, in its supervisory function under the terms of Article 46 § 2 of the Convention, adopted three interim resolutions concerning the implementation of *Sejdić and Finci* judgment (see documents nos. CM/ResDH(2011)291, CM/ResDH(2012)233 and CM/ResDH(2013)259). It urged the authorities of Bosnia and Herzegovina to take all the necessary steps for the full execution of that judgment by adopting required measures aimed at eliminating discrimination against those who are not affiliated with a constituent people in standing for election to the House of Peoples and the Presidency of Bosnia and Herzegovina and to bring its constitution and electoral legislation in conformity with the Convention requirements without any further delay.

The relevant part of the first interim resolution, adopted on 2 December 2011, reads:

“Recalling that, from the beginning of its examination of this case, the Committee considered that the execution of this judgment would require a number of amendments to the Constitution of Bosnia and Herzegovina and to its electoral legislation;

Bearing in mind further that, on 7 July 2010, on the occasion of the examination of Bosnia and Herzegovina’s honouring of its obligations and commitments, the Ministers’ Deputies urged the authorities of Bosnia and Herzegovina to bring the Constitution of Bosnia and Herzegovina in line with the Convention, in compliance with the present judgment;

Stressing that, in becoming a member of the Council of Europe in 2002, Bosnia and Herzegovina undertook to “review within one year, with the assistance of the European Commission for Democracy through Law (Venice Commission), the electoral legislation in the light of Council of Europe standards, and to revise it where necessary”;

Noting also that the Parliamentary Assembly has periodically reminded Bosnia and Herzegovina of this post-accession obligation;

...

Recalling that the Committee of Ministers deeply regretted that the elections took place in Bosnia and Herzegovina on 3 October 2010 in accordance with the legislation which was found to be discriminatory by the Court in the present judgment;

...

REITERATES ITS CALL ON the authorities and political leaders of Bosnia and Herzegovina to take the necessary measures aimed at eliminating discrimination against those who are not affiliated with a constituent people in standing for election to the House of Peoples and the Presidency of Bosnia and Herzegovina and to bring its constitution and electoral legislation in conformity with the Convention requirements without any further delay”. (footnotes omitted)

The relevant part of the second interim resolution, adopted on 6 December 2012, reads:

“Underlining that these amendments, by allowing all citizens of Bosnia and Herzegovina to run for elections, would enhance the functioning of democratic institutions in the country and citizens’ confidence in them;

...

Stressing that reaching a political consensus is an indispensable condition for the amendment of the Constitution and the electoral legislation in order to ensure not only the execution of the present judgment but also full compliance of future elections with Convention requirements;

FIRMLY RECALLS the obligation of Bosnia and Herzegovina under Article 46 of the Convention to abide by the judgment of the Court in the case of Sejdić and Finci;

STRONGLY URGES the authorities and political leaders of Bosnia and Herzegovina to amend the Constitution and the electoral legislation and to bring them in conformity with the Convention requirements without any further delay.”

The relevant part of the third interim resolution, adopted on 5 December 2013, reads:

“Recalling the Committee’s repeated calls on the authorities and political leaders of Bosnia and Herzegovina to reach a consensus and to amend the Constitution of Bosnia and Herzegovina and its electoral legislation to comply with this judgment and that these calls have been echoed notably by the Parliamentary Assembly of the Council of Europe (including most recently in its Recommendation 2025(2013)), as well as different bodies of the European Union and the United Nations;

Recalling the assurances given on numerous occasions by the representatives of the executive and the main political parties of Bosnia and Herzegovina that all political stakeholders are fully committed to finding an appropriate solution for the execution of this judgment;

Recalling also that the Constitution of Bosnia and Herzegovina provides that “The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law”;

Expressing the gravest concern that, despite the repeated assurances, including at its last human rights meeting in September 2013, the necessary constitutional and legislative amendments have still not been made and that time is running out for the 2014 elections to be held in compliance with the Convention requirements;

Reiterating that failure to do so would not only amount to a manifest breach of obligations under Article 46, paragraph 1, of the Convention but could also potentially undermine the legitimacy and the credibility of the country´s future elected bodies;

...

FIRMLY CALLS UPON all authorities and political leaders of Bosnia and Herzegovina to ensure that the constitutional and legislative framework is immediately brought in line with the Convention requirements so that the elections in October 2014 are held without any discrimination against those citizens who are not affiliated with any of the “constituent peoples”.”

**THE LAW**

**I.  ALLEGED VIOLATIONS OF ARTICLE 14 OF THE CONVENTION, ARTICLE 3 OF PROTOCOL NO. 1 AND ARTICLE 1 OF PROTOCOL NO. 12**

13.  The applicant complained of her ineligibility to stand for election to the House of Peoples and the Presidency because of her refusal to declare affiliation with any of the "constituent people"; in her submission this amounted to discrimination. She relied on Article 14 of the Convention, Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12.

Article 14 of the Convention provides:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

Article 3 of Protocol No. 1 provides:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

Article 1 of Protocol No. 12 to the Convention provides:

“1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.”

A.  Admissibility

1.  The parties

14.  The Government advanced several objections as regards the admissibility of the complaints. Firstly, they submitted that Bosnia and Herzegovina could not be held responsible for the contested constitutional provisions because the Constitution of Bosnia and Herzegovina was part of an international treaty, the Dayton Agreement.

Furthermore, the applicant was not actively involved in the political life of the respondent State. She has participated in the elections only once, in 2002, when she unsuccessfully ran for the Parliamentary Assembly of the Federation of Bosnia and Herzegovina. Therefore, the applicant could not claim to be a “victim” of the violations which she alleged. Lastly, the Government submitted that the applicant failed to use available domestic remedies for her complaints, in particular, a constitutional appeal.

15.  The applicant disputed these arguments.

2.  The Court’s assessment

(a)  Compatibility *ratione personae*

16.  In *Sejdić and Finci*, cited above, the Court held that, leaving aside the question whether the respondent State could be held responsible for putting in place contested constitutional provisions, it could nevertheless be held responsible for maintaining them (ibid., § 30). The Court therefore rejects the Government’s preliminary objection under this head.

(b)  Victim status

17.  As regards the second objection, in *Sejdić and Finci* the Court examined the applicants’ victim status and concluded that, given their active participation in public life, they might claim to be victims of the alleged discrimination (ibid., § 29). The Court sees no reason to depart from this conclusion in the present case and therefore rejects the Government’s second preliminary objection.

(c)  Exhaustion of domestic remedies

18.  The Court recalls that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention requires applicants first to use the remedies provided by the national legal system, thus dispensing States from answering before the European Court for their acts before they have had an opportunity to put matters right through their own legal system. The rule is based on the assumption that the domestic system provides an effective remedy in respect of the alleged breach. The burden of proof is on the Government claiming non-exhaustion to satisfy the Court that an effective remedy was available in theory and in practice at the relevant time; that is to say, that the remedy was accessible, capable of providing redress in respect of the applicant’s complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (see, *inter alia*, *Akdivar and Others v. Turkey*, 16 September 1996, § 68, *Reports of Judgments and Decisions* 1996-IV; *Sejdovic v. Italy* [GC], no. 56581/00, § 46, ECHR 2006-II; and *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99 et al., ECHR 2010).

19.  As to legal systems which provide constitutional protection for fundamental rights, such as that of Bosnia and Herzegovina, the Court recalls that it is incumbent on the aggrieved individual to test the extent of that protection (see *Mirazović v. Bosnia and Herzegovina* (dec.), no. 13628/03, 16 May 2006).

20.  That said, the Court would emphasise that the application of the rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, it has recognised that Article 35 must be applied with some degree of flexibility and without excessive formalism. It has further recognised that the rule of exhaustion of domestic remedies is neither absolute nor capable of being applied automatically; in reviewing whether the rule has been observed, it is essential to have regard to the particular circumstances of the individual case. This means, amongst other things, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicant (see *Akdivar and Others,* cited above*,* § 69, and *Selmouni v. France* [GC], no. 25803/94, § 77, ECHR 1999 V).

21.  Turning to the present case, the Court notes that the applicant failed to use a constitutional appeal before lodging the present application. However, in view of the Constitutional Court’s approach to the matter (see paragraph 11 above), the Court considers that a constitutional appeal was not an effective remedy for the present applicant’s complaints which she had to exhaust. In these circumstances, the Court considers that the Government’s objection on grounds of failure to exhaust domestic remedies cannot be upheld.

3.  Conclusion

22.  The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B.  Merits

1.  The applicant’s submissions

23.  The applicant maintained that despite being a citizen of Bosnia and Herzegovina she is denied by the Constitution any right to stand for election to the House of Peoples and the Presidency because she does not declare affiliation with one of the “constituent peoples” or any ethnic group.

2.  The Government’s submissions

24.  The Government argued that the current constitutional structure in Bosnia and Herzegovina was established by a peace agreement following one of the most destructive conflicts in recent European history. Its ultimate goal was the establishment of peace and dialogue between the three main ethnic groups – the “constituent peoples”. The Government maintained that the contested constitutional provisions, excluding persons who did not declare affiliation with a “constituent people” from the House of Peoples and the Presidency, should be assessed against this background. They claimed that the time was still not ripe for a political system which would be a simple reflection of majority rule, given, in particular, the prominence of mono-ethnic political parties and the continued international administration of Bosnia and Herzegovina.

25.  Moreover, they argued that the present applicant did not belong to any “minority”, but chose of her own will not to declare affiliation with any of the “constituent people”. She could change her mind at any time should she wish to participate in the political life of Bosnia and Herzegovina.

3.  The Court’s assessment

26.  **Discrimination means treating differently, without an objective and reasonable justification, persons in similar situations.** “No objective and reasonable justification” means that the distinction in issue does not pursue a “legitimate aim” or that there is not a “reasonable relationship of proportionality between the means employed and the aim sought to be realised” (see, among many authorities, *Andrejeva v. Latvia* [GC], no. 55707/00, § 81, ECHR 2009). The scope of a Contracting Party’s margin of appreciation in this sphere will vary according to the circumstances, the subject matter and the background (ibid., § 82).

27.  The Court further reiterates that the same term “discrimination” from Article 14 was used in Article 1 of Protocol No. 12 as well. Notwithstanding the difference in scope between those provisions, the meaning of this term in Article 1 of Protocol No. 12 was intended to be identical to that in Article 14 (see paragraph 18 of the Explanatory Report to Protocol No. 12). The Court sees no reason to depart from the settled interpretation of “discrimination”, as developed in the jurisprudence concerning Article 14 in applying the same term under Article 1 of Protocol No. 12 (see *Sejdić and Finci*, § 55, and *Ramaer and Van Willigen v. the Netherlands* (dec.), no. 34880/12, 23 October 2012, §§ 88-91).

(a)  As regards the House of Peoples of Bosnia and Herzegovina

28.  The applicant relied on Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1, Article 3 of Protocol No. 1 taken alone, and Article 1 of Protocol No. 12. The Court will first examine this complaint under the first-mentioned provisions. Furthemore, the test for Article 14 and Article 1 of Protocol No. 12 being the same (see paragraph 27 above), the Court finds it appropriate to look at this complaint under Article 1 of Protocol No. 12 at the same time.

29.  The Court has already held in *Sejdić and Finci* that elections to the House of Peoples of Bosnia and Herzegovina fall within the scope of Article 3 of Protocol No. 1 (ibid., §§ 40 and 41). **Accordingly, Article 14 of the Convention in conjunction with Article 3 of Protocol No. 1 is applicable in the present case.**

30.  **The Court observes that in accordance with the Constitution only persons declaring affiliation with a “constituent people” (Bosniacs, Croats and Serbs) are entitled to run for the House of Peoples of Bosnia and Herzegovina. The applicant, who does not declare affiliation with a “constituent people”, but declares herself as a citizen of Bosnia and Herzegovina, is, as a result, excluded** (see, mutatis mutandis, *Sejdić and Finci*, cited above, § 45**). The Court considers, therefore, that the present case is identical to *Sejdić and Finci***. **Although, unlike the applicants in that case, who were of Roma and Jewish origin respectively, the present applicant does not declare affiliation with any particular group, she is also prevented from running for election to the House of Peoples on the ground of her origin.**

31**.  As regards the Governmentʼs argument that the applicant could at any time choose to affiliate with one of the “constituent people“, the Court observes that the same could be said for members of minority groups, such as the applicants in *Sejdić and* Finci, or citizens without any ethnic affiliation. As noted above, there are no objective criteria for oneʼs ethnic affiliation** (see paragraph 8 above). It depends solely on oneʼs own self-classification. There may be different reasons for not declaring affiliation with any particular group, such as for example intermarriage or mixed parenthood or simply that the applicant wished to declare herself as a citizen of Bosnia and Herzegovina. While it is not clear what the present applicant’s reasons are, the Court considers them in any case irrelevant. **The applicant should not be prevented from standing for elections for the House of Peoples on account of her personal self-classification.**

32.  The Court reiterates that identical constitutional provisions have already been found to amount to a discriminatory difference in treatment in breach of Article 14 taken in conjunction with Article 3 of Protocol No. 1 in *Sejdić and Finci* (ibid., § 50). Accordingly, and for the detailed reasons elaborated in *Sejdić and Finci* (§§ 47-49), **the Court concludes that there has been a violation of Article 14 taken in conjunction with Article 3 of Protocol No. 1 and a violation of Article 1 of Potocol No. 12 resulting from the applicantʼs continued ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina.**

**33.  Having regard to its finding in the preceding paragraphs, the Court considers that it is not necessary to examine separately whether there has also been a violation of Article 3 of Protocol No. 1 taken alone as regards the House of Peoples.**

(b)  As regards the Presidency of Bosnia and Herzegovina

34.  The applicant relied on Article 1 of Protocol No. 12 only.

35.  The Court has already found this Article to be applicable to elections to Presidency of Bosnia and Herzegovina in *Sejdić and Finci* (ibid., § 54).

36.  The lack of a declaration of affiliation by the present applicant with a “constituent people” also renders her ineligible to stand for election to the Presidency. An identical constitutional precondition has already been found to amount to a discriminatory difference in treatment in breach of Article 14 taken in conjunction with Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12 as regards the House of Peoples (see paragraph 32 above) and, moreover, the notions of discrimination prohibited by Article 14 and by Article 1 of Protocol No. 12 are to be interpreted in the same manner (see paragraph 27 above). In *Sejdić and Finci* (ibid., § 56) the Court has already found that the constitutional provisions which rendered the applicants ineligibile for election to the Presidency were discriminatory and in breach of Article 1 of Protocol No. 12. The Court does not see any reason to depart from that jursiprudence in the present case.

37.  There has accordingly been a violation of Article 1 of Protocol No. 12 as regards the present applicantʼs ineligibility to stand for election to the Presidency.

**II.  APPLICATION OF ARTICLE 46 OF THE CONVENTION**

38.  The Court finds it appropriate to consider the present case under Article 46 of the Convention, which provides, in so far as relevant:

“1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution...”

39.  The Court recalls that Article 46 of the Convention, as interpreted in the light of Article 1, imposes on the respondent State a legal obligation to implement, under the supervision of the Committee of Ministers, appropriate general and/or individual measures to secure the right of the applicant which the Court found to be violated. Such measures must also be taken in respect of other persons in the applicant’s position, notably by solving the problems that have led to the Court’s findings (see, *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000 VIII; *Karanović v. Bosnia and Herzegovina*, no. 39462/03, § 28, 20 November 2007; *Čolić and Others v. Bosnia and Herzegovina*, nos. 1218/07 et al., § 17, 10 November 2009; *Burdov v. Russia (no. 2)*, no. 33509/04, § 125, ECHR 2009‑...; and *Greens and M.T. v. the United Kingdom*, nos. 60041/08 and 60054/08, § 106, ECHR 2010 (extracts)).

40.  The Court further recalls its finding in *Sejdić and Finci* that constitutional provisions which rendered the applicants ineligible to stand for elections to the House of Peoples and to the Presidency of Bosnia and Herzegovina amounted to a discriminatory difference in treatment in breach of Article 14 taken in conjunction with Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12. It emphasises that the finding of a violation in the present case was the direct result of the failure of the authorities of the respondent State to introduce measures to ensure compliance with the judgment in *Sejdić and Finci*. The failure of the respondent State to introduce constitutional and legislative proposals to put an end to the current incompatibility of the Constitution and the electoral law with Article 14, Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12 is not only an aggravating factor as regards the State’s responsibility under the Convention for an existing or past state of affairs, but also represents a threat to the future effectiveness of the Convention machinery (see *Broniowski*, cited above, § 193, and *Greens and M.T.*, cited above, § 111).

41.  Pursuant to Article 46 § 2, *Sejdić and Finci* is currently under the supervision of the Committee of Ministers, which has regularly examined domestic developments and sought a speedy end to the prevailing situation of non-compliance. It has always considered that a number of amendments to the Constitution of Bosnia and Herzegovina and its electoral legislation should be adopted for the execution of this judgment. The Committee of Ministers adopted three interim resolutions urging the authorities of Bosnia and Herzegovina to take all the necessary steps for the full execution of that judgment by adopting necessary measures aimed at eliminating discrimination against those who are not affiliated with a constituent people in standing for election to the House of Peoples and the Presidency of Bosnia and Herzegovina and to bring its constitution and electoral legislation in conformity with the Convention requirements without any further delay (see paragraph 12 above; see also Resolutions nos. 1701(2010), 1725(2010) and 1855(2012) and Recommendation no. 2025(2013) of the Parliamentary Assembly of the Council of Europe). In its third resolution in particular the Committee of Ministers called upon the respondent State “to ensure that the constitutional and legislative framework is immediately brought in line with the Convention requirements so that the elections in October 2014 are held without any discrimination against those citizens who are not affiliated with any of the ‘constituent peoples’” (see paragraph 12 above).

42.  In light of the lengthy delay which has already occurred, the Court, like the Committee of Ministers, is anxious to encourage the speediest and most effective resolution of the situation in a manner which complies with the Convention’s guarantees (compare, *Greens and M.T*., cited above, § 112).

43.  In *Sejdić and Finci* the Court observed that when the impugned constitutional provisions were put in place a very fragile ceasefire was in effect on the ground and that the provisions were designed to end a brutal conflict marked by genocide and “ethnic cleansing” (see ibid., § 45). The nature of the conflict was such that the approval of the “constituent peoples” was necessary to ensure peace (ibid.). However, now, more than eighteen years after the end of the tragic conflict, there could no longer be any reason for the maintenance of the contested constitutional provisions. The Court expects that democratic arrangements will be made without further delay. In view of the need to ensure effective political democracy, the Court considers that the time has come for a political system which will provide every citizen of Bosnia and Herzegovina with the right to stand for elections to the Presidency and the House of Peoples of Bosnia and Herzegovina without discrimination based on ethnic affiliation and without granting special rights for constituent people to the exclusion of minorities or citizens of Bosnia and Herzegovina.

**III.  APPLICATION OF ARTICLE 41 OF THE CONVENTION**

44.  Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

45.  The applicant did not submit a claim for just satisfaction. Accordingly, the Court considers that there is no call to award her any sum on that account.

**FOR THESE REASONS, THE COURT**

1.  *Declares* unanimously the application admissible;

2.  *Holds* by six votes to one that there has been a violation of Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1 as regards the applicant’s ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina;

3.  *Holds* unanimously that there has been a violation of Article 1 of Protocol No. 12 as regards the applicant’s ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina;

4.  *Holds* unanimously that there is no need to examine the same complaint under Article 3 of Protocol No. 1 taken alone;

5.  *Holds* unanimously that there has been a violation of Article 1 of Protocol No. 12 as regards the applicant’s ineligibility to stand for election to the Presidency of Bosnia and Herzegovina.

Done in English, and notified in writing on 15 July 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı Ineta Ziemele  
 Deputy Registrar President

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

I.Z.  
F.A.

**PARTLY DISSENTING OPINION OF  
JUDGE WOJTYCZEK**

1.  I agree that in the instant case there has been a violation of Article 1 of Protocol No. 12, but I do not share the view that Bosnia and Herzegovina has violated Article 14 of the Convention taken in conjunction with Article 3 of Protocol No 1.

2.  I note that the case raises very complex issues belonging to the scope of constitutional law. The majority decided to follow the approach adopted in the Grand Chamber judgment in the case of *Sejdić and Finci v. Bosnia and Herzegovina*, (nos. 27996/06 and 34836/06, ECHR 2009). In that judgment, the Court proceeded in four steps. Firstly, it analysed the powers of the House of Peoples of Bosnia and Hercegovina and emphasised their broad scope (paragraph 41). Secondly, given the broad scope of the powers enjoyed by this parliamentary chamber, it concluded that elections to it fell within the scope of Article 3 of Protocol No. 1. Thirdly, the Court verified whether the applicants’ continued ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina had an objective and reasonable justification. Fourthly, after carrying out an analysis of Bosnian law, it concluded that “the applicants’ continued ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina lack[ed] an objective and reasonable justification and ha[d] therefore breached Article 14 taken in conjunction with Article 3 of Protocol No. 1” (see paragraph 50 of the *Sejdić and Finci* judgment).

The reasoning in the case of *Sejdić and Finci* seems to be based on the following implicit assumptions concerning the meaning of Article 3 of Protocol No. 1: (i) if the second chamber has relatively broad legislative powers, then it must be elected; (ii) the elections to this second chamber should meet the same criteria as the elections to the first chamber; and (iii) every adult citizen therefore has a subjective right to stand for election to such a second chamber. I am not persuaded that the wording of Article 3 of Protocol No. 1 justifies accepting these assumptions as the necessary legal consequences of this provision. If we apply the proposed approach with consistency, then certain other European States with a bicameral legislature may be in breach of Article 3 of the Convention.

According to the case-law of the Court, Article 3 is applicable to the legislature of the European Union (see *Matthews v. the United Kingdom* [GC], no. 24833/94, ECHR 1999‑I). The European Union has a Parliament which is elected through universal but unequal suffrage and an unelected Council which enjoys wide legislative powers. In this context, serious doubts may arise as to whether the constitutional system of the European Union would pass the test implicitly laid down in the *Sejdić and Finci* case.

3.  The Preamble to the Convention contains important guidelines concerning the interpretation of the Convention. At least two of them are of paramount importance in cases concerning questions of constitutional law. Firstly, the Preamble refers to the “common understanding and observance of human rights”. The Convention should therefore be construed in a way which reflects the common understanding of human rights among the High Contracting Parties. When different interpretations are possible under the applicable rules of treaty interpretation, preference should be given to the solution which better reflects the common understanding of human rights.

Secondly, the Preamble refers to “a common heritage of political traditions, ideals, freedom and the rule of law”. The interpretation of the Convention should therefore take this common heritage into due account. When different interpretations are possible under the applicable rules of treaty interpretation, preference should be given to the solution which better reflects the common heritage of political traditions. The same idea may also be expressed in slightly different words: the interpretation of the Convention should take into due account the common European constitutional heritage. The paradigm of European constitutionalism is an inescapable point of reference for interpretation of the Convention.

4.  It is important to note the great variety of electoral laws across Europe, as well as the diversity of solutions concerning the organisation of legislative power. There exist a multitude of electoral systems which fulfil the criteria of free elections, and a multitude of models of bicameralism which fulfil the criteria of democracy.

The very idea of bicameralism presupposes that there exists a second chamber which is different in many respects from the first, and whose members may be chosen in a very different manner from the elections to the first chamber. Whereas the first chamber represents the Nation, understood as a political community consisting of citizens, the second chamber may be based on a different idea of representation. One of the possible justifications for a second chamber is to correct representational shortcomings in the first chamber. Constitution-makers may therefore devise a second chamber ensuring representation of special interests and opt for an electoral system which gives a stronger voice to certain social groups. This is the so-called model of incongruent bicameralism.

5.  Article 3 of Protocol No. 1 is worded in a very specific way. As rightly pointed out in the joint dissenting opinion of Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens to the Grand Chamber judgment in the case of *Hirst v. the United Kingdom (no. 2)* (no. 74025/01, ECHR 2005‑IX), the wording of this provision is different from nearly all other substantive clauses of the Convention. It is also completely different from the wording of Article 25 of the International Covenant on Civil and Political Rights, which states that “every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions ... to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors”.

In the Convention, the accent is placed on the objective guarantees of free elections rather than on the subjective rights of the right-holders. This focus on the objective law is of paramount importance for establishing the scope and content of the provision under consideration. There can be no doubt that free elections to the legislature refers to universal suffrage, understood as a lack of unreasonable restrictions on the right to vote and on the right to be elected. At the same time, democratic European constitutionalism has accepted certain inherent limitations on the scope of those rights. Electoral rights in respect of parliament are to be granted to adult citizens and do not necessarily encompass incapacitated persons or persons deprived of their right to vote in connection with a criminal conviction. Further restrictions and qualifications may be acceptable in the elections to the second chamber of parliaments.

6.  Article 3 of Protocol No. 1 raises the very delicate issue of the adequacy between the scope of the second chamber’s powers and the method of selecting its members. I agree that the distribution of legislative powers between the chambers of a national parliament is an important parameter from the perspective of this provision. If the second chamber has only limited powers, and if its opposition may be overcome by the first chamber, then the freedom to shape the method of selecting its members is extremely wide. If, however, the second chamber enjoys legislative powers equal to those of the first, then the scope of constitutional autonomy left to the States in shaping the method of selecting the members of the second chamber is much more restricted. However, I am not persuaded that in such a situation Article 3 of Protocol No. 1 not only imposes an obligation to elect the second chamber, but also lays down the same standards for such an election as for elections to the first chamber.

It is obvious that Article 3 of Protocol No. 1 imposes strict standards for elections to the first chamber of parliament. I agree with the view that this provision enshrines an individual and enforceable right to free elections to the “first” chamber of parliament, and that unreasonable limitations on the right to vote and on the right to stand for election are incompatible with the concept of free elections. Furthermore, it would be difficult to accept a first chamber elected by an indirect ballot.

As to the problem of the second chamber, it is impossible to disagree with the view reiterated in the *Sejdić and Finci* judgment (paragraph 40), to the effect that “Article 3 of Protocol No. 1 was carefully drafted so as to avoid terms which could be interpreted as an absolute obligation to hold elections for both chambers in each and every bicameral system (see *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, § 53, Series A no. 113)”. Furthermore, in my view, if Article 3 of Protocol No. 1 allows a method of selecting the members of the second chamber other than through election by citizens, we can derive from this provision neither a subjective right to vote nor a subjective right to stand in elections to this chamber. In the absence of a right protected by the Convention and its Protocols, Article 14 is not applicable. This latter provision cannot apply to a right to stand for election to the second chamber which is enshrined only in domestic legislation.

In my opinion, Article 3 of Protocol No. 1 sets up a more general and a more flexible test as the basis for assessing the method of selecting members of the second chamber. The provision in question requires that the constitutional system as a whole complies with the following standard. Free and direct elections to the first chamber, coupled with the adopted system of choosing the members of the second chamber, should ensure the free expression of the opinion of the people in the choice of the legislature. As mentioned above, this general assessment has to take account, among other things, of the scope of the powers enjoyed by each chamber of the national parliament. The constitutional architecture should enable citizens to determine the political orientation of the legislative power, considered as a whole.

## 

## **CASE OF BAGIROV AND OTHERS v. AZERBAIJAN**

*(Applications nos. 17356/11, 30504/11, 31959/11, 31996/11 and 32060/11)*

JUDGMENT

STRASBOURG

17 December 2015

*This judgment is final. It may be subject to editorial revision.*

In the case of Bagirov and Others v. Azerbaijan,

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

Faris Vehabović, *President,* Khanlar Hajiyev,  
 Carlo Ranzoni, *judges,*  
and Milan Blaško, *Deputy Section Registrar,*

Having deliberated in private on 1 December 2015,

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

**PROCEDURE**

1.  The case originated in five applications (nos. 17356/11, 30504/11, 31959/11, 31996/11 and 32060/11) against the Republic of Azerbaijan lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by five Azerbaijani nationals, Mr Khalid Zakir oglu Bagirov, Mr Tural Feyruz oglu Abbasli, Ms Yegana Telman qizi Hajiyeva, Mr Alayif Hasan oglu Hasanov and Mr Khayyam Maharram oglu Mammadov (“the applicants”), on various dates in 2011 (see Appendix).

2.  Mr Bagirov (application no. 17356/11) was represented by Mr J. Javadov. Mr Abbasli (application no. 30504/11) was represented by Mr E. Aslanov. Ms Hajiyeva (application no. 31959/11), who had been granted legal aid, and Mr Mammadov (application no. 32060/11) were represented by Mr R. Mustafazade and Mr A. Mustafayev. All representatives were lawyers practicing in Azerbaijan. Mr Hasanov (application no. 31996/11) was self-represented. The Azerbaijani Government (“the Government”) were represented by their Agent, Mr Ç. Asgarov.

3.  On 24 June 2013 (application no. 17356/11) and 30 August 2013 (applications nos. 30504/11, 31959/11, 31996/11 and 32060/11) the applications were communicated to the Government.

**THE FACTS**

**I.  THE CIRCUMSTANCES OF THE CASE**

4.  The applicants’ dates of birth and places of residence are given in the Appendix.

5.  **The applicants stood as candidates in the parliamentary elections** of 7 November 2010 and applied for registration as candidates in various single-mandate electoral constituencies (see Appendix). Mr Khalid Bagirov (application no. 17356/11) was nominated by the Karabakh Election Bloc. The other applicants were self-nominated.

6.  As the Electoral Code required that each nomination as a candidate for parliamentary elections be supported by a minimum of 450 voters, the applicants on various dates submitted sheets containing the signature of more than 450 voters collected in support of their candidacy to their respective Constituency Electoral Commissions (“ConECs”).

7.  Before a decision by a ConEC on registering an applicant as a candidate, the signature sheets and the other registration documents submitted by the applicants had first to be verified by special working groups (*işçi qrupu*) established by the ConECs. None of the applicants were invited to participate in the examination of their sheets of signatures by the ConEC working groups.

8.  The ConECs on various dates (see Appendix) issued decisions to refuse the applicants’ requests for registration as a candidate, after the ConEC working groups had found that some of the voter signatures were invalid and that the remaining valid signatures had numbered fewer than 450. **Signatures were found to be invalid on several grounds** in each case, including: (a) falsified or repeat signatures (“signatures made repeatedly by the same individuals who had already signed sheets in the name of other individuals”); (b) incorrect personal information on voters (birth date, identity card number, and so on); (c) signatures by persons whose identity cards had expired; (d) signatures belonging to voters registered outside the constituency; (e) uncertified corrections in signature sheets; (f) “withdrawn” signatures claimed to have been obtained “by deceptive means”; and (g) unspecified “other grounds”; and so on.

9.  None of the applicants were invited to the ConEC meetings where decisions to refuse their requests for registration were taken. In each case, despite the requirements of the law, all the relevant working group documents (expert opinions, minutes of the meeting, records and tables of results of the examination), as well as the ConEC decision itself, were only made available to the applicants after the decision to refuse their registration had been taken. In many cases, some of the documents were never made available to the applicants or were only made available to them as late as during the subsequent judicial proceedings in the Baku Court of Appeal.

10.  Each applicant lodged a complaint with the Central Electoral Commission (“the CEC”) against the ConEC decision. They made some or all of the following complaints:

(a)  the findings of the ConEC working groups that such large numbers of signatures were invalid had been factually wrong, unsubstantiated, and arbitrary. Some of those findings of fact could easily have been rebutted by simply contacting the voter in question and confirming the authenticity of his or her signature. However, the ConECs had not taken any steps to corroborate their findings with any reliable evidence, such as contacting and questioning a number of voters randomly selected from the group whose signatures were suspected of being false. There were no specialist handwriting experts among the members of the ConEC working groups and therefore their findings on the authenticity of some signatures had been highly subjective and arbitrary;

(b)  the ConEC decisions to declare the signatures invalid had been arbitrary and in breach of the substantive and procedural requirements of the law. Relying on various provisions of the Electoral Code, the applicants argued that unintentional and rectifiable errors in the signature sheets could not serve as a reason to declare a voter signature invalid. If the errors found could be rectified by making the necessary corrections, the Electoral Code required the ConEC to notify the particular candidate of this within twenty‑four hours and to provide him or her with an opportunity to make corrections in the documents before deciding on his or her registration as a candidate. The ConECs had, however, declared large numbers of signatures invalid in the case of each applicant on the basis of easily rectifiable errors, without informing the candidates in advance and giving them an opportunity to make necessary corrections;

(c)  the procedure followed by the ConECs had also breached other requirements of the Electoral Code. Contrary to the requirements of Article 59.3, the applicants had not been informed in advance of the time and place of the examination of the signature sheets and their presence had not been ensured. Contrary to the requirements of Article 59.13 of the Electoral Code, the applicants had also not been provided with a copy of the minutes of the examination of the validity of the signature sheets at least twenty-four hours prior to the ConEC meeting dealing with their respective requests for registration. Subsequently, none of the applicants had been invited to the ConEC meetings, which had deprived them of the opportunity to argue for their position;

(d)  some of the grounds for invalidation were not provided by law and therefore to declare signatures invalid on those grounds had been unlawful. For example, the Electoral Code did not allow the invalidation of a signature merely because the voter’s identity document had recently expired. Likewise, it had been unlawful to invalidate signatures on unspecified and unexplained “other grounds”, because the Electoral Code provided for an exhaustive list of clear grounds for declaring signatures invalid and did not give electoral commissions any discretionary power to introduce any other grounds for that purpose;

(e)  in some cases, various local public officials and police officers had applied undue pressure on voters or signature collectors to “withdraw” their signatures on the grounds that they had been tricked to sign in the candidate’s favour “by deceptive means”.

11.  Enclosed with their complaints to the CEC, some of the applicants submitted statements by a number of voters affirming the authenticity of their signatures. However, those statements were not taken into consideration by the CEC.

12.  The CEC arranged for another examination of the signature sheets by members of its own working group. None of the applicants was invited to participate in that examination process. The CEC working group found in each case that large numbers of signatures were invalid and that the remaining valid signatures were below the minimum required by law.

13.  In each case, the number of signatures found to be invalid by the CEC working group differed from the number given by the particular ConEC working group, with differences often being significant. Furthermore, in almost every case the grounds for declaring signatures invalid given by the CEC had been different from the grounds given for the same signature sheets by the ConEC. In most cases a certain number of the total signatures were also declared invalid on the grounds that they had “appeared” to have been falsified, that is, “made by the same person in the name of other people” (*“ehtimal ki, eyni şəxs tərəfindən icra olunmuşdur”*).

14.  On various dates, the CEC rejected the applicants’ complaints (see Appendix). None of the applicants were invited to attend the CEC meeting dealing with their complaint. Moreover, in each case, all the relevant CEC documents (including the working group documents) were only made available to the applicants after the CEC decision had been taken, while in some cases such documents were never given to them at all, or were given as late as at the stage of judicial appeal proceedings.

15.  On various dates, each of the applicants lodged an appeal with the Baku Court of Appeal against the decisions of the electoral commissions. They reiterated the complaints they had made before the CEC concerning the ConEC decisions and procedures. They also raised some or all of the following complaints concerning the CEC’s decisions and procedures:

(a)  contrary to the requirements of electoral law, the CEC had failed to notify them of its meetings and ensure their presence during the examination of the signature sheets and their complaints;

(b)  contrary to the requirements of electoral law, some or all of the relevant CEC documents had not been made available to them, depriving them of the opportunity to mount an effective challenge to the CEC decisions;

(c)  the decisions of the electoral commissions had been based on expert opinions that had contained nothing more than conjecture and speculation (for example, that the signatures had “appeared” (“*ehtimal ki*”) to have been falsified), instead of properly established facts;

(d)  in those cases where the applicants had submitted additional documents in support of their complaints, the CEC had ignored those submissions and failed to take them into account.

16.  Relying ona number of provisions of domestic law, and directly on Article 3 of Protocol No. 1 to the Convention, the applicants claimed that their right to stand for election had been infringed.

17.  On various dates (see Appendix), the Baku Court of Appeal dismissed appeals by the applicants, finding that their arguments were irrelevant or unsubstantiated and that there were no grounds for quashing the decisions of the CEC.

18.  The applicants lodged cassation appeals with the Supreme Court, reiterating their previous complaints and arguing that the Baku Court of Appeal had not carried out a fair examination of the cases and had delivered unreasoned judgments.

19.  On various dates (see Appendix), the Supreme Court dismissed the applicants’ appeals as unsubstantiated, without examining their arguments in detail, and found no grounds to doubt the findings of the electoral commissions or of the Baku Court of Appeal.

**II.  RELEVANT DOMESTIC LAW AND INTERNATIONAL DOCUMENTS**

20.  The relevant domestic law and international documents concerning the rules and requirements for candidate registration, as well as observations made during the 2010 parliamentary elections in Azerbaijan, are summarised in *Tahirov v. Azerbaijan* (no. 31953/11, §§ 23-31, 11 June 2015).

**THE LAW**

**I.  JOINDER OF THE APPLICATIONS**

21.  The Court considers that, in accordance with Rule 42 § 1 of the Rules of Court, the applications should be joined, given their similar factual and legal background.

**II.  THE GOVERNMENT’S REQUEST FOR THE APPLICATIONS TO BE STRUCK OUT UNDER ARTICLE 37 OF THE CONVENTION**

22.  On 16 September 2014 the Government submitted unilateral declarations with a view to resolving the issues raised by the present applications. They further requested that the Court strike the applications out of the list of cases in accordance with Article 37 of the Convention.

23.  The applicants disagreed with the terms of the unilateral declarations and requested the Court to continue its examination of the applications.

24.  Having studied the terms of the Government’s unilateral declarations, the Court considers – for the reasons stated in the *Tahirov* judgment (ibid., §§ 33-40), which are equally applicable to the present cases and from which the Court sees no reason to deviate – that the proposed declarations do not provide a sufficient basis for concluding that respect for human rights as defined in the Convention and its Protocols does not require it to continue its examination of the present applications.

25.  Therefore, the Court refuses the Government’s request for it to strike the applications out of its list of cases under Article 37 of the Convention, and will accordingly pursue its examination of the admissibility and merits of the cases.

**III.  ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL No. 1 TO THE CONVENTION**

26.  The applicants complained under Article 3 of Protocol No. 1 to the Convention that their right to stand as a candidate in free elections had been violated because their requests for registration as candidates had been refused arbitrarily. The applicants in applications nos. 17356/11 and 31996/11 also relied on Article 13 of the Convention in respect of this complaint. The Court considers that this complaint falls to be examined only under Article 3 of Protocol No. 1 to the Convention and that no separate examination is necessary under Article 13 (compare *Namat Aliyev v. Azerbaijan*, no. 18705/06, § 57, 8 April 2010). Article 3 of Protocol No. 1 to the Convention reads as follows:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

A.  Admissibility

27.  The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B.  Merits

**1.  The parties’ submissions**

28.  The applicants submitted that, contrary to the requirements of Article 59.3 of the Electoral Code, they had not been informed about the time of the ConEC working group meetings in advance and had not been given the opportunity to attend the meeting. Contrary to the requirements of Article 59.13 of the Electoral Code, the working group documents with the results of the examination of the signature sheets had also not been made available to them prior to the ConEC meeting dealing with their registration requests. Therefore, they had been deprived of the opportunity to provide the necessary explanations to working group members in order to dispel any doubts about the authenticity of disputed signatures and to correct any shortcomings found by the working group experts in the signature sheets.

29.  Most importantly, in the applicants’ view, the decisions of the electoral commissions to declare some of the signatures invalid were for various reasons substantively incorrect, unsubstantiated or arbitrary. Some of the working groups’ factual findings had been wrong and could easily have been rebutted by simply contacting the voter in question and confirming the authenticity of his or her signature. In particular, it was not clear how the commissions and their experts had concluded that a number of signatures had been falsified. There were no specialist handwriting experts among the working-group members and, therefore, their findings that large numbers of signatures were inauthentic had been highly subjective and arbitrary. However, the electoral commissions had relied on the working‑group expert opinions without conducting any further investigation to conclusively establish the authenticity of the impugned signatures.

30.  The applicants further noted that their appeals before the CEC and the domestic courts had not been examined in an impartial manner and that their arguments had not been addressed.

31.  The Government submitted that the Contracting States enjoyed a wide margin of appreciation under Article 3 of Protocol No. 1 in establishing conditions for exercising the right to stand for election. The requirement to collect at least 450 signatures in support of a candidate had a legitimate aim of reducing the number of fringe candidates and avoiding “overcrowded” lists of registered candidates in order to prevent confusion among the electorate.

32.  The Government argued that the domestic electoral law contained sufficient safeguards preventing the adoption of arbitrary decisions to refuse registration. Firstly, signature sheets were examined by working groups specially created by electoral commissions in accordance with Article 59.2 of the Electoral Code. These working groups consisted of experts and “specialists” of the relevant State authorities, most of whom were employees of the Centre of Forensic Science of the Ministry of Justice, the Ministry of the Interior, the State Register of Immovable Property and other agencies. Before taking up their duties as working group members, they had been trained by experts with the “appropriate knowledge and experience in the relevant field”. Secondly, the electoral law required that a working group meeting had to be open to the public, that the nominated candidate be given the opportunity to attend if he or she wished to do so, and that the working group’s documents on the results of examination of signature sheets be made available to the nominated candidate twenty-four hours before the electoral commission met to decide whether to register the candidate. Thirdly, the law required the working group to indicate the basis for invalidating signatures. Fourthly, the nominated candidate had a right to lodge appeals with the CEC and courts against a decision refusing the registration. All of the above combined to form a sufficient body of safeguards preventing arbitrary refusals to register candidates.

33.  The Government submitted that in the present case both the ConEC and CEC working groups had found that large numbers of signatures collected in support of the applicants were invalid. Therefore, the decisions to refuse registration had been justified, owing to the applicants’ failure to produce at least 450 valid signatures in their support. Both the Baku Court of Appeal and the Supreme Court had correctly concluded that there were no reasons to doubt the findings of the electoral commissions’ working groups.

**2.  The Court’s assessment**

34.  The Court refers to the summaries of its case-law made in the *Tahirov* judgment (cited above, §§ 53-57), which are equally pertinent to the present applications.

35.  For the purposes of the present complaint, the Court is prepared to accept the Government’s submission that the requirement for collecting 450 supporting signatures for nomination as a candidate pursued the legitimate aim of reducing the number of fringe candidates.

36.  **It remains to be seen whether, in the present case, the procedures for monitoring compliance with this eligibility condition were conducted in a manner affording sufficient safeguards against an arbitrary decision.**

37.  Having regard to the material in the case files and the parties’ submissions, the Court notes that the issues raised by the present complaint are essentially the same as those examined in the *Tahirov* judgment. **The facts of both the *Tahirov* case and the present case are similar to a significant degree. The Court considers that the analysis and conclusions made in the *Tahirov* judgment also apply to the present case. In particular, the Court noted the existence of serious concerns regarding the impartiality of the electoral commissions, a lack of transparency in their actions, and various shortcomings in their procedure (ibid., §§ 60-61); a lack of clear and sufficient information about the professional qualifications and the criteria for the appointment of working-group experts charged with the task of examining signature sheets (ibid., §§ 63-64); failure by the electoral commissions and courts to take any further investigative steps to confirm the experts’ opinions on the authenticity or otherwise of signatures (ibid., § 65); systematic failure by the electoral commissions to abide by a number of statutory safeguards designed to protect nominated candidates from arbitrary decisions (ibid., §§ 66-68 and 69); failure by the electoral commissions and courts to take into account the relevant and substantial evidence submitted by the candidate in an attempt to challenge the findings of the working-group experts on the authenticity or otherwise of signatures (ibid., § 69); and the failure by the domestic courts to deal with appeals in an appropriate manner (ibid., § 70). Having regard to the above, the Court found that, in practice, the applicant in the *Tahirov* judgment had not been afforded sufficient safeguards to prevent an arbitrary decision to refuse his registration as a candidate.**

**38.  Having regard to the facts of the present case and their clear similarity to those of the *Tahirov* case on all relevant and crucial points, the Court sees no particular circumstances that could compel it to deviate from its findings in that judgment, and finds that in the present case each applicant’s right to stand as a candidate was breached for the same reasons as those outlined above.**

**39.  There has accordingly been a violation of Article 3 of Protocol No. 1 to the Convention.**

**IV.  ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION**

40.  The applicants in applications nos. 31959/11 and 32060/11 also complained under Article 14 of the Convention, in conjunction with the above complaint, that they had been discriminated against on the ground of their opposition-oriented political views. Article 14 provides as follows:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

41.  The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

42.  However, having regard to its above finding in relation to Article 3 of Protocol No. 1, the Court considers that it is not necessary to examine whether in these cases there has been a violation of Article 14 (compare *Tahirov*, cited above, § 75).

**V.  APPLICATION OF ARTICLE 41 OF THE CONVENTION**

43.  Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A.  Damage

44.  The applicants claimed the following amounts in euros (EUR) in respect of non-pecuniary damage:

-  Mr Khalid Bagirov (application no. 17356/11) claimed EUR 45,000;

-  Mr Tural Abbasli (application no. 30504/11) claimed EUR 10,000;

-  Ms Yegana Hajiyeva (application no. 31959/11) claimed EUR 7,500;

-  Mr Alayif Hasanov (application no. 31996/11) claimed EUR 50,000;

-  Mr Khayyam Mammadov (application no. 32060/11) claimed EUR 7,500.

45.  The Government noted that the claims were excessive and considered that EUR 7,500 would be a reasonable award in respect of non‑pecuniary damage in each case.

46.  Ruling on an equitable basis, in respect of non-pecuniary damage, the Court awards the sum of EUR 10,000 each, plus any tax that may be chargeable, to Mr Khalid Bagirov, Mr Tural Abbasli and Mr Alayif Hasanov (applications nos. 17356/11, 30504/11 and 31996/11). The Court awards the sum of EUR 7,500 each, plus any tax that may be chargeable, to Ms Yegana Hajiyeva and Mr Khayyam Mammadov (applications nos. 31959/11 and 32060/11).

B.  Costs and expenses

47.  The applicants also claimed the following amounts for the costs and expenses:

-  Mr Khalid Bagirov (application no. 17356/11) claimed EUR 551 for postage and translation expenses;

-  Mr Tural Abbasli (application no. 30504/11) claimed EUR 6,900 for legal fees incurred in the domestic proceedings and in the proceedings before the Court;

-  Ms Yegana Hajiyeva (application no. 31959/11) claimed EUR 3,000 for legal fees incurred in the domestic proceedings and in the proceedings before the Court, as well as for translation costs;

-  Mr Alayif Hasanov (application no. 31996/11) claimed EUR 700 for translation costs and legal fees incurred in the domestic proceedings;

-  Mr Khayyam Mammadov (application no. 32060/11) claimed EUR 2,900 for legal fees incurred in the domestic proceedings and in the proceedings before the Court, as well as for translation costs.

48.  The Government submitted that the claims were excessive.

49.  In respect of application no. 31996/11, the Court notes that the applicant failed to present any documents in support of his claim. Therefore, the claim should be rejected.

50.  In respect of applications nos. 31959/11 and 32060/11, the Court notes that both applicants were represented by the same lawyers, Mr R. Mustafazade and Mr A. Mustafayev, in the proceedings before the Court. The same lawyers also represented the applicant in the *Tahirov* judgment (cited above). Substantial parts of the lawyers’ submissions in relation to the different applications were similar. Accordingly, the Court considers the amounts awarded in the two above-mentioned applications should be reduced and should be awarded to both applicants jointly.

51.  Having regard to that circumstance, as well as to the documents in its possession and to its case-law, the Court considers it reasonable to award the following amounts covering costs under all heads, plus any tax that may be chargeable to the applicants:

-  EUR 551 to Mr Khalid Bagirov (application no. 17356/11);

-  EUR 3,000 to Mr Tural Abbasli (application no. 30504/11);

-  EUR 3,000 jointly to Ms Yegana Hajiyeva and Mr Khayyam Mammadov (applications nos. 31959/11 and 32060/11), less EUR 850 already paid in legal aid by the Council of Europe to Ms Yegana Hajiyeva.

C.  Default interest

52.  The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

**FOR THESE REASONS, THE COURT, UNANIMOUSLY,**

1.  *Decides* to join the applications;

2.  *Rejects* the Government’s request to strike the applications out of the Court’s list of cases;

3.  *Declares* the applications admissible;

4.  *Holds* that there has been a violation of Article 3 of Protocol No. 1 to the Convention;

5.  *Holds* that there is no need to examine the complaint under Article 14 of the Convention raised by the applicants in applications nos. 31959/11 and 32060/11;

6.  *Holds*

(a)  that the respondent State is to pay the applicants, within three months, the following amounts, to be converted into Azerbaijani new manats at the rate applicable at the date of settlement:

(i)  EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, to each applicant in applications nos. 17356/11, 30504/11 and 31996/11, in respect of non-pecuniary damage;

(ii) EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable, to each applicant in applications nos. 31959/11 and 32060/11, in respect of non-pecuniary damage;

(iii)  EUR 551 (five hundred and fifty one euros), plus any tax that may be chargeable to the applicant, to the applicant in application no. 17356/11, in respect of costs and expenses;

(iv)  EUR 3,000 (three thousand euros), plus any tax that may be chargeable to the applicant, to the applicant in application no. 30504/11, in respect of costs and expenses;

(v)  EUR 2,150 (two thousand one hundred and fifty euros), plus any tax that may be chargeable to the applicants, to the applicants in applications nos. 31959/11 and 32060/11 jointly, in respect of costs and expenses, to be paid directly into their representatives’ bank account;

(b)  that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

7.  *Dismisses* the remainder of the applicants’ claim for just satisfaction.

Done in English, and notified in writing on 17 December 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško Faris Vehabović  
 Deputy Registrar President

## 

## **CASE OF GASIMLI AND OTHERS v. AZERBAIJAN**

*(Applications nos. 25330/11, 25340/11, 25345/11, 25361/11 and 25645/11)*

JUDGMENT

STRASBOURG

17 December 2015

*This judgment is final. It may be subject to editorial revision.*

In the case of Gasimli and Others v. Azerbaijan,

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

Faris Vehabović, *President,* Khanlar Hajiyev, Carlo Ranzoni, *judges,*  
and Milan Blaško, *Deputy Section Registrar,*

Having deliberated in private on 1 December 2015,

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

**PROCEDURE**

1.  The case originated in five applications (nos. 25330/11, 25340/11, 25345/11, 25361/11 and 25645/11) against the Republic of Azerbaijan lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by five Azerbaijani nationals, Mr Ali Salah oglu Gasimli, Mr Tazakhan Maharram oglu Miralamli, Mr Parviz Kamran oglu Hashimov, Mr Natig Mehman oglu Jafarov and Mr Eyyub Umud oglu Umudov (“the applicants”), on various dates in 2011 (see Appendix).

2.  The applicants were represented by Mr H. Hasanov, a lawyer practising in Azerbaijan. The Azerbaijani Government (“the Government”) were represented by their Agent, Mr Ç. Asgarov.

3.  On 24 June 2013 the applications were communicated to the Government.

**THE FACTS**

**I.  THE CIRCUMSTANCES OF THE CASE**

4.  The applicants’ dates of birth and places of residence are given in the Appendix.

5.  **The applicants stood as candidates in the parliamentary elections** of 7 November 2010 and applied for registration as candidates in various single–mandate electoral constituencies (see Appendix). Mr Natig Jafarov (application no. 25361/11) was self-nominated, while Mr Ali Gasimli, Mr Tazakhan Miralamli, Mr Parviz Hashimov and Mr Eyyub Umudov (applications nos. 25330/11, 25340/11, 25345/11 and 25645/11 respectively) were nominated by the coalition of the Popular Front and Müsavat parties.

6.  As the Electoral Code required that each nomination as a candidate for parliamentary elections be supported by a minimum of 450 voters, the applicants on various dates submitted sheets containing the signature of more than 450 voters collected in support of their candidacy to their respective Constituency Electoral Commissions (“ConECs”).

7.  Before a decision by a ConEC on registering an applicant as a candidate, the signature sheets and the other registration documents submitted by the applicants had first to be verified by special working groups (*işçi qrupu*) established by the ConECs. None of the applicants were invited to participate in the examination of their sheets of signatures by the ConEC working groups.

8.  The ConECs on various dates (see Appendix) issued decisions to refuse the applicants’ requests for registration as a candidate after the ConEC working groups had found that some of the voter signatures were invalid and that the remaining valid signatures had numbered fewer than 450. **Signatures were found to be invalid on several grounds in each case, including:** (a) falsified or repeat signatures (“signatures made repeatedly by the same individuals who had already signed sheets in the name of other individuals”); (b) incorrect personal information on voters (birth date, identity card number, and so on); (c) signatures by persons whose identity cards had expired; (d) signatures belonging to voters registered outside the constituency; (e) uncertified corrections in signature sheets; (f) signatures claimed to have been obtained “by deceptive means”; and (g) unspecified “other grounds”.

9.  None of the applicants were invited to the ConEC meetings where decisions to refuse their requests for registration were taken. In each case, despite the requirements of the law, all the relevant working group documents (expert opinions, minutes of the meeting, records and tables of the results of the examination), as well as the ConEC decision itself, were only made available to the applicants after the decision to refuse their registration had been taken. In many cases, some of the documents were never made available to the applicants or were only made available to them as late as during the subsequent judicial proceedings in the Baku Court of Appeal.

10.  Each applicant lodged a complaint with the Central Electoral Commission (“the CEC”) against the ConEC decisions. They made some or all of the following complaints:

(a)  the findings of the ConEC working groups that such large numbers of signatures were invalid had been factually wrong, unsubstantiated, and arbitrary. Some of those findings of fact could easily have been rebutted by simply contacting the voter in question and confirming the authenticity of his or her signature. However, the ConECs had not taken any steps to corroborate their findings with any reliable evidence, such as contacting and questioning a number of voters randomly selected from the group whose signatures were suspected of being false. There were no specialist handwriting experts among the members of the ConEC working groups and therefore their findings on the authenticity of some signatures had been highly subjective and arbitrary;

(b)  the ConEC decisions to declare the signatures invalid had been arbitrary and in breach of the substantive and procedural requirements of the law. Relying on various provisions of the Electoral Code, the applicants argued that unintentional and rectifiable errors in the signature sheets could not serve as a reason to declare a voter signature invalid. If the errors found could be rectified by making the necessary corrections, the Electoral Code required the ConEC to notify the particular candidate of this within twenty‑four hours and to provide him or her with an opportunity to make corrections in the documents before deciding on his or her registration as a candidate. The ConECs had, however, declared large numbers of signatures invalid in the case of each applicant on the basis of easily rectifiable errors, without informing the candidates in advance and giving them an opportunity to make the necessary corrections;

(c)  the procedure followed by the ConECs had also breached other requirements of the Electoral Code. Contrary to the requirements of Article 59.3, the applicants had not been informed in advance of the time and place of the examination of the signature sheets and their presence had not been ensured. Contrary to Article 59.13 of the Electoral Code, the applicants had also not been provided with a copy of the minutes of the examination of the validity of the signature sheets at least twenty-four hours prior to the ConEC meeting dealing with their respective requests for registration. Subsequently, none of the applicants had been invited to the ConEC meetings, which had deprived them of the opportunity to argue for their position;

(d)  some of the grounds for invalidation were not provided by law and therefore to declare signatures invalid on those grounds had been unlawful. For example, the Electoral Code did not allow the invalidation of a signature merely because the voter’s identity document had recently expired. Likewise, it had been unlawful to invalidate signatures on unspecified and unexplained “other grounds”, because the Electoral Code provided for an exhaustive list of clear grounds for declaring signatures invalid and did not give electoral commissions any discretionary power to introduce any other grounds for that purpose;

(e)  in some cases, various local public officials and police officers had applied undue pressure on voters or signature collectors to “withdraw” their signatures on the grounds that they had been tricked to sign in the candidate’s favour “by deceptive means”.

11.  Enclosed with their complaints to the CEC, some of the applicants submitted statements by a number of voters affirming the authenticity of their signatures. However, those statements were not taken into consideration by the CEC.

12.  The CEC arranged for another examination of the signature sheets by members of its own working group. None of the applicants was invited to participate in that examination process. The CEC working group found in each case that large numbers of signatures were invalid and that the remaining valid signatures were below the minimum required by law.

13.  In each case, the number of signatures found to be invalid by the CEC working group differed from the number given by the particular ConEC working group, with the differences often being significant. Furthermore, in almost every case, the grounds for declaring signatures invalid given by the CEC had been different from the grounds given for the same signature sheets by the ConEC. In most cases a certain number of the total signatures were also declared invalid on the grounds that they had “appeared” to have been falsified, that is, “made by the same person in the name of other people” (*“ehtimal ki, eyni şəxs tərəfindən icra olunmuşdur”*).

14.  On various dates, the CEC also rejected the applicants’ complaints (see Appendix). None of the applicants were invited to attend the CEC meeting dealing with their complaint. Moreover, in each case, all the relevant CEC documents (including the working group documents) were only made available to the applicants after the CEC decision had been taken, while in some cases such documents were never given to them at all, or were given as late as at the stage of judicial appeal proceedings.

15.  On various dates, each of the applicants lodged an appeal with the Baku Court of Appeal against the decisions of the electoral commissions. They reiterated the complaints they had made before the CEC concerning the ConEC decisions and procedures. They also raised some or all of the following complaints concerning the CEC’s decisions and procedures:

(a)  contrary to the requirements of electoral law, the CEC had failed to notify them of its meetings and ensure their presence during the examination of the signature sheets and their complaints;

(b)  contrary to the requirements of electoral law, some or all of the relevant CEC documents had not been made available to them, depriving them of the opportunity to mount an effective challenge to the CEC decisions;

(c)  the decisions of the electoral commissions had been based on expert opinions that had contained nothing more than conjecture and speculation (for example, that the signatures had “appeared” (“*ehtimal ki*”) to have been falsified), instead of properly established facts;

(d)  in those cases where the applicants had submitted additional documents in support of their complaints, the CEC had ignored those submissions and failed to take them into account.

16.  Relying ona number of provisions of domestic law, and directly on Article 3 of Protocol No. 1 to the Convention, the applicants claimed that their right to stand for election had been infringed.

17.  On various dates (see Appendix), the Baku Court of Appeal dismissed appeals by the applicants, finding that their arguments were irrelevant or unsubstantiated and that there were no grounds for quashing the decisions of the CEC.

18.  The applicants lodged cassation appeals with the Supreme Court, reiterating their previous complaints and arguing that the Baku Court of Appeal had not carried out a fair examination of the cases and had delivered unreasoned judgments.

19.  On various dates (see Appendix), the Supreme Court dismissed the applicants’ appeals as unsubstantiated, without examining their arguments in detail, and found no grounds to doubt the findings of the electoral commissions or of the Baku Court of Appeal.

**II.  RELEVANT DOMESTIC LAW AND INTERNATIONAL DOCUMENTS**

20.  The relevant domestic law and international documents concerning the rules and requirements for candidate registration, as well as observations made during the 2010 parliamentary elections in Azerbaijan, are summarised in *Tahirov v. Azerbaijan* (no. 31953/11, §§ 23-31, 11 June 2015).

**THE LAW**

**I.  JOINDER OF THE APPLICATIONS**

21.  The Court considers that, in accordance with Rule 42 § 1 of the Rules of Court, the applications should be joined, given their similar factual and legal background.

**II.  THE GOVERNMENT’S REQUEST FOR THE APPLICATIONS TO BE STRUCK OUT UNDER ARTICLE 37 OF THE CONVENTION**

22.  On 16 September 2014 the Government submitted unilateral declarations with a view to resolving the issues raised by the present applications. They further requested that the Court strike the applications out of the list of cases in accordance with Article 37 of the Convention.

23.  The applicants disagreed with the terms of the unilateral declarations and requested the Court to continue its examination of the applications.

24.  Having studied the terms of the Government’s unilateral declarations, the Court considers – for the reasons stated in the *Tahirov* judgment (ibid., §§ 33-40), which are equally applicable to the present cases and from which the Court sees no reason to deviate – that the proposed declarations do not provide a sufficient basis for concluding that respect for human rights as defined in the Convention and its Protocols does not require it to continue its examination of the present applications.

25.  Therefore, the Court refuses the Government’s request for it to strike the applications out of its list of cases under Article 37 of the Convention, and will accordingly pursue its examination of the admissibility and merits of the cases.

**III.  ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL No. 1 TO THE CONVENTION**

26.  The applicants complained under Article 3 of Protocol No. 1 to the Convention and Article 13 of the Convention that their right to stand as a candidate in free elections had been violated because their requests for registration as candidates had been refused arbitrarily. The Court considers that this complaint falls to be examined only under Article 3 of Protocol No. 1 to the Convention and that no separate examination is necessary under Article 13 (compare *Namat Aliyev v. Azerbaijan*, no. 18705/06, § 57, 8 April 2010). Article 3 of Protocol No. 1 to the Convention reads as follows:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

A.  Admissibility

27.  The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B.  Merits

1.  The parties’ submissions

28.  The applicants submitted that, contrary to the requirements of Article 59.3 of the Electoral Code, they had not been informed about the time of the ConEC working group meetings in advance and had not been given the opportunity to attend the meeting. Contrary to the requirements of Article 59.13 of the Electoral Code, the working group documents with the results of the examination of the signature sheets had also not been made available to them prior to the ConEC meeting dealing with their registration requests. Therefore, they had been deprived of the opportunity to provide the necessary explanations to working group members in order to dispel any doubts about the authenticity of disputed signatures and to correct any shortcomings found by the working group experts in the signature sheets.

29.  Most importantly, in the applicants’ view, the decisions of the electoral commissions to declare some of the signatures invalid were for various reasons substantively incorrect, unsubstantiated or arbitrary. Some of the working groups’ factual findings had been wrong and could easily have been rebutted by simply contacting the voter in question and confirming the authenticity of his or her signature. In particular, it was not clear how the commissions and their experts had concluded that a number of signatures had been falsified. There were no specialist handwriting experts among the working-group members and, therefore, their findings that large numbers of signatures were inauthentic had been highly subjective and arbitrary. However, the electoral commissions had relied on the working‑group expert opinions without conducting any further investigation to conclusively establish the authenticity of the impugned signatures.

30.  The applicants further noted that their appeals before the CEC and the domestic courts had not been examined in an impartial manner and that their arguments had not been addressed.

31.  The Government submitted that the Contracting States enjoyed a wide margin of appreciation under Article 3 of Protocol No. 1 in establishing conditions for exercising the right to stand for election. The requirement to collect at least 450 signatures in support of a candidate had a legitimate aim of reducing the number of fringe candidates and avoiding “overcrowded” lists of registered candidates in order to prevent confusion among the electorate.

32.  The Government argued that the domestic electoral law contained sufficient safeguards preventing the adoption of arbitrary decisions to refuse registration. Firstly, signature sheets were examined by working groups specially created by electoral commissions in accordance with Article 59.2 of the Electoral Code. These working groups consisted of experts and “specialists” of the relevant State authorities, most of whom were employees of the Centre of Forensic Science of the Ministry of Justice, the Ministry of the Interior, the State Register of Immovable Property and other agencies. Before taking up their duties as working group members, they had been trained by experts with the “appropriate knowledge and experience in the relevant field”. Secondly, the electoral law required that a working group meeting had to be open to the public, that the nominated candidate be given the opportunity to attend if he or she wished to do so, and that the working group’s documents on the results of examination of signature sheets be made available to the nominated candidate twenty-four hours before the electoral commission met to decide whether to register the candidate. Thirdly, the law required the working group to indicate the basis for invalidating signatures. Fourthly, the nominated candidate had a right to lodge appeals with the CEC and courts against a decision refusing the registration. All of the above combined to form a sufficient body of safeguards preventing arbitrary refusals to register candidates.

33.  The Government submitted that in the present case, both the ConEC and CEC working groups had found that large numbers of signatures collected in support of the applicants were invalid. Therefore, the decisions to refuse registration had been justified, owing to the applicants’ failure to produce at least 450 valid signatures in their support. In their appeal to the Baku Court of Appeal, in which they had challenged the findings of the electoral commissions’ working groups, the applicants had failed to request that the court order an expert examination by a graphologist. Both the Baku Court of Appeal and the Supreme Court had correctly concluded that there were no reasons to doubt the findings of the electoral commissions’ working groups.

2.  The Court’s assessment

34.  The Court refers to the summaries of its case-law made in the *Tahirov* judgment (cited above, §§ 53-57), which are equally pertinent to the present applications.

35.  For the purposes of the present complaint, the Court is prepared to accept the Government’s submission that the requirement for collecting 450 supporting signatures for nomination as a candidate pursued the legitimate aim of reducing the number of fringe candidates.

36.  It remains to be seen whether, in the present case, the procedures for monitoring compliance with this eligibility condition were conducted in a manner affording sufficient safeguards against an arbitrary decision.

37.  Having regard to the material in the case files and the parties’ submissions, the Court notes that the issues raised by the present complaint are essentially the same as those examined in the *Tahirov* judgment. The facts of both the *Tahirov* case and the present case are similar to a significant degree. The Court considers that the analysis and conclusions it made in the *Tahirov* judgment also apply to the present case. In particular, the Court noted the existence of serious concerns regarding the impartiality of the electoral commissions, a lack of transparency in their actions, and various shortcomings in their procedures (ibid., §§ 60-61); a lack of clear and sufficient information about the professional qualifications and the criteria for the appointment of working-group experts charged with the task of examining signature sheets (ibid., §§ 63-64); failure by the electoral commissions and courts to take any further investigative steps to confirm the experts’ opinions on the authenticity or otherwise of signatures (ibid., § 65); systematic failure by the electoral commissions to abide by a number of statutory safeguards designed to protect nominated candidates from arbitrary decisions (ibid., §§ 66-68 and 69); failure by the electoral commissions and courts to take into account the relevant and substantial evidence submitted by the candidate in an attempt to challenge the findings of the working‑group experts on the authenticity or otherwise of signatures (ibid., § 69); and the failure by the domestic courts to deal with appeals in an appropriate manner (ibid., § 70). Having regard to the above, **the Court found that, in practice, the applicant in the *Tahirov* judgment had not been afforded sufficient safeguards to prevent an arbitrary decision to refuse his registration as a candidate.**

38.  **Having regard to the facts of the present case and their clear similarity to those of the *Tahirov* case on all relevant and crucial points, the Court sees no particular circumstances that could compel it to deviate from its findings in that judgment, and finds that in the present case each applicant’s right to stand as a candidate was breached for the same reasons as those outlined above.**

**39.  There has accordingly been a violation of Article 3 of Protocol No. 1 to the Convention.**

**IV.  ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION**

40.  The applicants in applications nos. 25330/11, 25340/11, 25345/11 and 25645/11 also complained under Article 14 of the Convention, in conjunction with the above complaint, that their electoral rights had been breached as part of a series of deliberate and unlawful practical measures implemented by the Government, and which were aimed at restricting the participation of the political opposition in the elections and denying its candidates equal status to pro-Government candidates. Article 14 provides as follows:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

41.  The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

42.  However, having regard to its above finding in relation to Article 3 of Protocol No. 1, the Court considers that it is not necessary to examine whether in these cases there has been a violation of Article 14 (compare *Tahirov*, cited above, § 75).

**V.  APPLICATION OF ARTICLE 41 OF THE CONVENTION**

43.  Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A.  Damage

44.  Each applicant claimed 100,000 euros (EUR) in respect of non‑pecuniary damage.

45.  In connection with application no. 25345/11, the Government noted that the claim was excessive and considered that EUR 7,500 would be a reasonable award in respect of non-pecuniary damage. The Government did not submit any comments in connection with the other four applications.

46.  Ruling on an equitable basis, the Court awards each applicant the sum of EUR 10,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B.  Costs and expenses

47.  Each applicant also claimed EUR 1,600 for legal fees incurred before the domestic courts and before the Court.

48.  In connection with application no. 25345/11, the Government accepted the applicant’s claim. The Government did not submit any comments in connection with the other four applications.

49.  The Court notes that all the applicants were represented by the same lawyer, Mr H. Hasanov, in the proceedings before the Court and that substantial parts of the lawyer’s submissions in relation to the different applications were similar. Having regard to that circumstance, as well as to the documents in its possession and to its case-law, the Court considers it reasonable to award a total sum of EUR 5,000 to all five applicants jointly, covering costs under all heads, plus any tax that may be chargeable to the applicants.

C.  Default interest

50.  The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

**FOR THESE REASONS, THE COURT, UNANIMOUSLY,**

1.  *Decides* to join the applications;

2.  *Rejects* the Government’s request to strike the applications out of the Court’s list of cases;

3.  *Declares* the applications admissible;

4.  *Holds* that there has been a violation of Article 3 of Protocol No. 1 to the Convention;

5.  *Holds* that there is no need to examine the complaint under Article 14 of the Convention raised by the applicants in applications nos. 25330/11, 25340/11, 25345/11 and 25645/11;

6.  *Holds*

(a)  that the respondent State is to pay the applicants, within three months, the following amounts,to be converted into Azerbaijani new manats at the rate applicable at the date of settlement:

(i)  EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, to each applicant, in respect of non-pecuniary damage;

(ii)  EUR 5,000 (five thousand euros), plus any tax that may be chargeable to the applicants, to all five applicants jointly, in respect of costs and expenses;

(b)  that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

7.  *Dismisses* the remainder of the applicants’ claim for just satisfaction.

Done in English, and notified in writing on 17 December 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško Faris Vehabović  
 Deputy Registrar President

## 

## **CASE OF VUGAR ALIYEV AND OTHERS v. AZERBAIJAN**

*(Applications nos. 24853/11, 28465/11, 28502/11 and 31970/11)*

JUDGMENT

STRASBOURG

17 December 2015

*This judgment is final. It may be subject to editorial revision.*

In the case of Vugar Aliyev and Others v. Azerbaijan,

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

Faris Vehabović, *President,* Khanlar Hajiyev, Carlo Ranzoni, *judges,*  
and Milan Blaško, *Deputy Section Registrar,*

Having deliberated in private on 1 December 2015,

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

**PROCEDURE**

1.  The case originated in four applications (nos. 24853/11, 28465/11, 28502/11 and 31970/11) against the Republic of Azerbaijan lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by four Azerbaijani nationals, Mr Vugar Sabir oglu Aliyev, Mr Mohubbat Nariman oglu Jabbarov, Mr Vahid Fazil oglu Jafarov and Mr Razi Umudali oglu Abasov (“the applicants”), on various dates in 2011 (see Appendix).

2.  The applicants were represented by Mr K. Bagirov, a lawyer practising in Azerbaijan. The Azerbaijani Government (“the Government”) were represented by their Agent, Mr Ç. Asgarov.

3.  On 24 June 2013 (application no. 24853/11) and 30 August 2013 (applications nos. 28465/11, 28502/11 and 31970/11) the applications were communicated to the Government.

**THE FACTS**

**I.  THE CIRCUMSTANCES OF THE CASE**

4.  The applicants’ dates of birth and places of residence are given in the Appendix.

5.  The applicants **were nominated by the Karabakh Election Bloc as candidates in the parliamentary elections of 7 November 2010 and applied for registration as candidates in various single-mandate electoral constituencies** (see Appendix).

6.  As the Electoral Code required that each nomination as a candidate for parliamentary elections be supported by a minimum of 450 voters, the applicants on various dates submitted sheets containing the signature of more than 450 voters collected in support of their candidacy to their respective Constituency Electoral Commissions (“ConECs”).

7.  Before a decision by a ConEC on registering an applicant as a candidate, the signature sheets and the other registration documents submitted by the applicants had first to be verified by special working groups (*işçi qrupu*) established by the ConECs. **None of the applicants were invited to participate in the examination of their sheets of signatures by the ConEC working groups.**

8.  **The ConECs on various dates (see Appendix) issued decisions to refuse the applicants’ requests for registration as a candidate, after the ConEC working groups had found that some of the voter signatures were invalid and that the remaining valid signatures had numbered fewer than 450.** Signatures were found to be invalid on several grounds in each case, including: (a) falsified or repeat signatures (“signatures made repeatedly by the same individuals who had already signed sheets in the name of other individuals”); (b) incorrect personal information on voters (birth date, identity card number, and so on); (c) signatures by persons whose identity cards had expired; (d) signatures belonging to voters registered outside the constituency; (e) uncertified corrections in signature sheets; (f) withdrawal by the signature collector of his or her own signature certifying a list, invalidating the entire list of 50 signatures; and (g) unspecified “other grounds”; and so on.

9.  **None of the applicants were invited to the ConEC meetings where decisions to refuse their requests for registration were taken. In each case, despite the requirements of the law, all the relevant working group documents (expert opinions, minutes of the meeting, records and tables of results of the examination), as well as the ConEC decision itself, were only made available to the applicants after the decision to refuse their registration had been taken. In many cases, some of the documents were never made available to the applicants or were only made available to them as late as during the subsequent judicial proceedings in the Baku Court of Appeal.**

10.  Each applicant lodged a complaint with the Central Electoral Commission (“the CEC”) against the ConEC decision. They made some or all of the following complaints:

(a)  the findings of the ConEC working groups that such large numbers of signatures were invalid had been factually wrong, unsubstantiated, and arbitrary. Some of those findings of fact could easily have been rebutted by simply contacting the voter in question and confirming the authenticity of his or her signature. However, the ConECs had not taken any steps to corroborate their findings with any reliable evidence, such as contacting and questioning a number of voters randomly selected from the group whose signatures were suspected of being false. There were no specialist handwriting experts among the members of the ConEC working groups and therefore their findings on the authenticity of some signatures had been highly subjective and arbitrary;

(b)  the ConEC decisions to declare the signatures invalid had been arbitrary and in breach of the substantive and procedural requirements of the law. Relying on various provisions of the Electoral Code, the applicants argued that unintentional and rectifiable errors in the signature sheets could not serve as a reason to declare a voter signature invalid. If the errors found could be rectified by making the necessary corrections, the Electoral Code required the ConEC to notify the particular candidate of this within twenty‑four hours and to provide him or her with an opportunity to make corrections in the documents before deciding on his or her registration as a candidate. The ConECs had, however, declared large numbers of signatures invalid in the case of each applicant on the basis of easily rectifiable errors, without informing the candidates in advance and giving them an opportunity to make necessary corrections;

(c)  the procedure followed by the ConECs had also breached other requirements of the Electoral Code. Contrary to the requirements of Article 59.3, the applicants had not been informed in advance of the time and place of the examination of the signature sheets and their presence had not been ensured. Contrary to the requirements of Article 59.13 of the Electoral Code, the applicants had also not been provided with a copy of the minutes of the examination of the validity of the signature sheets at least twenty-four hours prior to the ConEC meeting dealing with their respective requests for registration. Subsequently, none of the applicants had been invited to the ConEC meetings, which had deprived them of the opportunity to argue for their position;

(d)  some of the grounds for invalidation were not provided by law and therefore to declare signatures invalid on these grounds had been unlawful. For example, the Electoral Code did not allow the invalidation of a signature merely because the voter’s identity document had recently expired;

(e)  in some cases, various local public officials and police officers had applied undue pressure on voters or signature collectors to “withdraw” their signatures on the grounds that they had been tricked to sign in the candidate’s favour “by deceptive means”.

11.  The CEC arranged for another examination of the signature sheets by members of its own working group. None of the applicants was invited to participate in that examination process. The CEC working group found in each case that large numbers of signatures were invalid and that the remaining valid signatures were below the minimum required by law.

12.  In each case, the number of signatures found to be invalid by the CEC working group differed from the number given by the particular ConEC working group, with differences often being significant. Furthermore, in almost every case the grounds for declaring signatures invalid given by the CEC had been different from the grounds given for the same signature sheets by the ConEC. In most cases a certain number of the total signatures were also declared invalid on the grounds that they had “appeared” to have been falsified, that is, “made by the same person in the name of other people” (*“ehtimal ki, eyni şəxs tərəfindən icra olunmuşdur”*).

13.  On various dates, the CEC rejected the applicants’ complaints (see Appendix). None of the applicants were invited to attend the CEC meeting dealing with their complaint. Moreover, in each case, all the relevant CEC documents (including the working group documents) were only made available to the applicants after the CEC decision had been taken, while in some cases such documents were never given to them at all, or were given as late as at the stage of judicial appeal proceedings.

14.  On various dates, each of the applicants lodged an appeal with the Baku Court of Appeal against the decisions of the electoral commissions. They reiterated the complaints they had made before the CEC concerning the ConEC decisions and procedures. They also raised some or all of the following complaints concerning the CEC’s decisions and procedures:

(a)  contrary to the requirements of electoral law, the CEC had failed to notify them of its meetings and ensure their presence during the examination of the signature sheets and their complaints;

(b)  contrary to the requirements of electoral law, some or all of the relevant CEC documents had not been made available to them, depriving them of the opportunity to mount an effective challenge to the CEC decisions;

(c)  the decisions of the electoral commissions had been based on expert opinions that had contained nothing more than conjecture and speculation (for example, that the signatures had “appeared” (“*ehtimal ki*”) to have been falsified), instead of properly established facts;

(d)  in those cases where the applicants had submitted additional documents in support of their complaints, the CEC had ignored those submissions and failed to take them into account.

15.  Relying ona number of provisions of domestic law, and directly on Article 3 of Protocol No. 1 to the Convention, the applicants claimed that their right to stand for election had been infringed.

16.  On various dates (see Appendix), the Baku Court of Appeal dismissed appeals by the applicants, finding that their arguments were irrelevant or unsubstantiated and that there were no grounds for quashing the decisions of the CEC.

17.  The applicants lodged cassation appeals with the Supreme Court, reiterating their previous complaints and arguing that the Baku Court of Appeal had not carried out a fair examination of the cases and had delivered unreasoned judgments.

18.  On various dates (see Appendix), the Supreme Court dismissed the applicants’ appeals as unsubstantiated, without examining their arguments in detail, and found no grounds to doubt the findings of the electoral commissions or of the Baku Court of Appeal.

**II.  RELEVANT DOMESTIC LAW AND INTERNATIONAL DOCUMENTS**

19.  The relevant domestic law and international documents concerning the rules and requirements for candidate registration, as well as observations made during the 2010 parliamentary elections in Azerbaijan, are summarised in *Tahirov v. Azerbaijan* (no. 31953/11, §§ 23-31, 11 June 2015).

**THE LAW**

**I.  JOINDER OF THE APPLICATIONS**

20.  The Court considers that, in accordance with Rule 42 § 1 of the Rules of Court, the applications should be joined, given their similar factual and legal background.

**II.  THE GOVERNMENT’S REQUEST FOR THE APPLICATIONS TO BE STRUCK OUT UNDER ARTICLE 37 OF THE CONVENTION**

21.  On 16 September 2014 the Government submitted unilateral declarations with a view to resolving the issues raised by the present applications. They further requested that the Court strike the applications out of the list of cases in accordance with Article 37 of the Convention.

22.  The applicants disagreed with the terms of the unilateral declarations and requested the Court to continue its examination of the applications.

23.  Having studied the terms of the Government’s unilateral declarations, the Court considers – for the reasons stated in the *Tahirov* judgment (ibid., §§ 33-40), which are equally applicable to the present cases and from which the Court sees no reason to deviate – that the proposed declarations do not provide a sufficient basis for concluding that respect for human rights as defined in the Convention and its Protocols does not require it to continue its examination of the present applications.

24.  Therefore, the Court refuses the Government’s request for it to strike the applications out of its list of cases under Article 37 of the Convention, and will accordingly pursue its examination of the admissibility and merits of the cases.

**III.  ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL No. 1 TO THE CONVENTION**

25.  The applicants complained under Article 3 of Protocol No. 1 to the Convention and Article 13 of the Convention that their right to stand as a candidate in free elections had been violated because their requests for registration as candidates had been refused arbitrarily. The Court considers that this complaint falls to be examined only under Article 3 of Protocol No. 1 to the Convention and that no separate examination is necessary under Article 13 (compare *Namat Aliyev v. Azerbaijan*, no. 18705/06, § 57, 8 April 2010). Article 3 of Protocol No. 1 to the Convention reads as follows:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

A.  Admissibility

26.  The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B.  Merits

1.  The parties’ submissions

27.  The applicants submitted that, contrary to the requirements of Article 59.3 of the Electoral Code, they had not been informed about the time of the ConEC working group meetings in advance and had not been given the opportunity to attend the meeting. Contrary to the requirements of Article 59.13 of the Electoral Code, the working group documents with the results of the examination of the signature sheets had also not been made available to them prior to the ConEC meeting dealing with their registration requests. Therefore, they had been deprived of the opportunity to provide the necessary explanations to working group members in order to dispel any doubts about the authenticity of disputed signatures and to correct any shortcomings found by the working group experts in the signature sheets.

28.  Most importantly, in the applicants’ view, the decisions of the electoral commissions to declare some of the signatures invalid were for various reasons substantively incorrect, unsubstantiated or arbitrary. Some of the working groups’ factual findings had been wrong and could easily have been rebutted by simply contacting the voter in question and confirming the authenticity of his or her signature. In particular, it was not clear how the commissions and their experts had concluded that a number of signatures had been falsified. There were no specialist handwriting experts among the working-group members and, therefore, their findings that large numbers of signatures were inauthentic had been highly subjective and arbitrary. However, the electoral commissions had relied on the working-group expert opinions without conducting any further investigation to conclusively establish the authenticity of the impugned signatures.

29.  The applicants further noted that their appeals before the CEC and the domestic courts had not been examined in an impartial manner and that their arguments had not been addressed.

30.  The Government submitted that the Contracting States enjoyed a wide margin of appreciation under Article 3 of Protocol No. 1 in establishing conditions for exercising the right to stand for election. The requirement to collect at least 450 signatures in support of a candidate had a legitimate aim of reducing the number of fringe candidates and avoiding “overcrowded” lists of registered candidates in order to prevent confusion among the electorate.

31.  The Government argued that the domestic electoral law contained sufficient safeguards preventing the adoption of arbitrary decisions to refuse registration. Firstly, signature sheets were examined by working groups specially created by electoral commissions in accordance with Article 59.2 of the Electoral Code. These working groups consisted of experts and “specialists” of the relevant State authorities, most of whom were employees of the Centre of Forensic Science of the Ministry of Justice, the Ministry of the Interior, the State Register of Immovable Property and other agencies. Before taking up their duties as working group members, they had been trained by experts with the “appropriate knowledge and experience in the relevant field”. Secondly, the electoral law required that a working group meeting had to be open to the public, that the nominated candidate be given the opportunity to attend if he or she wished to do so, and that the working group’s documents on the results of examination of signature sheets be made available to the nominated candidate twenty-four hours before the electoral commission met to decide whether to register the candidate. Thirdly, the law required the working group to indicate the basis for invalidating signatures. Fourthly, the nominated candidate had a right to lodge appeals with the CEC and courts against a decision refusing the registration. All of the above combined to form a sufficient body of safeguards preventing arbitrary refusals to register candidates.

32.  The Government submitted that in the present case both the ConEC and CEC working groups had found that large numbers of signatures collected in support of the applicants were invalid. Therefore, the decisions to refuse registration had been justified, owing to the applicants’ failure to produce at least 450 valid signatures in their support. Both the Baku Court of Appeal and the Supreme Court had correctly concluded that there were no reasons to doubt the findings of the electoral commissions’ working groups.

**2.  The Court’s assessment**

33.  The Court refers to the summaries of its case-law made in the *Tahirov* judgment (cited above, §§ 53-57), which are equally pertinent to the present applications.

34.  For the purposes of the present complaint, the Court is prepared to accept the Government’s submission that the requirement for collecting 450 supporting signatures for nomination as a candidate pursued the legitimate aim of reducing the number of fringe candidates.

35.  It remains to be seen whether, in the present case, the procedures for monitoring compliance with this eligibility condition were conducted in a manner affording sufficient safeguards against an arbitrary decision.

36.  Having regard to the material in the case files and the parties’ submissions, the Court notes that the issues raised by the present complaint are essentially the same as those examined in the *Tahirov* judgment. The facts of both the *Tahirov* case and the present case are similar to a significant degree. **The Court considers that the analysis and conclusions made in the *Tahirov* judgment also apply to the present case. In particular, the Court noted the existence of serious concerns regarding the impartiality of the electoral commissions, a lack of transparency in their actions, and various shortcomings in their procedure (ibid., §§ 60-61); a lack of clear and sufficient information about the professional qualifications and the criteria for the appointment of working-group experts charged with the task of examining signature sheets (ibid., §§ 63-64); failure by the electoral commissions and courts to take any further investigative steps to confirm the experts’ opinions on the authenticity or otherwise of signatures (ibid., § 65); systematic failure by the electoral commissions to abide by a number of statutory safeguards designed to protect nominated candidates from arbitrary decisions (ibid., §§ 66-68 and 69); failure by the electoral commissions and courts to take into account the relevant and substantial evidence submitted by the candidate in an attempt to challenge the findings of the working-group experts on the authenticity or otherwise of signatures (ibid., § 69); and the failure by the domestic courts to deal with appeals in an appropriate manner (ibid., § 70). Having regard to the above, the Court found that, in practice, the applicant in the *Tahirov* judgment had not been afforded sufficient safeguards to prevent an arbitrary decision to refuse his registration as a candidate.**

37.  Having regard to the facts of the present case and their clear similarity to those of the *Tahirov* case on all relevant and crucial points, the **Court sees no particular circumstances that could compel it to deviate from its findings in that judgment, and finds that in the present case each applicant’s right to stand as a candidate was breached for the same reasons as those outlined above.**

**38.  There has accordingly been a violation of Article 3 of Protocol No. 1 to the Convention.**

**IV.  APPLICATION OF ARTICLE 41 OF THE CONVENTION**

39.  Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A.  Damage

40.  Each applicant claimed 45,000 euros (EUR) in respect of non‑pecuniary damage.

41.  The Government noted that the claim was excessive and considered that EUR 7,500 would be a reasonable award in respect of non-pecuniary damage.

42.  Ruling on an equitable basis, the Court awards each applicant the sum of EUR 10,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B.  Costs and expenses

43.  Each applicant also claimed EUR 1,600 for legal fees incurred before the domestic courts and before the Court.

44.  The Government submitted that, given the fact that all four applicants were represented by the same lawyer, they should be awarded EUR 1,600 jointly.

45.  The Court notes that all the applicants were represented by the same lawyer, Mr K. Bagirov, in the proceedings before the Court and that substantial parts of the lawyer’s submissions in relations to the different applications were similar. Having regard to that circumstance, as well as to the documents in its possession and to its case-law, the Court considers it reasonable to award a total sum of EUR 4,000 to all four applicants jointly, covering costs under all heads, plus any tax that may be chargeable to the applicants.

C.  Default interest

46.  The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

**FOR THESE REASONS, THE COURT, UNANIMOUSLY,**

1.  *Decides* to join the applications;

2.  *Rejects* the Government’s request to strike the applications out of the Court’s list of cases;

3.  *Declares* the applications admissible;

4.  *Holds* that there has been a violation of Article 3 of Protocol No. 1 to the Convention;

5.  *Holds*

(a)  that the respondent State is to pay the applicants, within three months, the following amounts,to be converted intoAzerbaijani new manats at the rate applicable at the date of settlement:

(i)  EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, to each applicant, in respect of non-pecuniary damage;

(ii)  EUR 4,000 (four thousand euros), plus any tax that may be chargeable to the applicants, to all four applicants jointly, in respect of costs and expenses;

(b)  that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6.  *Dismisses* the remainder of the applicants’ claim for just satisfaction.

Done in English, and notified in writing on 17 December 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško Faris Vehabović  
 Deputy Registrar President

## **CASE OF ANNAGI HAJIBEYLI v. AZERBAIJAN**

*(Application no. 2204/11)*

JUDGMENT

STRASBOURG

22 October 2015

FINAL

22/01/2016

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*

In the case of Annagi Hajibeyli v. Azerbaijan,

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

András Sajó, *President,* Elisabeth Steiner, Khanlar Hajiyev, Mirjana Lazarova Trajkovska, Julia Laffranque, Erik Møse, Dmitry Dedov, *judges,*  
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 29 September 2015,

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

**PROCEDURE**

1.  The case originated in an application (no. 2204/11) against the Republic of Azerbaijan lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Azerbaijani national, Mr Annagi Bahadur oglu Hajibeyli (*Ənnağı Bahadur oğlu Hacıbəyli* – “the applicant”), on 24 December 2010.

2.  The applicant was represented by Mr I. Aliyev, a lawyer practising in Azerbaijan. The Azerbaijani Government (“the Government”) were represented by their Agent, Mr Ç. Asgarov.

3.  The applicant alleged, in particular, that he had been arbitrarily refused registration as a candidate in the 2010 parliamentary elections.

4.  On 24 June 2013 the application was communicated to the Government. The applicant and the Government each submitted written observations on the admissibility and merits of the case. Observations were also received from the International Commission of Jurists (the ICJ), to whom the President had given leave to intervene as a third party in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court).

**THE FACTS**

**I.  THE CIRCUMSTANCES OF THE CASE**

5.  The applicant was born in 1955 and lives in Baku.

6.  **The applicant was nominated b**y the coalition of the Popular Front and Musavat parties **to stand as a candidate in the parliamentary elections** of 7 November 2010 and applied for registration **as a candidate in the single‑mandate Saatli Electoral Constituency No. 62.**

A.  Refusal to register the applicant as a candidate

7.  As the Electoral Code required that each nomination as a candidate for parliamentary elections be supported by a minimum of 450 voters, on 5 October 2010 **the applicant submitted to the Constituency Electoral Commission (“the ConEC”) fourteen signature sheets containing 675 voter signatures collected in support of his candidacy.**

8.  Before the ConEC’s decision on the question of the applicant’s registration as a candidate, the accuracy of the signature sheets and other registration documents submitted by the applicant were to be first examined by a special working group (*işçi qrupu*) established by the ConEC. Although the applicant had requested to be present during the process of the examination by the working group, this took place without him.

9.  By a decision of 11 October 2010 **the ConEC refused the applicant’s request for registration as a candidate. The ConEC found that, according to the opinion of the working group, a number of submitted supporting signatures were invalid, and that the remaining valid signatures numbered fewer than 450. In particular, 597 of the 675 signatures had been examined, and it was found that 257 of those signatures were invalid.**

10.  The following reasons were given in the ConEC working group’s examination record dated 10 October 2010: (a) three signatures were “repeat signatures”; (b) seven signatures were invalid because there were uncertified corrections of them on the signature sheets; (c) twelve signatures were invalid owing to incorrect personal information provided concerning those voters; (d) one signature was invalid because it was on the wrong line; (e) 201 signatures were not authentic because they had been made repeatedly by the same individuals who had already signed the signature sheets; and (f) thirty-three signatures were invalid for “other” (unspecified) reasons.

B.  Appeal to the Central Electoral Commission

11.  On 13 October 2010 the applicant lodged a complaint with the Central Electoral Commission (“the CEC”) against the ConEC decision to refuse registration. He complained, *inter alia*, of the following:

(a)  257 signatures were deemed invalid on the basis of a mere visual examination, without any additional adequate investigation;

(b)  the members of the ConEC working group were not real experts. The head of the working group was a school gym teacher, while two other members were an employee of a statistics committee and an employee of the passports department of a local police office;

(c)  there was no explanation as to what constituted “other” reasons for declaring thirty-three of the signatures invalid;

(d)  contrary to the requirements of Article 59.3 of the Electoral Code, the applicant had not been invited to participate in the process of examination of the signature sheets by the ConEC working group, and thus had been deprived of the right to give the necessary explanations to the experts;

(e)  contrary to the requirements of Article 59.13 of the Electoral Code, he had not been provided with a copy of the results of the examination of the signature sheets at least twenty-four hours prior to the ConEC meeting to decide on the applicant’s registration;

(f)  the applicant’s presence at the ConEC meeting of 11 October 2010 had not been ensured.

12.  Enclosed with his complaint to the CEC, the applicant submitted written statements by over 400 voters whose signatures had been declared invalid, affirming the authenticity of their signatures. However, according to the applicant, those statements were not taken into consideration by the CEC.

13.  The CEC conducted another examination of the signature sheets using members of its own working group. The applicant was not invited to participate in this process. According to the working group’s findings, a total of 238 signatures were considered to be invalid. It appears that 233 of those were considered inauthentic because they had allegedly been made repeatedly by the same persons in the name of other persons, and the remaining five were found to be invalid owing to the voters’ incorrect personal information.

14.  The applicant was not invited to the CEC meeting dealing with his complaint against the ConEC decision of 11 October 2010.

15.  By a decision of 16 October 2010 the CEC dismissed the applicant’s complaint and upheld the ConEC decision of 11 October 2010. It found that, on the basis of the findings of the CEC’s own working group, 238 out of 675 signatures submitted by the applicant were invalid and that the remaining 437 valid signatures were below the minimum number required by law.

16.  The applicant was given copies of the CEC decision and the working group opinion on 17 October 2010.

C.  Appeals to domestic courts

17.  On 19 October 2010 the applicant lodged an appeal against the CEC decision with the Baku Court of Appeal. He reiterated his complaints made before the CEC concerning the ConEC decision and procedures. Moreover, he raised, *inter alia*, the following complaints:

(a)  contrary to the requirements of the electoral law, the CEC had failed to notify him of its meetings and to ensure his presence during the examination of the signature sheets and the examination of his complaint;

(b)  the CEC had ignored the written statements by over 400 voters confirming the authenticity of their signatures and had failed to take them into account; and

(c)  the CEC had failed to provide any reasoning and had not addressed any of the applicant’s arguments in its decision.

18.  By a judgment of 22 October 2010 the Baku Court of Appeal dismissed the applicant’s appeal. The court dismissed the applicant’s arguments as irrelevant or unsubstantiated, and found that there were no grounds for quashing the CEC’s decision.

19.  On 25 October 2010 the applicant lodged a further appeal with the Supreme Court, reiterating his previous complaints and arguing that the Baku Court of Appeal had not carried out a fair examination of the case and had delivered an unreasoned judgment.

20.  On 28 October 2010 the Supreme Court dismissed the applicant’s appeal as unsubstantiated, without examining his arguments in detail and finding no grounds for doubting the findings of the electoral commissions and the Court of Appeal.

D.  The Court proceedings and seizure of the applicant’s case file

21.  In addition to the applicant in the present case, at the material time the applicant’s representative Mr Intigam Aliyev was representing twenty‑seven other applicants in cases concerning the 2010 parliamentary elections and a number of applicants in other cases before the Court. Mr Aliyev has also lodged an application on his own behalf in a case relating to the 2010 elections (application no. 66684/12).

22.  In August 2014 the prosecution authorities launched an investigation into the activities of a number of NGOs, including the Legal Education Society, an NGO headed by Mr Aliyev.

23.  On 7 August 2014 the Nasimi District Court issued a search warrant authorising the search of Mr Aliyev’s office in the Legal Education Society and seizure of “legal, financial, accounting and banking documents, letters and contracts, reports on execution of grant contracts and tax documents relating to [the organisation’s] establishment, structure, functioning, membership registration, receipt of grants and other financial aid, and allocation of granted funds, as well as computers, disks, USB keys and other electronic devices storing relevant information ...”

24.  On 8 August 2014 Mr Intigam Aliyev was arrested after questioning by an investigator of the Prosecutor General’s Office in connection with the criminal proceedings instituted against him under Articles 192.2.2 (illegal entrepreneurship), 213.1 (large-scale tax evasion) and 308.2 (abuse of power) of the Criminal Code. On the same day, the Nasimi District Court ordered his detention pending trial. He remains in detention while the criminal proceedings against him are pending. The circumstances relating to Mr Aliyev’s arrest and detention are the subject of a separate application brought by him before the Court (application no. 68762/14).

25.  On 8 and 9 August 2014 the investigation authorities conducted a search of Mr Aliyev’s home and office pursuant to the Nasimi District Court’s search warrant of 7 August 2014, seizing, *inter alia,* a large number of documents from his office, including all the case files relating to the pending proceedings before the Court, which were in Mr Aliyev’s possession and which concerned over 100 applications in total. The file relating to the present case, which, it appears, included copies of all the documents and correspondence between the Court and the parties, was also seized in its entirety. No adequate inventory of the seized document files relating to the Court proceedings was made in the search and seizure records of 8 and 9 August 2014.

26.  On an unspecified date Mr Aliyev lodged a complaint with the Nasimi District Court, claiming that the search had been unlawful. He complained that the investigator had failed to register each seized document as required by the relevant law and had taken the documents without making an inventory. He further complained about the seizure of the documents and files relating to the ongoing court proceedings before the Court and the domestic courts.

27.  On 12 September 2014 the Nasimi District Court dismissed Mr Aliyev’s claim. It held that the searches had been conducted in accordance with the relevant law. As to the seizure of the documents relating to the cases pending before the Court and the domestic court, it found that they could not be returned to the applicant at this stage of the proceedings. Following an appeal, on 23 September 2014 the Baku Court of Appeal upheld the first-instance court’s decision of 12 September 2014.

28.  On 25 October 2014 the investigation authorities returned a number of the case files concerning the applications lodged before the Court, including the file relating to the present case, to Mr Aliyev’s lawyer. The investigator’s relevant decision specified that “since it has been established that among documents seized on 8 and 9 August 2014 there were files concerning applications by a number of individuals and organisations lodged with the European Court of Human Rights, which have no relation to the substance of the criminal proceedings [against Mr Intigam Aliyev], [those files] have been delivered to [Mr Aliyev’s lawyer] Mr Javad Javadov”.

**II.  RELEVANT DOMESTIC LAW AND INTERNATIONAL DOCUMENTS**

29.  The relevant domestic law and international documents concerning the rules and requirements for candidate registration, as well as observations made during the 2010 parliamentary elections in Azerbaijan, are summarised in *Tahirov v. Azerbaijan* (no. 31953/11, §§ 23-31, 11 June 2015).

**THE LAW**

**I.  THE GOVERNMENT’S REQUEST FOR THE APPLICATION TO BE STRUCK OUT UNDER ARTICLE 37 OF THE CONVENTION**

30.  On 16 September 2014 the Government submitted a unilateral declaration with a view to resolving the issues raised by the present application. They further requested the Court to strike the application out of the list of cases in accordance with Article 37 of the Convention.

31.  The unilateral declaration had been submitted before the applicant raised the complaint under Article 34 of the Convention in the present case. It therefore does not cover the issues pertinent to that complaint.

32.  The applicant disagreed with the terms of the unilateral declaration. He noted that it did not contain any undertakings as to general or individual measures to be taken in respect of his case. He argued that the actual intention behind the Government’s declaration was to avoid the Court’s examination of the case on its merits and to prevent the supervision by the Committee of Ministers of the execution by the Government of the Court’s judgment on the merits.

33.  The Court notes that it may be appropriate in certain circumstances to strike out an application, or part thereof, under Article 37 § 1 on the basis of a unilateral declaration by the respondent Government even where the applicant wishes the examination of the case to be continued. Whether this is appropriate in a particular case depends on whether the unilateral declaration offers a sufficient basis for finding that respect for human rights as defined in the Convention does not require the Court to continue its examination of the case (see *Tahsin Acar v. Turkey* (preliminary objections) [GC],no. 26307/95, § 75, ECHR 2003‑VI).

34.  Relevant factors in this respect include the nature of the complaints made, whether the issues raised are comparable to issues already determined by the Court in previous cases, the nature and scope of any measures taken by the respondent Government in the context of the execution of judgments delivered by the Court in any such previous cases, and the impact of these measures on the case at issue. It may also be material whether the facts are in dispute between the parties, and, if so, to what extent, and what prima facie evidentiary value is to be attributed to the parties’ submissions on the facts. Other relevant factors may include whether in their unilateral declaration the respondent Government have made any admissions in relation to the alleged violations of the Convention and, if so, the scope of such admissions and the manner in which the Government intend to provide redress to the applicant. As to the last-mentioned point, in cases in which it is possible to eliminate the effects of an alleged violation and the respondent Government declare their readiness to do so, the intended redress is more likely to be regarded as appropriate for the purposes of striking out the application, the Court, as always, retaining its power to restore the application to its list as provided in Article 37 § 2 of the Convention and Rule 44 § 5 of the Rules of Court (ibid., § 76; see also *Rantsev v. Cyprus and Russia*, no. 25965/04, § 195, ECHR 2010 (extracts)).

35.  The foregoing factors are not intended to constitute an exhaustive list of relevant factors. Depending on the particular facts of each case, it is conceivable that further considerations may come into play in the assessment of a unilateral declaration for the purposes of Article 37 § 1 of the Convention (see *Tahsin Acar*, cited above, § 77).

36.  Finally, the Court reiterates that its judgments serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties. Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States (see *Rantsev*, cited above, § 197, with further references).

37.  In considering whether it would be appropriate to strike out the present application on the basis of the unilateral declaration, the Court makes the following observations.

38.  **The Court emphasises the serious nature of the allegations made in the present case. It further observes, from a more general standpoint, that various types of alleged violations of the rights protected under Article 3 of Protocol No. 1 to the Convention have been an object of recurrent and relatively numerous complaints brought before the Court in cases against Azerbaijan after each parliamentary election that has taken place since the country’s ratification of the Convention. The Court notes that this appears to disclose an existence of systematic or structural issues which call for adequate general measures to be taken by the authorities. No such measures are mentioned in the unilateral declaration submitted by the respondent Government in the present case in respect of the specific issues complained of in connection with the 2010 elections** (contrast *Gambar and Others v. Azerbaijan* (dec.), nos. 4741/06, 19552/06, 22457/06, 22654/06, 24506/06, 36105/06, and 40318/06, 9 December 2010).

39.  Having studied the terms of the Government’s unilateral declaration, the Court considers that the proposed declaration does not provide a sufficient basis for concluding that respect for human rights as defined in the Convention and its Protocols do not require it to continue its examination of this particular case.

40.  Therefore, the Court refuses the Government’s request for it to strike the application out of its list of cases under Article 37 of the Convention, and will accordingly pursue its examination of the admissibility and merits of the case.

**II.  ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL No. 1 TO THE CONVENTION**

41.  The applicant complained under Article 3 of Protocol No. 1 to the Convention and Article 13 of the Convention that his right to stand as a candidate in free elections had been violated because his request for registration as a candidate had been refused arbitrarily. The Court considers that this complaint falls to be examined only under Article 3 of Protocol No. 1 to the Convention and that no separate examination is necessary under Article 13 (compare *Namat Aliyev v. Azerbaijan*, no. 18705/06, § 57, 8 April 2010). Article 3 of Protocol No. 1 to the Convention reads as follows:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

A.  Admissibility

42.  The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B.  Merits

1.  The parties’ submissions

43.  The Government submitted that the Contracting States enjoyed a wide margin of appreciation under Article 3 of Protocol No. 1 in establishing conditions for exercising the right to stand for election. The requirement to collect at least 450 signatures in support of a candidate had a legitimate aim of reducing the number of fringe candidates and avoiding “overcrowded” lists of registered candidates in order to prevent confusion among the electorate.

44.  The Government argued that the domestic electoral law contained sufficient safeguards preventing the adoption of arbitrary decisions to refuse registration. Firstly, signature sheets were examined by working groups specially created by electoral commissions in accordance with Article 59.2 of the Electoral Code. These working groups consisted of experts and “specialists” of the relevant State authorities, most of whom were employees of the Centre of Forensic Science of the Ministry of Justice, the Ministry of the Interior, the State Register of Immovable Property and other agencies. Before taking up their duties as working group members, they had been trained by experts with the “appropriate knowledge and experience in the relevant field”. Secondly, the electoral law required that a working group meeting had to be open to the public, that the nominated candidate be given the opportunity to attend if he wished to do so, and that the working group’s documents on the results of examination of signature sheets be made available to the nominated candidate twenty-four hours before the electoral commission met to decide whether to register the candidate. Thirdly, the law required the working group to indicate the basis for invalidating signatures. Fourthly, the nominated candidate had a right to lodge appeals with the CEC and courts against a decision refusing the registration. All of the above combined to form a sufficient body of safeguards preventing arbitrary refusals to register candidates.

45.  In the present case, both the ConEC and CEC working groups found that a large number of signatures collected in support of the applicant were invalid. Therefore, the decision to refuse registration was justified, owing to the applicant’s failure to produce at least 450 valid signatures in his support. In his appeal to the Baku Court of Appeal, where he challenged the findings of the electoral commissions’ working groups, the applicant failed to request the court to appoint an expert examination by a graphologist. Both the Baku Court of Appeal and the Supreme Court reached a correct conclusion that there were no reasons to doubt the findings of the electoral commissions’ working groups.

46.  The applicant submitted that, contrary to the requirements of Article 59.3 of the Electoral Code, he had not been informed about the time of the ConEC working group meeting in advance and had not been given the opportunity to attend the meeting, thus depriving him of the opportunity to provide necessary explanations to working group members in order to dispel any doubts over authenticity of the disputed signatures.

47.  Furthermore, contrary to the requirements of Article 59.13 of the Electoral Code, the working group documents on the results of examination of signature sheets had not been made available to him prior to the ConEC meeting dealing with his registration request. He was eventually and belatedly given copies of only some of those documents. Therefore, he was also deprived of the opportunity to correct any shortcomings found by the working group experts in the signature sheets.

48.  Most importantly, in the applicant’s view, the decisions of the electoral commissions on invalidation of signatures were substantively incorrect, unsubstantiated or arbitrary, for various reasons. Some of the working groups’ factual findings were wrong and could be easily rebutted by simply contacting the voter in question and confirming the authenticity of his or her signature. In particular, it was not clear how the commissions and their experts concluded that a number of signatures (201 according to the ConEC, and 233 according to the CEC) had been falsified. There were no specialised handwriting experts among the working-group members and, therefore, their findings that large numbers of signatures were inauthentic were highly subjective and arbitrary. However, the electoral commissions relied on the working-group expert opinions without conducting any further investigation to conclusively establish the authenticity of the impugned signatures. Moreover, a number of signatures were declared invalid on the basis of easily rectifiable errors, without informing the applicant in advance and giving him an opportunity to rectify those errors, as required by the Electoral Code. The invalidation by the ConEC of 33 signatures on “other grounds”, without explaining what those grounds were, was unlawful because the Electoral Code provided for an exhaustive list of grounds for invalidation.

49.  The applicant further noted that in his appeal to the CEC he had tried to prove the authenticity of a number of signatures by submitting statements by over 400 voters confirming the authenticity of their signatures. Had this information been taken into account and the authenticity of the signatures confirmed, the total number of valid signatures would have exceeded the statutory threshold of 450 signatures. However, the CEC ignored those documents without giving any reasons.

2.  The Court’s assessment

50.  The Court refers to the summaries of its case-law made in the *Tahirov* judgment (cited above, §§ 53-57), which are equally pertinent to the present case.

51.  For the purposes of the present complaint, the Court is prepared to accept the Government’s submission that the requirement for collecting 450 supporting signatures for nomination as a candidate pursued a legitimate aim of reducing the number of fringe candidates.

52.  It remains to be seen whether, in the present case, the procedure for monitoring compliance with this eligibility condition was conducted in a manner affording sufficient safeguards against an arbitrary decision.

53.  Having regard to the material in the case file and the parties’ submissions, **the Court notes that the issues raised by the present complaint are essentially the same as those examined in the *Tahirov* judgment. The facts of both cases are similar to a significant degree. The Court considers that its analysis and conclusions made in the *Tahirov* judgment also apply to the present case. In particular, the Court noted the existence of serious concerns regarding the impartiality of the electoral commissions, lack of transparency in their activity, and various shortcomings in the procedure** (ibid., §§ 60-61), **a lack of clear and sufficient information about the professional qualifications and the criteria for appointment of working-group experts charged with the task of examining signature sheets** ((ibid., §§ 63-64), **failure by the electoral commissions and courts to take any further investigative steps to confirm the experts’ opinions on the authenticity or otherwise of signatures** ((ibid., § 65), **systematic failure by the electoral commissions to abide by a number of statutory safeguards designed to protect nominated candidates from arbitrary decisions** (ibid., §§ 66-68 and 69), **failure by the electoral commissions and courts to take into account the relevant and substantial evidence submitted by the candidate in an attempt to challenge the working-group experts’ findings on the authenticity or otherwise of signatures** (ibid., § 69), **and the failure by the domestic courts to deal with the appeals in an appropriate manner** (ibid., § 70). Having regard to the above, **the Court found that, in practice, the applicant in the *Tahirov* judgment was not afforded sufficient safeguards to prevent an arbitrary decision to refuse his registration as a candidate.**

54.  **Having regard to the facts of the present case and their significant similarity to those of the *Tahirov* case on all relevant and crucial points, the Court sees no particular circumstances that could compel it to deviate from its findings in the *Tahirov* case, and finds that in the present case the applicant’s right to stand as a candidate was breached for the same reasons as those outlined above.**

55.  There has accordingly been a **violation of Article 3 of Protocol No. 1 to the Convention.**

**III.  ALLEGED VIOLATION OF ARTICLE 34 OF THE CONVENTION**

56.  By a fax of 9 September 2014 the applicant’s representative Mr Aliyev introduced a new complaint on behalf of the applicant, arguing that the seizure from his office of the entire case file relating to the applicant’s pending case before the Court, together with all the other case files, had amounted to a hindrance to the exercise of the applicant’s right of individual petition under Article 34 of the Convention, the relevant parts of which read as follows:

“The Court may receive applications from any person ... claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”

A.  The parties’ submissions

1.  The Government

57.  The Government noted that the case files relating to the proceedings before the Court, including the applicant’s, had been taken from Mr Aliyev’s office on 9 August 2014 and were in the prosecution authorities’ possession for a period of seventy-six days, until 25 October 2014 when they were returned to Mr Aliyev’s lawyer.

58.  The Government further noted that in the applicant’s case by 9 August 2014 the parties had already submitted all the observations, comments, proposals and claims requested by the Court. Accordingly, during the period when the applicant’s case file was in the prosecution authorities’ possession no correspondence was taking place between the Court and the parties, and the applicant and his lawyer were awaiting the Court’s decision. For these reasons, the Government considered that there had been no hindrance by the State of the effective exercise of the applicant’s right of application.

2.  The applicant

59.  The applicant noted that the contents of the case file had no connection with any of the formal criminal charges brought against Mr Aliyev. He further argued that Mr Aliyev’s arrest was “part of the [recent] serious crackdown on civil society in Azerbaijan, including the lawyers and human rights [activists]”.

60.  The applicant submitted that during the searches of 8 and 9 August 2014 the investigators had indiscriminately seized all the documents in Mr Aliyev’s office, including his case file. Contrary to the requirements of the domestic rules of criminal procedure, the investigators in charge of the search did not make an inventory of the seized documents in the search record. The applicant noted that on 25 October 2014 some of the documents, including his case file, had been returned to Mr Aliyev’s representative, Mr Javadov. However, according to the applicant, some case files relating to applications by other applicants had not been returned.

3.  The International Commission of Jurists (ICJ), the third party

61.  In their submissions, the ICJ summarised international standards on non-interference with the work of lawyers, enshrined in the UN Basic Principles on the Role of Lawyers, the Draft Universal Declaration on the Independence of Justice (the Singhvi Declaration) and other documents which recognise the role of lawyers as essential agents in the administration of justice. The ICJ noted that, despite such recognition under international law, lawyers in many jurisdictions incur serious risks when carrying out their professional functions.

62.  Citing the Court’s case-law extensively, the ICJ, intervening, stated that confidentiality of communications between lawyers and their clients was a well-established principle of international human rights law, recognised as an element of the right to a fair trial, as well as of the right to respect for private life, home and correspondence. The significance of lawyer-client confidentiality in any justice system for the effective protection of rights guaranteed under the Convention required particularly close scrutiny of any interference with such confidentiality, including searches of lawyers’ premises and seizure of documents.

63.  The ICJ further summarised the Court’s case-law under Article 34 of the Convention, focusing particularly on the Court’s jurisprudence on acts directed at the lawyers or legal representatives of the applicants that were found to have discouraged or impaired the pursuance of an individual’s right of petition. The ICJ further stressed that, in assessing the impact of any acts by the authorities which might hinder an applicant’s effective exercise of the right of individual application, account should be taken of the national context. In this connection, the intervener pointed to the current situation in Azerbaijan as identified by various international organisations and NGOs who had expressed their growing concern at the treatment of human rights defenders in the country.

B.  The Court’s assessment

64.  According to the Court’s case-law, a complaint under Article 34 of the Convention is of a procedural nature and therefore does not give rise to any issue of admissibility under the Convention (see *Cooke v. Austria*, no. 25878/94, § 46, 8 February 2000, and *Ergi v. Turkey*, 28 July 1998, § 105, *Reports of Judgments and Decisions* 1998‑IV).

65.  The Court reiterates that Article 34 of the Convention imposes an obligation on a Contracting State not to hinder the right of individual petition. While the obligation imposed is of a procedural nature, distinguishable from the substantive rights set out in the Convention and Protocols, it flows from the very essence of this procedural right that it is open to individuals to complain of its alleged infringement in Convention proceedings. The Court also underlines that the undertaking not to hinder the effective exercise of the right of individual application precludes any interference with the individual’s right to present and pursue his complaint before the Court effectively (see *Chaykovskiy v. Ukraine*, no. 2295/06, § 84, 15 October 2009, with further references).

66.  It is of the utmost importance for the effective operation of the system of individual petition guaranteed by Article 34 of the Convention that applicants or potential applicants should be able to communicate freely with the Court without being subjected to any form of pressure from the authorities to withdraw or modify their complaints (see *Akdivar and Others v. Turkey*, 16 September 1996, § 105, *Reports* 1996‑IV, and *Kurt v. Turkey*, 25 May 1998, § 159, *Reports* 1998‑III). In this context, “any form of pressure” includes not only direct coercion and flagrant acts of intimidation, but also other improper indirect acts or contacts designed to dissuade or discourage applicants from pursuing a Convention complaint or having a “chilling effect” on the exercise of the right of individual petition by applicants and their representatives (see *Kurt*, cited above, §§ 160 and 164; *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 130, ECHR 1999‑IV; and *Fedotova v. Russia*, no. 73225/01, § 48, 13 April 2006).

67.  Whether or not contacts between the authorities and an applicant are tantamount to unacceptable practices from the standpoint of Article 34 must be determined in the light of the particular circumstances of the case (see *Salman v. Turkey* [GC], no. 21986/93, § 130, ECHR 2000‑VII).

68.  Furthermore, the Court has repeatedly held that persecution and harassment of members of the legal profession strikes at the very heart of the Convention system. Therefore, searches of lawyers’ premises should be subject to especially strict scrutiny (see *Elçi and Others v. Turkey*, nos. 23145/93 and 25091/94, § 669, 13 November 2003).

69.  The Court has examined a number of cases concerning searches of lawyers’ offices under Article 8 of the Convention, finding that such searches amount to an interference with the lawyer’s “private life”, “home”, and “correspondence” (see *Niemietz v. Germany*, 16 December 1992, §§ 29‑33, Series A no. 251‑B; *Tamosius v. the United Kingdom* (dec.), no. 62002/00, ECHR 2002‑VIII; *Sallinen and Others v. Finland*, no. 50882/99, §§ 70-72, 27 September 2005; *Wieser and Bicos Beteiligungen GmbH v. Austria*, no. 74336/01, §§ 43-45, ECHR 2007‑IV; and *Aleksanyan v. Russia*, no. 46468/06, § 212, 22 December 2008). To determine whether a search was “necessary in a democratic society”, the Court has explored the availability of effective safeguards against abuse or arbitrariness under domestic law, and checked how those safeguards operated in the specific case under examination. Elements taken into consideration in this regard were the severity of the offence in connection with which the search and seizure were effected, whether they were carried out pursuant to a warrant issued by a judge or a judicial officer, whether the warrant was based on reasonable suspicion, and whether its scope was reasonably limited. The Court must also review the manner in which the search was executed, and, where a lawyer’s office is involved, whether it was carried out in the presence of an independent observer to ensure that material subject to legal professional privilege was not removed. The Court must finally take into account the extent of the possible repercussions on the work and the reputation of the persons affected by the search (see *Aleksanyan*, cited above, § 214, with further references). In cases where search warrants at issue were formulated in excessively broad terms, lacking any reservation in respect of privileged documents and giving the prosecution unrestricted discretion in determining which documents to seize, the Court has found that the lawyer’s rights under Article 8 of the Convention had been breached on that ground (see *Aleksanyan*, cited above, §§ 216-18; *Smirnov v. Russia*, no. 71362/01, §§ 47-49, 7 June 2007; and *Iliya Stefanov v. Bulgaria*, no. 65755/01, §§ 41-42, 22 May 2008).

70.  The Court notes that Mr Intigam Aliyev has lodged a separate application with the Court (application no. 68672/14) concerning, *inter alia*, the alleged breach of his rights under Articles 8 and 18 of the Convention by the prosecuting authorities conducting the search and seizure carried out in his home and office and the allegedly abusive intent behind the authorities’ actions leading to his arrest and prosecution. The Court considers that, when deciding the present case, it should avoid prejudging any issues raised in that application, and should therefore leave unaddressed the applicant’s argument in the present case that the institution of criminal proceedings against Mr Aliyev was an act of intentional interference with his legal representation of a number of applicants before the Court and part of a crackdown campaign against human-rights lawyers and activists. Instead, the Court will focus on the narrower issue specific to the present case – whether the fact of the seizure of the applicant’s case file, as such, amounted to a breach of his rights under Article 34 of the Convention.

71.  It appears that the case file in question was the applicant’s copy of all the material relating to the application before the Court, including a copy of the original application form with the annexed documents, copies of the Government’s and the applicant’s observations together with all the relevant annexed documents, all the correspondence between the parties and the Court conducted up until the time of the seizure, information on the case number assigned to the application by the Court, barcode labels provided by the Court to the applicant for the purpose of facilitating the correspondence, and so on. The applicant’s case file was in the possession of Mr Aliyev because he was the lawyer representing the applicant before the Court.

72.  After the seizure on 9 August 2014, for a period of seventy-six days neither the applicant nor his lawyer had any access to their copy of the case file relating to the application pending before the Court.

73.  The Court considers that the principle of effective exercise of the right of individual petition and the principle of the adversarial nature of the proceedings before it require that each party should enjoy unhindered access to copies of all the material relating to the case pending before the Court. Removal from the applicant’s possession of his copy of the case file by the authorities of the respondent State, for whatever reason, constitutes an interference with the integrity of the Court proceedings and requires serious justification and compensatory measures for the Court to consider whether such interference is acceptable.

74.  The Court notes that the criminal charges brought against Mr Aliyev were formally unrelated to the present application. The prosecution authorities and the Nasimi District Court were aware or ought to have been aware that Mr Aliyev was representing numerous clients in domestic civil proceedings and before the Court. However, no reservation was put in place in the search warrant with regard to privileged client documents that were kept in his office. In the context of the present complaint, the Court will refrain from drawing a general conclusion as to whether the search warrant issued by the Nasimi District Court on 7 August 2014 was formulated in excessively broad terms. Nevertheless, it notes that the search warrant specified that the documents and other material to be seized were to be related only to the Legal Education Society’s establishment, structure, functioning, membership registration and financial activities. Whereas the documents in the applicant’s case file did not relate to any of the above, it appears that the prosecution authorities overstepped the scope of the search warrant by seizing the applicant’s case file. Moreover, it does not appear that the search was conducted in the presence of an independent observer capable of identifying, independently of the investigation team, which documents were covered by professional privilege. No adequate inventory of the seized privileged documents was made in the search and seizure records of 8 and 9 August 2014.

75.  The Court finds that neither the Government nor the domestic authorities or courts have demonstrated any justification for seizing the documents concerning the present application in the context of the criminal proceedings against the applicant’s lawyer.

76.  Furthermore, no safeguards or compensatory measures were offered to the applicant. Even if there existed some sort of justification for seizing the case file, the Court considers that, at the very least, the applicant should have been informed of the seizure in a timely manner and given an opportunity to make and retain copies of all the material in the case file, to enable him to participate effectively in the Court proceedings after the seizure.

77.  Having regard to the above, the Court takes the view that lack of access to the applicant’s case file must have had a “chilling effect” on the exercise of the right of individual petition by the applicant and his representative, and that it cannot realistically be argued otherwise. It is true that, before the seizure, the application form and the relevant documents had reached the Court and that both the Government and the applicant had made all the required subsequent submissions enabling the Court to examine the applicant’s complaint under Article 3 of Protocol No. 1. However, a failure by the respondent Government to comply with their procedural obligation under Article 34 of the Convention does not necessarily require that the alleged interference should have actually restricted, or had any appreciable impact on, the exercise of the right of individual petition. The Contracting Party’s procedural obligation must be enforced irrespective of the eventual outcome of the proceedings and in such a manner as to avoid any actual or potential chilling effect on the applicants or their representatives (see *Janowiec and Others v. Russia* [GC], nos. 55508/07 and 29520/09, § 209, ECHR 2013).

78.  The Court therefore finds immaterial the Government’s argument that no correspondence or activity relating to the applicant’s case had actually taken place during the period when his case file was in the authorities’ possession. The Court considers that, at the time of the seizure, it could not be foreseen by the applicant, or by any other party, for how long his case file would remain in the authorities’ possession and whether any correspondence would take place during that period. The very fact that the applicant and his lawyer were deprived of access to their copy of the case file for a lengthy period of time, without any justification and without any compensatory measures, constituted in itself an undue interference with the integrity of the proceedings and a serious hindrance to the effective exercise of the applicant’s right of individual petition.

79.  In view of the foregoing, the Court considers that the respondent State has failed to comply with its obligations under Article 34 of the Convention.

**IV.  APPLICATION OF ARTICLE 41 OF THE CONVENTION**

80.  Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A.  Damage

81.  The applicant claimed 20,000 new Azerbaijani manats (AZN) in respect of non-pecuniary damage.

82.  The Government argued that the claim was unsubstantiated and excessive.

83.  Ruling on an equitable basis, the Court awards the applicant 10,000 euros (EUR) in respect of non-pecuniary damage, plus any tax that may be chargeable.

B.  Costs and expenses

84.  The applicant also claimed AZN 2,500 for legal fees incurred in the proceedings before the Court, AZN 300 for translation costs and AZN 100 for postal expenses.

85.  The Government argued that the amounts claimed in respect of legal fees and translation costs were excessive, while the claim in respect of the postal expenses was not supported by relevant documentary evidence.

86.  According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,600 covering costs under all heads, plus any tax that may be chargeable to the applicant.

C.  Default interest

87.  The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

**FOR THESE REASONS, THE COURT, UNANIMOUSLY,**

1.  *Rejects* the Government’s request to strike the application out of the Court’s list of cases;

2.  *Declares* the application admissible;

3.  *Holds* that there has been a violation of Article 3 of Protocol No. 1 to the Convention;

4.  *Holds* that the respondent State has failed to comply with its obligations under Article 34 of the Convention;

5.  *Holds*

(a)  that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts,to be converted into new Azerbaijani manats at the rate applicable at the date of settlement:

(i)  EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii)  EUR 2,600 (two thousand six hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be paid directly into his representative’s bank account;

(b)  that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6.  *Dismisses* the remainder of the applicant’s claim for just satisfaction.

Done in English, and notified in writing on 22 October 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen András Sajó  
 Registrar President

## 

## **CASE OF ABDALOV AND OTHERS v. AZERBAIJAN**

*(Applications nos. 28508/11 and* 2 *others)*

JUDGMENT

STRASBOURG

11 July 2019

FINAL

11/10/2019

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*In the case of Abdalov and Others v. Azerbaijan,

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

Angelika Nußberger, *President,* Yonko Grozev, André Potocki, Mārtiņš Mits, Gabriele Kucsko-Stadlmayer, Lәtif Hüseynov, Lado Chanturia, *judges,*  
and Milan Blaško, *Deputy* *Section Registrar,*

Having deliberated in private on 18 June 2019,

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

**PROCEDURE**

1.  The case originated in three applications (nos. 28508/11, 37602/11 and 43776/11) against the Republic of Azerbaijan lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by three Azerbaijani nationals, Mr Ikhtiyar Alish oglu Abdalov (*İxtiyar Əliş oğlu Abdalov* – “the first applicant”), Mr Ibrahim Zabit oglu Ahmadzade (*İbrahim Zabit oğlu Əhmədzadə* – “the second applicant”) and Mr Tariel Adishirin oglu Shirinli (*Tariel Adışirin oğlu Şirinli* – “the third applicant”), on 26 April, 1 June and 8 June 2011 respectively.

2.  The first applicant was represented by Mr K. Bagirov, a lawyer based in Azerbaijan. The second and third applicants were represented by Mr I. Aliyev, a lawyer based in Azerbaijan. The Azerbaijani Government (“the Government”) were represented by their Agent, Mr Ç. Əsgǝrov.

3.  **The applicants alleged, in particular, that their rights under Article 3 of Protocol No. 1 had been infringed because they had been unable to participate, as candidates, in the 2010 parliamentary election under equal conditions *vis-à-vis* other candidates, and that the domestic proceedings in their cases had been ineffective, contrary to the requirements of Article 13 of the Convention. The second and third applicants also alleged that the exercise of their right of individual application under Article 34 of the Convention had been hindered.**

4.  On 26 August 2014 notice of the applications was given to the Government. The applicants and the Government each submitted written observations on the admissibility and merits of the cases. Observations in respect of applications nos. 37602/11 and 43776/11 were also received from the International Commission of Jurists (the ICJ), to whom the President had given leave to intervene as a third party in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court).

**THE FACTS**

**I.  THE CIRCUMSTANCES OF THE CASE**

5.  The applicants were born in 1964, 1975 and 1955 and live in Baku, Sumgayit and Imishli respectively.

A.  The first applicant

6.  **The first applicant was nominated by the Karabakh election bloc to stand as one of its candidates in the parliamentary elections** of 7 November 2010 for the single-mandate Yasamal First Electoral Constituency No. 15. **On an unspecified date the relevant constituency electoral commission (“the ConEC”) preliminarily accepted his nomination as a candidate and issued him with official signature sheets in order to collect a minimum of 450 voter signatures in support of the nomination, as required by law.** **Under the Electoral Code, the ConEC would decide whether to register him as a candidate following the submission of all required registration documents, including the completed signature sheets.**

7.  **The applicant collected 550 voter signatures on eleven signature sheets and submitted them to the ConEC, together with other relevant documents, on 14 September 2010.**

**8.  On 2 October 2010 the ConEC issued a decision refusing “to accept the nomination of [the first applicant] ...**”. **The ConEC found that, out of the 550 signatures submitted by the applicant, 159 were invalid for various reasons** (including 143 signatures found to be false, and the remaining 16 rendered invalid due to various technical errors) **and that, therefore, the total number of valid signatures was below the minimum of 450 required by law.**

9.  On 5 October 2010 **the applicant lodged an appeal** against that decision with the Central Electoral Commission (“the CEC”). He argued that the findings of the ConEC working group that such a large number of signatures were invalid were wrong and arbitrary. Contrary to the requirements of Article 59.3 and 59.13 of the Electoral Code, he had not been invited to participate in the process of examination of the signature sheets by the ConEC working group. Nor had he been provided with a copy of the record on the results of the examination of the signature sheets at least twenty-four hours prior to the ConEC meeting on his registration. Lastly, he argued that his presence at the ConEC meeting of 2 October 2010 had not been ensured.

10.  Pursuant to a request by its expert reviewing the appeal, the ConEC extended the statutory three-day period for examination of the appeal (see paragraph 72 below). By a decision of 13 October 2010, the CEC dismissed the appeal, having conducted its own examination of the signature sheets and having found that 187 signatures were invalid.

11.  **The official electoral campaign period for all registered candidates started on 15 October 2010**.

12.  The applicant appealed against the CEC decision, reiterating his earlier complaints concerning the ConEC decision and additionally arguing that the CEC had committed the same procedural violations. By a judgment of 19 October 2010, the Baku Court of Appeal dismissed the appeal, endorsing the CEC’s reasoning and finding no reasons to doubt its findings. The judgment was delivered to the applicant on 20 October 2010.

13.  On an unspecified date the applicant lodged a further appeal with the Supreme Court.

14.  On 28 October 2010 the Supreme Court granted the appeal and quashed the Baku Court of Appeal’s judgment. **The Supreme Court found that, after the applicant had submitted the relevant registration documents, the ConEC had been required, under Article 60.1 of the Electoral Code, to either formally register him as a candidate or refuse registration. However, in the present case, the ConEC had instead taken a decision refusing to accept his nomination, which was a procedurally incorrect decision (the applicant’s nomination having been already accepted at that stage). The court held that, in fact, in the present case no formal ConEC decision on the applicant’s registration had been taken under Article 60.1 of the Electoral Code within the time-limits prescribed by law. The Supreme Court remitted the case to the Baku Court of Appeal.**

15.  By a judgment of 2 November 2010 the Baku Court of Appeal ruled in the applicant’s favour. The judgment did not mention the Supreme Court’s legal reasoning as to the unlawfulness of the ConEC decision of 2 October 2010 on procedural grounds. Instead, the Court of Appeal ordered a new analysis of the signature sheets by a handwriting expert. The expert report found that a total of only 61 (and not 187, as had been found earlier) signatures out of 550 were invalid. Based on that report, the Court of Appeal found that the total number of valid signatures exceeded 450 and that, therefore, the applicant should have been registered as a candidate. It therefore instructed the CEC to do so.

16.  **On 3 November the CEC registered the applicant as a candidate**. It issued the relevant registration card to him one day later, on 4 November 2010.

17.  The last full day of the official electoral campaign period was effectively 5 November 2010, owing to a statutory ban on any campaigning during a twenty-four-hour blackout period before election day.

18.  On 5 November 2010 the applicant sent a telegram to the CEC, asking them to postpone the elections in his constituency so that he could have time to conduct his campaign on an equal footing with other candidates. No reply was received by him before election day.

19**.  The applicant received very few votes and was not elected**.

20.  The CEC replied to his telegram of 5 November 2010 by a letter of 8 November 2010, one day after election day. It said that Article 149 of the Electoral Code provided for specific cases when elections could be postponed and that the applicant’s situation did not constitute one of them.

21.  The applicant lodged a formal complaint with the CEC, asking for the election results to be declared invalid and for a repeat election. He argued that the elections had been unfair owing to the unlawful delay in registration of his candidacy, as a result of which he had been unable to have sufficient time for electoral campaigning and thus to participate in the elections on an equal footing with the other candidates.

22.  On 20 November 2010 the CEC dismissed the complaint, stating that the legislation did not provide for postponement of elections in the event of late registration of one of the candidates.

23.  On 25 November 2010 the Baku Court of Appeal dismissed an appeal lodged by the applicant against the CEC’s decision. It noted that the Electoral Code did not provide for a possibility of postponement of elections owing to late registration of a candidate. It also noted that the applicant had in fact been able to campaign after his candidacy had been registered, that he had appeared on television once, and that his electoral campaign materials had been printed in the form of booklets and also published in newspapers. The court concluded that from the moment of his registration, the applicant had been able to campaign and participate in the election on an equal footing with the other candidates.

24.  On 30 November 2010 the Supreme Court dismissed a further appeal lodged by the applicant, reiterating the Baku Court of Appeal’s reasoning.

B.  The second applicant

25.  **The second applicant was self-nominated to stand as a candidate** in the parliamentary elections of 7 November 2010 for the single-mandate Sumgayit Third Electoral Constituency No. 43.

26.  The applicant collected 500 voter signatures and submitted them to the ConEC, together with other relevant documents, on 8 October 2010.

27.  By a decision of 13 October 2010, the **ConEC refused to register him as a candidate. It found that, out of the 500 signatures submitted, 138 were invalid because they were “false” signatures** made by the same person in the name of other persons and that, therefore, the total number of valid signatures was below the minimum of 450 required by law. The ConEC also found that the other documents submitted by the applicant did not comply with the requirements of the Electoral Code.

28.  The official electoral campaign period for all registered candidates started on 15 October 2010.

29.  On 15 October 2010 the applicant lodged an appeal against the ConEC decision with the CEC, arguing that the ConEC’s conclusions concerning the validity of signatures had been arbitrary and unreasoned, and that the other documents submitted by him were in compliance with the Electoral Code. He also complained that, contrary to the requirements of Article 59.3 and 59.13 of the Electoral Code, he had not been invited to participate in the process of examination of the signature sheets by the ConEC working group. Nor had he been provided with a copy of the record on the results of the examination of the signature sheets at least twenty-four hours prior to the ConEC meeting on his registration. Lastly, he complained that his presence at the ConEC meeting of 13 October 2010 had not been ensured.

30.  By a decision of 19 October 2010, the CEC dismissed the applicant’s appeal, having conducted its own examination of the signature sheets and having found that 169 signatures were invalid. The decision was silent as to whether the other registration documents complied with the requirements of the Electoral Code. The decision was taken in the applicant’s absence.

31.  On 23 October 2010 the applicant appealed to the Baku Court of Appeal against the CEC decision, reiterating his complaints. He argued that the CEC had not ensured his attendance and had taken its decision in breach of a number of his other procedural rights under the Electoral Code. He urged the Court of Appeal to quash the CEC decision, order the CEC to register him and request the law-enforcement authorities to institute criminal proceedings against members of the electoral commissions responsible for the arbitrary decisions against him.

32.  By a judgment of 29 October 2010, the Baku Court of Appeal partially upheld the applicant’s appeal. Having ordered a new expert handwriting examination, the court found that only 38 signatures were invalid and the remaining valid signatures (462) exceeded the minimum of 450 required by law. The court ordered the CEC to register the applicant. It dismissed the remainder of the applicant’s points of appeal.

33.  The applicant lodged a further appeal with the Supreme Court in respect of the part of the Baku Court of Appeal’s judgment of 29 October 2010 partially dismissing his appeal. On 3 November 2010 the Supreme Court dismissed this appeal.

34.  In the meantime, on 2 November 2010 the CEC registered the applicant as a candidate, in compliance with the Baku Court of Appeal’s order, and issued him with a candidate registration card.

35.  On 4 November 2010 the applicant lodged a direct complaint with the Baku Court of Appeal against the ConEC and the CEC. He argued that, owing to the arbitrary decisions by both electoral commissions refusing to register him and the ensuing significant delay in registration, he was unable to conduct an effective electoral campaign on an equal footing with other candidates, all of whom had been campaigning since 15 October 2010. He asked the court to order the postponement of the election in his constituency and payment of compensation to him by the electoral commissions. According to the applicant, that complaint was never examined.

36.  On 4 November 2010 the applicant also sent complaints to the Sumgayit City prosecutor’s office and the prosecutor’s office of the Binagadi District of Baku, complaining about the electoral officials’ actions, but to no avail.

37.  The last full day of the official electoral campaigning period was effectively 5 November 2010, owing to the statutory ban on any campaigning during the twenty-four-hour blackout period before election day.

38.  The applicant was not elected.

39.  On 10 November 2010 the applicant lodged a complaint with the CEC, asking for the election results to be declared invalid and for a repeat election. He argued that the elections had been unfair owing to the unlawful delay in the registration of his candidacy. He also argued that there had been a number of irregularities during election day.

40.  On 19 November 2010 the CEC dismissed the applicant’s complaint, finding that the applicant had been able to conduct his electoral campaign freely from the moment of his registration and that he had failed to substantiate his allegations concerning the election-day irregularities.

41.  On 23 November 2010 the Baku Court of Appeal dismissed an appeal lodged by the applicant, reiterating the CEC’s reasoning. On 1 December 2010 the Supreme Court dismissed a further appeal lodged by the applicant, endorsing the Court of Appeal’s reasoning.

C.  The third applicant

42.  **The third applicant was self-nominated to stand as a candidate** in the parliamentary elections of 7 November 2010 for the single-mandate Imishli Electoral Constituency No. 79.

43.  The applicant collected 550 voter signatures and submitted them to the ConEC, together with other relevant documents, on 5 October 2010.

44.  By a decision of 11 October 2010, the ConEC refused to register the applicant as a candidate. It found that, **out of the 550 signatures submitted by the applicant, 139 were invalid for various reasons** (including 132 signatures found to be false) and that, therefore, the total number of valid signatures was below the minimum of 450 required by law.

45.  That decision was made available to the applicant on 14 October 2010.

46.  The official electoral campaigning period for all registered candidates started on 15 October 2010.

47.  The applicant lodged an appeal against the ConEC decision with the CEC, arguing that the ConEC’s conclusions concerning the validity of signatures had been arbitrary and unreasoned and that its decision had been taken in breach of a number of procedural requirements of the Electoral Code. The applicant posted his complaint late in the day on 16 October 2010, after the last dispatch. The complaint was sent out by the post office on 18 October 2010, as 17 October had been a non-working day.

48.  By a decision of 22 October 2010, the CEC rejected the applicant’s appeal, finding that the applicant had missed the three-day deadline for appealing provided for by the Electoral Code.

49.  On 25 October 2010 the applicant appealed against the CEC decision, reiterating his complaints and arguing that the CEC had not ensured his attendance and had taken its decision in breach of a number of the applicant’s other procedural rights under the Electoral Code. He also argued that he had not missed the deadline for appealing and, in support of this contention, attached a copy of the postal receipt showing that he had posted his complaint to the CEC on 16 October 2010 by registered mail.

50.  By a decision of 28 October 2010, the Baku Court of Appeal dismissed the applicant’s appeal, upholding the CEC’s finding that the applicant had missed the deadline for appealing. The court noted that the copy of the postal receipt did not prove that the envelope posted on 16 October 2010 had actually contained the document in question (the complaint against the ConEC decision).

51.  The applicant lodged a further appeal with the Supreme Court. On 3 November 2010 the Supreme Court granted his appeal, finding that he had lodged his appeal with the CEC on time. The Supreme Court quashed the CEC decision of 22 October 2010 and the Baku Court of Appeal’s decision of 28 October 2010. However, without remitting the case to the CEC or the appellate court for examination of the merits of the appeal, and without examining itself the merits of the applicant’s complaint against the ConEC’s decision of 11 October 2010, the Supreme Court ordered the CEC to register the applicant as a candidate.

52.  On 4 November 2010 the CEC registered the applicant as a candidate, in compliance with the Supreme Court’s order. The CEC issued him with a candidate registration card the next day, 5 November 2010, which was the last full day of the official electoral campaigning period.

53.  On 5 November 2010 the applicant lodged a complaint with the Baku Court of Appeal against the ConEC and the CEC. He requested the postponement of the election in his constituency, owing to the fact that he had insufficient time to conduct his electoral campaign. He also sought monetary compensation from both electoral commissions in respect of non‑pecuniary damage. On 5 November 2010 that complaint was declared inadmissible for failure to pay the correct amount of court fees. The inadmissibility decision was subsequently upheld by the Supreme Court on 29 November 2010.

54.  The applicant was not elected.

55.  On 10 November 2010 the applicant lodged a complaint with the ConEC, arguing that, owing to the arbitrary decisions by both electoral commissions refusing to register him and the ensuing significant delay in registration, he had been unable to conduct an electoral campaign on an equal footing with other candidates, all of whom had been campaigning since 15 October 2010. He also claimed that there had been a number of irregularities in various polling stations during election day. He requested, *inter alia,* the invalidation of the election results in the constituency.

56.  On 13 November 2010 the ConEC dismissed the complaint. It noted that the applicant’s complaints about the refusal to register him had been examined by the courts and that he had obtained a ruling in his favour. As for the alleged irregularities during election day, it had been found that the applicant’s claims were unsubstantiated.

57.  On 25 November 2010 the CEC dismissed an appeal lodged by the applicant against the above-mentioned decision. It noted that his complaint had been duly examined by the ConEC. The CEC further noted that, on 22 November 2010, it had already formally approved the election results in the majority of constituencies, including the applicant’s, and had forwarded that decision for final approval by the Constitutional Court. In such circumstances, there was no longer any basis for granting any of the applicant’s requests.

58.  On 26 November 2010 the Baku Court of Appeal dismissed an appeal lodged by the applicant against the CEC’s decision. Following a further appeal lodged by the applicant, on 8 December 2010 the Supreme Court upheld the Court of Appeal’s judgment of 26 November 2010.

D.  Court proceedings and seizure of the applicants’ case files (applications nos. 37602/11 and 43776/11)

59.  At the material time the representative of the applicants in the above-mentioned applications, Mr I. Aliyev, was also representing twenty‑seven other applicants in cases concerning the 2010 parliamentary elections and a number of applicants in other cases before the Court.

60.  On 8 August 2014 criminal proceedings were instituted against Mr Aliyev, which were the subject of a separate application brought by him before the Court (see *Aliyev v. Azerbaijan*, nos. 68762/14 and 71200/14, 20 September 2018). On 8 and 9 August 2014 the investigating authorities seized a large number of documents from Mr Aliyev’s office, including all the case files relating to the pending proceedings before the Court which were in Mr Aliyev’s possession. They concerned over 100 applications in total. The files relating to the present cases, which, it appears, included copies of all the documents and correspondence between the Court and the parties, were also seized in their entirety. The facts relating to the seizure and the relevant proceedings are described in more detail in *Annagi Hajibeyli* *v. Azerbaijan* (no. 2204/11, §§ 21-28, 22 October 2015).

61.  On 25 October 2014 the investigating authorities returned a number of the case files concerning the applications lodged with the Court, including the files relating to applications nos. 37602/11 and 43776/11, to Mr Aliyev’s lawyer.

**II.  RELEVANT DOMESTIC LAW AND INTERNATIONAL DOCUMENTS**

A.  Electoral Code

62.  Unless specified otherwise, the provisions of the Electoral Code set out below were in effect at the time of the parliamentary elections of 7 November 2010.

1.  System of electoral commissions

63.  Elections and referenda are organised and carried out by electoral commissions, which are competent to deal with a wide range of issues relating to the electoral process (Article 17). There are three levels of electoral commissions: (a) the Central Electoral Commission (“the CEC”); (b) constituency electoral commissions (“ConEC”); and (c) precinct (polling station) electoral commissions (“PEC”) (Article 18.1). A more detailed summary of the system of electoral commissions, their composition and decision-making procedures, as well as the procedure for examination of election-related appeals, is provided in *Namat Aliyev v. Azerbaijan* (no. 18705/06, §§ 31-44, 8 April 2010).

2.  Time-limits applicable to the process of candidate registration

64.  Following nomination, a candidate or his or her representative must submit documents required for registration, including signature sheets, to the relevant electoral commission at most fifty and at least thirty days before election day (Article 58). Before the amendments of 18 June 2010, this period was between sixty-five and forty days. Before the earlier amendments of 2 June 2008, it was 105 days and seventy days.

65.  After receipt of the signature sheets and the other registration documents required, the relevant electoral commission must issue a decision to register or to refuse to register the candidate within a period of seven days (Article 60.1). Before the amendments of 18 June 2010, the time-limit was ten days.

3.  Procedure for examination of the signature sheets

66.  Article 59 provides as follows, in the relevant parts:

“59.3.  Candidates and their authorised representatives, as well as authorised representatives of political parties or blocs of political parties, may be present during the process of examination of signature sheets at the relevant electoral commission. The relevant electoral commission shall give advance notice to the above-mentioned persons about the examination of signature sheets. The electoral commission may not object to or obstruct the participation in this procedure of the above-mentioned persons sent by a candidate, political party or bloc of political parties. All signatures on the signature sheets shall be examined.

...

59.13.  The head of the working group and a member of the relevant electoral commission with a decisive voting right shall prepare a record [*protokol*] of the results of the examination of the signature sheets of each candidate, sign it, and submit it to the electoral commission for a decision. The results record shall indicate the number of examined signatures and the number of invalid signatures, together with grounds for invalidation. The results record shall be appended to the relevant decision of the electoral commission. A copy of the results record shall be given to the candidate or authorised representative of a political party or bloc of political parties at least 24 hours prior to the electoral commission’s meeting on registration of a candidate. If it is found during the examination of signatures that there are fewer than the number required, the candidate ... shall have the right to obtain, in addition to a copy of the results record approved by the head of the working group, a copy of the record of the results of the examination indicating the line numbers of the specific signatures and the number of the relevant folder containing the grounds for invalidation of voter signatures.”

4.  Electoral campaign period

67.  It is prohibited to conduct an electoral campaign on election day and the day preceding election day (Article 75.1).

68.  The electoral campaign period begins twenty-three days before election day and ends twenty-four hours before election day (Article 75.2). Before the amendments of 18 June 2010, this period was to begin twenty‑eight days before election day. Before the earlier amendments of 2 June 2008, it was to begin sixty days before election day.

5.  Examination of electoral disputes

69.  Candidates and other affected persons may complain about decisions or actions (or omissions to act) violating the electoral rights of candidates or other affected persons, within three days of publication or receipt of such decisions or occurrence of such actions (or omissions) or within three days of an affected person becoming aware of such decisions or actions (or omissions) (Article 112.1).

70.  Such complaints can be submitted directly to a higher electoral commission (Article 112.2). If a complaint is first decided by a lower electoral commission, a higher electoral commission may overrule its decision or adopt a new decision on the merits of the complaint or remit the complaint for a new examination (Article 112.9). Decisions or actions (or omissions to act) of a ConEC may be appealed against to the CEC, and decisions or actions (or omissions to act) of the CEC may be appealed against to an appellate court (Article 112.3).

71.  In cases provided for in the Electoral Code, the courts are empowered to quash decisions of the relevant electoral commissions, including decisions concerning voting results and election results (Article 112.5).

72.  The relevant electoral commission must adopt a decision on any complaint submitted during the election period and deliver it to the complainant within three days of receipt of the complaint, except for complaints submitted on election day or the day after election day, which must be examined immediately (Article 112.10). Following the amendments of 2 June 2008, a new provision was introduced to the Electoral Code, allowing for a possibility for the relevant electoral commission to extend the above-mentioned three-day period, upon a request by its expert group, for an indefinite period of time (Article 112-1.10). Following the amendments of 20 April 2012, adopted after the events in the present cases, the duration of the extension period was limited to three days.

73.  Complaints concerning decisions of electoral commissions must be examined by the courts within three days (unless the Electoral Code provides for a shorter period). The time-limit for lodging an appeal against a court decision is also three days (Article 112.11).

B.  Code of Good Practice in Electoral Matters

74.  The relevant excerpts from the Code of Good Practice in Electoral Matters (Guidelines and Explanatory Report) (CDL-AD (2002) 23 rev), adopted by the European Commission for Democracy Through Law (“the Venice Commission”) at its 51st and 52nd sessions (5-6 July and 18‑19 October 2002), read as follows:

“GUIDELINES ON ELECTIONS

...

1.3.  Submission of candidatures

i.  The presentation of individual candidates or lists of candidates may be made conditional on the collection of a minimum number of signatures;

...

iii.  Checking of signatures must be governed by clear rules, particularly concerning deadlines;

iv.  The checking process must in principle cover all signatures; however, once it has been established beyond doubt that the requisite number of signatures has been collected, the remaining signatures need not be checked;

v.  Validation of signatures must be completed by the start of the election campaign;

...

EXPLANATORY REPORT

...

1.3.  Submission of candidatures

8.  The obligation to collect a specific number of *signatures* in order to be able to stand is theoretically compatible with the principle of universal suffrage. ... The signature verification procedure must follow clear rules, particularly with regard to deadlines, and be applied to all the signatures rather than just a sample; however, once the verification shows beyond doubt that the requisite number of signatures has been obtained, the remaining signatures need not be checked. In all cases candidatures must be validated by the start of the election campaign, because late validation places some parties and candidates at a disadvantage in the campaign. ...”

C.  Joint opinion of the Venice Commission and the Organisation for Security and Cooperation in Europe, Office for Democratic Institutions and Human Rights (OSCE/ODIHR)

75.  The following are extracts from the Joint Opinion on the Draft Law on Amendments and Changes to the Electoral Code of the Republic of Azerbaijan, by the Venice Commission and OSCE/ODIHR adopted by the Council for Democratic Elections at its 25th Meeting (Venice, 12 June 2008) and by the Venice Commission at its 75th Plenary Session (Venice, 13‑14 June 2008):

“**II.  Discussion of amendments**

**1.  Abbreviated timeframes for the election campaign and election processes**

10.  A significant set of amendments reduces the amount of time for the official campaign period by more than fifty percent (50%). These amendments were not included in previous drafts discussed with the OSCE/ODIHR and the Venice Commission. The official start of the campaign period in Article 75.2 has been reduced from 60 days to 28 days prior to election day. This means that the equal access provisions to public media will apply only for a few weeks before election day. It also means that any other legal provision which is intended to create equal campaign conditions for registered candidates will only be applicable for a limited time period. While international practice differs in this respect, an abbreviated official campaign period is troublesome when other legal provisions, such as those creating a ‘level playing field’ for campaigning, are tied directly to the official campaign period or when the reduction of the official campaign period negatively impacts the rights of voters. In the case of Azerbaijan these amendments are introduced only a few months before the elections. As noted by the United Nations Human Rights Committee: ‘[T]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential’. If equal conditions for the communication of information to voters are limited to a few weeks before election day, then the right of voters to receive information is significantly limited. In the context of other amendments (*see also paragraphs 11, 16 ...*), the reduction of the official campaign period, cannot be considered as positive.

11.  In addition to the reduction of the time for the official campaign period, these amendments reduce the deadline for announcing the elections and subsequent timeframe for preparation of the election processes. Article 8.1 has been amended to reduce the deadline for announcing the elections from 120 to 75 days before voting day. Article 29.6 has been amended to reduce the deadline for the organization of election constituencies from 115 days to 70 days before voting day. Similarly, other deadlines have been reduced, such as for candidate registration and the transfer of funds to constituency election commissions. It remains to be seen whether any of these reduced deadlines will have a negative impact on voters, candidates, or the orderly administration of election processes.

...

16.  The reduced timeframe for election processes is also of concern due to the amendments that delete existing Articles 58.5 and 60.5. These two articles had allowed for candidates to register by paying a deposit should an insufficient number of valid signatures be submitted in support of candidacy. Due to the reduced timeframes introduced by the amendments, there is a greater likelihood that potential candidates will be rejected due to signature irregularities. However, such potential candidates will no longer be able to avail themselves of the possibility to register by paying a monetary deposit. The deletion of Articles 58.5 and 60.6 cannot be considered as positive.

...

**III.  Conclusion**

49.  The adopted amendments have addressed some previous recommendations of the OSCE/ODIHR and the Venice Commission. This is a positive development. However, some of the new amendments are problematic. In addition, several previous recommendations remain unaddressed or insufficiently addressed.”

D.  The OSCE/ODIHR Election Observation Mission Final Report on the Parliamentary Elections of 7 November 2010 (Warsaw, 25 January 2011)

76.  The relevant extracts from the Final Report read as follows:

“**VII.  NOMINATION AND REGISTRATION OF CANDIDATES**

The two-step process of candidate nomination and registration was handled by the ConECs. First, candidates could be nominated by political parties or by blocs of parties, by groups of voters, or through self-nomination. A political party could nominate individuals who are not party members. After examining the submitted candidate notifications and nominating party documents within a five-day period, the ConECs certified the nomination of 1,412 candidates. Of these, some 445 were nominated by 5 registered electoral blocs, some 350 were nominated by 11 political parties, and the rest were self-nominated or nominated by initiative voter groups.

In order to register a candidate, a ConEC should have received, *inter alia*, not less than 450 valid voters’ signatures in support of the candidacy. The possibility to submit a financial deposit *in lieu* of signatures was removed from the Election Code in 2008. Within seven days, the ConEC had to check all the submitted documents and the collected signatures and pass a decision on registration of the candidate or on refusal of registration. Some 300 nominees did not submit the documents and signature sheets required for their registration.

Of the 1,115 prospective candidates who submitted their registration documents before the deadline of 8 October, only 699 were initially registered by ConECs. As a result of complaints, 35 rejected candidates were later registered by the CEC, and a further 9 candidates were registered on the basis of Court of Appeal and Supreme Court decisions. Most registrations upon complaint or appeal were instituted after the start of the official campaign period. [Footnote: The Code of Good Practice in Electoral Matters of the Venice Commission states that validation of signatures must be completed by the start of the election campaign (I.1.3.v). In the explanatory report it is stated that in all cases candidatures must be validated by the start of the election campaign, because late validation places some parties and candidates at a disadvantage.] After 52 candidates withdrew and one was de-registered, 690 candidates ultimately contested the elections.

...

**VIII.  THE ELECTION CAMPAIGN**

...

The pre-election environment was not conducive to the fair and free competition of political ideas and platforms; the whole environment and competitiveness of the election campaign was adversely affected by the fact that a very high number of prospective candidates nominated by opposition parties, as well as many self‑nominated candidates, were not registered. Many interlocutors professed a lack of confidence in the election process. Many candidates expressed their concerns that the significantly shortened campaign period compared to 2005 [Footnote: The campaign period was shortened from 60 days in 2005 to 22 days (the campaign period begins 23 days before election day and ends 24 hours before the opening of the polls). In addition, several candidates were registered only during the campaign period after appealing to courts, which further limited their campaign opportunities] did not give them enough time to conduct a proper election campaign.

...

**XIII.  PRE-ELECTION COMPLAINTS AND APPEALS**

Complaints and appeals can be filed by voters, candidates, political parties and blocs and their representatives, observers and election commissions. Actions and decisions as well as omissions of election commissions that violate electoral rights can be challenged at the higher election commission. Decisions of election commissions upon complaints, as well as decisions and actions of the CEC, can be appealed to the Court of Appeal. Decisions of the Court of Appeal can be further appealed to the Supreme Court. The timeframe for submitting a complaint or appeal is three days from the day a violation occurred or a decision was adopted or published, or the day the plaintiff was informed of the decision if the period was more than three days. Complaints and appeals lodged before election day should be reviewed and decided upon within three days; complaints and appeals submitted on or after election day should be reviewed and decided upon immediately.

The Election Code foresees the creation of expert groups at CEC and ConEC level for the adjudication of electoral disputes, consisting of nine and three members, respectively; it does not, however, provide any criteria for the appointment of these experts. It only states that commissioners with legal background may be members of these groups. The relevant CEC instruction sets as criteria professionalism, ability to conduct factual and legal analysis, experience in the field of elections and existence of high public confidence in their professional activity. In practice, expert groups were composed of commissioners and in some cases also of administrative staff members. The CEC claimed that they did not opt for external lawyers as it would have been difficult to assess whether they enjoy public confidence. It is questionable whether the expert groups added any fact-finding capacity, as was the stated intention when they were introduced, since they consisted of those already working for the election administration and their advisory opinions did not contain detailed argumentation based on the facts or the law.

The Election Code allows for an extension of the three-day investigation period upon the request of the expert group. This provision creates a problem since it does not set an upper time limit for the extension. The possibility to extend the investigation period was used extensively by the CEC and resulted in a protracted dispute-resolution process, which in combination with the shortened election period and ambiguous legal provisions undermined the right to seek an effective and timely remedy. The review of cases for candidate registration by the Supreme Court was conducted up to 6 November. The last registration of a candidate by the CEC upon a court decision took place on 4 November.”

**THE LAW**

**I.  JOINDER OF THE APPLICATIONS**

77.  The Court considers that, in accordance with Rule 42 § 1 of the Rules of Court, the applications should be joined, given their similar factual and legal background.

**II.  THE GOVERNMENT’S REQUEST TO STRIKE OUT APPLICATION No. 28508/11UNDER ARTICLE 37 OF THE CONVENTION**

78.  The Government submitted a unilateral declaration with a view to resolving the issues raised by the above-mentioned application. They further requested that the Court strike this application out of the list of cases, in accordance with Article 37 of the Convention.

79.  The first applicant disagreed with the terms of the unilateral declaration and asked the Court to continue its examination of the application.

80.  Having studied the terms of the Government’s unilateral declaration, the Court considers – for the reasons stated in *Tahirov v. Azerbaijan* (no. 31953/11, §§ 32-42, 11 June 2015) and *Annagi Hajibeyli* *v. Azerbaijan* (no. 2204/11, §§ 30-40, 22 October 2015), which are equally applicable to the present case and from which the Court sees no reason to deviate – that the proposed declaration does not provide a sufficient basis for concluding that respect for human rights as defined in the Convention and its Protocols does not require it to continue its examination of the present application.

81.  The Court therefore refuses the Government’s request for it to strike the application out of its list of cases under Article 37 of the Convention, and will accordingly pursue its examination of the admissibility and merits of the case.

**III.  ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL No. 1 TO THE CONVENTION**

82.  The applicants complained under Article 3 of Protocol No. 1 to the Convention that, owing to arbitrary decisions initially refusing to register them as candidates and the subsequent delayed registrations following a number of appeals, they had been unable to participate in the parliamentary elections under equal conditions *vis-à-vis* other candidates, because they had been left with a very short time to conduct their respective electoral campaigns. Article 3 of Protocol No. 1 reads as follows:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

A.  Admissibility

83.  The Court notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B.  Merits

1.  The parties’ submissions

(a)  The applicants

84.  The applicants argued that the process of examination of signatures had been arbitrary and that the examination of their appeals had been delayed, resulting in their late registration as candidates. This, coupled with the shortened period for the electoral campaign, had resulted in a situation where they had had only three days or less to campaign. They had thus been unable to run for election under equal conditions *vis-à-vis* other registered candidates who had campaigned for twenty-two days.

85.  In particular, the applicants pointed out that there had been no expert graphologists in the ConEC working groups. Instead, the role of the expert had been carried out by officials of the local police offices, who were not qualified for the task of verifying the authenticity of signatures. Moreover, in the CEC working group, experts were employees of the forensic examination centre of the Ministry of Justice. The same body provided experts for the examinations ordered by the Baku Court of Appeal. Despite this, the conclusions reached by the experts examining signature sheets at various levels of electoral commissions and courts differed significantly.

86.  The decisions of the electoral commissions to invalidate signatures had been substantively incorrect or unlawful, for various reasons. In particular, the electoral commissions had based their decisions on inconclusive findings by the working-group experts. In respect of the signatures invalidated on the grounds that they had been falsified, the electoral commissions’ experts had stated in their opinions that there was only a “probability” (*ehtimal*) that those signatures had been made by the same person. This meant that the experts had abstained from making any definitive conclusions about the authenticity of those signatures based solely on the handwriting analysis of the signature sheets, and had implicitly acknowledged that there remained a possibility that those signatures were authentic. In such circumstances, without conducting any further investigation, the electoral commissions had declared the signatures invalid based merely on a probability of inauthenticity. Furthermore, some of the findings of inauthenticity of signatures had clearly been arbitrary.

87.  Furthermore, the applicants pointed out that the length of the overall period for the conduct of the elections, as well as the period for the electoral campaign, had been significantly reduced shortly before the 2010 parliamentary elections. In particular, on 2 June 2008 the overall election period had been reduced from 120 days to seventy-five days, and on 18 June 2010 it had been further reduced to sixty days. As to the electoral campaign period, on 2 June 2008 its starting day had been moved from sixty days before election day to twenty-eight days before election day, and on 18 June 2010 it had been moved again to twenty-three days before election day. Those amendments had been criticised by the Venice Commission, OSCE/ODIHR, domestic non-governmental election monitoring organisations and opposition parties. The shortening of the above‑mentioned periods had led to systemic difficulties for the timely registration of candidates and the timely completion of appeal procedures before the start of the electoral campaign.

(b)  The Government

88.  The Government submitted that, although the applicants had initially been refused registration, their appeals had eventually been granted by the Baku Court of Appeal or the Supreme Court and they had been registered as candidates and had participated in the elections. Thus, their electoral rights had been restored and there had been no violation of Article 3 of Protocol No. 1 to the Convention.

**2.  The Court’s assessment**

89.  The general principles regarding Article 3 of Protocol No. 1 to the Convention have been set out in, among other cases, *Sitaropoulos and Giakoumopoulos v. Greece* ([GC], no. 42202/07, §§ 63-67, ECHR 2012) and *Davydov and Others v. Russia* (no. 75947/11, §§ 271-77, 30 May 2017). In particular, **the Court reiterates that Article 3 of Protocol No. 1 enshrines a characteristic principle of an effective political democracy and is accordingly of prime importance in the Convention system. While this Article is phrased in terms of the obligation of the High Contracting Parties to hold elections under conditions which will ensure the free expression of the opinion of the people rather than in terms of a particular right or freedom, the Court has held that it also implies individual rights, including the right to vote and the right to stand for election** (see *Sitaropoulos and Giakoumopoulos*, cited above, § 63).

90.  **In the present cases, owing to the applicants’ late registration as candidates, they were allowed to join the electoral campaign at a very late stage and were able to campaign for significantly shorter periods of time** than other candidates **or were not able to campaign at all. The Court considers that these cases differ from those where the central issue was alleged inequality of treatment** (such as, for example, alleged unequal media coverage) of the candidates during the electoral campaign or inequality of campaigning opportunities available to registered candidates (contrast, for example, *Communist Party of Russia and Others v. Russia*, no. 29400/05, §§ 107-29, 19 June 2012, and *Oran v. Turkey*, nos. 28881/07 and 37920/07, §§ 69-78, 15 April 2014). **In the present cases, the applicants’ ability to campaign was impaired by a time constraint**, which was a practical consequence of their late registration**. The primary issue, therefore, is not, in and of itself, any inequality of treatment or opportunities during the campaign, but whether the applicants’ late registration adversely affected their individual right to stand freely and effectively for election**. **The timely registration of candidates is crucial in order for them to be known to voters and to be able to convey their political message during the electoral campaign period in an effort to gain votes and get elected. The free choice of the electorate depends on, *inter alia*, having information concerning all eligible candidates, and receiving it in a timely manner in order to form an opinion and express it on election day.**

91.  **The Court reiterates that the applicants were entitled, under Article 3 of Protocol No. 1, to stand for election in fair and democratic conditions, regardless of whether ultimately they won or lost** (see *Uspaskich v. Lithuania*, no. 14737/08, §§ 88-92, 20 December 2016, § 88, with further references). The Court has to satisfy itself that the conditions in which the applicants’ individual electoral rights were exercised did not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness (see *Namat Aliyev* *v. Azerbaijan,* no. 18705/06, § 75, 8 April 2010; *Scoppola v. Italy (no. 3)* [GC], no. 126/05, § 84, 22 May 2012; and *Riza and Others v. Bulgaria*, nos. 48555/10 and 48377/10, § 142, 13 October 2015). Such conditions must not thwart the free expression of the people in the choice of legislature – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage (see *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, § 62, ECHR 2005‑IX).

92.  **At the outset, the Court takes note of the Government’s argument that the applicants’ electoral rights had been “restored” because they had eventually been registered as candidates and had been able to run for election. However, that argument is misplaced in the context of the complaint in the present cases, because the complaint does not concern the applicants’ ineligibility to stand for election, as they were indeed eventually registered as eligible candidates. The complaint in the present case is that the applicants’ late registration denied them the possibility to participate in the elections effectively, in breach of the respondent State’s undertaking to “hold free elections ... under conditions which will ensure the free expression of the opinion of the people”.**

93.  **The Court also notes the applicants’ argument that the reduction of the electoral campaign period shortly before the 2010 parliamentary elections had adversely affected their ability to effectively stand for election.** In this connection, the Court reiterates that Article 3 of Protocol No. 1 was not conceived as a code on electoral matters, designed to regulate all aspects of the electoral process. There are numerous ways of organising and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe, which it is for each Contracting State to mould into its own democratic vision (see *Ždanoka v. Latvia* [GC], no. 58278/00, § 103, ECHR 2006‑IV). Under Article 3 of Protocol No. 1, the States “enjoy considerable latitude to establish rules within their constitutional order governing parliamentary elections and the composition of the parliament, and ... the relevant criteria may vary according to the historical and political factors peculiar to each State” (see *Aziz v. Cyprus*, no. 69949/01, § 28, ECHR 2004‑V). The Court considers that it is not its task in the present cases to give a general assessment of the compatibility of the domestic electoral legislation with the Convention. Its task is limited to the assessment of whether the applicants’ rights under Article 3 of Protocol No. 1 were breached in the specific circumstances which obtained in the present cases.

94.  Turning to those circumstances, the Court observes that the official electoral campaign period for the parliamentary elections of 7 November 2010 began on 15 October and ended on 5 November 2010. Campaigning on 6 November 2010 was prohibited owing to the twenty-four-hour black‑out period before election day. The Court further observes that the first applicant was issued with his candidate registration card on 4 November 2010, the second applicant on 2 November 2010, and the third applicant on 5 November 2010. In such circumstances, the first applicant had only one full day to campaign, the second applicant had only three full days, and the third applicant had practically no time left for campaigning.

95.  **The Court notes that the Venice Commission’s Code of Good Practice in Electoral Matters recommends that candidatures be validated by the start of the election campaign, because late validation places some parties and candidates at a disadvantage in the campaign** (see paragraph 74 above).

96.  The Court considers that it is necessary to determine whether the late registration in the present cases was due to arbitrariness in the procedures and/or arbitrary delays attributable to the authorities. If so, it must then determine whether such late registration curtailed the applicants’ electoral rights to an extent that was incompatible with the requirements of Article 3 of Protocol No. 1.

97.  **In this regard, the Court observes that it has consistently stressed the need to avoid arbitrary decisions and abuse of power in the electoral context, especially as regards the registration of candidates. It has also emphasised that the procedures for registering candidates must be characterised by procedural fairness and legal certainty** (see *Petkov and Others v. Bulgaria*, nos. 77568/01 and 2 others, § 61, 11 June 2009, with further references).

98.  The applicants’ specific situation in the present cases must be assessed in the general context of certain systemic issues observed in the Azerbaijani 2010 parliamentary elections stemming from the lack of sufficient safeguards to prevent refusals to register candidates based on arbitrary findings of inauthenticity of supporting signatures. In particular, in the leading case of *Tahirov v. Azerbaijan* (cited above)concerning the refusal to register a candidate owing to an allegedly insufficient number of valid supporting signatures, the Court found, *inter alia*, that there were concerns regarding the impartiality of the electoral commissions, a lack of transparency in their actions and various shortcomings in their procedures (ibid., §§ 60-61); a lack of clear and sufficient information about the professional qualifications and the criteria for the appointment of working‑group experts charged with the task of examining signature sheets (ibid., §§ 63-64); failure by the electoral commissions and courts to take any further investigative steps to confirm the experts’ opinions on the authenticity or otherwise of signatures (ibid., § 65); and systematic failure by the electoral commissions to abide by a number of statutory safeguards designed to protect nominated candidates from arbitrary decisions (ibid., §§ 66-68 and 69). Similar findings were made in a number of other cases (see *Gasimli and Others v. Azerbaijan* [Committee], nos. 25330/11 and 4 others, 17 December 2015; *Vugar Aliyev and Others v. Azerbaijan* [Committee], nos. 24853/11 and 3 others, 17 December 2015; *Bagirov and Others v. Azerbaijan* [Committee], nos. 17356/11 and 4 others, 17 December 2015; *Soltanov and Others v. Azerbaijan* [Committee], nos. 30362/11 and 4 others, 16 June 2016; *Gaya Aliyev and Others v. Azerbaijan* [Committee]*,* nos. 29781/11 and 5 others, 16 June 2016; and *Mammadli and Others* [Committee], nos. 2326/11 and 3 others, 30 June 2016). Having regard to the material in the case files and the parties’ submissions in the present cases, the Court notes that they disclose essentially the same problematic issues in respect of the candidate‑registration process – in particular as they pertain to the process of verifying the authenticity of supporting signatures – as those examined in the above-mentioned judgments. Even though the applicants in the present cases were eventually registered after a series of appeals, the Court finds, having regard to the material in the case files, that the initial refusals to register the applicants as candidates and the subsequent proceedings, up to the point of the respective decisions granting their appeals, disclosed the existence of the same procedural shortcomings as those summarised above.

99.  As to the electoral time-limits, the Court notes that the domestic law provided for a maximum three-day period for electoral appeals and a maximum three-day period for the electoral commissions and courts to examine the appeals (see paragraphs 69 and 72-73 above). At the electoral commission level, the three-day period for examination could be extended for an indefinite duration (see paragraph 72 above), which was subject to, in the Court’s opinion, well-founded criticism by the OSCE/ODIHR (see paragraph 76 above). With three levels of appeal against a ConEC decision (comprised of the CEC, the Court of Appeal and the Supreme Court), the electoral appeal proceedings in cases concerning refusals to register candidates could theoretically take up to eighteen days (and sometimes longer, in situations where the appeal period was extended by the CEC or where a case was remitted to a lower instance). Since the decision on refusal to register could be delivered as late as on the eve of the official start of the electoral campaign period (see paragraphs 64-65 above), the examination of appeals against such decision could take place after the start of the campaign period, as happened in the present cases. Thus, under this system, a degree of overlap was possible between the period for examination of appeals against refusals to register (which was of variable length, depending on the number of consecutive appeals which had to be lodged in a specific case and on whether the examination by the CEC was extended) and the electoral campaign period (which was fixed at twenty-two days). Consequently, given the possibility of overlap between the time periods allocated for the above-mentioned stages of the electoral process and the reduced length of the electoral campaign period, it was of utmost importance to conduct the appeal proceedings in a timely manner in order to ensure that, should an appellant be successful, he would have sufficient time before election day to conduct his campaign.

100.  On that point, the Court notes that the proceedings in the present cases were subject to a number of delays attributable to the electoral commissions and the courts, which on several occasions delivered their respective decisions in a belated manner, sometimes in breach of the three‑day limit prescribed by law. For example, the first applicant’s appeal against the ConEC decision was examined by the CEC in eight days, after the appeal period was extended for an undefined period of time (see paragraphs 9‑10 above). While technically this was not in breach of the domestic law because there was a lawful extension decision, the fact that at the material time the law did not provide for a time-limit for the extended period was, in the Court’s view, problematic. Furthermore, it appears that, in the first applicant’s case, the Supreme Court’s decision of 28 October 2010 following his appeal against the Baku Court of Appeal’s judgment was also delivered belatedly (see paragraphs 12-14 above). In the second applicant’s case, it took six days for the Baku Court of Appeal to decide on his appeal against the CEC decision (see paragraphs 31-32 above). In the third applicant’s case the proceedings were significantly delayed owing to the CEC’s and the Baku Court of Appeal’s incorrect findings that he had missed the deadline for appealing (see paragraphs 47-50 above). Even though their findings were eventually corrected by the Supreme Court, a significant amount of the applicant’s potential campaigning time was irretrievably lost.

101.  Having regard to the above, **the Court finds that the applicants’ late registration in the present cases was due to a lack of safeguards against arbitrariness in the candidate registration procedures and, moreover, to delays in the examination of their appeals attributable to the electoral authorities and the courts.**

102.  **As to whether such delays in registration amounted to a breach of the requirements of Article 3 of Protocol No. 1, the Court notes that, while an electoral campaign is important and does have an effect on the voting results, it is not the only factor which affects the choice of potential voters; that choice is also affected by other factors, so it may be difficult to determine a clear causal link between excessive or insufficient campaign publicity and the number of votes obtained by a candidate** (see, *mutatis mutandis*, *Communist Party of Russia and Others*, cited above, § 118). **However, as noted above, what is at stake in the present cases is not a restriction of campaign publicity or media coverage as such, but the applicants’ individual right to stand freely and effectively for election in fair and democratic conditions** (see paragraph 90 above).

103.  **In the present cases, the delays in the applicants’ registrations were not minor. The applicants were registered so late and so close to election day that they did not have a reasonable amount of time to conduct effective electoral campaigns. As noted above, the late registration was due to a lack of safeguards against arbitrariness in the candidate registration procedures and to delays by the electoral authorities and courts. In such circumstances, the Court finds that the applicants’ individual electoral rights in the present cases were curtailed to such an extent as to significantly impair their effectiveness.**

104.  **There has accordingly been a violation of Article 3 of Protocol No. 1 to the Convention.**

**IV.  ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION**

105**.**Relying on Article 13 of the Convention in conjunction with the above complaint, the applicants complained that the domestic proceedings had been ineffective. Article 13 provides as follows:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

106.  The applicants reiterated the complaint. The Government submitted that the applicants had had effective domestic remedies at their disposal and that, having used them to their benefit, they had had their right to stand as candidates restored.

107.  The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

108.  Having regard to the finding relating to Article 3 of Protocol No. 1 to the Convention (see paragraph 103 above), the Court considers that it is not necessary to examine whether, in this case, there has been a violation of Article 13.

**V.  ALLEGED VIOLATION OF ARTICLE 34 OF THE CONVENTION IN APPLICATIONS Nos. 37602/11 AND 43776/11**

109.  By a fax of 9 September 2014 Mr I. Aliyev, the representative of the second and third applicants, introduced a new complaint on behalf of those applicants. He argued that the seizure from his office of the entire case files relating to the applicants’ pending cases before the Court, together with all the other case files, had amounted to a hindrance to the exercise of the applicants’ right of individual application under Article 34 of the Convention, which reads as follows:

“The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”

110.  The submissions made by the applicants, the Government and the third party, the International Commission of Jurists (ICJ), were identical to those made by the relevant parties in respect of the same complaint raised in the case of *Annagi Hajibeyli* (cited above, §§ 57-63).

111.  In *Annagi Hajibeyli*, having examined an identical complaint based on the same facts, the Court found that the respondent State had failed to comply with its obligations under Article 34 of the Convention (ibid., §§ 64‑79). The Court considers that the analysis and finding it made in the *Annagi Hajibeyli* judgment also apply to the present cases and sees no reason to deviate from that finding.

112.  The Court therefore finds that the respondent State has failed to comply with its obligations under Article 34 of the Convention in respect of applications nos. 37602/11 and 43776/11.

**VI.  APPLICATION OF ARTICLE 41 OF THE CONVENTION**

113.  Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A.  Damage

114.  The first and third applicants claimed 20,000 euros (EUR) each in respect of non-pecuniary damage. The second applicant claimed EUR 40,000 in respect of non-pecuniary damage.

115.  The Government argued that the claims were excessive and considered that it would be reasonable to award less than EUR 7,500 to each applicant in respect of non-pecuniary damage.

116.  Ruling on an equitable basis, the Court awards each applicant the sum of EUR 7,500 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B.  Costs and expenses

117.  The applicants also claimed the following amounts in respect of costs and expenses:

(i)  the first applicant (application no. 28508/11) claimed EUR 2,000 for legal fees incurred in the domestic proceedings and the proceedings before the Court, and EUR 359 for translation costs incurred before the Court;

(ii)  the second applicant (application no. 37602/11) claimed EUR 2,500 for legal fees incurred in the domestic proceedings and the proceedings before the Court;

(iii)  the third applicant (application no. 43776/11) claimed EUR 2,500 for legal fees incurred in the domestic proceedings and the proceedings before the Court and EUR 340 for translation costs incurred before the Court.

118.  The Government argued that the claims were excessive and could not be considered reasonable. They also noted that Mr Aliyev, the second and third applicants’ representative, had not represented the applicants in the domestic proceedings. Moreover, both representatives of the applicants had represented a number of other applicants in similar cases before the Court and substantial parts of the representatives’ submissions in the present cases, as well as in relation to other applications, were similar.

119.  According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court awards EUR 1,400 to the first applicant (application no. 28508/11) and EUR 2,200 jointly to the second and third applicants (applications nos. 37602/11 and 43776/11) in respect of costs and expenses, plus any tax that may be chargeable to the applicants.

C.  Default interest

120.  The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

**FOR THESE REASONS, THE COURT, UNANIMOUSLY,**

1.  *Decides* to join the applications;

2.  Rejects the Government’s request to strike application no. 28508/11 out of the Court’s list of cases;

3.  *Declares* the complaints under Article 3 of Protocol No. 1 to the Convention and Article 13 of the Convention admissible;

4**.  *Holds* that there has been a violation of Article 3 of Protocol No. 1 to the Convention;**

5.  *Holds* that there is no need to examine the complaint under Article 13 of the Convention;

6.  *Holds* that the respondent State has failed to comply with its obligations under Article 34 of the Convention in respect of applications nos. 37602/11 and 43776/11;

7.  *Holds*

(a)  that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts,to be converted into Azerbaijani manats at the rate applicable at the date of settlement:

(i)  EUR 7,500 (seven thousand five hundred euros) to each applicant, plus any tax that may be chargeable, in respect of non‑pecuniary damage;

(ii)  EUR 1,400 (one thousand four hundred euros), plus any tax that may be chargeable to the applicant, to the applicant in application no. 28508/11, in respect of costs and expenses, to be paid directly into their representative’s bank account;

(iii)  EUR 2,200 (two thousand two hundred euros), plus any tax that may be chargeable to the applicants, to the applicants in applications nos. 37602/11 and 43776/11 jointly, in respect of costs and expenses, to be paid directly into their representative’s bank account;

(b)  that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points;

8.  *Dismisses* the remainder of the applicants’ claim for just satisfaction.

Done in English, and notified in writing on 11 July 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško Angelika Nußberger  
 Deputy Registrar President

## **CASE OF ABIL v. AZERBAIJAN (No. 2)**

*(Application no. 8513/11)*

JUDGMENT

Art 3 P1 • Stand for election • Applicant’s disqualification from parliamentary elections for early campaigning and vote buying, resulting from deficient procedure and inadequate assessment of evidence • Insufficient safeguards against arbitrariness

Art 34 • Hinder the exercise of the right of application • Seizure of applicant’s case-file concerning his application to the Court

STRASBOURG

5 December 2019

**FINAL**

**05/03/2020**

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*

In the case of Abil v. Azerbaijan (no. 2),

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

Angelika Nußberger, *President,* Gabriele Kucsko-Stadlmayer, André Potocki, Yonko Grozev, Mārtiņš Mits, Lәtif Hüseynov, Lado Chanturia, *judges,*  
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 12 November 2019,

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

**PROCEDURE**

1.  The case originated in an application (no. 8513/11) against the Republic of Azerbaijan lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Azerbaijani national, Mr Baybala Alibala oglu Abil (*Bəybala Əlibala oğlu Əbil* – “the applicant”), on 5 January 2011.

2.  The applicant was represented by Mr I. Aliyev, a lawyer based in Azerbaijan. The Azerbaijani Government (“the Government”) were represented by their Agent, Mr Ç. Əsgərov.

3**.  The applicant alleged, in particular, that his right to stand for election, as guaranteed by Article 3 of Protocol No. 1 to the Convention, had been infringed.**

4.  On 26 August 2014 notice of the application was given to the Government. The applicant and the Government each submitted written observations on the admissibility and merits of the case. Observations were also received from the International Commission of Jurists, to whom the President had given leave to intervene as a third party in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court).

**THE FACTS**

**I.  THE CIRCUMSTANCES OF THE CASE**

5.  The applicant was born in 1952 and lives in Baku.

6.  The applicant was nominated by the Classic Popular Front Party to stand as one of its candidates in the parliamentary elections of 7 November 2010. On an unspecified date in early October 2010 **he applied for registration as a candidate** in the single-mandate Garadagh Electoral Constituency No. 11 and, on 5 October 2010, **the Constituency Electoral Commission (“the ConEC”) registered him as a candidate.**

A.  The incident in Qizildash and the related proceedings

7.  **While the applicant’s registration was pending, on 4 October 2010 several posters containing the applicant’s photograph, biography and a text purportedly describing his electoral platform were hung on walls of various building**s in Qizildash, a settlement in the Garadagh district. **According to the applicant, this was not carried out by him or his electoral staff. The official campaigning period for the 2010 parliamentary elections was scheduled to start on 15 October 2010 and, under Article 75.2 of the Electoral Code, it was prohibited to campaign before that date.**

8.  According to the documents submitted by the applicant, **the posters showed an incorrect date as his date of birth, contained incorrect information as to his previous career posts in both his party and in the executive authorities, and the full name of his political party was also given incorrectly. It also contained numerous spelling mistakes.**

9.  According to the applicant, he found out about the above-mentioned posters at 8 a.m. on 4 October 2010. At 8:30 a.m. **he informed the ConEC chairman of this fact by telephone and complained orally that the posters had been orchestrated by his political opponents as an attempt to sabotage his electoral candidacy. Later that day, he submitted a written complaint to the ConEC,** where he also mentioned that the posters in question were fake and contained a lot of incorrect information. **He requested the ConEC to take lawful measures to stop “the sabotage”, to find the perpetrators and to hold them responsible.**

10.  On the same day, **a similar complaint was lodged by the applicant’s electoral representative with the police, but to no avail.**

11.  On the same day, **the ConEC informed the applicant by a letter that it had received “complaints by citizens” about the illegal dissemination of his electoral platform** in Qizildash. In this connection, the applicant was informed that, by a decision of 4 October 2010, the **ConEC had decided to issue a formal warning to the applicant for starting his electoral campaigning early,** in breach of the requirements of Article 75.2 of the Electoral Code. **The applicant was warned that, if he did not cease illegally campaigning, the ConEC would consider the question of cancellation of his candidacy. T**he decision to issue the warning was taken in the applicant’s absence and a copy was eventually sent to the applicant by post on 13 October 2010 and was received by him on 18 October 2010.

12.  On 5 October 2010 the applicant was formally registered as a candidate (see paragraph 6 above).

13.  On 6 October 2010 the applicant sent an information request to the ConEC, asking *inter alia* for details as to the “complaints by citizens” received by the ConEC, the process of examination of those complaints, and the reasons for not inviting the applicant or his representative to participate in the examination. By a letter of 13 October 2010 (after most of the below-mentioned proceedings had taken place) the ConEC responded that on 4 October 2010 it had received complaints from four specifically-named residents of Qizildash, that based on those complaints the ConEC had requested a number of precinct electoral commissions (“PEC”) located in Qizildash to investigate whether the information in those complaints was correct, that an expert group at the ConEC, having examined the complaints and the responses from the PECs, had given its opinion and that, based on that opinion, on 4 October 2010 the ConEC had taken its decision.

14.  On 7 October 2010 **the applicant personally wrote to the ConEC chairman, stating that what was happening in Qizildash were attempts at sabotaging his candidacy and asking the chairman to take measures to stop them. It appears that he received no reply**. On 9 October 2010 he sent a similar complaint by telegram to the chairman of the Central Electoral Commission (“the CEC”). He received no reply to this telegram.

15.  In the meantime, on 6 October 2010 **the applicant lodged a complaint against the ConEC’s decision of 4 October 2010 with the CEC**. He complained that he had only been informed of that decision by means of a letter but, to date, had not been given a copy of it. He argued that the decision had not been based on any reliable evidence of any wrongdoing on his part and complained that, contrary to the requirements of Articles 40.2, 40.9 and 40.10 of the Electoral Code, it had been taken in his absence.

16.  By a decision of 11 October 2010, **the CEC dismissed the applicant’s complaint,** following its examination by the CEC expert group. In its decision, **the CEC noted briefly that the applicant’s complaint was unsubstantiated, that the ConEC decision had been lawful and that there were no grounds for quashing it.** According to the CEC expert group’s opinion, which accompanied the CEC decision, the applicant had been invited to participate in the examination of the complaint by the CEC expert group and by the CEC but he had not submitted any evidence beyond the evidence he had submitted together with his complaint.

17**.  The applicant appealed against this decision** to the Baku Court of Appeal, arguing that the electoral commissions’ decisions had been unlawful and incorrect, that the ConEC had not ensured his participation in its meeting, and that both commissions had not adequately examined the arguments raised in his complaints, namely the fact that his alleged electoral posters had contained numerous mistakes which he would not have made and that he himself had repeatedly informed and complained to the commissions about the dissemination of those posters.

18.  On 20 October 2010 **the Baku Court of Appeal dismissed the applicant’s appeal, finding that the electoral commissions’ decisions had been lawful and that the applicant had failed to submit any reliable evidence proving that the posters had not been disseminated by him or that their dissemination had been an act of sabotage of his candidacy**.

19.  On 1 November 2010 the Supreme Court dismissed a further appeal by the applicant, upholding the appellate court’s reasoning.

B.  The incident in Alat and the subsequent proceedings

20.  In the meantime, on 5 October 2010 the applicant lodged another written complaint with the ConEC, complaining that unknown persons had done the same thing – hanging false campaign posters in his name on the walls of various buildings – in Alat, another settlement located in his constituency. On 8 October 2010 the ConEC notified him by letter that it had received his complaint and had forwarded it to the local police office for inquiry and the necessary measures to be taken. No further response was given to this complaint by the police.

21.  On 10 October 2010 a resident of Alat, K.M., wrote a complaint to the ConEC stating that on 9 October 2010 someone had hung the applicant’s election posters on the walls of his house. He further noted that some people on the street had noticed the posters and informed him that it was illegal to display election materials. Lastly, he asked the ConEC to take “lawful measures in connection with the illegally hung posters”.

22.  The ConEC officials questioned K.M. and three other Alat residents in connection with the above complaint. They each gave handwritten statements on the same day, 10 October 2010.

23.  K.M. stated that on 9 October 2010 another resident of Alat, J.A., had come to his house and asked him whether he could hang the applicant’s election posters on the walls of his house and that K.M. had allowed him to do so.

24.  A statement made by I.I., another Alat resident, was essentially identical to that of K.M. He stated that he had allowed J.A. to hang a poster on the walls of his house.

25.  A handwritten statement prepared by another Alat resident, F.S., a teahouse owner, was essentially identical to those of K.M. and I.I. He stated that he had allowed J.A. to hang a poster on the walls of his teahouse.

26.  J.A., the resident mentioned in K.M.’s, I.I.’s and F.S.’s statements, stated that on 9 October 2010 he had been approached by a man whose first name was Vahid and who introduced himself as the applicant’s close relative and electoral representative. According to J.A., Vahid gave him 150 Azerbaijani manats (AZN) and promised him AZN 300 more in exchange for J.A.’s help in hanging the applicant’s election posters around the settlement. J.A. took the money and hung the posters on various houses, including K.M.’s and I.I.’s houses and F.S.’s teahouse.

27.  On the same day, the ConEC requested the chairmen of six PECs located in Alat to verify the above allegations.

28.  The chairmen of four PECs informed the ConEC that they had not found any campaign posters of the applicant on the territory of their respective precincts.

29.  The chairmen of PECs nos. 5 and 6 informed the ConEC that they had discovered that the applicant’s campaign material had been disseminated on the territory of their respective precincts.

30.  On 11 October 2010 the ConEC expert group examined the above complaints and reports by the PECs, determined that the applicant had breached the requirements of the electoral law for a second time, and issued an opinion that the ConEC should seek a court order fining the applicant for having committed an administrative offence.

31.  By a letter posted on 11 October 2010 the ConEC requested the applicant to appear before the ConEC at 3 p.m. on the same day and to give an explanation in connection with the complaints about him. That letter was delivered to the applicant on 13 October 2010 and, for that reason, until that date he remained unaware of the developments described in paragraphs 21‑29 above.

32.  Based on its expert group’s opinion of 11 October, on 12 October 2010 the ConEC took a decision to request the district court to sentence the applicant to an administrative fine for breaching Articles 2.6.10, 75.2, 88.4.1 and 88.4.2 of the Electoral Code. The decision briefly summarised the Alat residents’ and the PECs’ statements (see paragraphs 21-29 above), and noted that those statements proved that a person named “Vidadi” (*sic* – “Vahid”: see paragraph 26 above), who was the applicant’s representative, had begun to disseminate the applicant’s campaign material ahead of the official start of the electoral campaign. The decision was taken in the applicant’s absence.

33.  Based on the above decision, on 12 October 2010 the ConEC chairman drew up an administrative-offence record (*inzibati xəta haqqında protokol*) in respect of the applicant under Article 39.1 (breach of the rules on the period for conducting the pre-election or referendum-related campaigning) of the Code of Administrative Offences (“the CAO”).

34.  According to the applicant, a copy of the administrative-offence record of 12 October 2010 was shown to him for the first time during a hearing at the Garadagh District Court on 15 October 2010, while a copy of the ConEC decision of 12 October 2010 was given to him on 19 October 2010.

35.  On 15 October 2010 the Garadagh District Court held a hearing to determine the request made by the ConEC.

36.  The applicant made two written submissions to the court, apparently either during the hearing or on the day of the hearing. In the first, he requested the court to take into account, *inter alia*,his complaints to the ConEC and the police of 4 October 2010, his complaint to the ConEC of 5 October 2010, his information request to the ConEC of 6 October 2010, his complaint to the CEC of 6 October 2010, and the election poster in question containing incorrect information about him, copies of which he attached to his submissions.

37.  In his second submission he noted that, from the documents he received during the court proceedings, he had become aware of a person named Vahid who allegedly claimed to be his electoral representative. He denied having any representatives named Vahid and noted that all his representatives were present in the courtroom. He made the following requests to the court: (a) to grant him more time to acquaint himself with the case material; (b) to take measures to identify the person named Vahid and to hear him in person at the court hearing; and (c) to apply to the prosecution authorities for a criminal investigation into the actions of J.A. who had stated that he had accepted a payment for unlawful activities. There are no documents in the case file showing that the court responded to any of the above requests by the applicant.

38.  At the oral hearing, the applicant and his representatives argued that, despite the applicant’s own numerous complaints which he had been making since 4 October 2010 to various authorities about illegal actions being taken in his name and against him, the electoral authorities had wrongly concluded that he had breached electoral law. He maintained that his candidacy was being sabotaged.

39.  The court also heard evidence from the chairman and two members of the ConEC who maintained their findings reached in the ConEC decision of 12 October 2010.

40.  The court further heard evidence from J.A., K.M., I.I. and F.S., all of whom reiterated their written statements as made to the ConEC.

41.  Based on the above submissions, the Garadagh District Court found that the available evidence proved that the applicant had breached Article 39.1 of the CAO and sentenced him to an administrative fine in the amount of AZN 25 (around 23 euros (EUR) at the time).

42.  The applicant appealed, arguing that the Garadagh District Court had not examined the documents adduced by him in evidence and had not responded to his requests and arguments. He requested the appellate court to quash the first-instance court’s judgment and reiterated his requests that the person named Vahid be identified and examined at the court hearing and that the case be referred to the prosecution authorities for investigation of J.A.’s actions.

43.  By a judgment of 29 October 2010 the Baku Court of Appeal upheld the Garadagh District Court’s judgment, without expressly responding to the applicant’s arguments and holding that the lower court had correctly found that the available case material proved that the applicant had breached the relevant legal provisions. No further appeal lay against the Court of Appeal’s judgment.

C.  Cancellation of the applicant’s candidacy

44.  Referring to the Garadagh District Court’s judgment of 15 October 2010, on the same day the ConEC decided, in accordance with Article 113.2 of the Electoral Code, to request the Baku Court of Appeal to cancel the applicant’s candidacy for breaching Article 39.1 of the CAO and Articles 75.2, 88.4.1 and 88.4.2 of the Electoral Code. This decision was taken in the applicant’s absence.

45.  In his written submissions to the court in response to the ConEC’s request, the applicant reiterated his earlier arguments at length and maintained that the alleged illegal campaigning and the subsequent actions taken against him had been staged to sabotage his candidacy.

46.  By a judgment of 19 October 2010 the Baku Court of Appeal granted the ConEC’s request and cancelled the applicant’s candidacy. In reaching this decision, it examined the ConEC’s and the applicant’s oral and written submissions and the documents available in the case file. No witnesses were heard.

47.  Following an appeal by the applicant, on 1 November 2010 the Supreme Court upheld the Court of Appeal’s judgment, holding that the lower court had correctly applied the substantive and procedural requirements of the domestic law and that the arguments raised in the applicant’s appeal were unsubstantiated.

D.  Court proceedings and seizure of the applicant’s case file

48.  At the material time the applicant’s representative in the present case, Mr I. Aliyev, was also representing twenty‑seven other applicants in cases concerning the 2010 parliamentary elections and a number of applicants in other cases before the Court.

49.  On 8 August 2014 criminal proceedings were instituted against Mr Aliyev, which were the subject of a separate application brought by him before the Court (see *Aliyev v. Azerbaijan*, nos. 68762/14 and 71200/14, 20 September 2018). On 8 and 9 August 2014 the investigating authorities seized a large number of documents from Mr Aliyev’s office, including all the case files relating to the proceedings pending before the Court which were in Mr Aliyev’s possession. They concerned over 100 applications in total. The file relating to the present case was also seized in its entirety. The facts relating to the seizure and the relevant proceedings are described in more detail in *Annagi Hajibeyli* *v. Azerbaijan* (no. 2204/11, §§ 21-28, 22 October 2015).

50.  On 25 October 2014 the investigating authorities returned a number of the case files concerning the applications lodged with the Court, including the file relating to the present application, to Mr Aliyev’s lawyer.

II.  RELEVANT DOMESTIC LAW

51.  The relevant provisions of the Electoral Code, as in force at the material time, provided as follows:

Article 2.  Principles of participation in elections and referendum

“2.6.  Persons participating in elections (referendums) shall comply with the terms set out below:

...

2.6.10.  not to influence voters to one’s side through illegal activities; ...”

Article 40.  Transparency in the activity of electoral commissions

“40.2.  ... [C]andidates registered in the relevant constituency and their authorised representatives or counsel ... have the right to observe the meetings of electoral commissions and the vote counting; ... obtain copies of the decisions of the constituency and precinct electoral commissions and other election documents ...; observe the implementation of other election activities in electoral commissions.

...

40.9.  In accordance with the rules specified in Article 20.1 of this Code, the relevant electoral commission shall provide information on the timings of processing election documents and meetings of the electoral commission to: the superior election commissions [and to] each registered candidate and his or her authorised representative ...

40.10.  Representatives of the interested parties shall have the right to be present at meetings at which electoral commissions are investigating formally submitted complaints. ...”

Article 75.  The electoral campaign period

“75.1.  Any form of electoral campaigning on election day and the preceding day shall be prohibited.

75.2.  The electoral campaign shall begin twenty-three days before election day and end twenty-four hours before election day. ...”

Article 87.  Production and distribution of printed, audiovisual and other  
electoral campaign materials

“87.3.  Printed and audiovisual electoral campaign material should contain information about the organisation that produced it and the organisation that ordered its production, the number of issues and the date of production.

87.4.  A registered candidate, political party, bloc of political parties, or referendum campaign group should submit to the electoral commission detailed information about their printed electoral campaign materials or their copies, and the addresses of organisations that ordered and produced those materials.

87.5.  It shall be prohibited to distribute electoral campaign materials in breach of the requirements of Articles 87.3 and 87.4 of this Code.”

Article 88.  Prohibition of abuse while conducting an electoral campaign

“88.4.  Candidates, registered candidates, political parties, blocs of political parties, referendum campaign groups, their authorised representatives, and other persons and organisations who participate directly or indirectly in an electoral campaign are prohibited from gaining the support of voters in the following ways:

88.4.1.  giving money, gifts and other valuable items (except for badges, stickers, posters and other campaign materials having nominal value) to voters, except for the purposes of performing organisational work;

88.4.2.  giving or promising rewards contingent on the outcome of the voting to voters who were involved in the above-mentioned organisational work; ...”

Article 113.  Cancellation of registration of registered candidates or  
 referendum campaign groups and refusal to register candidates

“113.2.  Registration of a candidate or a referendum campaign group shall be cancelled in the cases mentioned below and in the manner provided by law on the basis of a final court verdict in respect of a criminal offence or a final court judgment in respect of an administrative offence:

...

113.2.2.  if it is established that a candidate or referendum campaign group has been conducting an electoral campaign before being registered or before the period indicated in Article 75 of this Code (this provision may not serve as a ground for restricting the freedom of expression and thought guaranteed by the Constitution of the Republic of Azerbaijan);

113.2.3.  if it is established that there has been a[n unlawful] gain of voter support, that is if a candidate, political party, bloc of political parties, referendum campaign group, or their authorised representatives or counsel are found to have committed actions prohibited by Article 88.4 of this Code; ...”

52.  The relevant provisions of the 2000 Code of Administrative Offences, as in force at the material time, provided as follows:

Article 39.  Breach of the rules or the time period for conducting an electoral or  
referendum-related campaign

“39.1.  Breach of the rules or the time period established by law for conducting an electoral or referendum-related campaign is punishable by a fine in an amount of twenty-five to fifty manats. ...”

**THE LAW**

**I.  THE GOVERNMENT’S REQUEST TO STRIKE OUT THE APPLICATION UNDER ARTICLE 37 OF THE CONVENTION**

53.  The Government submitted a unilateral declaration with a view to resolving the issues raised by the application. They further requested that the Court strike this application out of the list of cases, in accordance with Article 37 of the Convention.

54.  The applicant did not comment on the terms of the unilateral declaration.

55.  Having studied the terms of the Government’s unilateral declaration, the Court considers – for the reasons stated in *Tahirov v. Azerbaijan* (no. 31953/11, §§ 34-42, 11 June 2015) and *Annagi Hajibeyli* *v. Azerbaijan* (no. 2204/11, §§ 33-40, 22 October 2015), which are equally applicable to the present case and from which the Court sees no reason to deviate – that the proposed declaration does not provide a sufficient basis for concluding that respect for human rights as defined in the Convention and its Protocols does not require it to continue its examination of the present application.

56.  The Court therefore refuses the Government’s request for it to strike the application out of its list of cases under Article 37 of the Convention, and will accordingly pursue its examination of the admissibility and merits of the case.

**II.  ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL No. 1 TO THE CONVENTION**

57.  The applicant complained under Article 3 of Protocol No. 1 to the Convention and Article 13 of the Convention that his registration as a candidate for the parliamentary elections had been cancelled arbitrarily. The Court considers that this complaint falls to be examined only under Article 3 of Protocol No. 1 to the Convention (see *Abil v. Azerbaijan*, no. 16511/06, § 23, 21 February 2012), which reads as follows:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

A.  Admissibility

58.  The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B.  Merits

59.  The applicant noted that, even before the ConEC had begun its examination of the alleged illegal campaigning, he himself was the first one to report to the authorities the fact of the unauthorised distribution of false campaign material on his behalf. He brought the matter to the attention of the authorities and repeatedly complained that it was an attempt to undermine his candidacy. However, those complaints were never taken into consideration by the ConEC when examining the matter.

60.  The applicant submitted that the fake electoral campaign posters had been anonymously disseminated by someone with the aim of sabotaging his candidacy in the elections. The posters in question had contained numerous mistakes of the kind that would not be reasonably made in legitimate campaign material, such as the incorrect date of birth of the candidate, the incorrect full name of his political party, and wrong factual information about his professional career. Moreover, the posters had displayed the applicant’s image taken from a photograph that he had submitted to a police office and the ConEC to get a temporary candidate ID. That photograph had never been used anywhere else.

61.  The applicant further submitted that he had never been given an opportunity to question any of the local residents who had made complaints about him to the ConEC. In the domestic proceedings, no attempt was made to adequately establish any actual link between the person allegedly named Vahid and the applicant. The applicant maintained that there had been no person named Vahid among the electoral staff authorised to conduct his electoral campaign. Neither had he known J.A., who was the witness who had testified about the person named Vahid. Despite the applicant’s numerous requests and applications where he had pointed out these issues, neither the electoral authorities nor the courts had taken them into consideration.

62.  Lastly, the applicant noted that neither his nor his representatives’ participation had been ensured at a number of the relevant ConEC meetings. As a result, he had been deprived of the opportunity to defend himself against arbitrary decisions.

63.  The Government submitted that Article 75.2 of the Electoral Code established strict dates for the start of electoral campaigns and Article 113.2 of the Electoral Code provided for the cancellation of a candidate’s registration, by virtue of a final court decision in respect of an administrative offence, if the candidate was found to have started his campaigning before the period specified in Article 75.2. These provisions were laid down to ensure equal conditions for candidates during an electoral campaign, which was one of the major pre-requisites for an election to be considered free and fair. Accordingly, the measures taken against the applicant pursued a legitimate aim.

64.  The Government further submitted that the domestic decisions finding that the applicant had violated the rules for conducting his electoral campaign had been based on repeated complaints and witness statements of local residents. The electoral authorities’ and courts’ decisions were well‑founded and the applicant’s complaints and appeals against those decisions had been correctly dismissed as unsubstantiated.

65.  The general principles regarding Article 3 of Protocol No. 1 to the Convention, including the principles on conditions for the eligibility to stand for election, have been set out in, among other judgments, *Davydov and Others v. Russia* (no. 75947/11, §§ 271-77, 30 May 2017), *Paksas v. Lithuania* ([GC], no. 34932/04, § 96, ECHR 2011 (extracts)), *Tănase v. Moldova* ([GC], no. 7/08, §§ 154-61, ECHR 2010), *Tahirov v. Azerbaijan* (cited above, §§ 53-57) and *Orujov v. Azerbaijan* (no. 4508/06, §§ 40-42, 26 July 2011). In particular, the Court reiterates that, while the Contracting States enjoy a wide margin of appreciation in imposing conditions on the right to vote and to stand for election, it is for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they meet the requirement of lawfulness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate or arbitrary (see *Davydov and Others*, cited above, § 272; see also *Paksas*, cited above, § 96-97; *Tănase*, cited above, §§ 161-62; and *Dicle and Sadak* *v. Turkey*, no. 48621/07, § 83, 16 June 2015).

66.  Unlike other provisions of the Convention, such as Article 5, Articles 8 to 11, or Article 1 of Protocol No. 1, the text of Article 3 of Protocol No. 1 does not contain an express reference to the “lawfulness” of any measures taken by the State. However, the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention and its Protocols (see, among many other authorities, *Amuur v. France*, 25 June 1996, § 50, *Reports of Judgments and Decisions* 1996‑III). This principle entails a duty on the part of the State to put in place a legislative framework for securing its obligations under the Convention in general and Article 3 of Protocol No. 1 in particular (see *Karimov v. Azerbaijan*, no. 12535/06, § 42, 25 September 2014; *Paunović and Milivojević* *v. Serbia*, no. 41683/06, § 61, 24 May 2016; and *Yabloko Russian United Democratic Party and Others v. Russia*, no. 18860/07, § 75, 8 November 2016).

67.  As to the lawful basis for the interference in the present case, the Court notes that the applicant was disqualified on two grounds, namely, that he had started his campaign early, contrary to Article 75.2 of the Electoral Code, and that he had attempted to buy votes, that is to gain voter support by giving them money, contrary to the requirements of Articles 88.4.1 and 88.4.2 of the Electoral Code. The procedure for disqualification was regulated by Article 113.2 of the Electoral Code, combined in the applicant’s case with Article 39.1 of the CAO.

68.  Given that Article 3 of Protocol No. 1 does not contain a list of “legitimate aims” capable of justifying restrictions on the exercise of the rights it guarantees and does not refer to those enumerated in Articles 8 to 11 of the Convention, the Contracting States are free to rely on an aim not mentioned in those Articles, provided that it is compatible with the principle of the rule of law and the general objectives of the Convention (see, for example, *Ždanoka v. Latvia* [GC], no. 58278/00, § 115, ECHR 2006‑IV). The Court accepts the Government’s argument that the conditions set out in Articles 75.2 and 113.2 of the Electoral Code pursued the legitimate aim of ensuring equal conditions for the candidates during the electoral campaign. While the Government did not expressly comment on Articles 88.4.1 and 88.4.2 of the Electoral Code, the Court considers that those provisions were also aimed at ensuring equal and fair conditions for all candidates in the elections (see *Atakishi v. Azerbaijan*, no. 18469/06, § 38, 28 February 2012).

69.  It remains to be determined whether there was arbitrariness or a lack of proportionality in the authorities’ decisions.

70.  The Court reiterates that its competence to verify compliance with domestic law is limited and that it is not its task to take the place of the domestic courts in such matters as assessment of evidence or interpretation of the domestic law. Nevertheless, for the purpose of supervision of the compatibility of an interference with the requirements of Article 3 of Protocol No. 1, the Court must scrutinise the relevant domestic procedures and decisions in detail in order to determine whether sufficient safeguards against arbitrariness were afforded to the applicant and whether the relevant decisions were sufficiently reasoned (see *Atakishi*, cited above, § 40). A finding that a candidate has engaged in unfair or illegal campaigning could entail serious consequences for the candidate concerned, in that he or she could be disqualified from running for the election. As the Convention guarantees the effective exercise of individual electoral rights, the Court considers that, in order to prevent arbitrary disqualification of candidates, the relevant domestic procedures should contain sufficient safeguards protecting the candidates from abusive and unsubstantiated allegations of electoral misconduct, and that decisions on disqualification should be based on sound, relevant and sufficient proof of such misconduct (see *Orujov*, cited above, § 46).

71.  The Court notes that the applicant was disqualified by virtue of the Baku Court of Appeal’s judgment of 19 October 2010, delivered at the ConEC’s request, as upheld by the Supreme Court’s decision of 1 November 2010. These disqualification proceedings were the result of, and based on the findings reached in, the two preceding sets of proceedings initiated at the ConEC level. The first set of proceedings concerned the incident in Qizildash, which resulted in a formal warning being issued to the applicant for early campaigning. The second set concerned the “repeated” incident of early campaigning, as well as vote buying, in Alat, which resulted in an administrative fine. The Court considers that the circumstances of the case and the complaint raised before it require a review of all the proceedings leading to and including the disqualification proceedings.

72.  **As to the first set of proceedings concerning the incident in Qizildash, the Court notes that the applicant himself was the first one to report the incident to the ConEC** on the morning of 4 October 2010, informing it of the allegedly fake posters, noting that he was not responsible for disseminating them and complaining that it had been orchestrated by someone unknown to him (see paragraph 9 above).

73.  **In response, the ConEC took a decision of 4 October 2010 formally warning the applicant for early campaigning, in his absence, and without hearing from him beforehand.** **The applicant was not informed of the ConEC meeting in advance, and had no knowledge of the evidence on which its decision was based. He was not provided with a copy of that decision until several days later** (see paragraph 11 above). It was only on 13 October 2010, after his appeal against the decision was examined by the CEC, that the ConEC provided him with a copy of the decision and informed him that it was based on complaints by several Qizildash residents received on 4 October 2010. **The applicant was never given copies of those complaints or an opportunity to challenge the complainants at any stage of the proceedings, including the appeal proceedings in the CEC, the Baku Court of Appeal or the Supreme Court** (see paragraphs 15-19 above).

74.  As to the second set of proceedings, the Court notes that, again, it was the applicant who first reported the incident in Alat to the ConEC on 5 October 2010. Without questioning the applicant, the ConEC forwarded the complaint to the police and, as it appears, did not give any further consideration to that complaint. Subsequently, according to the ConEC, on 10 October 2010 it received complaints from Alat residents of alleged illegal campaigning by the applicant. The ConEC reacted to those complaints on the same day by questioning those individuals and various PEC chairmen. The ConEC’s decision of 12 October 2010 to seek a court order in respect of an administrative offence was taken in the applicant’s absence and without his knowledge, because he was only informed about it belatedly (see paragraph 31 above). A copy of the decision of 12 October 2010 was made available to him on 19 October 2010, only after the Garadagh District Court sentenced him to an administrative fine (see paragraph 34 above). Moreover, the applicant first became aware of the existence of the complaints made against him by K.M., I.I., F.S. and J.A., and the contents of those complaints, only during the court hearing.

75.  **Having regard to the above, the Court reiterates that considerations of expediency and the necessity for tight time-limits designed to avoid delaying the electoral process, although often justified, may nevertheless not serve as a pretext to undermine the effectiveness of electoral procedures or to deprive the persons concerned by those procedures of the opportunity to effectively contest any accusations of electoral misconduct made against them** (see *Orujov*, cited above, § 56, and *Khanhuseyn Aliyev v. Azerbaijan*, no. 19554/06, § 40, 21 February 2012). In the present case**, the Court finds that, in the proceedings before the ConEC, the applicant was not afforded sufficient procedural safeguards. He had not been informed of the relevant ConEC meetings in advance and had not been given an opportunity to challenge the evidence used against him, depriving him of the possibility to adequately defend his position before the ConEC. Moreover, copies of the ConEC decisions and other relevant documents were given to him with significant delays of several days. This deprived the applicant of the opportunity to adequately prepare his appeals within the maximum three‑day statutory period for lodging appeals against ConEC decisions.**

76.  When examining the applicant’s appeals against the ConEC decision of 10 October 2010, as well as in the judicial proceedings concerning the administrative offence, **the domestic courts did not address the applicant’s repeated arguments concerning the above-mentioned procedural deficiencies in the ConEC proceedings. Likewise, those arguments were also raised by the applicant but not given due consideration by the Baku Court of Appeal and the Supreme Court in the subsequent proceedings concerning the cancellation of the applicant’s candidacy.**

77.  Furthermore, in addition to the above-mentioned procedural deficiencies, **the Court considers that, throughout the entirety of the proceedings, neither the electoral commissions nor the domestic courts adequately assessed the evidence serving as the basis for the applicant’s disqualification as a candidate or the applicant’s arguments raised in his defence.**

78.  **The available evidence consisted of the election posters in question and statements by several local residents and two PEC chairmen.**

79.  As to the election posters, **the applicant repeatedly noted in his various submissions, both in the first and in the subsequent sets of proceedings, that the posters were fake and pointed to the fact that they contained numerous incorrect data concerning his personal and career details, which in itself was evidence that they could not have been made by him and that they were made by someone who was not on his campaign staff. In the Court’s view, this was a strong argument that required examination by the electoral authorities and courts in order to determine whether the posters indeed originated from the applicant’s electoral staff, before finding him responsible for early campaigning. However, this argument was never given any response or consideration by the electoral authorities or the courts.**

80.  As to the witnesses’ and PEC chairmen’s statements, the majority of them merely noted either that they had simply seen the applicant’s election posters in Qizildash or Alat (see paragraphs 13 and 29 above) or that they had allowed J.A. to hang the posters on the walls of the buildings they owned (see paragraphs 21-25 above). Only one witness statement – that of J.A., a resident of Alat – provided some detail as to who was allegedly behind the posters’ dissemination (see paragraph 26 above). He stated that someone who identified himself only by his given name (Vahid) had introduced himself as the applicant’s electoral representative and asked for J.A.’s assistance in disseminating the posters, giving him money in exchange for his assistance and promising more in the future. However, the Court considers that this witness statement alone could not prove, by itself, that the person named Vahid was acting on the applicant’s instructions or otherwise had authority to act on his behalf. There existed no other evidence linking the applicant to that person. The mere fact that he had allegedly claimed to represent the applicant does not mean that he had actually acted on his instructions (compare *Abil*, cited above, § 36).

81.  Despite the applicant’s repeated and insistent arguments that there was no person named Vahid on his campaign staff, the domestic courts never attempted to either investigate this matter further or to provide a reasoned response to the applicant’s arguments. In view of the requirement that decisions on disqualification from election should be based on sound, relevant and sufficient proof of misconduct (see paragraph 70 above), the Court considers that J.A.’s statement, in and of itself but especially when coupled with the unexamined dubious content of the posters in question and the applicant’s repeated protests as to his association with J.A., was insufficient to establish the applicant’s responsibility for the misconduct attributed to him. This required the ConEC and the courts to seek and examine further evidence, either corroborating or refuting the information provided in J.A.’s statement.

82.  **The foregoing considerations are sufficient to enable the Court to conclude that the interference with the applicant’s electoral rights did not meet the requirements of Article 3 of Protocol No. 1. The domestic procedures resulting in the applicant’s disqualification from the election did not afford him sufficient safeguards against arbitrariness and the domestic authorities’ decisions lacked sufficient reasoning and adequate assessment of the evidence.**

83**.  There has accordingly been a violation of Article 3 of Protocol No. 1 to the Convention.**

**III.  ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION**

84.  In conjunction with the above complaint, the applicant complained that his disqualification was a discriminatory measure based on his affiliation with the political opposition. He relied on Article 14 of the Convention, which provides as follows:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

85.  The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

86.  However, having regard to its above finding in relation to Article 3 of Protocol No. 1, the Court considers that it is not necessary to examine whether in this case there has been a violation of Article 14.

**IV.  ALLEGED FAILURE TO COMPLY WITH THE OBLIGATIONS UNDER ARTICLE 34 OF THE CONVENTION**

87.  By a fax of 9 September 2014 Mr I. Aliyev, the applicant’s representative in the present case, introduced a new complaint on behalf of the applicant. He argued that the seizure from his office of the entire case file relating to the present application had amounted to a hindrance to the exercise of the applicant’s right of individual application under Article 34 of the Convention, which reads as follows:

“The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”

88.  The submissions made by the applicant, the Government and the third party, the International Commission of Jurists, were identical to those made by the relevant parties in respect of the same complaint raised in the case of *Annagi Hajibeyli* (cited above, §§ 57-63).

89.  In *Annagi Hajibeyli*, having examined an identical complaint based on the same facts, the Court found that the respondent State had failed to comply with its obligations under Article 34 of the Convention (ibid., §§ 64‑79). The Court considers that the finding it made in the *Annagi Hajibeyli* judgment also applies to the present case and sees no reason to deviate from that finding.

90.  The Court therefore finds that the respondent State has failed to comply with its obligations under Article 34 of the Convention.

**V.  APPLICATION OF ARTICLE 41 OF THE CONVENTION**

91.  Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A.  Damage

92.  The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage.

93.  The Government argued that the claim was excessive.

94.  Ruling on an equitable basis, the Court awards the applicant EUR 4,500 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B.  Costs and expenses

95.  The applicant also claimed EUR 2,859 for the costs and expenses incurred before the domestic courts and the Court. In particular, he claimed EUR 2,000 for legal services provided by Mr I. Aliyev in the domestic proceedings and before the Court. He further claimed EUR 500 for legal services provided by Mr K. Bagirov, another lawyer, who, according to the applicant, provided him with legal assistance in connection with the present application during the time period when Mr I. Aliyev was detained. He also claimed EUR 359 for translation costs.

96.  The Government submitted that Mr I. Aliyev had not represented the applicant in the domestic proceedings and, moreover, as to his legal fees in respect of the proceedings before the Court, the claim was excessive. As to the legal fees claimed in respect of the services of Mr K. Bagirov, the Government argued that they amounted to double-billing the applicant for the work already done by Mr I. Aliyev and, therefore, had not been necessarily incurred.

97.  According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum.

98.  The Court notes that there is no sufficient evidence showing that Mr I. Aliyev represented the applicant as a lawyer in the proceedings before the domestic courts as stipulated and itemised in the contract for legal services concluded between him and the applicant and the accompanying statement of services provided. Furthermore, it appears from the documents in the case file that the applicant was represented by several other lawyers in the proceedings before various domestic instances; however, no claims in respect of their legal services and no copies of relevant documents concerning their legal fees have been submitted. Therefore, the part of the claim concerning the legal fees incurred in the domestic proceedings must be dismissed. The Court further notes that Mr K. Bagirov had not been appointed as the applicant’s representative in connection with the present application and, therefore, the part of the claim in respect of his legal fees must also be dismissed.

99.  As to the remainder of the claims, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,459 covering costs under all heads.

C.  Default interest

100.  The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

**FOR THESE REASONS, THE COURT, UNANIMOUSLY,**

1.  *Rejects* the Government’s request to strike the application out of the Court’s list of cases;

2.  *Declares* the application admissible;

3. *Holds* that there has been a violation of Article 3 of Protocol No. 1 to the Convention;

4.  *Holds* that there is no need to examine the complaint under Article 14 of the Convention;

5.  *Holds* that the respondent State has failed to comply with its obligations under Article 34 of the Convention;

6.  *Holds*

(a)  that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts,to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i)  EUR 4,500 (four thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii)  EUR 1,459 (one thousand four hundred and fifty-nine euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b)  that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

7.  *Dismisses* the remainder of the applicant claim for just satisfaction.

Done in English, and notified in writing on 5 December 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek Angelika Nußberger  
 Registrar President

## 

## **CASE OF POLITICAL PARTY “PATRIA” AND OTHERS v. THE REPUBLIC OF MOLDOVA**

(Applications nos. 5113/15 and 14 others)

JUDGMENT

Art 3 P1 • Stand for election • Arbitrary disqualification of a party three days before parliamentary elections on account of alleged use of undeclared foreign funds • Disqualification based on unsubstantiated allegations • Insufficient procedural guarantees against arbitrariness • Lack of reasoning in the domestic courts’ decisions

STRASBOURG

4 August 2020

FINAL

04/11/2020

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*In the case of Political Party “Patria” and Others v. the Republic of Moldova,

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

Jon Fridrik Kjølbro, *President,* Marko Bošnjak, Valeriu Griţco, Ivana Jelić, Arnfinn Bårdsen, Darian Pavli, Peeter Roosma, *judges,*  
and Stanley Naismith, *Section Registrar,*

Having regard to:

the applications (nos. 5113/15 and 14 others, listed in the appended table) against the Republic of Moldova lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by Political Party “Patria” (“the applicant party”) and fourteen Moldovan nationals (“the other applicants”), on the various dates indicated in the appended table;

the decision to give notice to the Moldovan Government (“the Government”) of the complaint concerning Article 3 of Protocol No. 1;

the parties’ observations;

Having deliberated in private on 23 June 2020,

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

**INTRODUCTION**

1.  The applicants are a political party which ran in the 2014 general elections and fourteen candidates on its electoral list. The application concerns the removal of the applicant party from the list of participants three days before the elections on the ground that, contrary to the provisions of the electoral law, it had used undeclared funds, including money from abroad.

1. **THE FACTS**

2.  The applicant party is a Moldovan political party without representation in Parliament at the time of the events. The other applicants were candidates on its electoral list in the 2014 legislative elections. The applicant party and Mr I. Pohilă are represented by Mr S. Pavlovschi, a lawyer practising in Chișinău. The remaining applicants are represented by Mr I. Pohilă, a lawyer practising in Chișinău.

3.  The Government were represented by their Agent, Mr O. Rotari.

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

* + 1. Background to the case

5.  In May 2014 Parliament decided that the next general election would be held on 30 November of the same year. The decision was published in the Official Gazette on 10 June 2014 and entered into force on 15 September 2014.

6.  One of the applicants in the present case, Mr R. Usatîi, is a businessman who, at the time of the events, ran all his business in the Russian Federation. After 2012 he returned to Moldova, where he gained popularity as a wealthy businessman, philanthropist, showman, politician and organiser of concerts and anti-government rallies. In April 2014 Mr Usatîi became the leader of an inactive political party after that party’s congress elected him and changed the party’s name. However, the Ministry of Justice refused to register the changes to the party’s statute and thus it could not participate in the upcoming elections under its new name and leadership. In August 2014 Mr Usatîi created another political party, “P.”. However, the Ministry of Justice refused to register that party too.

7.  On 12 September 2014 the applicant party was officially created and registered by the Ministry of Justice with another person as its leader and without Mr Usatîi’s involvement. On 13 October 2014, the Central Electoral Commission (“CEC”) officially registered the applicant party to participate in the elections and it was then that Mr Usatîi appeared as candidate number one in the applicant party’s list of candidates, and the electoral symbol of the party became a square containing Mr Usatîi’s first and last names. The other applicants in the present case were also included in the applicant party’s list of candidates for the November 2014 elections.

8.  According to the results of a poll conducted in November 2014, the applicant party was credited with almost 9% of popular support, making it the fourth most represented political party in the Parliament to be elected.

* + 1. The CEC’s application to disqualify the applicant party

9.  On 26 November 2014, that is **three days before the elections, the chief of the general police inspectorate wrote to the CEC that the applicant party had breached the provisions of the Code of Minor Offences** *(Codul contravențional)* **and requested the cancellation of its registration in the upcoming elections.** According to the letter, between 30 May and 29 September 2014 the first candidate on the applicant party’s list of candidates, **Mr Usatîi, had officially brought into Moldova foreign currency in cash in an amount of 14,872,128 Moldovan lei (MDL) (the equivalent of approximately 800,000 euros (EUR)). Over the same period of time Mr Usatîi had used MDL 6,713,622 in two transactions, while the remaining MDL 8,158,506 had been used for the needs of the applicant party’s campaign, in the following manner:**

-  the applicant party had used some seventy mobile telephone lines belonging to a private company owned by the mother of one of the applicant party’s candidates, for which that company had spent MDL 112,000 (the equivalent of EUR 6,000) between August and October 2014;

-  the applicant party had filled its cars with some 1,200 litres of fuel worth MDL 21,450 (the equivalent of EUR 1,200) at a petrol station owned by the son of one of its members, which did not appear in the applicant party’s financial reports;

-  the applicant party had used for its campaign eleven cars which had been bought by two candidates on its electoral list who, according to their tax returns for the previous years, had no means to buy them; the value of the cars was MDL 5,342,003 (the equivalent of EUR 286,000).

The letter continued by stating that on 25 November 2014 proceedings concerning the alleged breach of Article 48 of the Code of Minor Offences had been initiated against the applicant party and against Mr Usatîi in respect of all the above facts. However, since the Electoral Code did not allow for administrative or criminal sanctions to be imposed on candidates in elections, the police inspectorate requested permission for them to be applied. It also requested that the applicant party’s registration for the upcoming elections be cancelled on the grounds of using funds from abroad or undeclared funds.

**It does not appear that the letter was accompanied by any documents or other evidence supporting the facts described therein.**

10.  On the same date the **CEC held a meeting at which it decided, *inter alia*, to lodge an application with the Chișinău Court of Appeal seeking the cancellation of the applicant party’s registration in the elections on the basis of the facts described in the general police inspectorate’s letter. An application was lodged with the Chișinău Court of Appeal the same day.**

* + 1. The proceedings before the domestic courts

11.  On 27 November 2014 the applicant party contested the above‑mentioned decision (see paragraph 10 above) before the Court of Appeal arguing, *inter alia*, that the CEC’s meeting had been announced only fifteen minutes before it began, in breach of Article 37 of the CEC’s Rules (see paragraph 22 below) which set a minimum of twelve hours for the announcement of the meetings. Not only had the meeting begun in the absence of the applicant party’s representative, but he had not been given access to the materials examined by the CEC. Only after the adoption of the CEC’s decision had the applicant party’s representative been given a copy of the general police inspectorate’s letter. Thus, the applicant party’s right to defence during the CEC’s meeting had not been respected.

12.  In so far as the merits of the allegations against it were concerned, the applicant party argued that the accusations were unsubstantiated and based on supposition. The proceedings initiated against it were pending and, according to the Code of Minor Offences, the accused person was presumed innocent until proved guilty by a final judicial decision. The applicant party also submitted that it had opened a special bank account which had received donations of MDL 10,842,000 from its members. During the campaign the applicant party had spent MDL 10,746,405 from that account, of which MDL 975,000 for fuel and MDL 200,000 for mobile communications. None of the money belonging to Mr Usatîi had been used in the campaign.

13.  The applicant party presented before the Court of Appeal copies of lease contracts for 161 cars it had used during the campaign, according to which they had been leased to the applicant party free of charge by its members for the duration of the campaign, that is between 13 October and 30 November 2014. It also presented copies of receipts for the purchase of fuel for those cars.

14.  Mr Usatîi submitted during the proceedings that he had provided the money for the acquisition of eleven cars by two persons who worked for him and who later became party members. However, that acquisition had taken place in May 2014, that is before the beginning of the electoral period. The fact that those members had not declared the cars to the tax authorities could not be held against the party. Mr Usatîi also stated that the money brought by him into Moldova between 30 May and 29 September 2014 had been given to charity.

15.  The applicant party’s representative also submitted that, according to Article 69 of the Electoral Code (see paragraph 20 below), the amount of undeclared funds used during the campaign had to attain a minimum of MDL 2,750,000 in order for the CEC to be able to disqualify a political party from participating in the elections on the ground of use of undeclared funds. The amount of MDL 8,158,506, which the CEC deemed to have been spent by Mr Usatîi on the campaign, represented just the difference between the amount of money brought by him to Moldova and the amount used by him for two transactions. There was no evidence to prove that he had used that money for the party’s campaign.

16.  The applicant party also submitted that it was the only one of all the parties running in the campaign whose funds had been verified by the authorities, and argued that the proceedings against it were politically motivated.

17.  On 27 November 2014 the Chișinău Court of Appeal accepted the CEC’s application to exclude the applicant party from the elections and dismissed the applicant party’s objection. In support of its decision, the Court of Appeal reiterated the submissions in the general police inspectorate’s letter and ordered the confiscation of MDL 8,158,506, representing the funds from abroad used by the first applicant.

18.  The applicant party challenged the above-mentioned decision with an appeal on points of law before the Supreme Court of Justice. It argued, *inter alia*, that there was no evidence to support the accusations against it. Moreover, it submitted that the eleven cars which had been bought with Mr Usatîi’s money had in fact been purchased before 30 May 2014, namely the beginning of the period over which the impugned MDL 8,158,506 had entered Moldova.

19.  On 29 November 2014 the Supreme Court of Justice dismissed the applicant party’s appeal.

1. **RELEVANT LEGAL FRAMEWORK**

20.  The relevant provisions of the Electoral Code of the Republic of Moldova in force at the material time read as follows:

Article 36. Ban on foreign funding

“(1)  It shall be unlawful for direct and/or indirect funding and material support of any kind to initiative groups, electoral campaigns rolled out by candidates and to electoral competitors to be provided by other countries, by foreign, international or joint enterprises, institutions, organisations, as well as by individuals who are not Moldovan citizens. Such funds are subject to seizure and shall be transferred to the state budget. None of the above provisions shall be construed and applied to limit funding allocated openly and transparently with the aim of supporting efforts to promote democratic values and international standards for free, democratic and fair elections.

(2)  If an electoral competitor has intentionally used money from abroad, the Central Election Commission shall submit to the Chișinău Court of Appeal a request to cancel its registration.”

Article 69. Legal liability

“(4)  The cancellation of registration is applied at the request of the Central Electoral Commission, [...], by a final court decision which finds:

a)  the intentional use by the electoral competitor of undeclared funds or exceeding expenses above the ceiling of the means of the electoral fund, in all cases in considerable amounts (more than 5% of the limit) [in 2014 the limit was 55 million lei];

b)  the intentional use by an electoral competitor of funds from abroad; ...”

21.  The relevant provisions of the Code of Minor Offences read as follows:

Article 48. The use of foreign or undeclared funds in elections and referenda

“The use of foreign or undeclared funds in elections and referenda shall be punished with a fine of MDL 600 - 800 for individuals and MDL 6,000 - 10,000 for officials.”

22.  According to Article 37 of the CEC’s Rules, the agenda of ordinary meetings shall be brought to the attention of its members and made public at least twenty-four hours in advance, and that of extraordinary meetings at least twelve hours in advance.

1. **THE LAW**
   1. **JOINDER OF THE APPLICATIONS**

23.  Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

* 1. **ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL No. 1 TO THE CONVENTION**

24.  The applicants alleged that the cancellation of the applicant party’s registration to participate in the elections interfered with their right to participate in free elections and to take seats in Parliament if elected, thus ensuring the free expression of the opinion of the people in the choice of the legislature. They relied on Article 3 of Protocol No. 1, which provides:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

* + 1. Submissions by the parties

25.  The Government submitted in the first place that the complaints submitted by the other applicants were inadmissible on the ground of non‑exhaustion of domestic remedies. In particular, they argued that it was only the applicant party that had contested the decision of the CEC to disqualify it from participating in the elections, while the other applicants had failed to do so.

26.  In so far as the merits of the case were concerned, the Government argued that the domestic courts had established that the applicant party had used in its campaign undeclared funds from abroad in an amount of MDL 8,158,506. The interference with the applicant party’s right to participate in the elections had had a legal basis under domestic law, namely Articles 36 and 69 of the Electoral Code. The removal of the applicant party from the elections had pursued the legitimate aim of observance of the rule of law and the protection of democracy’s proper functioning, which implied the assurance of equal and fair conditions for all candidates in the electoral campaign and the protection of free expression of the opinion of the people in elections. The interference had been proportionate to the aim pursued and devoid of arbitrariness.

27.  The applicants submitted that the other applicants should not have had to exhaust any domestic remedies after the domestic courts finally determined the dispute between the CEC and the applicant party. It would have been excessive to require all of them to bring similar proceedings against the CEC after the Supreme Court had already given a final verdict in the case.

28.  As to the merits of the case, the applicants submitted that the removal of the political party “Patria” from the elections had had no legal basis and had not pursued a legitimate aim. The only real aim pursued by the authorities had been the removal of a competitor with high popular support. The decision to remove the applicant party had been arbitrary and in breach of the provisions of Article 3 of Protocol No. 1. The applicants contended, *inter alia*, that the applicant party’s representatives had not had the possibility to organise their defence, simply because they had no access to the evidence relied upon by the general police inspectorate which served as a basis for the accusations against the party. Also, they had not had sufficient time to prepare for the proceedings. The courts had not relied on any evidence that the applicant party had used money brought to Moldova by Mr Usatîi, but only on supposition. In any event, even assuming that Mr Usatîi’s money had been used by the applicant party in the campaign, according to Article 36 of the Electoral Code only funding by non‑Moldovan nationals had been forbidden. Since Mr Usatîi was a Moldovan national, the provisions did not apply to him.

* + 1. Admissibility

29.  In so far as the Government’s objection on grounds of non‑exhaustion is concerned, the Court points out that an applicant cannot be regarded as having failed to exhaust domestic remedies if he or she can show, by providing relevant domestic case‑law or any other suitable evidence, that an available remedy which he or she has not used was bound to fail. For example, applicants who have not pursued a remedy that has already proved ineffective for other applicants in the same position can reasonably be exempted from doing so (see *Davydov and Others v. Russia*, no. 75947/11, § 233, 30 May 2017 and *Kleyn and Others v. the Netherlands* [GC], nos. 39343/98 and 3 others, § 156, ECHR 2003‑VI).

30.  In the present case the Court is of the opinion that it was reasonable for the other applicants to consider that, in view of the final judgments of the Chișinău Court of Appeal and Supreme Court of Justice of 27 and 29 November 2014, a similar complaint to that brought against the CEC by the applicant party would have had had no prospects of success. Accordingly, the other applicants cannot be regarded as having failed to exhaust domestic remedies and the Government’s objection should be dismissed.

31.  The Court further notes that the 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.

* + 1. Merits

32.  The general principles regarding Article 3 of Protocol No. 1 to the Convention, including the principles on conditions for the eligibility to stand for election, have been set out in, among other judgments, *Davydov and Others v. Russia* (cited above, §§ 271-77), *Paksas v. Lithuania* ([GC], no. 34932/04, § 96, ECHR 2011 (extracts)), *Orujov v. Azerbaijan* (no. 4508/06, §§ 40-42, 26 July 2011), *Ždanoka v. Latvia* ([GC], no. 58278/00, § 115, ECHR 2006‑IV) and *Tănase v. Moldova* ([GC], no. 7/08, §§ 154-61, ECHR 2010). In particular, the Court reiterates that, while the Contracting States enjoy a wide margin of appreciation in imposing conditions on the right to vote and to stand for election, it is for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they meet the requirement of lawfulness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate or arbitrary (see *Davydov and Others*, cited above, § 272; see also *Paksas*, cited above, § 96‑97; *Tănase*, cited above, §§ 161-62; and *Dicle and Sadak* *v. Turkey*, no. 48621/07, § 83, 16 June 2015).

33.  **The Court notes that the annulment of the party’s registration constituted an interference both with the rights of the party and of the individual applicants under Article 3 of Protocol No. 1** (see *Yabloko Russian United Democratic Party and Others v. Russia*, no. 18860/07, § 74, 8 November 2016). **The interference was based on Articles 36 and 69 of the Electoral Code, which provided for the possibility of disqualification of those competitors who used in their campaign funds from abroad and/or undeclared funds in considerable amounts** (see paragraph 20 above). Accordingly, **the Court is satisfied that the impugned legislation met the requirements of foreseeability. Although there would appear to be some vagueness in the applicability of the provisions concerning the use of foreign funds to money belonging to Moldovan nationals, in view of its findings below, the Court does not consider it necessary to resolve the apparent ambiguity.**

34.  Given that Article 3 of Protocol No. 1 does not contain a list of “legitimate aims” capable of justifying restrictions on the exercise of the rights it guarantees and does not refer to those enumerated in Articles 8 to 11 of the Convention, the Contracting States are free to rely on an aim not mentioned in those Articles, provided that it is compatible with the principle of the rule of law and the general objectives of the Convention (see, for example, *Ždanoka*, cited above, § 115). The Court accepts the Government’s argument that the conditions set out in the above‑mentioned provisions of the Electoral Code pursue the legitimate aim of observance of the rule of law and the protection of democracy’s proper functioning which imply the assurance of equal and fair conditions for all candidates in the electoral campaign and the protection of free expression of the opinion of the people in elections. It remains to be determined whether there was arbitrariness or a lack of proportionality in the authorities’ decisions.

35**.  The decision to disqualify the applicant party was based in the first place on the allegation that it had used more than eight million MDL of foreign origin belonging to Mr Usatîi in its electoral campaign**. According to the police, between 30 May and 29 September 2014, Mr Usatîi had declared more than fourteen million MDL to Moldovan Customs when entering Moldova. Since he had later used some six million MDL in two transactions, it was claimed that the remaining eight million had been used to finance the applicant party’s campaign. **No evidence of the use of any cash belonging to Mr Usatîi for the needs of the applicant party was presented by the police and none was requested by the CEC and the domestic courts. Indeed, the Court obtained a full copy of the domestic case file and it does not appear to contain anything in that respect. Neither did the Government point to the existence of such evidence. H**owever, the domestic courts accepted the hypothesis that the remaining eight million MDL belonging to Mr Usatîi had been used for the applicant party’s campaign without any reserve and, apparently, in the absence of any proof.

36.  Another argument for disqualifying the applicant party, accepted by the CEC and the domestic courts, was that the applicant party had spent over five million MDL of undeclared money on the purchase of eleven cars in May 2014. The applicant party had also allegedly spent over one hundred and thirty thousand MDL of undeclared money for fuel and mobile communications. As with the eight million MDL allegedly spent on the campaign, no evidence was presented to support the above allegations by the general police inspectorate and none was required by the CEC and the courts. It is true that Mr Usatîi admitted during the proceedings that he had financed the purchase of eleven cars, but that purchase had taken place before the impugned eight million MDL had been brought into Moldova and before the electoral campaign had commenced, not to mention that it had happened before the creation of the applicant party.

37.  **Besides the lack of substantiation of the allegations against the applicant party, the Court notes that the applicant party was not afforded sufficient procedural safeguards against arbitrariness.** In particular, **the Court notes that the CEC informed the applicant party about its hearing of 26 November 2014 only fifteen minutes in advance, instead of the minimum twelve hours required by the CEC Rules** (see paragraph 22 above**) thus taking the applicant party by surprise and leaving it unprepared for the hearing before CEC**. Moreover, the courts did not react in any way and left unanswered such pertinent arguments by the applicant party as, for instance, that there was no evidence in the case file to support the allegation that eight million MDL belonging to Mr Usatîi had been used in the campaign, that the eleven cars had been purchased before the introduction of the impugned eight million MDL into Moldova by Mr Usatîi and before the beginning of the electoral campaign, let alone before the creation of the applicant party, or that all the fuel and the mobile communications had been paid from the applicant party’s bank account. **The courts did not make an effort to check what expenditures have been made from the applicant party’s bank account and whether they coincided with the expenditures for fuel or mobile communications invoked in letter of the general police inspectorate of 26 November 2014. The courts disregarded all the pertinent arguments brought by the applicant party and accepted without hesitation what appeared to be unsubstantiated accusations against it.**

38.  The foregoing considerations are sufficient to enable the Court to conclude that **the interference with the applicants’ electoral rights fell short of the standards required by Article 3 of Protocol No. 1. In particular, the applicant party’s disqualification from participating in the elections was not based on sufficient and relevant evidence, the procedures of the electoral commission and the domestic courts did not afford the applicant party sufficient guarantees against arbitrariness, and the domestic authorities’ decisions lacked reasoning and were thus arbitrary.**

**39.  There has accordingly been a violation of Article 3 of Protocol No. 1 to the Convention.**

**ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION**

40.  In conjunction with the above complaint, the applicants complained that the applicant party’s disqualification was a discriminatory measure based on ulterior political motives. They relied on Article 14 of the Convention, which provides as follows:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

41.  Having regard to the facts of the case, the submissions of the parties and its findings under Article 3 of Protocol No. 1 to the Convention, the Court considers that it is not necessary to examine either the admissibility or the merits of the complaint under Article 14 (see *Kaos GL v. Turkey*, no. 4982/07, § 65, 22 November 2016; *Ghiulfer Predescu v. Romania*, no. 29751/09, § 67, 27 June 2017).

* 1. **APPLICATION OF ARTICLE 41 OF THE CONVENTION**

42.  Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

* + 1. Pecuniary damage

43.  The applicant party claimed MDL 11,833,587.83 in respect of pecuniary damage. The amount represented the amount spent by it during the electoral campaign. Most of the other applicants claimed amounts between MDL 95,000 and 1,700,000 representing sums which they had contributed to the applicant party’s electoral campaign.

44.  The Government asked the Court to dismiss the applicants’ claims in respect of pecuniary damage.

45.  The Court notes that the present application was about the applicants’ right to stand for election. It cannot be assumed that, had the applicants’ right not been infringed, the applicant party would necessarily have cleared the electoral threshold and entered Parliament. Therefore, it cannot be considered that the expenditure on the electoral campaign was a pecuniary loss resulting from the violation found (see *Orujov v. Azerbaijan*, cited above, § 67). As no causal link has been established between the alleged pecuniary loss and the violation found, the Court dismisses the applicants’ claim under this head.

* + 1. Non-pecuniary damage

46.  The applicant party claimed EUR 50,000 in respect of non-pecuniary damage. The other applicants claimed EUR 3,000 each.

47.  The Government considered those amounts to be excessive.

48.  In the light of all the circumstances, the Court awards the applicant party EUR 7,500 in respect of non-pecuniary damage. In so far as the other applicants are concerned, the Court considers that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage which they may have suffered.

* + 1. Costs and expenses

49.  The two applicants represented by Mr S. Pavlovschi claimed EUR 4,650 for legal fees and MDL 2,743 for postal expenses incurred before the Court. The remaining applicants, represented by Mr I. Pohilă, claimed EUR 14,850 for legal fees and MDL 11,005 for postal expenses incurred before the Court.

50.  The Government disagreed with the amounts claimed by the applicants and asked the Court to dismiss them.

51.  According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 3,500 to the applicants represented by Mr S. Pavlovschi and EUR 4,500 to those represented by Mr I Pohilă.

* + 1. Default interest

52.  The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

1. **FOR THESE REASONS, THE COURT, UNANIMOUSLY,**
2. *Decides* to join the applications;
3. *Declares* the complaint under Article 3 of Protocol No. 1 admissible;
4. *Holds* that there has been a violation of Article 3 of Protocol No. 1 to the Convention;
5. *Holds* that there is no need to examine the admissibility or the merits of the complaint under Article 14 of the Convention;
6. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicants other than the applicant party;
7. *Holds*
   1. that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      1. EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage to the applicant party;
      2. EUR 3,500 (three thousand five hundred euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses incurred by the applicants represented by Mr S. Pavlovschi, to all of them jointly;
      3. EUR 4,500 (four thousand five hundred euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses incurred by the applicants represented by Mr I. Pohilă, to all of them jointly;
   2. that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
8. *Dismisses* the remainder of the applicants’ claim for just satisfaction.

Done in English, and notified in writing on 4 August 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith Jon Fridrik Kjølbro  
 Registrar President

## **CASE OF MAYMAGO AND OTHERS v. RUSSIA**

(Applications nos. 56354/07 and 2 others – see appended list)

JUDGMENT  
STRASBOURG

22 June 2021

*This judgment is final but it may be subject to editorial revision.*

In the case of Maymago and Others v. Russia,

The European Court of Human Rights (Third Section), sitting as a Committee composed of:

Georgios A. Serghides, *President,* María Elósegui, Andreas Zünd, *judges,*  
and Olga Chernishova, *Deputy Section Registrar,*

Having regard to:

the applications (nos. 56354/07, 66556/11 and 35736/12) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by three Russian nationals (“the applicants”) on the various dates indicated in the appended table;

the decision to give notice to the Russian Government (“the Government”) of the complaints concerning the right to stand for election and to declare inadmissible the remainder of the applications;

the parties’ observations;

the decision to reject the Government’s objection to examination of the applications by a Committee;

Having deliberated in private on 1 June 2021,

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

**INTRODUCTION**

1.  This case concerns the applicants’ allegations of a breach of their respective right to stand for election **on account of annulment of their candidacy registrations for election to the respective legislative assemblies of three constituent subjects of the Russian Federation. The decision‑making process of the domestic courts examining the applicants’ appeals against the annulments decisions was not accompanied by adequate and sufficient safeguards against arbitrariness.**

1. **THE FACTS**

2.  The applicants’ personal details are indicated in the appended table.

3.  The Government were represented by Mr M. Galperin, Representative of the Russian Federation to the European Court of Human Rights.

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

* 1. Application no. 56354/07

5.  Mr Maymago (“the first applicant”) stood for the election of the Krasnoyarsk Regional Legislative Assembly (“the Krasnoyarsk LA”) to be held on 15 April 2007. His candidacy was registered by the Precinct Electoral Commission (PEC) (*участковая избирательная комиссия* (*УИК*) of precinct no. 23 on 14 February 2007.

6.  On 9 and 10 March 2007 the applicant, three other individuals registered as candidates for the election to the Krasnoyarsk LA in constituencies other than that of the first applicant, and their staff visited the villages of Khatanga and Dudinka, respectively, where they held a meeting with residents, in the course of which the four men spoke complimentary of each other’s qualities. Immediately after the meetings, a music band from Krasnoyarsk called “Yakhont” gave free-of-charge concerts under the headline “‘Yakhont’ against drugs”. The band members did not say anything to support the candidacy of Mr Maymago in the course of their performances.

7.  Mr Ts., another candidate to the Krasnoyarsk LA election registered in constituency no. 23, lodged a complaint with the PEC of constituency no. 23 arguing that Mr Maymago had spent more than 5% of his statutory electoral fund on campaigning *(«предвыборная агитация»*) even though the domestic law set a 5% limit for such expenses. He referred to the cost of train and plane tickets to Dudinka for eleven persons and to the costs of the concert of the Yakhont band. Mr Ts. did not provide any proof to the fact that the money from Mr Maymago’s electoral fund had been used to pay for the tickets or to pay to the band. Instead he had mentioned the average fee that the Yakhont band would charge as estimated by the Krasnoyarsk Regional Philharmonic Service, 449,840 Russian roubles (RUB) (at the material time, approximately 13,025 euros). The Yakhont band had no formal affiliation with the Krasnoyarsk Regional Philharmonic Service.

8.  The PEC, relying on the information provided by Mr Ts. regarding the estimate of the Yakhont band’s fee and other expenses allegedly incurred, declared the meetings with residents of Khatanga and Dudinka and the concerts to be “campaigning events”.

9.  Mr Ts. requested the Court of the Taymyr (Dolgano-Nenetskiy) Autonomous Region (“the Taymyr Court”) to annul Mr Maymago’s candidacy registration.

10.  The Taymyr Court refused to postpone a scheduled hearing despite the applicant’s request to reschedule on health grounds.

11.  On 9 April 2007 the Taymyr Court held a hearing in the absence of the applicant; the latter was not represented. The Taymyr Court did not seek to establish whether Mr Maymago or any third parties had in fact paid the Yakhont band, and if so, how much, and whether Mr Maymago or any third parties had used the statutory election fund to pay the band but relied on the estimate of a fee provided by Mr Ts. The Taymyr Court granted Mr Ts.’s request and annulled Mr Maymago’s candidacy registration, ordering an immediate execution of the judgment.

12.  The applicant appealed arguing, in particular, that the Taymyr Court had arbitrarily concluded that the Yakhont band had in fact been paid the amount estimated by the Philharmonic Service despite the absence of any documentary evidence.

13.  On 14 April 2007 the Supreme Court of Russia (“the Supreme Court”) upheld the Taymyr Court’s judgment leaving the first applicant’s points of appeal unaddressed. It declared the immediate execution unlawful while noting that this had not violated any personal right of Mr Maymago.

* 1. Application no. 66556/11

14.  Ms Popova (“the second applicant”), willing to stand for the election to the Tambov Regional Legislative Assembly (“the Tambov LA”) to be held on 13 March 2011, collected 346 signatures in support of her candidacy (316 signatures being a statutory requirement for a candidacy registration).

15.  The PEC of Znamenskiy constituency no. 3 set up a working group composed of five members, including a police graphology expert, and randomly checked 20% of the signatures submitted by Ms Popova, that is, sixty-three, and declared eleven of them invalid: two – on the grounds that they had been “unreliable” (that is, carried out by a person in the name of another person), and nine – as “void” (that is, collected in breach of the rules and procedure for collecting signatures). Of the latter nine signatures, four were declared void because they appeared on the page that bore handwritten corrections in the “date” field, and five – because the person who had collected them had not mentioned “the administrative district” in his home address (an administrative district being a category that is very rarely used in a postal address within the Russian territory). The PEC working group noted that, in any event, the number of valid signatures (335) exceeded the statutory requirement and recommended the second applicant’s registration as a candidate. A few days later the PEC invited Ms Popova to correct certain details in her documents, in particular, to rectify the information regarding her place of work, to supplement information regarding her bank account and to provide a full copy of her passport. The applicant having made the corrections, on 3 February 2011 the PEC registered Ms Popova’s candidacy.

16.  On 9 February 2011 Ms L., another candidate for the Tambov LA election registered in Znamenskiy constituency no. 3, requested the Tambov Regional Court (“the Tambov Court”) to annul Ms Popova’s candidacy registration.

17.  On 18 February 2011 the Tambov Court examined Ms L.’s request. Relying on the findings of the PEC working group (see paragraph 15 above), it referred, in particular, to the fact that the number of “defective” signatures identified by the PEC had exceeded 10 %, contrary to the domestic laws. The Tambov Court refused to reconsider the PEC’s findings stating that “the domestic law did not provide for such a procedure of verification of the collected signatures” and annulled Ms Popova’s candidacy registration.

18.  The second applicant appealed arguing, in particular, that the failure to mention the “administrative district” in the home address of the collector had not affected the validity of the five contested signatures as the other elements of the collector’s home address had been clearly sufficient to identify the person in question and his place of residence; moreover, the same collector had added the administrative district when writing down his address on other signature sheets submitted together with the one containing the five contested signatures. She argued that the Tambov Court’s approach had been overly formalistic and had infringed upon her right to stand for election as the annulment of the candidacy registration had been too harsh a measure.

19.  On 4 March 2011 the Supreme Court upheld the Tambov Court’s judgment leaving the arguments raised in Ms Popova’s points of appeal unaddressed.

* 1. Application no. 35736/12

20.  Mr Sysoyev (“the third applicant”) stood for the election to the Stavropol Regional Legislative Assembly (“the Stavropol LA”) to be held on 4 December 2011. He submitted documents concerning the property he owned. The PEC of constituency no. 5 informed him that some data had been presented in a form that differed from the standard one. The third applicant submitted corrected documents. On 14 October 2011 the PEC of constituency no. 5 registered his candidacy.

21.  Mr A., another candidate for the Stavropol LA election registered in constituency no. 5, requested the Stavropol Regional Court (“the Stavropol Court”) to annul the third applicant’s candidacy registration on the grounds that the information regarding Mr Sysoyev’s property had not been presented in the correct form (the third applicant had included information about his bank accounts, amount of his savings and securities in the “Property” field, whereas that information should have been included in other specifically dedicated separate fields). Mr A. also stated that the third applicant had incorrectly stated his employer and occupation in the form: Mr Sysoyev had written “The Stavropol LA, member of the Stavropol LA” instead of “The Stavropol State LA, member of the Stavropol State LA on a full-time basis”.

22.  On 2 November 2011 the Stavropol Court granted Mr A.’s request on the grounds that the third applicant, when filling in a candidacy application form, had submitted the information on his property in the wrong fields of and had wrongly described his place of work and occupation.

23.  The third applicant appealed arguing that the annulment of his candidacy registration had been unlawful as the shortcomings imputed to him had not been grounds for annulment under the relevant domestic law, which contained an exhaustive list of such grounds.

24.  On 17 November 2011 the Supreme Court upheld the Stavropol Court’s judgment briefly noting that Mr Sysovey had incorrectly filled in the fields of the form concerning his property. The Supreme Court did not address the applicant’s arguments regarding the “place of work and occupation” field of the form.

1. **THE LAW**
   1. **JOINDER OF THE APPLICATIONS**

25.  Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

* 1. **ALLEGED VIOLATION OF ARTICLE 3 of Protocol no. 1 to THE CONVENTION**

26.  The applicants complained about a violation of their right to stand for election guaranteed by Article 3 of Protocol No. 1 to the Convention. Mr Maymago also invoked Article 13 of the Convention.

27.  The Court considers that this complaint falls to be examined only under Article 3 of Protocol No. 1 (see *Davydov and Others v. Russia*, no. 75947/11, §§ 199-200, 30 May 2017), which reads as follows:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

* + 1. Admissibility

28.  The Government considered the applicants’ complaint ill-founded.

29.  The applicants maintained their complaint.

30.  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.

* + 1. Merits

31.  The applicants maintained that there had been a breach of their right to stand for election.

32.  The Government referred to the subsidiarity principle and argued that domestic laws governing elections must be complied with to the letter, otherwise the rights of other candidates standing for election in the same constituency as the applicants would have been breached.

33.  The general principles established in the Court’s case-law regarding Article 3 of Protocol No. 1 have been summarised in *Tahirov v. Azerbaijan*, no. 31953/11, §§ 53-57, 11 June 2015; *Yabloko Russian United Democratic Party and Others v. Russia*, no. 18860/07, §§ 65-71, 8 November 2016; *Davydov and Others*, cited above, §§ 271-77; and *Mugemangango v. Belgium* [GC], no. 310/15, §§ 67-73, 10 July 2020.

34.  In particular, the Court reiterates that Article 3 of Protocol No. 1 contains certain positive obligations of a procedural character, in particular requiring the existence of a domestic system for the effective examination of individual complaints and appeals in matters concerning electoral rights (see *Mugemangango*, cited above, § 69). For the examination of such appeals to be effective, the decision-making process concerning challenges to election results must be accompanied by adequate and sufficient safeguards ensuring, in particular, that any arbitrariness can be avoided. In particular, the decisions in question must be taken by a body which can provide sufficient guarantees of its impartiality. Similarly, the discretion enjoyed by the body concerned must not be excessive; it must be circumscribed with sufficient precision by the provisions of domestic law. Lastly, the procedure must be such as to guarantee a fair, objective and sufficiently reasoned decision (ibid., § 70).

35.  **The Court considers that the task incumbent on it is to establish whether, as regards each of the three applicants, the procedures for verifying the compliance with eligibility requirements were conducted in a manner affording sufficient safeguards against an arbitrary decision** (see *Tahirov*, cited above, § 59). In doing so, it will confine its analysis to the grounds that were ultimately endorsed by the domestic courts upholding the annulment of the applicants’ respective candidacy registrations (see *Krasnov and Skuratov v. Russia*, nos. 17864/04 and 21396/04, § 57, 19 July 2007).

36.  **The Taymyr Court decided to annul Mr Maymago’s candidacy registration following a hearing held in his absence and in the absence of any representation of his interests.** Notably**, it did so without attempting to establish the basic facts that were pivotal in the context of the proceedings at hand: whether the Yakhont band had been paid at all; whether the band’s fee as estimated by the Philharmonic Service had corresponded to the fees actually charged; or whether the band’s performance had been paid for from Mr Maymago’s statutory election fund** (see paragraphs 10‑11 above).

37.  The Tambov Court sitting on the request to annul Ms Popova’s candidacy registration accepted the conclusions of the PEC of Znamenskiy constituency no. 3 regarding the annulled signatures at face value and dismissed the second applicant’s objections noting that under domestic law there had been no “procedure of verification of the collected signatures” (see paragraph 17 above). **Yet the Court considers it highly unlikely that the collector of signatures in support of Ms Popova’s candidacy had acted in bad faith trying to conceal his identity when he had not mentioned “the administrative district” before the name of his home city (see paragraph 15 above), especially in view of the fact that he had noted down the administrative district in his home address on other signature sheets submitted to the same electoral commission (see paragraph 18 above). To consider five signatures void because of such a trivial departure from the formal rules that had had no bearing whatsoever on the truthfulness of the information contained in the impugned signature lists is grossly disproportionate.**

38.  The Stavropol Court, in its turn, annulled Mr Sysoyev’s candidacy registration on account of the latter’s failure to indicate the information about his income and assets in several fields, to add a formulaic descriptor to his job title and to add the word “State” when naming the regional legislative assembly (see paragraph 21 above). **The Court emphasises that the accuracy of the information provided by the third applicant was at no time called into doubt; it was never alleged that the information in question was incomplete, or that the third applicant knowingly misrepresented any details** (contrast *Krasnov and Skuratov* citedabove, §§ 48-51). **The Court considers that it could not be seriously maintained that the difference between the positions of a “member of the Stavropol LA” and of a “member of the Stavropol State LA on a full‑time basis” was capable of misleading the voters** (ibid., § 62).

39.  **In the Court’s view, the defects in Ms Popova’s and Mr Sysoyev’s candidacy registration forms were obviously clerical in nature and insignificant to the point of irrelevance. As such, they could have been rectified without resorting to such a stringent measure as a candidacy registration annulment. The domestic courts were competent, under both federal and regional legislation, to perform independent and effective evaluations of allegations of breaches of the right to free and fair elections** (see *Davydov and Others*, cited above, § 333**). Yet the Tambov and Stavropol Courts granted the requests for candidacy annulment by the applicants’ competitors using a formalistic approach and without attempting to perform any balancing exercise of the competing interests.** **The Court reiterates in this connection that it is a fundamental corollary of the rule of law, that rights prescribed in legislative acts must be effective and practical, and not theoretical and illusory** (see *Tahirov*, cited above, § 67).

40.  **Most strikingly, the Supreme Court in all three sets of proceedings at hand failed to address the applicants’ arguments raised in the points of appea**l (see paragraphs 13, 19 and 24 above).

41.  In view of the above considerations, **the Court cannot but conclude that the decision-making process as regards each applicant’s challenge to the decision to annul their candidacy registration was not accompanied by adequate and sufficient safeguards ensuring that any arbitrariness can be avoided** (see *Mugemangango*, cited above, § 70).

42.  **The foregoing considerations are sufficient to enable the Court to conclude that the applicants’ right to stand for election was not respected given that the procedures for verifying the compliance with eligibility requirements did not afford sufficient safeguards against an arbitrary decision (see, for similar reasoning, *Davydov and Others*, cited above, § 336).**

**43.  There has accordingly been a violation of Article 3 of Protocol No. 1 to the Convention.**

* 1. **APPLICATION OF ARTICLE 41 OF THE CONVENTION**

44.  Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

45.  Mr Maymago and Ms Popova did not submit any claims for just satisfaction, while Mr Sysoyev sought 10,000 euros (EUR) in compensation of non-pecuniary damage. The Government found the amount claimed to be excessive.

46.  The Court agrees that the applicants are victims of a violation of the right to free elections and that such a finding can lead to an award compensating for non-pecuniary damage. It thus awards Mr Sysoyev EUR 5,000, plus any tax that may be chargeable, in respect of non‑pecuniary damage,

47.  The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

1. **FOR THESE REASONS, THE COURT, UNANIMOUSLY,**
2. *Decides* to join the applications;
3. *Declares* the complaints concerning Article 3 of Protocol No. 1 to the Convention admissible and the remainder of the applications inadmissible;
4. *Holds* that there has been a violation of Article 3 of Protocol No. 1 to the Convention;
5. *Holds*
   1. that the respondent State is to pay the third applicant, Mr Sysoyev, within three months, EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent Stateat the rate applicable at the date of settlement;
   2. that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses* the remainder of the applicants’ claim for just satisfaction.

Done in English, and notified in writing on 22 June 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Olga Chernishova Georgios A. Serghides  
 Deputy Registrar President

## **CASE OF AHMET YAVUZ YILMAZ v. TURKEY**

(Application no. 48593/07)

JUDGMENT

Art 3 P1 • Right to free elections • Alleged lack of clarity regarding the use of a Kurdish song during election campaign • Applicant’s complaints before the Court and domestic authorities purely abstract • Playing a Kurdish song not appearing to be a criminal offence and no prosecution brought • Applicant able to stand as independent candidate and not prevented from conveying political and social opinions to the public • Electoral rights not so curtailed as to significantly impair their effectiveness

STRASBOURG

10 November 2020

FINAL

10/02/2021

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*

In the case of Ahmet Yavuz Yılmaz v. Turkey,

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

Jon Fridrik Kjølbro, *President,* Valeriu Griţco, Egidijus Kūris, Ivana Jelić, Arnfinn Bårdsen, Darian Pavli, Saadet Yüksel, *judges,*  
and Stanley Naismith, *Section Registrar,*

Having regard to:

the application (no. 48593/07) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national, Mr Ahmet Yavuz Yılmaz (“the applicant”), on 30 October 2007;

the decision to give notice to the Turkish Government (“the Government”) of the complaint concerning Article 3 of Protocol No. 1 to the Convention;

the parties’ observations;

Having deliberated in private on 29 September 2020,

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

**INTRODUCTION**

1.  Relying on Article 3 of Protocol No. 1 to the Convention, the applicant complained that during the parliamentary election campaign held on 22 July 2007, in which he stood as an independent candidate from the province of Ardahan, he had been subjected to a treatment that constituted a breach of his right to free elections.

1. **THE FACTS**

2.  The applicant was born in 1959 and lives in Ardahan. He was represented by Mr G.S. Yılmaz, a lawyer practising in Ardahan.

3.  The Government were represented by their Agent.

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

5.  **The applicant, who is a lawyer, stood for election as an independent candidate from the province of Ardahan in the parliamentary elections of 22 July 2007.**

6.  During the election campaign, on 2 July 2007 the applicant applied to the Ardahan District Electoral Council. **Referring to the decision of the Supreme Electoral Council dated 8 May 2007, which stated that no other language than Turkish could be used during the election campaign, he requested the District Council to determine whether playing a song that would be sung in both the Turkish and Kurdish languages from his campaign vehicle would constitute a breach of domestic law. In his petition, he stated that the Kurdish language was being used on national TV channels, namely the TRT, and he referred to a decision of the Court of Cassation, dated 27 April 2005, which had concluded that playing a song that was sung in a language other than Turkish would not constitute a crime under domestic law.**

7.  On 5 July 2007 the Ardahan District Electoral Council decided that it had no jurisdiction to deliver a decision on the matter. **The District Electoral Council held that whether playing a Kurdish song during the election campaign would constitute a crime within the meaning of Section 58 of Law no. 298 could only be determined by a criminal court in the course of criminal proceedings.**

8.  **On 9 July 2007 the applicant filed an objection against this decision with the Ardahan Provincial Electoral Council, stating that there was no rule which prohibited him from using a Kurdish song for his campaign.**

9.  On 12 July 2007 the Ardahan Provincial Electoral Council dismissed the objection, stating that deciding on this matter would breach its jurisdiction as that decision should be delivered by the criminal courts.

10.  The applicant subsequently filed a further objection with the Supreme Electoral Council.

11.  On 21 July 2007 the Supreme Electoral Council dismissed the case, holding that the decision of the Ardahan Provincial Electoral Council had been in line with the domestic law and procedure.

12.  **The general election was held on 22 July 2007 and the applicant contested the elections as an independent candidate together with fourteen political parties. The applicant, the only independent candidate, obtained 5,187 votes out of the 55,606 votes that were validly cast in the Ardahan District.**

13.  On 24 July 2007 the applicant filed an objection with the District Electoral Council, disputing the election results. **He requested a recount, alleging that because he was an independent candidate, his name had been printed in a smaller font size on the ballot papers, compared to political parties.**

14.  On the same day **the District Electoral Council delivered a decision and stated that it did not have jurisdiction to examine these complaints. The applicant then applied to the Supreme Electoral Council.**

15.  On 28 July 2007 **the Supreme Electoral Council dismissed the applicant’s recount request, stating that the ballot papers had been prepared in accordance with conditions set out in Law No. 298.**

1. **RELEVANT LEGAL FRAMEWORK AND PRACTICE**

16.  Section 58 of Law No. 298 on the fundamental provisions governing elections and voter registration read, at the material time, as follows:

“... it shall be forbidden to use any language or script other than Turkish in campaigning for election on radio or television or by other means.”

17.  By Law of No. 6529 dated 2 March 2014, the relevant part of Section 58 was amended as follows:

“The Turkish flag and religious statements shall not be written on leaflets and all kinds of printed materials used for propaganda purposes. All kinds of propaganda disseminated by political parties and candidates may be made in different languages and dialects as well as Turkish.”

18.  By a decision of 27 April 2005 (no. 2003/12472E, 2005/2707 K), the Court of Cassation delivered a decision in the case of two accused persons, Y.U. and A.B. According to this decision, Y.U. had sung a song in Kurdish, and A.B. had played a Kurdish song during the election campaign. The Court of Cassation held that that the fact that they had played or sung a song in Kurdish did not constitute propaganda in violation of the law and that they should be acquitted of the charges against them.

1. **THE LAW**

**ALLEGED VIOLATION OF ARTICLE 3 of PROTOCOL No. 1 TO THE CONVENTION**

19.  Relying solely on Article 3 of Protocol No. 1 to the Convention, the applicant stated that his right to free elections had been breached. He mainly argued that he had not been able to play a Kurdish song during his electoral campaign. In the second part of his complaint, he further stated that as an independent candidate his name had not appeared on equal footing with the political parties on the ballot paper, that strict security measures had been applied during his campaign, and that he had had to hold his campaign meeting in a sports centre which was far away from the city centre.

Article 3 of Protocol No. 1 provides:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

* + 1. Admissibility
       1. Regarding the complaint concerning the applicant’s alleged inability to play a Kurdish song during his political campaign

20.  The Government submitted that the applicant did not have victim status within the meaning of Article 34 of the Convention. In this connection, they pointed out that the applicant had not played the song in question during his election campaign and no criminal proceedings had been initiated against him based on section 58 of Law No. 298.

21.  The Court reiterates that, in order to be able to lodge a petition by virtue of Article 34, a person, non-governmental organisation or group of individuals must be able to claim to be the victim of a violation of the rights set forth in the Convention. In order to claim to be a victim of a violation, a person must be directly affected by the impugned measure: the Convention does not envisage the bringing of an *actio popularis* for the interpretation of the rights it contains or permit individuals to complain about a provision of national law simply because they consider, without having been directly affected by it, that it may contravene the Convention. However, it is open to a person to contend that a Law violates his rights, in the absence of an individual measure of implementation, if he is required either to modify his conduct or risks being prosecuted or if he is a member of a class of people who risk being directly affected by the legislation (see *Tănase v. Moldova* [GC], no. 7/08, § 104, ECHR 2010; and *Burden v. the United Kingdom* [GC], no. 13378/05, §§ 33 and 34, ECHR 2008).

22.  In the present case, although no individual measures were taken against the applicant, namely no criminal proceedings were initiated against him, the examination of the case-file reveals that the law as it was in force at the time caused the applicant to refrain from playing a Kurdish song during his election campaign. Consequently, as the applicant complied with the impugned law, and did not play the song in question, this could be considered as having a direct impact on his campaign. In view of the foregoing, the Court dismisses the Government’s objection regarding the victim status of the applicant.

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

* + - 1. Regarding the remaining complaints raised under Article 3 of Protocol No. 1

24.  The applicant further complained under Article 3 of Protocol No. 1 that as an independent candidate, his name had not appeared on equal footing with the political parties on the ballot paper, that strict security measures had been applied during his campaign, and that he had had to hold his campaign meeting in a sports centre which was far away from the city centre.

25.  The Court observes that the applicant’s complaint regarding the irregularities of the ballot paper was effectively examined by the domestic authorities and it was established that the ballot papers were in line with the domestic law (see paras. 13-15). Moreover, the applicant has not submitted any information which would indicate that any prejudice was caused by the alleged irregularities. Furthermore, regarding the allegations that strict security measures were applied to his campaign meetings and that he had to hold his campaign rally in a sports centre which was far from the city centre, the Court takes note of the fact that these complaints were never raised before the domestic authorities.

26.  The Court therefore finds that an examination of the material submitted to it does not disclose any appearance of a violation of this provision. It follows that this part of the application is manifestly ill‑founded and must be declared inadmissible pursuant to Article 35 §§ 3 and 4 of the Convention.

* + 1. Merits

27.  The applicant complained about the lack of clarity as to whether he could play a Kurdish song during his election campaign.

28.  The Government argued that the applicant had not suffered any damage due to the alleged restriction and that his right to free elections had not been breached. They submitted that even if the Court were to consider that there had been an interference in the present case, it had been based on section 58 Law no. 298 and it had pursued the legitimate aim of protecting public order. The Government further stated that restrictions might be imposed on the right to vote and to stand for election, however these restrictions should not breach the principles of a democratic society. In the present case, they underlined the fact that the applicant had been able to participate in the election and maintained that there was no breach of Article 3 of Protocol No. 1.

29.  Finally, the Government referred to the amendment of the relevant domestic legislation in 2014, according to which all kinds of propaganda disseminated by political parties and candidates may be made in different languages and dialects as well as Turkish.

30.  **The Court reiterates that Article 3 of Protocol No. 1 differs from other rights guaranteed by the Convention and its Protocols as it is phrased in terms of the obligation of the High Contracting Party to hold elections which ensure the free expression of the opinion of the people rather than in terms of a particular right or freedom. However, having regard to the preparatory work to Article 3 of Protocol No. 1 and the interpretation of the provision in the context of the Convention as a whole, the Court has established that this provision also implies individual rights, including the right to vote and to stand for election** (see *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, §§ 46-51, Series A no. 113).

31.  **The Court refers, in particular, to the principles established in its case-law on Article 3 of Protocol No. 1**, as summarised in its recent judgment *Mugemangango v. Belgium* ([GC], no. 310/15, §§ 67-73, 10 July 2020). **Accordingly, in accordance with the subsidiarity principle, it is not for the Court to take the place of the national authorities in interpreting domestic law or assessing the facts. In the specific context of electoral disputes, the Court is not required to determine whether the irregularities in the electoral process alleged by the parties amounted to breaches of the relevant domestic law. Nor is the Court in a position to assume a fact-finding role by attempting to determine whether the alleged irregularities took place and whether they were capable of influencing the outcome of the elections. Owing to the subsidiary nature of its role, the Court needs to be wary of assuming the function of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case.**

**32.  The rights guaranteed under Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law. Nonetheless, these rights are not absolute, there is room for “implied limitations”, and Contracting States must be given a margin of appreciation in this sphere. The Court reaffirms that the margin in this area is wide. There are numerous ways of organising and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe (see *Mugemangango*, cited above, § 73).**

33**.  It is, however, for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions imposed on the rights to vote or to stand for election do not curtail the exercise of those rights to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate. In particular, any such conditions must not thwart the free expression of the people in the choice of the legislature – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage** (see *Ždanoka v. Latvia* [GC], no. 58278/00, § 104, ECHR 2006‑IV)*.*

34.  Turning to the present case, **the Court notes that the applicant complained of a breach of his right to free elections due to the lack of clarity on the part of the authorities regarding the use of a Kurdish song during his election campaign.** In this connection, **the Court observes that by applying to the Ardahan District Electoral Council, the applicant was merely making an enquiry before the national authorities to determine whether playing a song in Kurdish would constitute a crime. It also observes that the applicant explicitly referred to the decision of the Court of Cassation (cited above in paragraph 18), which had concluded that playing or singing a Kurdish song did not constitute a crime under domestic law**. In reply, the District Electoral Council concluded that this matter did not fall within its jurisdiction but fell within the jurisdiction of the public prosecutors and the criminal courts. **The Court considers that as the applicant is a lawyer he should have known that the Electoral Council had no authority to give an approval to his request. His complaints before the Court as well as the domestic authorities were therefore purely abstract**. **Even if, at the material time, Section 58 of Law No. 298 stipulated that the election campaign could only be done in the Turkish language and that this provision applied to all political parties and candidates without any exception, it appears that playing a song in Kurdish would not have constituted a criminal offence.** This is supported by the decision of the Court of Cassation, referred to above, of which the applicant was fully aware.In any event, the Court notes that no criminal proceedings were initiated against the applicant (see, *a contrario*, *Şükran Aydın and Others v. Turkey*, nos. 49197/06 and 4 others, 22 January 2013). **In particular, he was able to stand in the elections as an independent candidate and there is no allegation that the applicant was prevented from conveying his political and social opinions to the public during the election campaign.**

35.  In view of the foregoing considerations, **the Court finds that the applicant’s electoral rights were not curtailed to such an extent as to significantly impair their effectiveness. The case file does not reveal any disproportionate acts that would undermine the very substance of free expression of the opinion of the people or of the applicant’s right to stand in elections for the purposes of Article 3 of Protocol No. 1.**

36.  There has accordingly **been no violation** of Article 3 of Protocol No. 1 to the Convention.

37.  **The Court takes note of the fact that Section 58 of Law no. 298 was amended in 2014 and accordingly now all kinds of propaganda disseminated by political parties and candidates may be made in different languages and dialects as well as Turkish** (see paragraph 17 above).

1. **FOR THESE REASONS, THE COURT**
2. *Declares*, unanimously, the complaint raised under Article 3 of Protocol No. 1 about the applicant’s alleged inability to play a Kurdish song during his election campaign admissible and the reminder of the application inadmissible;
3. *Holds*, by five votes to two, that there has been no violation of Article 3 of Protocol No. 1 to the Convention.

Done in English, and notified in writing on 10 November 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith Jon Fridrik Kjølbro  
 Registrar President

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

J.F.K.  
S.H.N.

**DISSENTING OPINION OF JUDGE KŪRIS, JOINED BY JUDGE PAVLI**

1.  There has clearly been a violation of Article 3 of Protocol No. 1 to the Convention. Let us have a look at the facts of the case and the way in which they have been addressed in the instant judgment. I wish they had been assessed adequately, that is to say, more critically.

2.  Some three weeks before the 2007 parliamentary elections, Mr Yılmaz, an independent candidate, asked the Ardahan District Electoral Council whether playing a song in Kurdish (alongside Turkish) would constitute a breach of Turkish law. He referred to two decisions of the authorities. The first was the decision of the Court of Cassation of 27 April 2005, which stated that playing a song in any language other than Turkish would not constitute a crime under domestic law. The second decision was that of the Supreme Electoral Council of 8 May 2007, which concluded that no language other than Turkish could be used in an election campaign. That blanket ban was copy-pasted from section 58 of decades-old Law no. 298.

The District Electoral Council provided no answer on the merits of the request. Instead, it decided that it had no jurisdiction on the matter of which it was seised and which could be determined only by a criminal court in the course of criminal proceedings.

The applicant tried his luck again by challenging the District Electoral Council’s decision before the Ardahan Provincial Electoral Council, which dismissed the objection and upheld the reasoning of the District Electoral Council. The Provincial Council too directed the applicant to the criminal courts.

Mr Yılmaz’s last attempt did not come to fruition either. The Supreme Electoral Council upheld the decision of the Provincial Electoral Council. Its own decision was adopted on the eve of the elections; so even if it had explained that playing a song in Kurdish constituted an exception to its recently reiterated absolutist rule and was not against domestic law (or at least not a criminal offence), Mr Yılmaz would not have been able to benefit from that explanation. Dates matter – or so they should.

3.  In the absence of a final ruling, Mr Yılmaz did not take any chances. Who would? The applicant simply did not play the song in Kurdish, and no criminal court was seised of this matter. Whether playing the song would have helped him in his campaign or not would be guesswork. At the end of the day, he garnered less than 10 percent of all votes cast, so I guess that most likely no song would have helped him to win. But that is a matter of third-rate significance. I could accept that the applicant might also have had other reasons (whatever they could be) for abandoning his wish to play the song in Kurdish, but that too would be irrelevant for this case. What *is* of primary importance is that, as we shall see, domestic electoral law as it stood in 2007 *certainly needed clarification* – clarification which he requested from the authorities in charge of the elections. This was not illegitimate, was it?

4.  Why can it reasonably be asserted that the legislation in question was not sufficiently clear? The decision of the Court of Cassation of 27 April 2005 came across as friendly to the potential players of songs in Kurdish. Could it be that the applicant, by requesting determination of whether he could play a song in Kurdish, in fact put an unnecessary burden on the authorities? If so, he could be said to have abused, in a peculiar form, his right of application to the authorities, who duly rejected his request. But no.

It depends on how one looks at it. Whatever statutes say is made real by court decisions: for it is the courts which say what the law is. The decision of the Court of Cassation of 27 April 2005, which interpreted section 58 of Law no. 298, could be understood as having curbed, to some extent, the absolutist drive of the prohibition on using a language other than Turkish in an election campaign and thus as having rendered that prohibition not all‑embracing. On the other hand, dates indeed matter, as well as the circumstances in which a legal provision has been formulated.

This brings us to the relation between the two decisions referred to by the applicant in his initial request – that of the Court of Cassation of 27 April 2005 and that of the Supreme Electoral Council of 8 May 2007.

5.  For the foreign readership (but not exclusively) that relation is not instantly obvious, especially given: (i) that the decision of the Court of Cassation was adopted in the concrete circumstances of the case examined by criminal courts and might not compulsorily have had a precedential value in each and every situation where a song in languages other than Turkish was to be played during an election campaign; and (ii) that the decision of the Supreme Electoral Council, adopted right before the 2007 elections and intended to instruct those who stood in them, was subsequent to the first one by two years.

The latter – and later – decision merely reiterated a ban which was not novel, but a replica of the one which had for a long time been present in section 58 of Law no. 298. None of these twin provisions provided any specificities as to whether the term “language” (non-Turkish) covered all tongues of the world – those used in Turkey and those not, and those alive and those extinct; or whether the word “use” covered all imaginable forms of campaigners’ recourse to non-Turkish, including, say, their greetings to people at rallies, or quotes from foreign texts, or the Oscars-style shouting (in English, which, to be sure, is not Turkish) “and the winner is!”, or wearing a cap, a pea-jacket or a T-shirt with an inscription in non-Turkish, or, for that matter, the crooning of the lyrics of a foreign tune. Casuistics aside, if the decision of the Court of Cassation had really neutralised some of the initial excessiveness of section 58 of Law no. 298, the Supreme Electoral Council would have had no trouble in at least hinting to that in its decision of 8 May 2007. As it had not even dropped such a hint, any electoral council, top-to-bottom or bottom-to-top, should have been entitled and able to explain that neutralisation to all those in need of that explanation – or even *urbi et orbi* (for example, on television). That would have been not only in the inquirers’ interests, but also in the general interest. In a democracy, electoral authorities are meant to act in the general interest of the people, are they not? This is called good governance.

From the perspective of good governance, a reference (even a brief one) to the fact that the decision of the Court of Cassation of 27 April 2005 rendered the blanket prohibition of the above-mentioned section 58 of Law no. 298 not so absolute, despite the absolutist terms in which it was couched, would have been desirable, if not in the Supreme Electoral Council’s decision of 8 May 2007, then at least in the subsequent explanations by electoral authorities when they were seised of this matter, or even *proprio motu*. Good governance is intrinsically related to the rule of law, the principle underlying the European legal area and enshrined in the Convention. It requires that where an issue in the general interest is at stake it is incumbent on the public authorities to act in good time, in an appropriate manner and with the utmost consistency (see, for example, *Megadat.com S.r.l. v. Moldova*, no. 21151/04, § 72, 8 April 2008, and *Moskal v. Poland*, no. 10373/05, § 51, 15 September 2009). It is also incumbent on them to put in place internal procedures which enhance the transparency and clarity of their operations and minimise the risk of mistakes (see, for example, *Rysovskyy v. Ukraine*, no. 29979/04, § 70, 20 October 2011, with further references).

Against this background, the Supreme Electoral Council copy-pasted the impugned blanket ban from section 58 of Law no. 298 two years after the somewhat restrictive interpretation of the latter by the Court of Cassation. That jurisprudential development notwithstanding, the ban was repeated in its initial form, chilling as it was to those campaigners who would have wanted to play a song in a language other than Turkish. No wonder the applicant requested that the electoral authorities clarify the law *as it stood at that time*.

6.  It is unlikely that the Supreme Electoral Council, when adopting its decision of 8 May 2007, had been unfamiliar with the decision of the Court of Cassation of 27 April 2005. Such a doubt must therefore be rejected; otherwise it could be held that the Supreme Electoral Council’s decision of 21 July 2007 in Mr Yılmaz’s case was unlawful, on the ground (if not any other) that the body which adopted it was incompetent to rule on the matter before it.

But could the Supreme Electoral Council wilfully disregard (for whatever reason) the decision of the Court of Cassation? To give credence to this supposition, exceptionally weighty reasons would have to be adduced, yet I see none. I proceed on the assumption that the Supreme Electoral Council was guided by the intention to follow the law (whatever that law was and however it understood that law), not to undermine it.

So why then did the Supreme Electoral Council merely reiterate, in its decision of 8 May 2007, the blanket ban enshrined in section 58 of Law no. 298, without even hinting that that ban, per the case-law of the State’s highest court, might have been inapplicable in some situations?

We do not know.

Was it because that decision was applicable only in certain specific, exceptional, or even one-off, situations and thus left the blanket ban in question virtually intact and still almost all-encompassing?

Maybe this was so, maybe not. Again, we do not know for sure.

Very little information has been provided to the Court about that decision of the Court of Cassation, which nonetheless has served as a principal factor in substantiating the finding of no violation of Article 3 of Protocol No. 1.

7.  But let us explore one more hypothesis as to what the reasons for the Supreme Electoral Council’s silence on the ostensible two-year-old jurisprudential exception to the impugned blanket ban could be. Not wanting to be too assertive, I nevertheless think that such a hypothesis merited some exploration by the Chamber, especially given the fact that it is insistently suggested by the Court’s most pertinent over-seven-year-old judgment, which in the instant case should have been given much greater prominence than it has actually received. That is to say, between 27 April 2005 and 8 May 2007 *something of jurisprudential significance* happened which prevented any hint about, so to say, the “gap in the ban”. That “something” *had already been dealt with* by the Court in *Şükran Aydın and Others v. Turkey* (nos. 49197/06, 23196/07, 50242/08, 60912/08 and 14871/09, 22 January 2013). That case has much in common with the instant one, but is mentioned in the present judgment only once, in paragraph 34, and moreover from an angle which does not seem instructive.

In *Şükran Aydın and Others* five applicants were convicted for speaking Kurdish during an election campaign. Kurdish was their mother tongue, but also that of the population whom they were addressing. They complained under Articles 6, 9, 10, 11 and 14, and Article 3 of Protocol No. 1 (the latter was invoked by three of them). The Court examined their grievances under Article 10, which alone was invoked by all applicants, and found a violation of that Article, but held that it was not necessary to rule on the complaints under Article 14, not invoked by all applicants, in conjunction with Article 10. It held that the blanket ban, as contained in section 58 of Law no. 298 and entailing criminal sanctions for breaches of that provision, deprived the domestic courts of their power to exercise proper judicial scrutiny, did not meet a pressing social need, was not proportionate to the legitimate aim of “prevention of disorder” (adduced by the Government), and was not necessary in a democratic society. The Court skipped the examination of whether the above-mentioned aim was legitimate – which is telling.

What is relevant to the hypothesis explored here is that in *Şükran Aydın and Others* the applicants were sentenced at various times both before and *after* 27 April 2005, the date of the ostensibly restrictive interpretation of section 58 of Law no. 298 by the Court of Cassation. Moreover, some convictions were upheld by that very court *after* that date.

It follows that the presumption that the decision of the Court of Cassation of 27 April 2005 amounted to decriminalisation of some forms of the use of Kurdish during an election campaign (so Mr Yılmaz had nothing to fear if he chose to play a song in Kurdish) *was not set in stone*. It was *rebuttable*, in view of the fact that the applicants in *Şükran Aydın and Others* (and maybe other persons) *were* convicted for using Kurdish in election campaigning.

True, they were convicted not for playing songs in Kurdish, but for using Kurdish in their speeches. That notwithstanding, the *real* extent of the statutory ban in question, as reiterated by the Supreme Electoral Council, was insufficiently clear. In general, the line between singing (or playing a song) and speaking (relaying a recorded speech) is a very fine one with regard to some forms of expression (is rap singing or speaking?). Even more so, there is no clear-cut water-divide between playing a song in another language and speaking in that language. One of the applicants in *Şükran Aydın and Others* maintained that he had spoken in Turkish but may have greeted some people in the audience in Kurdish – and he was convicted. If, per the decision of the Court of Cassation of 27 April 2005, someone had been allowed to play a song in Kurdish, would he or she have been allowed also to announce it in Kurdish? It would seem natural for a song in Kurdish to be announced in Kurdish, would it not? But was that natural under Turkish law in 2007? Or was such an announcement to be prosecuted – criminally or otherwise?

Again, the ostensible curbing, by the Court of Cassation, of the absolutist complexion of the blanket ban in question *was not so radical* as it is portrayed in paragraph 34 of the instant judgment, where it has been given undue prominence. This may allow for some understanding as to why the Supreme Electoral Council two years later simply repeated the statutory formula of the ban.

That ban is no longer in place. *Şükran Aydın and Others* contributed to this development. In 2014 the ban was removed (see paragraph 17). But even before that, in 2010, the infamous section 58 of Law no. 298 was amended, providing that “[d]uring election campaigns political parties and candidates shall primarily use Turkish” (see *Şükran Aydın and Others*, cited above, § 51).

8.  But now is now, and then was then. In 2007 it was merely consequential for someone standing for election to ask for clarification of insufficiently clear electoral legislation. Mr Yılmaz did just that: *he requested that the electoral council(s) explain what the decision of the highest of them meant*, no less, no more. In legal theory this is called *authentic interpretation*. Did he apply to the wrong institution?

The judgment’s “Relevant legal framework and practice” section does not deal with the powers of electoral councils. I wish it did. This omission may be legitimate on one condition, namely that Turkish electoral councils are competent in their knowledge of electoral law (including the related judicial practice), and able to properly advise those in need. Otherwise, why on earth do they exist? If electoral councils are entitled to adopt binding decisions, they must have both the jurisdiction and the ability to explain the meaning of those decisions *before* the law is violated. What other body could be better placed for preventing in this way the commission of offences?

9.  The facts of the case suggest a far-fetched answer to this seemingly rhetorical question: the electoral authorities’ decisions were to be clarified *not by themselves, but by the criminal courts*.

Criminal courts in all States *do* *indeed* clarify various matters, including those related to offences committed during elections. The petty triviality is that they do so *ex post facto*. Turkish criminal courts, too, could have satisfied Mr Yılmaz’s curiosity, if curiosity it was, on the condition that they had been seised of the matter, which was possible if criminal proceedings had been initiated against him. Thus, to have electoral legislation clarified, Mr Yılmaz had to commit an act which might turn out to be a criminal offence and result in his conviction (or any other offence resulting in another form of liability). He, however, abstained from the act which he was not sure was lawful – to the detriment of the clarity and certainty of domestic electoral legislation. How ungenerous!

There is no such thing as a free lunch; all learning comes at a price. It appears that the price for satisfying curiosity may be such as to resolve that remaining in ignorance is not so bad after all.

The Turkish electoral councils’ stance in Mr Yılmaz’s case meant that they (in addition to their main function) were seen as *sui generis* “advisory bodies” – at least in some election-related disputes. This innovative idea could make a strong showing in the competition for the Ig Nobel Prize or some other parody award, because the “effective remedy to be exhausted” for the purposes of the request for “advice” to be accepted by the “judicial advisory body” is the commission of an offence, for which the “inquirer” may be convicted – as a side-effect of the *ex post* provision of the “advice”.

The idea would be amusing, were it not rueful.

This is how Turkish (bottom-to-top) electoral councils saw that things had to evolve in the applicant’s case. If he wanted to be sure whether playing a song in Kurdish was allowed, he had to play it and wait for a conviction or an acquittal. *Instead of preventing the possible offence, the electoral councils suggested that the applicant commit the act which might be an offence (even a criminal one)*. No act meant no clarification on what the law said. The legislation applied in Mr Yılmaz’s case had already been torn to shreds by this very Court in *Şükran Aydın and Others* (cited above). What is now obvious is its other fault – the impossibility of obtaining an interpretation. The Chamber did not budge on that front.

This brings back to mind the notion of good governance, in particular the requirement that public authorities put in place internal procedures which enhance the transparency and clarity of their operations and minimise the risk of mistakes (see paragraph 5 above). Forget that, says this judgment.

10.  The finding of no violation of Article 3 of Protocol No. 1 in this case renders “good governance” mere empty words, justifies the oddball approach to the prevention of offences in general and the functions of the criminal courts in particular, and whitewashes the discriminatory, undemocratic practices long ago condemned by this very Court. Only at this high price could the said finding of no violation be substantiated. In my opinion, Article 3 of Protocol No. 1 *has been violated*. A violation of Article 10 could also have been found, had the Chamber examined this case from the same standpoint as *Şükran Aydın and Others* (cited above).

11.  The doctrinal basis for that substantiation is set out in paragraphs 31-33, where the Court recalls the principles established in its Article 3 of Protocol No. 1 case-law, as summarised in *Mugemangango v. Belgium* ([GC], no. 310/15, 10 July 2020), *inter alia*, that the Court, confined to its subsidiary role, must not take the place of the national authorities in interpreting domestic law or assessing the facts, in particular in the context of electoral disputes. Paragraphs 34-36, which deal with the application of the said principles to the facts of the case, do not cite either *Mugemangango* or any other case referred to in that judgment (the only case cited is *Şükran Aydın and Others*, cited above).

*Mugemangango* is a great judgment. However, though being about elections, it concerned a matter very different from the one examined in the instant case. To put it bluntly, it concerned the recount of ballot papers, i.e. *(ir)regularities in an election procedure*, where the threshold for the Court’s intervention is indeed very high.

The instant case has *nothing to do with the election procedure as such*, let alone the counting of ballots. It is about the *ability to campaign freely*. Restrictions on campaigning are hard to quantify and are not easily (if at all) translated into electoral impact (for their assessment, the outcome of the election is of little, if any, relevance; compare paragraph 3 above). The Court’s case-law to be followed naturally in a case on restrictions imposed on campaigning is not *Mugemangango* (whatever its virtues), but rather *Article 10 case-law*, including *Şükran Aydın and Others*. In this regard Article 3 of Protocol No. 1 and Article 10 are joined at the hip. By the way, had the Chamber followed *Şükran Aydın and Others*, it would not have engaged in something which its subsidiary role commanded it to avoid in cases dealing with *(ir)regularities* in an election process, but would have engaged in matters which were not only dealt with, but had already been decided upon from the standpoint of Article 10, for the *domestic law in question and analogous facts had already been assessed* in *Şükran Aydın and Others*.

The failure to follow its own case-law is artificial and leaves the Court open to a charge of *inconsistency*.

12.  On the subject of inconsistency, the present judgment displays more of that quality in the reasoning which directly substantiates the finding of no violation of Article 3 of Protocol No. 1. That reasoning, leading as it does in the opposite direction from that of the Court’s earlier views, is contained in a single paragraph, the remarkable half-page paragraph 34. It can be summed up in a few lines.

The impugned ban is interpreted as being “applied to all political parties and candidates without exception”. Prominence is given to the fact that Mr Yılmaz was a lawyer, who “should have known” not only “that the Electoral Council had no authority to give an approval to his request”, which was “purely abstract”, but also that “playing a song in Kurdish would not have constituted a criminal offence [owing to] the decision of the Court of Cassation [of 27 April 2005]”. Moreover, “it appears [from the decision of the Court of Cassation of 27 April 2005] that playing a song in Kurdish would not have constituted a criminal offence”; “[i]n any event ... no criminal proceedings were initiated against the applicant” (here the *a contrario* comparison with *Şükran Aydın and Others*, cited above, is brought in). And it is concluded that the applicant “was able to stand in the elections ... and there is no allegation that [he] was prevented from conveying his political and social opinions to the public during the election campaign”.

That’s it. Truth to tell, these factually and legally misleading arguments raise more questions than they give answers. The questions are as follows, one by one.

13.  The attempted *justification* of the impugned ban as applicable equally to all (in particular, Turks equally with Kurds) does not hold water. In 2013 the Court made mincemeat of that provision. The Turkish State itself got rid of it years ago. Why would anyone even want to embellish that shameful ban?

14.  Contrary to the majority’s plainly erroneous assessment, *the applicant’s request was not “purely abstract”*, that is to say, not an *actio popularis* born out of mere curiosity. Let us separate cutlets from flies: an abstract interpretation of legislation does not render *the request* for an interpretation abstract. The request in question must be assessed *on its own merits*, account being taken of its *context* and of whether the requested interpretation would be *dispositive for the further actions* that the inquirer may or may not take. The context of Mr Yılmaz’s request was as concrete as could be. He stood for election. He campaigned. He intended to play a song (in two languages). I surmise that he knew where and when he would play the song and even had the equipment ready for that purpose (the campaign vehicle was explicitly mentioned in his request). And, having not received an answer from the electoral authorities, he abstained from playing that song. What was “purely abstract” here?

15.  Contrary to what the judgment says, the applicant had *not* asked the District Electoral Council (and subsequently the superior electoral councils) for any “approval” of a request. What he did request was *not that the authorities “approve”* of his playing a song in Kurdish, but that they *provide an interpretation of the electoral legislation as to the possible sanctioning* for playing the song in Kurdish, which was not sufficiently clear to those to whom it might have been applied. In the Court’s language, such legislation is called *unforeseeable* or *unpredictable*, often leading it to find a violation of the relevant Article.

16.  Mr Yılmaz did *not* ask the authorities whether playing a song in Kurdish would constitute a *criminal* offence. He requested that they “determine whether playing a song ... in both the Turkish and Kurdish languages from his campaign vehicle would constitute *a breach of domestic law*” (paragraph 6; emphasis added). This fact, correctly noted in the “Facts” section, is distorted in paragraph 34, *inter alia*, by underlining that domestic law carried no risk of the applicant’s criminal prosecution, owing to the decision of the Court of Cassation of 27 April 2005. This is *a substitution*: playing a song in Kurdish might not have been contrary to criminal law, but *still against the law and entailing another form of liability*. To everyone’s great relief, criminal law is not all law.

17.*Can any significance at all be attached to the fact that the applicant was a lawyer*? He certainly had a law degree, but what does the Court know about the field of his legal practice or, for that matter, whether he practised law at all? Does it flow from being a lawyer that one is knowledgeable in all fields of law, including electoral law? To claim that whoever has a law degree “should know” all law would amount to holding that if one is a sportsman, he or she should be skilled in track and field, weight-lifting, swimming, horseracing, football, aerobics and so on. In a similar vein, the applicant might well have been a family lawyer, or an insurance lawyer, or a real estate lawyer, or a tax lawyer, or an international lawyer, etc., he might have been specialising in legal sociology or comparative legal history, you name it – but of that the Court knows nothing. Why should it know? And since when have lawyers been deprived of the right to address authorities with requests?

18.  In addition to being “fully aware” of the decision of the Court of Cassation of 27 April 2005, the applicant may also have been aware *of the subsequent practice of that court of apex jurisdiction*, in particular the convicting of persons in situations similar to his own, which pointed to a stance by that court that was *opposite* to the one taken in the said decision. These convictions were dealt with by the Court in *Şükran Aydın and Others* (cited above) and found to be contrary to Article 10. It is the Chamber that chose *to ignore that practice*. Had there not been this other line of judicial practice, there would have been less (if any) need to request that the authorities clarify the law. This merely demonstrates that the applicant’s request was not inconsequential.

19.  The majority claim that the applicant should have known that the electoral council(s) had no authority to give an “approval to his request”. As mentioned in paragraph 8 above, the judgment does not deal at all with the powers of electoral councils. The legal basis for the presumed absence of authority to give a requested instruction (not to “approve a request”) *has not been demonstrated* to the Court. Wherefrom does the Chamber know that the dismissal of the applicant’s request was not *arbitrary*, if it has *not analysed* the legislation on the powers of the electoral councils?

20.  It is rightly noted that no criminal proceedings were initiated against the applicant. But so what? They were not initiated because the applicant did not take any chances and did not play the song in Kurdish. It is bewildering and sad to see the Court rationalising that it is an *asset* that a person was not criminally prosecuted for an act which could have been an offence, but an act that he or she, wishing to stay on the safe side, *did not commit*.

21.  Last but not least, the majority are satisfied that the applicant was not prevented from conveying his political and social opinions to the public during the election campaign. This is not much to be satisfied with. A campaigner seeks *not only* to “convey his political and social opinions to the public”, but to do so in a certain way, which also means *freely*. In this regard Mr Yılmaz *was effectively prevented by the domestic authorities from doing what he legitimately sought to do*. He might have erred in the assessment of the effectiveness of the means chosen. But, if liberty means anything, that is not the business of any authority. Not even that of this Court.

# **THE RIGHT TO VOTE**

## **CASE OF SITAROPOULOS AND GIAKOUMOPOULOS v. GREECE**

*(Application no. 42202/07)*

JUDGMENT

STRASBOURG

15 March 2012

In the case of Sitaropoulos and Giakoumopoulos v. Greece,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Nicolas Bratza, *President*,  
 Jean-Paul Costa,  
 Françoise Tulkens,  
 Josep Casadevall,

Boštjan M. Zupančič,  
 Lech Garlicki,  
 Egbert Myjer,  
 Davíd Thór Björgvinsson,  
 Ján Šikuta,  
 Ineta Ziemele,  
 Luis López Guerra,  
 Nona Tsotsoria,  
 Ann Power-Forde,  
 Zdravka Kalaydjieva,  
 Vincent A. De Gaetano,  
 Angelika Nußberger, *judges*,  
 Spyridon Flogaitis, *ad hoc judge*,  
and Johan Callewaert, *Deputy Grand Chamber Registrar,*

Having deliberated in private on 4 May 2011 and 18 January 2012,

Delivers the following judgment, which was adopted on the last-mentioned date:

**PROCEDURE**

1.  The case originated in an application (no. 42202/07) against the Hellenic Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by three Greek nationals, Mr Nikolaos Sitaropoulos, Mr Stephanos Stavros and Mr Christos Giakoumopoulos (“the applicants”), on 20 September 2007.

2.  The applicants were represented by Mr I. Ktistakis, a member of the Athens Bar. The Greek Government (“the Government”) were represented by their Agent’s delegates, Ms K. Paraskevopoulou, Adviser at the State Legal Council, and Ms Z. Hatzipavlou, Legal Assistant at the State Legal Council.

3.  **The applicants alleged that their inability to vote from their place of residence amounted to disproportionate interference with the exercise of their right to vote in parliamentary elections** enshrined in Article 3 of Protocol No. 1.

4.  The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Christos Rozakis, the judge elected in respect of Greece, withdrew from sitting in the case. The Government accordingly appointed Spyridon Flogaitis to sit as an *ad hoc* judge (former Article 27 § 2 of the Convention, and Rule 29 § 1).

5.  On 8 July 2010 a Chamber of that Section, composed of Nina Vajić, President, Anatoly Kovler, Elisabeth Steiner, Khanlar Hajiyev, Dean Spielmann and Sverre Erik Jebens, judges, and Spyridon Flogaitis, *ad hoc* judge, and Søren Nielsen, Section Registrar, delivered a judgment in which it decided to strike the application out of the list of cases in respect of the second applicant. The Chamber held, by five votes to two, that the application was admissible in respect of the first and third applicants and that there had been a violation of Article 3 of Protocol No. 1.

6.  On 22 November 2010, following a request from the Government of 7 October 2010, a panel of the Grand Chamber decided to refer the case to the Grand Chamber under Article 43 of the Convention.

7.  The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

8.  The applicants and the Government each filed observations (Rule 59 § 1), as did the Hellenic League for Human Rights, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3).

9.  A hearing was held in public in the Human Rights Building, Strasbourg, on 4 May 2011 (Rule 59 § 3).

There appeared before the Court:

(a)  *for the Government*  
Ms K. Paraskevopoulou, Adviser, State Legal Council,   
Ms Z. Hatzipavlou, Legal Assistant,  
 State Legal Council, *Agent’s Delegates*;

(b)  *for the applicants*  
Mr I. Ktistakis, lawyer, *Counsel*;  
Ms A. Terzis, lawyer, *Adviser*.

The Court heard addresses by Mr Ktistakis and Ms Hatzipavlou.

**THE FACTS**

**I.  THE CIRCUMSTANCES OF THE CASE**

10.  The applicants were born in 1967 and 1958 respectively and live in Strasbourg. They are officials of the Council of Europe.

11.  By Presidential Decree no. 154/2007 of 18 August 2007, the Greek Parliament was dissolved and a general election was called for 16 September 2007.

12.  In a faxed letter of 10 September 2007 to the Greek ambassador in France, **the applicants, who are permanently resident in France, expressed the wish to exercise their voting rights in France in the elections to be held** on 16 September 2007.

13.  On 12 September 2007 the ambassador, relying on the instructions and information provided by the Ministry of the Interior, replied as follows.

“[The Greek State] confirms its wish – frequently expressed at the institutional level – to enable Greek citizens resident abroad to vote from their place of residence. However, it is clear that this necessitates statutory rules which do not currently exist. In fact, such rules cannot be introduced by a simple administrative decision, as special measures are required for the setting-up of polling stations in embassies and consulates ... In the light of the above and despite the wish expressed by the State, your request concerning the forthcoming elections cannot be granted for objective reasons.”

14.  The general election took place on 16 September 2007. The applicants, who did not travel to Greece, did not exercise their right to vote.

**II.  RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE**

A.  Domestic law and practice

1.  The Greek Constitution of 1975

15.  The relevant provisions of the Constitution read as follows.

Article 1

“ ...

2.  Popular sovereignty shall be the foundation of government.

3.  All powers shall derive from the people and exist for the people and the nation; they shall be exercised as specified by the Constitution.”

Article 51 (before the 2001 revision of the Constitution)

“1.  The number of members of parliament shall be defined by law. It shall not be below two hundred or above three hundred.

2.  The members of parliament shall represent the nation.

3.  The members of parliament shall be elected through direct universal suffrage and by secret ballot, by those citizens who have the right to vote, as specified by law. The law shall not curtail citizens’ right to vote except in cases where the statutory minimum age has not been attained, in cases of legal incapacity or in connection with a final criminal conviction for certain offences.

4.  Parliamentary elections shall be held simultaneously throughout the country.  
The conditions governing the exercise of the right to vote by persons outside the country may be specified by statute.

5.  The exercise of the right to vote shall be mandatory. Exceptions and criminal sanctions shall be specified in each case by law.”

Article 54

“1.  The electoral system and constituencies shall be specified by a law which will apply to the elections immediately following the forthcoming elections unless an explicit provision, adopted by a majority of two-thirds of the total number of members of parliament, stipulates that it is to apply as of the forthcoming elections.

2.  The number of members of parliament elected in each constituency shall be specified by presidential decree on the basis of the population of the constituency for legal purposes, derived, according to the latest census, from the number of persons registered on the relevant municipal rolls, as provided for by law. The results of the census for this purpose shall be those published on the basis of the data held by the relevant department one year after the last day of the census.

3.  Part of the Parliament, comprising not more than one-twentieth of the total number of its members, may be elected on a uniform nationwide basis in proportion to the total votes won by each party throughout the country, as specified by law.”

Article 108

“1.  The State must be attentive to the situation of emigrant Greeks and to the maintenance of their ties with the homeland. The State shall also attend to the education and the social and professional advancement of Greeks working outside the State.

2.  The law shall lay down arrangements relating to the organisation, operation and competences of the World Council of Hellenes Abroad, whose mission is to allow the full expression of Hellenism worldwide.”

The second paragraph of Article 108 was added during the 2001 revision of the Constitution.

16.  In 2001, Article 51 § 4 was amended as follows:

“Parliamentary elections shall be held simultaneously throughout the country. The conditions governing the exercise of the right to vote by persons living outside the country may be specified by statute, adopted by a majority of two-thirds of the total number of members of parliament. Concerning such persons, the principle of holding elections simultaneously does not rule out the exercise of their right to vote by postal vote or other appropriate means, provided that the counting of votes and the announcement of the results are carried out at the same time as within the country.”

2.  The electoral legislation in force at the material time

17.  At the time of the parliamentary elections in issue, Presidential Decree no. 96/2007, which was the electoral legislation then in force, provided as follows.

Article 4 – Right to vote

“1.  Any Greek national aged 18 or over shall be entitled to vote. ...”

Article 5 – Forfeiture of the right

“The following persons shall lose the right to vote:

(a)  persons who have been placed under guardianship, in accordance with the provisions of the Civil Code;

(b)  persons whose final conviction for one of the offences provided for in the Criminal Code or the Military Criminal Code is accompanied by a measure disqualifying them from voting for the duration of their sentence.”

Article 6 – Exercise of the right

“1.  The right to vote in a constituency shall be reserved to those persons registered on the electoral roll of a municipality or local authority area within that constituency.

2.  The exercise of the right to vote shall be mandatory.”

3.  Bill entitled “Exercise of the right to vote in parliamentary elections by Greek voters living abroad”

18.  The report on this bill placed before Parliament by the Ministers of the Interior, Justice and the Economy on 19 February 2009 indicated that the purpose of the bill was to fulfil “one of the government’s major historical obligations, one which undeniably reinforces Greek expatriates’ ties with the homeland”. The report stated that voting rights for Greek nationals living abroad arose out of both Article 108 and Article 51 § 4 of the Constitution. It pointed out in particular that Article 108 “affords Greek expatriates a ‘social right’. This provision obliges the Greek State to take all necessary measures to maintain Greek expatriates’ ties with Greece, to ensure that they have access to Greek education and to make provision, as a matter of State duty, for the social and professional advancement of Greeks working outside Greece. Regulating the conditions for the exercise by Greek expatriates of their right to vote in Greek parliamentary elections will undeniably contribute to real ties being forged between Greek expatriates and their homeland.” Moving on to the constitutional provision on this specific subject, namely Article 51 § 4, the report characterised the statute to which that Article referred as a law implementing the Constitution. Lastly, the report considered that “in these times of globalisation, it is self-evident that Greek expatriates should have a decisive say in the development of their own country”.

19.  The Scientific Council (*Επιστημονικό Συμβούλιο*) of Parliament is a consultative body reporting to the Speaker of Parliament. It comprises ten members, including professors of law, political science, economics, statistics and information technology, and an expert in international relations. It produced a report dated 31 March 2009 on the above-mentioned bill. The report noted that, in the past, some legal authorities had argued that Article 51 § 4 of the Constitution imposed upon the legislature an obligation to permit expatriate Greeks to exercise the right to vote from outside Greece. However, referring to other legal authorities and to the preparatory work for Article 51 § 4 of the Constitution, it asserted that it was an option rather than a duty for the legislature to permit the exercise of voting rights from abroad. It also took the view that the optional nature of the above-mentioned provision of the Constitution had not been affected by the 2001 constitutional revision.

20.  On 7 April 2009 the bill was rejected by Parliament since it failed to secure the majority of two-thirds of the total number of members of parliament required under Article 51 § 4 of the Constitution. The members of parliament, especially those on the opposition benches, referred in particular to the number of Greek citizens living abroad compared with the numbers resident in Greece, and to the implications this would have for the composition of the legislature.

B.  International law and practice

1.  Texts adopted by the Parliamentary Assembly of the Council of Europe

21.  The relevant texts adopted by the Parliamentary Assembly of the Council of Europe read as follows.

(a)  Resolution 1459 (2005) of the Parliamentary Assembly of the Council of Europe – Abolition of restrictions on the right to vote

“...

2.  In accordance with the opinion of the European Commission for Democracy through Law (Venice Commission) adopted in December 2004, [the Parliamentary Assembly] ... invites the member and observer States of the Organisation to reconsider all existing restrictions to electoral rights and to abolish all those that are no longer necessary and proportionate in pursuit of a legitimate aim.

3.  The Assembly considers that, as a rule, priority should be given to granting effective, free and equal electoral rights to the highest possible number of citizens, without regard to their ethnic origin, health, status as members of the military or criminal record. Due regard should be given to the voting rights of citizens living abroad.

...

7.  Given the importance of the right to vote in a democratic society, the member countries of the Council of Europe should enable their citizens living abroad to vote during national elections bearing in mind the complexity of different electoral systems. They should take appropriate measures to facilitate the exercise of such voting rights as much as possible, in particular by considering absentee (postal), consular or e-voting, consistent with Recommendation Rec(2004)11 of the Committee of Ministers to member States on legal, operational and technical standards for e‑voting. Member States should cooperate with one another for this purpose and refrain from placing unnecessary obstacles in the path of the effective exercise of the voting rights of foreign nationals residing on their territories.

...

11.  The Assembly therefore invites:

i.  the Council of Europe member and observer States concerned to:

...

b.grant electoral rights to all their citizens (nationals), without imposing residency requirements;

c.  facilitate the exercise of expatriates’ electoral rights by providing for absentee voting procedures (postal and/or consular voting) and considering the introduction of e-voting consistent with Recommendation Rec(2004)11 of the Committee of Ministers and to cooperate with one another to this end;

...”

(b)  Recommendation 1714 (2005) of the Parliamentary Assembly of the Council of Europe – Abolition of restrictions on the right to vote

“1.  Referring to its Resolution 1459 (2005) on the abolition of restrictions on the right to vote, the Parliamentary Assembly calls upon the Committee of Ministers to:

i.  appeal to member and observer States to:

a.  sign and ratify the 1992 Council of Europe Convention on the Participation of Foreigners in Public Life at Local Level (ETS No. 144) and to grant active and passive electoral rights in local elections to all legal residents; and

b.  reconsider existing restrictions on electoral rights of prisoners and members of the military, with a view to abolishing all those that are no longer necessary and proportionate in pursuit of a legitimate aim;

ii.  invite the competent services of the Council of Europe, in particular the European Commission for Democracy through Law (Venice Commission) and its Council for Democratic Elections, to develop their activities aimed at improving the conditions for the effective exercise of election rights by groups facing special difficulties, such as expatriates, prison inmates, persons who have been convicted of a criminal offence, residents of nursing homes, soldiers or nomadic groups;

iii.  review existing instruments with a view to assessing the possible need for a Council of Europe convention to improve international cooperation with a view to facilitating the exercise of electoral rights of expatriates.”

2.  Texts adopted by the European Commission for Democracy through Law (the Venice Commission)

(a)  Code of Good Practice in Electoral Matters (Opinion no. 190/2002)

22.  The Code states that “the right to vote and to be elected may be accorded to citizens residing abroad” (point I.1.1.c.v.). The explanatory report makes the following indication in this regard:

“... the right to vote and/or the right to stand for election may be subject to *residence* requirements, residence in this case meaning habitual residence. ... Conversely, quite a few States grant their nationals living abroad the right to vote, and even to be elected. This practice can lead to abuse in some special cases, e.g. where nationality is granted on an ethnic basis.”

23.  The other relevant parts of the Code provide:

“...

3.2  Freedom of voters to express their wishes and action to combat electoral fraud

i.  voting procedures must be simple;

ii.  voters should always have the possibility of voting in a polling station. Other means of voting are acceptable under the following conditions:

iii.  postal voting should be allowed only where the postal service is safe and reliable; the right to vote using postal votes may be confined to people who are in hospital or imprisoned or to persons with reduced mobility or to electors residing abroad; fraud and intimidation must not be possible;

iv.  electronic voting should be used only if it is safe and reliable; in particular, voters should be able to obtain a confirmation of their votes and to correct them, if necessary, respecting secret suffrage; the system must be transparent;

v.  very strict rules must apply to voting by proxy; the number of proxies a single voter may hold must be limited;

...”

(b)  2006 report on electoral law and electoral administration in Europe (Study no. 352/2005)

24.  The report notes, among other things, the following:

“*Voting rights for citizens abroad*

57.  External voting rights, e.g. granting nationals living abroad the right to vote, are a relatively new phenomenon. Even in long-established democracies, citizens living in foreign countries were not given voting rights until the 1980s (e.g. Federal Republic of Germany, United Kingdom) or the 1990s (e.g., Canada, Japan). In the meantime, however, many emerging or new democracies in Europe have introduced legal provisions for external voting (out-of-country voting, overseas voting). Although it is yet not common in Europe, the introduction of external voting rights might be considered, if not yet present. However, safeguards must be implemented to ensure the integrity of the vote ...

...

152. Postal voting is permitted in several established democracies in western Europe, e.g. Germany, Ireland, Spain, Switzerland ... It was also used, for example, in Bosnia and Herzegovina and the Kosovo in order to ensure maximum inclusiveness of the election process (CG/BUR (11) 74). However, it should be allowed only if the postal service is secure and reliable. Each individual case must be assessed as to whether fraud and manipulation are likely to occur with postal voting.

...”

(c)  2011 report on out-of-country voting (Study no. 580/2010)

25.  The conclusions of this report read as follows.

“91.  National practices regarding the right to vote of citizens living abroad and its exercise are far from uniform in Europe.

92.  However, developments in legislation, such as the judgment delivered recently by the European Court of Human Rights in a case concerning Greece, which is not yet final, point to a favourable trend in out-of-country voting, in national elections at least, as regards citizens who have maintained ties with their country of origin.

93.  That is true at least of persons who are temporarily out of the country. But definitions of the temporary nature of a stay abroad vary greatly and if this criterion is adopted, it should be clarified.

94.  Distinctions should also be drawn according to the type of elections. National, single-constituency elections are easier to open up to citizens resident abroad, while local elections are generally closed to them, particularly on account of their tenuous link with local politics.

95.  The proportions of citizens living out of the country may also vary greatly from one country to another. When there are a large number of them, they may have a decisive impact on the outcome of the election, which may justify the implementation of specific measures.

96.  It is perfectly legitimate to require voters living abroad to register to be able to vote, even if registration is automatic for residents.

97.  The obligation to vote in an embassy or consulate may in practice severely restrict the right to vote of citizens living abroad. This restriction may be justified on the grounds that the other means of voting (postal vote, proxy voting, e-voting) are not always reliable.

98.  To sum up, while the denial of the right to vote to citizens living abroad or the placing of limits on that right constitutes a restriction of the principle of universal suffrage, the Commission does not consider at this stage that the principles of the European electoral heritage require the introduction of such a right.

99.  Although the introduction of the right to vote for citizens who live abroad is not required by the principles of the European electoral heritage, the European Commission for Democracy through Law suggests that States, in view of citizens’ European mobility, and in accordance with the particular situation of certain States, adopt a positive approach to the right to vote of citizens living abroad, since this right fosters the development of national and European citizenship.”

3.  International Covenant on Civil and Political Rights

26.  The right to vote is enshrined in Article 25 of the Covenant, the relevant parts of which read as follows:

“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

...

(b)  To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

...”

During the drafting of the General Comment on Article 25 of the Covenant, which was published on 12 July 1996 by the Human Rights Committee, a proposal was made calling on States to enable their nationals residing overseas to make use of absentee postal-voting systems where such systems were available. However, as the Human Rights Committee could not agree on the proposal, it was not included in the General Comment.

4.  American Convention on Human Rights

27.  Article 23 of the said Convention provides as follows:

“1.  Every citizen shall enjoy the following rights and opportunities:

a.  to take part in the conduct of public affairs, directly or through freely chosen representatives;

b.  to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and

c.  to have access, under general conditions of equality, to the public service of his country.

2.  The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.”

28.  The right to vote under Article 23 is not absolute and may be subject to restrictions on the grounds expressly laid down in the second paragraph, which include “residence”. However, not every restriction of the right to vote based on residence is justified.

29.  In the case of *Statehood Solidarity Committee v. United States* (Case 11.204, Report no. 98/03 of 29 December 2003), the Inter-American Commission on Human Rights held that the approach to the interpretation and application of the right guaranteed under Article 23 of the American Convention was consistent with the case-law of the other international systems of human rights protection whose treaties provided similar guarantees. It referred in that regard to the case-law of the European Court of Human Rights and the United Nations Human Rights Committee:

“93. ... Like the European Court and this Commission, the UN Human Rights Committee has recognized that the rights protected under Article 25 of the ICCPR [International Covenant on Civil and Political Rights] are not absolute, but that any conditions that apply to the right to political participation protected by Article 25 should be based on ‘objective and reasonable criteria’. The Committee has also found that in light of the fundamental principle of proportionality, greater restrictions on political rights require a specific justification.

...”

5.  Human rights protection system based on the African Charter on Human and Peoples’ Rights

30.  Article 13 § 1 of this Charter is worded as follows:

“Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.”

31.  Taking the view that this provision was similar in substance to Article 25 of the International Covenant, the African Commission on Human and Peoples’ Rights interpreted Article 13 of the Charter in the light of the Human Rights Committee’s General Comment on Article 25. It therefore held that any conditions applicable to the exercise of Article 25 rights should be based on objective and reasonable criteria established by law (see *Purohit and Moore v. The Gambia*, Communication no. 241/2001, § 76).

C.  Comparative law

32**.  According to the comparative-law materials available to the Court on the legislation of member States of the Council of Europe concerning the right to vote from abroad, the majority of the countries concerned authorise and have implemented procedures to allow their nationals resident abroad to vote in parliamentary elections**. However, the situation varies greatly and the different scenarios do not lend themselves to classification into neat categories. **A distinction can nevertheless be made between two broad categories: those member States which permit their citizens to vote from abroad, on the basis of a variety of arrangements; and those which, as a general rule, do not. Lastly, most of the member States which allow voting from abroad lay down administrative procedures for the registration of expatriates on the electoral roll.**

1.  Arrangements for voting from abroad in the countries which authorise it in principle

33.  Thirty-seven member States fall into this category: Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, the Republic of Moldova, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, “the former Yugoslav Republic of Macedonia”, Turkey, Ukraine and the United Kingdom.

34.  The above-mentioned countries provide either for voting in polling stations abroad or postal voting, or both. The following seventeen countries allow voting in embassies or consulates or in polling stations set up elsewhere: Bulgaria, Croatia, the Czech Republic, Denmark, Finland, France, Georgia, Hungary, Iceland, the Republic of Moldova, Norway, Poland, Romania, Russia, Serbia, “the former Yugoslav Republic of Macedonia” and Ukraine.

Eight countries (Austria, Germany, Italy, Liechtenstein, Luxembourg, the Netherlands, Portugal and Slovakia) allow their citizens living abroad to vote by post only, either through an embassy or consulate or by writing directly to the competent national authority. The possibility of voting either at an embassy (or consulate) or by post is provided for in Belgium, Bosnia and Herzegovina, Estonia, Latvia, Lithuania, Slovenia, Spain and Sweden. A handful of countries – Belgium, France, the Netherlands, Switzerland and the United Kingdom – also allow voting by proxy. In Monaco, proxy voting is the sole means by which nationals of that country can vote from abroad.

A few States (the Netherlands and Switzerland) allow Internet voting. This type of voting is already enshrined in law and in operation in Estonia, while it is under consideration in Spain.

35.  In five member States (Bosnia and Herzegovina, Denmark, Hungary, Liechtenstein and “the former Yugoslav Republic of Macedonia”), only persons temporarily resident outside the country have the right to vote from abroad. In the last-mentioned country, the law refers explicitly to persons living and working abroad temporarily. In some countries, expatriates lose the right to vote after a certain period of time (fifteen years in the United Kingdom and twenty-five years in Germany).

36.  Certain countries such as Austria, Hungary, Slovenia and Ukraine allow external voting only with the permission of the host country.

37.  In four countries – Croatia, France, Italy and Portugal – expatriates may elect their own representatives to the national parliament in constituencies set up outside the country. In Portugal, each of the two constituencies elects a member of parliament. French citizens living abroad participate in the election of twelve members of the Senate via the 150‑strong Assembly of French Expatriates. From 2012, they will also be able to elect eleven members to the National Assembly. In Croatia and Italy, the number of parliamentary seats allocated to expatriate constituencies depends on the number of votes cast.

2.  Countries which do not grant the right to vote from abroad or impose significant restrictions on it

38.  Eight member States – Albania, Andorra, Armenia, Azerbaijan, Cyprus, Malta, Montenegro and San Marino – do not allow voting from abroad in parliamentary elections. In particular, in Albania, the electoral code in force contains no provisions concerning voting from abroad. In Ireland, strict rules are laid down, with postal voting for expatriates being confined to members of the police and armed forces and to Irish diplomats and their spouses. The right is therefore limited to a specific, very small group of individuals. Under the legislation in Montenegro and San Marino, persons resident abroad may vote only in their own country.

3.  Administrative procedures for registration of expatriates on the electoral roll

39.  In at least twenty-two of the member States which allow voting from abroad, persons wishing to avail themselves of this facility must apply by a certain deadline to be registered on the electoral roll, either to the authorities in their country of origin or to the diplomatic or consular mission abroad.

40.  In Bosnia and Herzegovina an application for registration must be made before each election to the country’s central electoral commission. In Denmark, persons eligible to vote have to submit an application to the last municipality in which they lived. In Hungary, voters may request registration at the diplomatic or consular mission, by filling out an application to the local electoral bureau within the specified time-limit. In Germany and Luxembourg, the request must be made to the local authorities. In Slovakia, voters living abroad must request registration on a special electoral roll held by the municipal authorities of Bratislava‑Petržalka. In Slovenia, persons voting abroad must notify the national electoral commission, while in Serbia they must request registration on the electoral roll as foreign residents. Spanish voters must apply to the provincial branch of the electoral bureau for registration on the special list of absentee voters. In the United Kingdom, overseas voters must re-register each year with their local electoral registration office.

41.  In some countries, the request must be sent to the diplomatic mission or consulate, which either draws up the list of voters itself or forwards requests to the competent authority in the country of origin. Belgian citizens included on the population register held by the diplomatic mission or consulate must complete a form indicating the municipality in which they wish to be registered and the voting method they will use. The form is then sent to the municipality concerned and the person’s name is added to the list of expatriate voters.

42.  In Bulgaria, the Czech Republic, Poland and Russia, the list of expatriate voters is drawn up by the diplomatic or consular mission on the basis of requests from voters. Croatian citizens wishing to vote abroad must register with the Croatian embassy or consulate. Latvian voters who wish to vote by post have to apply to the diplomatic mission or consulate concerned, where they are registered on a special list. In the Netherlands, expatriates eligible and wishing to vote must request registration on the electoral roll of Dutch nationals living abroad by applying to the head of the consular mission, who forwards the request to The Hague. In Portugal, voting abroad entails prior registration on a consular list of voters. Swiss citizens living abroad must apply to the diplomatic or consular mission with which they are registered. The application is forwarded to the municipality in which the person concerned habitually voted, and he or she is registered on the electoral roll there. In “the former Yugoslav Republic of Macedonia”, expatriate voters are registered on the country’s electoral roll after applying to the diplomatic mission or consulate. In Turkey, expatriate voters must register on a special electoral roll by submitting a declaration of residence to the nearest consulate.

43.  In other countries, expatriate voters do not have to complete any formalities in order to register, as the authorities register them automatically on the basis of the existing lists of voters. This is the case in Estonia, Finland, France, Georgia, Iceland, Italy, Lithuania, the Republic of Moldova, Norway, Romania, Sweden and Ukraine. Voters who are not on the electoral roll may register on request (for instance in France, Georgia, Italy and Ukraine).

44.  In Iceland, voters must re-register on the national electoral roll after eight years’ residence abroad; in Norway and Sweden, the time-limit is ten years.

45.  In some countries which have automatic registration, expatriates must complete certain formalities in order to vote in their country of origin. For instance, Italian voters resident abroad who wish to vote in Italy must inform the relevant consular authority in writing. French expatriates must request registration on the electoral roll in France if they wish to vote there.

**THE LAW**

**ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL No. 1**

46.  The applicants alleged that their inability to vote from their place of residence amounted to disproportionate interference with the exercise of their right to vote in the 2007 parliamentary elections, in breach of Article 3 of Protocol No. 1, which provides:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

A.  The Chamber judgment

47.  In its judgment of 8 July 2010, the Chamber held that there had been a violation of Article 3 of Protocol No. 1. **It took the view that the present case did not concern the recognition of the applicants’ right to vote as such,** which was already recognised under the Greek Constitution, **but rather the conditions governing the exercise of that right by Greek nationals living abroad.** On this point the Chamber noted that Article 51 § 4 of the Greek Constitution, adopted in 1975 and clarified during the 2001 constitutional revision, empowered the legislature to specify the conditions in question. **Although the applicants still had the option of travelling to Greece in order to vote, in practice this complicated significantly the exercise of that right, as it entailed expense and disruption to their professional and family lives.**

48**.  The Chamber acknowledged that Article 3 of Protocol No. 1 did not impose any obligation to secure voting rights in parliamentary elections to voters living abroad. However, the constitutional provision in question (Article 51 § 4) could not remain inapplicable indefinitely, depriving its content and the intention of its drafters of any normative value**. Thirty-five years (at the time of the judgment) after the enactment of Article 51 § 4, the Greek legislature had still not given effect to its content.

49.  **The Chamber also held that the failure to enact legislation giving practical effect to voting rights for expatriates was likely to constitute unfair treatment of Greek citizens living abroad – particularly those living at a considerable distance – in comparison with those living in Greece, despite the fact that the Council of Europe had urged member States to enable their citizens living abroad to participate to the fullest extent possible in the electoral process**. On the basis of a comparative study of the domestic law in thirty-three member States of the Council of Europe, the Chamber observed that the great majority had implemented procedures towards that end, and concluded that Greece fell short of the common denominator among member States in that regard.

B.  The parties’ submissions

1.  The applicants

50.  **The applicants submitted that the right of Greek citizens to vote from abroad had first been recognised in 1862 in** the election of members to the Second National Assembly, when Greek citizens had been able to vote from their places of residence abroad. A significant section of academic opinion on Greek constitutional law, and also the Greek courts, were of the view that a constitutional provision guaranteeing a right of such importance as the right to vote could not remain inapplicable indefinitely. The applicants pointed out in particular that, when faced with the same issue concerning Article 24 § 6 of the Constitution, which provided for the enactment of a law on measures restricting ownership rights for the purposes of protecting the cultural environment and on the manner in which owners were compensated, the full Supreme Administrative Court had held that, in so far as the legislature had not enacted the implementing law in question, “the authorities were under the obligation, arising directly out of the Constitution, to ensure the continuing protection of the monument and, simultaneously, to compensate the affected owner”. In the applicants’ view, the requirement for the Greek legislature to pass legislation in accordance with Articles 108 and 51 § 4 of the Constitution was binding and not optional. They submitted that the delay of thirty-six years, imputable to the Greek State, in giving effect to a specific provision of the Constitution and making effective the right of expatriates to vote from abroad amounted to a violation of Article 3 of Protocol No. 1.

51.  In the applicants’ view, the stance taken by the Court in *Hilbe v. Liechtenstein* ((dec.), no. 31981/96, ECHR 1999‑VI) was not relevant in the instant case. Unlike the applicant in that case, they were already registered on the electoral roll and their right to vote was explicitly recognised in domestic law. Hence, they were not complaining about a restriction on their right to vote as such, but about the failure to adopt the arrangements needed to give effect to that right.

52.  The applicants stated that they followed political developments in their country of origin with particular interest and wished to maintain close ties with Greece. In particular, they pointed out that they were registered on the electoral roll in Greece, held valid Greek passports, owned immovable property in Greece on which they paid income tax and were still authorised to practise as lawyers in Greece. They maintained that being unable to vote in the Greek parliamentary elections from their State of residence constituted interference with their voting rights, in breach of both the Greek Constitution and the Convention. That interference arose out of the fact that they would have to travel to Greece in order to exercise their right to vote. The applicants acknowledged that they could fly to Samos and Thessaloniki, their respective home towns, for parliamentary elections. However, that possibility did not alter the substance of their claim, namely that they would thereby incur significant expense and that their professional and family life would be disrupted since they would be obliged to be away from their work and families for a few days.

53.  In the applicants’ view, it was clear from the Council of Europe instruments, and in particular Parliamentary Assembly Resolution 1459 (2005), Recommendation 1714 (2005) and the Venice Commission’s Code of Good Practice in Electoral Matters, that member States were under an obligation to make the right to vote effective. They noted that, according to the study to which the Chamber referred in its judgment of 8 July 2010, at least twenty-nine Council of Europe member States guaranteed in practice the right of expatriates to vote from abroad in parliamentary elections.

2.  The Government

54.  The Government argued that the constitutionally recognised possibility of enacting legislation governing the exercise of the right to vote by voters living outside Greece could not be a decisive factor in determining whether there had been a violation of Article 3 of Protocol No. 1 in the present case. In particular, they stressed that Article 51 § 4 of the Constitution, far from imposing any obligation on the legislature, was optional in nature. Moreover, the Court’s case-law on Article 3 of Protocol No. 1 recognised that Contracting States had a wide margin of appreciation when it came to organising their electoral systems. The Government added that, in accordance with Article 51 § 4 of the Constitution, voting arrangements for Greek nationals outside Greece had to be adopted by a majority of two-thirds of Parliament; this confirmed the need to secure very broad political consensus on the subject in Greece. Furthermore, it had already attempted to pass a law in 2009 on voting rights for Greek expatriates, a fact which demonstrated the political will to find a solution to the problem. In the Government’s view, defining these arrangements was an extremely complex and delicate political issue. Blanket recognition of the right of expatriates to vote in parliamentary elections from their place of residence could give rise to considerable political and economic problems, not just in Greece but also in other member States of the Council of Europe.

55.  The Government referred to the case-law of the Court and the former European Commission of Human Rights regarding the compatibility with Article 3 of Protocol No. 1 of measures making the right to vote subject to a residence requirement. They contended that, according to that case-law, imposing such a requirement was justifiable. They referred to the legitimate concern of the legislature to limit the influence of citizens living abroad in parliamentary elections, which focused primarily on issues affecting citizens living in the country. In the Government’s view, expatriates could not legitimately argue that they were affected by the decisions of the country’s political institutions to a greater extent than Greek citizens living in Greece.

56.  Referring in particular to the parliamentary input into the 2001 revision of the Constitution, the Government observed that the legislation referred to in Article 51 § 4 of the Constitution continued to be optional. Although Article 51 § 4 made reference for the first time to postal voting, the latter was purely optional. Furthermore, the exercise of postal voting had to comply with the constitutional principle of simultaneous conduct of parliamentary elections. The Government also reiterated the reasons for requiring an enhanced two-thirds majority for enactment of the implementing legislation referred to in Article 51 § 4 of the Constitution, namely the need for political consensus in view of the considerable numbers of Greek citizens living abroad (some 3,700,000 persons compared with a population of 11,000,000 living in Greece). For instance, there were around 1,850,000 Greek citizens living in the United States and some 558,000 in Australia. Hence, according to the Government, the broadest possible consensus among the political parties was needed in order to prevent political tensions arising out of the *de facto* increase in the electorate.

57.  The Government argued that Greek citizens who had their permanent residence abroad developed social, economic, political and cultural ties in their host country and that the main centre of their interests lay there. In addition, any comparison between Greece and other countries which had granted expatriates the right to vote from their place of residence had to take into account the specific features of each case, in particular the number of citizens living outside their country of origin, the socio-political context in each country and the electoral system in place.

58.  The Government further submitted that the participation of expatriate Greeks in parliamentary elections could not be compared to the exercise of the right to vote in elections to the European Parliament. In the latter case, it was merely a matter of granting voting rights to a section of expatriate Greeks, namely those resident in member States of the European Union, an obligation arising directly out of European Union law and specifically provided for in domestic legislation.

59.  To sum up, the Government pointed out that the applicants satisfied the requirements laid down by the electoral legislation for the purposes of exercising their right to vote in Greece. The issue of granting expatriates the right to vote from their place of residence fell within the margin of appreciation of the domestic authorities, who could decide how and when to grant that right.

3.  The third-party intervener

60.  The Hellenic League for Human Rights, established in 1953, is the oldest non-governmental organisation in Greece and a member of the International Federation for Human Rights. It noted the paradoxical situation with regard to voting rights for expatriates from their place of residence. While the right of expatriates to participate in the political decisions of the “motherland” was not disputed, the principle in question, which had acquired constitutional value, appeared to be ineffective: although ten years had elapsed since the constitutional revision of 2001, the constitutional requirement to adopt “postal voting” for Greeks resident abroad had not yet been enforced.

61.  The debate on expatriates’ political rights hinged on two opposing ideas and the majority of positions and practices of States, with different variants and nuances, fell within the two extremes. The first was the idea of a political community based entirely on territory while the second was that of a community beyond territory, formed by links of solidarity which united the nation. The third-party intervener cited J. Habermas, according to whom the notion of the democratic self-determination of a community “require[d] that those who [were] subject to the law and those to whom the law [made] reference should consider themselves to be the creators of the law”. This quotation reflected a notion of the status of citizen that primarily viewed residence on a territory as the decisive criterion but took objective account of the fact that it was not absolutely necessary for individuals to reside on the territory of a State in order for them to feel that they had vital links with that State. There was an increasing realisation that “it [was] possible to live at home and far from home”. This transnational approach to citizenship rendered obsolete a debate on voting rights for expatriates based solely on a territorial understanding of citizenship. The fact that electoral campaigns were now conducted principally via computer-based social networks (such as Facebook and Twitter) proved that the argument of “distance” between the expatriate and his or her country of origin was no longer as relevant as it had been a few years previously.

62.  In the view of the third-party intervener, the response to the dilemma of whether to grant political rights to expatriates could not be an “all or nothing” one. There was a need to define an objective criterion by which to assess whether or not expatriates had meaningful links with the Greek State and thus decide whether they should be included in the electorate. The League observed that in most member States of the European Union which provided for electoral rights for expatriates, the usual precondition was registration on the electoral roll of the State concerned at the embassy or consulate located in the region in question. Accordingly, the only objectively reliable criterion for the granting or otherwise of “a postal vote or other appropriate means” would appear to be whether or not electoral rolls existed at the overseas consulate. The response to the demands of the Greek diaspora to participate in Greek elections should be graduated in order to take account, in a proportionate and balanced manner, of the way in which the democratic process in the country of origin influenced the lives of expatriates.

C.  The Court’s assessment

1.  General principles

63.  **The Court reiterates that Article 3 of Protocol No. 1 enshrines a characteristic principle of an effective political democracy and is accordingly of prime importance in the Convention system** (see *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, § 47, Series A no. 113). This Article would appear at first to differ from the other provisions of the Convention and its Protocols, as it is phrased in terms of the obligation of the High Contracting Parties to hold elections under conditions which will ensure the free expression of the opinion of the people rather than in terms of a particular right or freedom. However, having regard to the *travaux préparatoires* of Article 3 of Protocol No. 1 and the interpretation of the provision in the context of the Convention as a whole, **the Court has held that it also implies individual rights, including the right to vote and the right to stand for election** (ibid., § 51). **It has also held that the standards to be applied for establishing compliance with Article 3 of Protocol No. 1 must be considered to be less stringent than those applied under Articles 8 to 11 of the Convention** (see *Ždanoka v. Latvia* [GC], no. 58278/00, § 115, ECHR 2006‑IV).

64.  **The concept of “implied limitations” under Article 3 of Protocol No. 1 is of major importance for the determination of the relevance of the aims pursued by the restrictions on the rights guaranteed by this provision** (see *Mathieu-Mohin and Clerfayt*, cited above, § 52). Given that **Article 3 of Protocol No. 1 is not limited by a specific list of “legitimate aims”** such as those enumerated in Articles 8 to 11 of the Convention, **the Contracting States are free to rely on an aim not contained in such a list to justify a restriction, provided that the compatibility of that aim with the principle of the rule of law and the general objectives of the Convention is proved in the particular circumstances of a case** (see *Ždanoka*, cited above). **Nevertheless, it is for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with**; it has to satisfy itself that the conditions to which the right to vote and the right to stand for election are made subject do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they meet the requirements of lawfulness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate (see *Tănase v. Moldova* [GC], no. 7/08, § 162, ECHR 2010, and *Mathieu-Mohin and Clerfayt*, cited above, § 52).

65.  As regards, in particular, **the choice of electoral system, the Court reiterates that the Contracting States enjoy a wide margin of appreciation in this sphere.** In that regard, Article 3 of Protocol No. 1 goes no further than prescribing “free” elections held at “reasonable intervals”, “by secret ballot” and “under conditions which will ensure the free expression of the opinion of the people”. Subject to that reservation, it does not create any “obligation to introduce a specific system” such as proportional representation or majority voting with one or two ballots (see *Mathieu-Mohin and Clerfayt*, cited above, § 54).

66.  There are numerous ways of organising and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into its own democratic vision (see *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, § 61, ECHR 2005‑IX). For the purposes of applying Article 3 of Protocol No. 1, any electoral legislation must be assessed in the light of the political evolution of the country concerned, so that features that would be unacceptable in the context of one system may be justified in the context of another, at least so long as the chosen system provides for conditions which will ensure the “free expression of the opinion of the people in the choice of the legislature” (see *Yumak and Sadak v. Turkey* [GC], no. 10226/03, § 111, ECHR 2008). Furthermore, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any emerging consensus as to the standards to be achieved. In this regard, one of the relevant factors in determining the scope of the authorities’ margin of appreciation may be the existence or non-existence of common ground between the laws of the Contracting States (see *Glor v. Switzerland*, no. 13444/04, § 75, ECHR 2009).

67.  **It should also be noted that, in the context of Article 3 of Protocol No. 1, the primary obligation is not one of abstention or non-interference, as with the majority of civil and political rights, but one of adoption by the State of positive measures to “hold” democratic elections** (see *Mathieu-Mohin and Clerfayt*, cited above, § 50). In this regard the Court also takes into consideration the fact that **the right to vote, the “active” element of the rights under Article 3 of Protocol No. 1, is not a privilege. In the twenty-first century, the presumption in a democratic State must be in favour of inclusion** (see *Hirst*, cited above, § 59).

68.  **Accordingly, the exclusion from the right to vote of any groups or categories of the general population must be reconcilable with the underlying purposes of Article 3 of Protocol No.** **1** (see *Ždanoka*, cited above, § 105). The Court has held, *inter alia*, **that domestic legislation making the right to vote subject to a minimum age or to residence conditions is, in principle, compatible with Article 3 of Protocol No. 1** (see *Hirst*, § 62, and *Hilbe*, both cited above). It has acknowledged that any general, automatic and indiscriminate departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws it promulgates (see *Hirst*, cited above).

69.  **As regards restrictions on expatriate voting rights based on the criterion of residence, the** Convention institutions have accepted in the past that **these might be justified by several factors: firstly, the presumption that non-resident citizens are less directly or less continually concerned with their country’s day-to-day problems and have less knowledge of them; secondly, the fact that non-resident citizens have less influence on the selection of candidates or on the formulation of their electoral programmes; thirdly, the close connection between the right to vote in parliamentary elections and the fact of being directly affected by the acts of the political bodies so elected; and, fourthly, the legitimate concern the legislature may have to limit the influence of citizens living abroad in elections on issues which, while admittedly fundamental, primarily affect persons living in the country** (see *Hilbe*, cited above; see also *X and Association Y v. Italy*, no. 8987/80, Commission decision of 6 May 1981, Decisions and Reports (DR) 24, p. 192, and *Polacco and Garofalo v. Italy*, no. 23450/94, Commission decision of 15 September 1997, DR 90-A, p. 5). More recently, **the Court has taken the view that having to satisfy a residence or length-of-residence requirement in order to have or exercise the right to vote in elections is not, in principle, an arbitrary restriction of the right to vote and is therefore not incompatible with Article 3 of Protocol No. 1** (see *Doyle v. the United Kingdom* (dec.), no. 30158/06, 6 February 2007).

2.  Application of these principles to the present case

70**.  The Court observes at the outset that the applicants complained that the Greek legislature had not to date made the necessary arrangements enabling Greek expatriates to vote in parliamentary elections from their current place of residence.** Accordingly, the complaint does not concern the recognition of expatriates’ right to vote as such, the principle of which is already recognised by Article 51 § 4 of the Greek Constitution in conjunction with Article 4 of Presidential Decree no. 96/2007, but rather the conditions governing the exercise of that right. Like the Chamber, the Grand Chamber is therefore of the view that its task consists in examining whether, despite the failure to enact legislation on the conditions for exercising the right to vote, the Greek electoral system, in the instant case, nevertheless permitted “the free expression of the opinion of the people” and preserved “the very essence of the ... right to vote”, as required by Article 3 of Protocol No. 1 (see *Matthews v. the United Kingdom* [GC], no. 24833/94, § 65, ECHR 1999‑I). It will conduct its examination in the light of the broader question as to whether Article 3 of Protocol No. 1 places States under an obligation to introduce a system enabling expatriate citizens to exercise their voting rights from abroad.

71.  In general terms, Article 3 of Protocol No. 1 does not provide for the implementation by Contracting States of measures to allow expatriates to exercise their right to vote from their place of residence. Nevertheless, since the presumption in a democratic State must be in favour of inclusion (see *Hirst*, cited above, § 59), such measures are consonant with that provision. The question is, however, whether Article 3 of Protocol No. 1 goes so far as to require them to be taken. In answering that question, Article 3 should be interpreted with reference to the relevant international and comparative law (see *Yumak and Sadak*, cited above, § 127, and *Demir and Baykara v. Turkey* [GC], no. 34503/97, §§ 76 and 85, ECHR 2008) and to the domestic law of the country concerned.

72.  Firstly, with regard to international law, the Court notes that neither the relevant international and regional treaties – such as the International Covenant on Civil and Political Rights, the American Convention on Human Rights and the African Charter on Human and Peoples’ Rights – nor their interpretation by the competent international bodies provide a basis for concluding that voting rights for persons temporarily or permanently absent from the State of which they are nationals extend so far as to require the State concerned to make arrangements for their exercise abroad (see paragraphs 26-31 above).

73.  It is true that, in order to give greater effect to the right to vote in parliamentary elections, the institutions of the Council of Europe have, *inter alia*, invited member States to enable their citizens living abroad to participate to the fullest extent possible in the electoral process. Hence, Resolution 1459 (2005) of the Parliamentary Assembly of the Council of Europe (see paragraph 21 above) states that member States should take appropriate measures to facilitate the exercise of voting rights to the fullest extent possible, in particular by means of postal voting. Furthermore, in Recommendation 1714 (2005), the Parliamentary Assembly invited the Council of Europe to develop its activities aimed at improving the conditions for the effective exercise of election rights by groups facing special difficulties, including expatriates. The Venice Commission, for its part, observed that since the 1980s the recognition of external voting rights had gained ground in Europe. While it also recommended that member States facilitate the exercise of expatriates’ voting rights, it did not consider that they were obliged to do so. Rather, it viewed such a move as a possibility to be considered by the legislature in each country, which had to balance the principle of universal suffrage on the one hand against the need for security of the ballot and considerations of a practical nature on the other (see, in particular, paragraph 25 above).

74.  Furthermore, a comparative survey of the legislation of Council of Europe member States in this sphere shows that, while the great majority of them allow their nationals to vote from abroad, some do not (see paragraph 38 above). However, as regards those States which do allow voting from abroad, closer examination reveals that the arrangements for the exercise of expatriates’ voting rights are not uniform, but take a variety of forms. By way of example, some countries allow voting in polling stations set up abroad, and/or postal voting, proxy voting and e-voting (see paragraph 34 above). The length of residence abroad is another factor taken into consideration by member States. Some grant voting rights only to nationals temporarily resident outside the country, while in others expatriates lose the right to vote after a certain period of time (see paragraph 35 above). Furthermore, some Contracting States make provision for expatriates to elect their own representatives to the national parliament, in electoral constituencies set up outside the country (see paragraph 37 above). Lastly, in the majority of member States which allow voting from abroad, persons wishing to avail themselves of this facility must register by a certain deadline on the electoral roll with the authorities in their country of origin or the diplomatic or consular authorities abroad (see paragraphs 39‑45 above).

75**.  In short, none of the legal instruments examined above forms a basis for concluding that, as the law currently stands, States are under an obligation to enable citizens living abroad to exercise the right to vote. As to the arrangements for exercising that right put in place by those Council of Europe member States that allow voting from abroad, there is currently a wide variety of approaches.**

76.  Secondly, with regard to the domestic legislation in issue in the present case, the Court observes that Article 51 § 4 of the Constitution provides that “[t]he conditions governing the exercise of the right to vote by persons outside the country may be specified by statute ...”. The Scientific Council of Parliament, for its part, stated, in its report of 31 March 2009 on the bill concerning the exercise of the right to vote in parliamentary elections by Greek voters living abroad, that permitting the exercise of the right to vote from abroad was an option rather than a duty for the legislature, while stressing that legal opinion was not unanimous on the subject (see paragraph 19 above**). In conclusion, it would appear that while Article 51 § 4 of the Constitution allows the legislature to give effect to the exercise of voting rights for expatriate Greeks from their place of residence, it does not oblige it to do so.** Accordingly, and having regard to the considerations outlined above (see paragraph 75), **the Court is of the view that it is not its task to indicate to the national authorities at what time and in what manner they should give effect to Article 51 § 4 of the Constitution.**

77.  Furthermore, since 2000, the Greek authorities have made several attempts to give effect to the provisions of Article 51 § 4. During the 2001 constitutional revision, for instance, the content of these provisions was clarified and it was stated that the principle of simultaneous voting did not rule out the exercise of voting rights by postal vote or other appropriate means, provided that the counting of votes and the announcement of the results were carried out at the same time as within the country (see paragraph 16 above).

78.  Mention should also be made of the initiative taken in 2009 aimed at enacting the legislation provided for by Article 51 § 4 of the Constitution, in the form of a bill placed before Parliament on 19 February 2009 by the Interior, Justice and Economics Ministers laying down the arrangements for the exercise of voting rights in parliamentary elections by expatriate Greek voters. The bill was not passed as it failed to secure the two‑thirds majority of the total number of members of parliament required by Article 51 § 4 of the Constitution as amended following the 2001 constitutional revision.

79.  **Lastly, as regards the specific situation of the applicants, the Court has no reason to doubt their assertion that they maintain close and continuing links with Greece and follow political, economic and social developments in the country closely, with the aim of playing an active part in the country’s affairs. The presumption that non‑resident citizens are less directly or less continually concerned with the country’s day-to-day problems and have less knowledge of them (see paragraph 69 above) does not therefore apply in the instant case. Nevertheless, in the Court’s view, this is not sufficient to call into question the legal situation in Greece. In any event, the competent authorities cannot take account of every individual case in regulating the exercise of voting rights, but must lay down a general rule** (see *Hilbe*, cited above).

80**.  As to the disruption to the applicants’ financial, family and professional lives that would have been caused had they had to travel to Greece in order to exercise their right to vote in the 2007 parliamentary elections, the Court is not convinced that this would have been disproportionate to the point of impairing the very essence of the voting rights in question.**

3.  Conclusion

81.  Having regard to the foregoing considerations, **it cannot be said that the very essence of the applicants’ voting rights guaranteed by Article 3 of Protocol No. 1 was impaired in the instant case. Accordingly, there has been no breach of that provision.**

**FOR THESE REASONS, THE COURT UNANIMOUSLY**

*Holds* that there has been no violation of Article 3 of Protocol No. 1.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 15 March 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Johan Callewaert Nicolas Bratza

Deputy to the Registrar President

## **CASE OF SHINDLER v. THE UNITED KINGDOM**

*(Application no. 19840/09)*

JUDGMENT

STRASBOURG

7 May 2013

FINAL

09/09/2013

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*

In the case of Shindler v. the United Kingdom,

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

Ineta Ziemele, *President,* David Thór Björgvinsson, George Nicolaou, Ledi Bianku, Zdravka Kalaydjieva, Vincent A. De Gaetano, Paul Mahoney, *judges,*  
and Fatoş Aracı, *Deputy* *Section Registrar,*

Having deliberated in private on 9 April 2013,

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

**PROCEDURE**

1.  The case originated in an application (no. 19840/09) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a British national, Mr Harry Shindler (“the applicant”), on 26 March 2009.

2.  The applicant was represented by Ms C. Oliver, a lawyer practising in Rome. The United Kingdom Government (“the Government”) were represented by their Agent, Mr D. Walton, of the Foreign and Commonwealth Office.

3.  **The applicant alleged that his disenfranchisement as a result of his residence outside the United Kingdom constituted a violation of Article 3 of Protocol No. 1 to the Convention, taken alone and taken together with Article 14, and Article 2 of Protocol No. 4 to the Convention.**

4.  On 14 December 2010 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

**THE FACTS**

**I.  THE CIRCUMSTANCES OF THE CASE**

5.  **The applicant was born in 1921** and lives in Ascoli Piceno, Italy. He **left the United Kingdom in 1982 following his retirement and moved to Italy with his wife, an Italian national.**

6.  **Pursuant to primary legislation, British citizens residing overseas for less than fifteen years are permitted to vote in parliamentary elections in the United Kingdom (see paragraphs 10-11 below). The applicant does not meet the fifteen-year criterion and is therefore not entitled to vote. In particular, he was unable to vote in the general election of 5 May 2010**.

**II.  RELEVANT DOMESTIC LAW AND PRACTICE**

A.  The United Kingdom

1.  General provisions on voting in parliamentary elections

7.  Section 1(1) of the Representation of the People Act 1983 (“the 1983 Act”) provides that a person is entitled to vote as an elector at a parliamentary election if on the date of the poll he is, *inter alia*, registered in the register of parliamentary electors for a constituency and is either a Commonwealth citizen or a citizen of the Republic of Ireland. Pursuant to section 4(1), a person is entitled to be registered if on the relevant date he is, *inter alia*, resident in the constituency and is either a Commonwealth citizen or a citizen of the Republic of Ireland.

2.  Provisions regarding persons with a service qualification

8.  Sections 14-17 of the 1983 Act allow certain categories of persons otherwise eligible to vote who do not fulfill the normal residence requirements to continue to register to vote by making a “service declaration”. A service declaration can be made by a person who is (a) a member of the forces, (b) employed in the service of the Crown in a post outside the United Kingdom of any prescribed class or description, (c) employed by the British Council in a post outside the United Kingdom, or (d) the spouse or civil partner of a person falling within categories (a), (b) or (c) above.

9.  Section 17 provides that where a person’s service declaration is in force, he shall be regarded for the purposes of section 4 of the 1983 Act as a resident on the date of the declaration at the address specified in it (current or former address in the United Kingdom).

3.  Provisions regarding overseas voters

(a)  Current legislation

10.  Section 1 of the Representation of the People Act 1985 as amended (“the 1985 Act”) provides that a person who is a British citizen is entitled to vote as an elector at a parliamentary election if he qualifies as an overseas elector on the date on which he makes an “overseas elector’s declaration” (see paragraph 14 below). A person qualifies as an overseas elector if he is not resident in the United Kingdom and he satisfies one of the sets of conditions set out in the legislation.

11.  The relevant set of conditions for the purpose of the present case is set out in section 1(3):

“The first set of conditions is that—

(a) he was included in a register of parliamentary electors in respect of an address at a place that is situated within the constituency concerned,

(b) that entry in the register was made on the basis that he was resident, or to be treated for the purposes of registration as resident, at that address,

(c) that entry in the register was in force at any time falling within the period of 15 years ending immediately before the relevant date [i.e. the date on which the applicant makes a declaration under section 2], and

(d) subsequent to that entry ceasing to have effect no entry was made in any register of parliamentary electors on the basis that he was resident, or to be treated for the purposes of registration as resident, at any other address.”

12.  Section 2(1) provides that a person is entitled to be registered pursuant to an “overseas elector’s declaration” in the constituency where he was last registered to vote or last resided and the registration officer concerned is satisfied that he qualifies as an overseas elector in respect of that constituency. Where the entitlement of a person to remain registered as an overseas voter terminates, the registration officer concerned shall remove that person’s entry from the register (section 2(2)).

13.  Section 2(3) requires that an overseas elector’s declaration state the date of the declaration, that the declarant is a British citizen, that the declarant is not resident in the United Kingdom, and the date on which he ceased to be so resident.

14.  Section 2(4) stipulates that an overseas elector’s declaration must show which set of conditions in section 1 of the Act the declarant claims to satisfy and, in the case of the first set of conditions, specify the address in respect of which he was registered.

(b)  History to the current legislation

15.  Prior to the enactment of the 1985 Act, no British citizen living overseas could vote in a parliamentary, i.e. general, election in the United Kingdom, other than members of the armed forces or Crown servants.

16.  In 1982 a parliamentary committee, the Home Affairs Select Committee, published a report on the Representation of the People Acts which recommended that British citizens living in what were then Member States of the European Economic Community should be able to vote in parliamentary elections for an indefinite period. The Government’s response to that report recommended a seven-year limit for all overseas voters, expressing the view that a person’s links with the United Kingdom were likely to have weakened significantly if he had lived outside it for as long as ten years.

17.  The 1985 Act as originally enacted extended the right to vote to British citizens resident overseas but who had been resident in the United Kingdom within the previous five years. The bill originally proposed a seven-year period but concerns were expressed during the passage of the bill that that period was both too long and too short. Further concerns regarding the inability of a straightforward time-limit to reflect the positions and intentions of individuals regarding their contact with the United Kingdom were also raised.

18.  The five-year period was extended to twenty years by virtue of section 1 of the Representation of the People Act 1989. The bill which led to the Act was prepared following consultation and proposed increasing the time-limit to twenty-five years. During parliamentary debates, the Secretary of State acknowledged that there was no correct answer as to where the correct cut-off point lay and explained that a balance had to be struck between the interests of those who, although resident abroad for some time, had retained close and continuing connection with the United Kingdom and those who had “cut adrift” from such links much earlier. Parliamentarians expressed a broad spectrum of views, with some opposing any change which would allow those resident abroad for long periods to vote and others arguing that restrictions on the right to vote should be kept to a minimum.

19.  Section 1 of the 1989 Act was subsequently repealed and replaced, with retention of the twenty-year period, by section 8 and Schedule 2 of the Representation of the People Act 2000.

20.  In September 1998 the Home Affairs Select Committee published a report on Electoral Law and Administration. It proposed that the period during which overseas voters be permitted to vote be reduced. The relevant extract of its report reads:

“113. The Representation of the People Act 1985 introduced a right for British citizens resident overseas on the qualifying date to register as a voter for parliamentary and European elections for up to five years following their move overseas. This period was increased to twenty years under the Representation of the People Act 1989. The peak year for actual registrations under the Act was in 1991 when 34,500 registered; the numbers have steadily decreased since then until a rise in 1997, when the total stood at 23,600, followed by a further fall in 1998 to 17,300. Estimates of the potential number who could register have ranged as high as three million.

114. It has been suggested that it is unreasonable for people who have been away for so long to retain the right to vote. Professor Blackburn argued that the system meant that ‘an expatriate living hundreds or thousands of miles away, for the duration of a period exceeding a whole generation, carrying memories of British politics in the past and with little or no personal knowledge of contemporary issues in the constituency where he or she used to live, can influence the election of the government of a country to which he is not subject and to whom he or she may be paying no taxes’. Electoral administrators pointed out that there were costs attached to registering overseas citizens and that a shorter period might be cheaper and easier to operate. The Labour Party and Liberal Democrat representatives both suggested that 20 years was perhaps too long. Professor Blackburn suggested that the right to vote while overseas might be related in some way to the nature of the links retained with the UK or to an intention to return.

115. On the other hand, it is clear that the present rules – with so few persons actually registering – cause very little disruption or distortion to the actual results and, for the Labour Party, Mr Gardner indicated that changing the time limit was not a priority issue. It must also be likely that those who do register are those with the greater commitment to events in the UK and are those most likely to be planning to return. A further restraining factor is that overseas voters have to vote by proxy (because it is not possible to send a ballot paper overseas reliably in the time available) which means that in order to exercise their right to vote they have to establish some form of connection with their former home. The Home Office reported that most of the correspondence they received on this issue was not from people calling for the twenty year period to be lowered but from people who had been resident overseas for more than twenty years arguing for it to be increased.

116. On balance, **we take the view that** **the twenty year maximum period within which a British citizen overseas may retain the right to vote is excessive and that the earlier limit** – **five years** – **should be restored**.” (emphasis in original; references omitted)

21.  The twenty-year period was subsequently reduced to fifteen years pursuant to section 141(a) of the Political Parties, Elections and Referendums Act 2000. The bill preceding the Act proposed a reduction to ten years. During parliamentary debates, the relevant Government minster explained that the proposed ten-year period struck a balance between the various strongly-held views expressed. During the bill’s passage through the House of Lords, the Government minister proposed an increase to fifteen years in response to concerns aired during the debate. While the minister accepted that the amendment represented a broad-brush approach, he considered it to be the most equitable approach that could be adopted.

(c)  Recent legislative and policy developments

22.  On 6 May 2009, during the passage through Parliament of the bill which led to the Political Parties and Elections Act 2009, an amendment was proposed to raise the period for overseas voting from fifteen to twenty years. The reasons given for the proposed amendment were as follows:

“The first is that we live in an era of increasing globalisation and internationalisation of economic activity, a process which has gathered pace since the reduction of the qualifying period in 2000. Secondly, we need to reflect the different nature of modern society and the mobility of populations. Thirdly, I seek to reflect the fact of Britain’s membership of the European Union.”

23.  The Government minister defended the fifteen-year period, noting the absence of any compelling argument or evidence that would justify a change. He considered that the focus should be instead on raising the registration rate of overseas voters, noting that fewer than 13,000 overseas voters were registered in England and Wales as of 1 December 2008. The amendment was not passed.

24.  During a short debate in the House of Lords on 2 March 2011 regarding voting arrangements for overseas electors, some members called on the Government to reconsider the fifteen-year period. Attention was drawn to the fact that those who worked abroad for international organisations did not have the same voting rights as members of the armed forces, Crown servants and employees of the British Council, who were not subject to the fifteen-year limit. The Government minister acknowledged that the Government ought to address the issue of overseas votes, noting that of an estimated 5.5 million British citizens resident abroad, only about 30,000 actually voted.

25.  On 27 June 2012, during the passage through Parliament of the bill which led to the Electoral Registration and Administration Act 2013, an amendment was proposed in the House of Commons to remove the fifteen-year rule. The reasons for the proposed amendment were explained as follows:

“According to the Institute for Public Policy Research, 5.6 million British citizens currently live abroad. The shocking truth is that although, as of last December, about 4.4 million of them were of voting age, only 23,388 were registered for an overseas vote, according to the Office for National Statistics’ electoral statistics. Out of 4.4 million potential overseas voters, only 23,000-odd are actually registered! ...

...

In most other countries, both developed and emerging, voting rights for parliamentary elections depend solely on nationality, not on an arbitrary time limit. For example, US nationals can vote in presidential, congressional and state elections, regardless of where they reside in the world. Similarly, Australian nationals can vote in the equivalent elections there, no matter where they live. However, the most startling example comes from our nearest neighbour. French citizens in the UK have just elected a new President and taken part in parliamentary elections for one of the 11 Members of Parliament whose job it is solely to represent French people abroad ....

The right of Spaniards abroad to vote is enshrined in article 68 of the Spanish constitution. ...

...

[A]ll Portuguese citizens living abroad have the same right to vote in Assembly elections as fellow citizens living in their home country. The simple fact is that the citizens of the US, Australia, Belgium, the Netherlands, France, Germany, Portugal, Slovenia, Spain, Sweden and all these other countries have better voting rights for their citizens abroad than we do for British citizens living abroad.

For a democracy as ancient as ours, it is not an exaggeration to say that it is a stain on our democratic principles that our citizens are placed at such a disadvantage when they have moved abroad compared with citizens from those other countries. Her Majesty’s Government is very happy to collect tax from most of the enormous number of people involved, but denies them the vote.”

...

“The states in which these British citizens reside do not allow them to vote as residents, because voting rights are based on nationality and not residence, and they cannot vote in the UK on the basis of the current rule, for which there is no obvious rationale. I challenge the Deputy Leader of the House to state where there would be any disadvantage in abolishing the rule. The consequence of the rule is that many British citizens living abroad are in a state of electoral limbo, unable to participate in any election whatsoever. That seems to be a very unsatisfactory state of affairs.”

26.  The Government minister replied that the Government would give the issue “serious consideration”. The amendment was subsequently withdrawn.

27.  A similar amendment to the bill was proposed at the Committee stage in the House of Lords on 14 January 2013. The reasons given for the proposed amendment were as follows:

“The fundamental issue at stake here is the complete exclusion of so many British citizens living abroad for more than 15 years from the right to vote here. According to the Institute for Public Policy Research, 55% of those who moved abroad in 2008 did so for work-related reasons, 25% for study and 20% for life in retirement. With an ageing population, and increased opportunities for work and study abroad, people are likely to continue to leave the United Kingdom in substantial numbers. Many of them will reside abroad for more than 15 years. In the countries to which they move, voting rights rest overwhelmingly on nationality, not residence. Apart from some nine Commonwealth countries – mainly islands in the West Indies – I understand that no state permits British citizens to vote in its principal national elections. They therefore exist in an electoral limbo.

...

Within the European Union, Britain compares unfavourably with most of its partners. Of the 27 EU members, 22 countries allow their expatriate citizens the right to vote, without any restriction on the period of residence outside the home country. That is apart from Germany, which restricts it to 25 years for expatriates living outside the EU. Just two countries, Denmark and the United Kingdom, restrict the period for voting rights: the UK to 15 years and Denmark to four. In three countries – Cyprus, the Republic of Ireland and Malta – expatriates have no right to vote.

The world has become much smaller. Britons overseas can listen to our radio via their computer, they can watch British television and read British newspapers just as rapidly as anyone living here, if they subscribe to them electronically. I make a confident prediction that this debate in our House today will attract one of the largest television online audiences abroad that your Lordships have had. I have met many British overseas residents who are as well, if not better, informed about British political affairs than the average voter here. So the old argument about expatriates’ inability to make an informed judgment about the great issues in our political life no longer holds.”

28.  The Government minister responded that the question whether the time limit was appropriate was a wider question which remained under consideration within Government. He noted that there were valid arguments on both sides which needed to be carefully considered alongside any practical issues before any informed decisions could be taken. The amendment was withdrawn but it was subsequently reintroduced on 23 January 2013 during the Report stage of the bill, with further debate taking place. Again, the Government minister indicated that the issue was under consideration by Government and the amendment was withdrawn.

(d)  Judicial review proceedings in *Preston* ([2011] EWHC 3174 (Admin) and [2012] EWCA Civ 1378)

29.  On 1 December 2011, the High Court handed down judgment in the case of *Preston v Wandsworth Borough Council and Lord President of the Council*. The claimant was a long-term resident of Spain who sought judicial review of the fifteen-year rule under section 1(3) of the 1985 Act. He argued that he had a directly effective right under European Union law to move to and reside in other Member States and that the fifteen-year rule operated unjustifiably to interfere with the exercise of that right.

30.  The court found that there was no evidential basis for the contention that the fifteen-year rule created a barrier of any kind to free movement. The matter therefore did not fall within the scope of EU law. That being so, the issue of justification did not arise. The court nonetheless indicated that it considered the rule to be a proportionate interference with the right to free movement. It was of the view that the Government were entitled to hold that there was a legitimate objective which the rule was designed to achieve, namely to remove the right to vote from those whose links with the United Kingdom had diminished and who were not, for the most part at least, directly affected by the laws passed there. It observed:

“44. ... [T]he 15 year rule is designed to establish a test to identify when the absence of residence can fairly be said to have diluted the link with the UK sufficient to justify the removal of the right to vote. The fact that some residence tests do not properly or proportionately measure the strength of commitment does not mean that the adoption of a non-residence test cannot legitimately measure the weakening of commitment. This rule does not fix on non-residence at some particular point in time; it requires a consistent period of non-residence. In my judgment that is a justified way to measure the dilution of commitment. Thereafter the choice of a bright line rule is inevitable. It would in my view be wholly impracticable to adopt a rule which required consideration of the personal circumstances of all potential expatriate voters ...”

31.  The court found that decisions of this Court upholding residence rules were “highly material” (referring to *Hilbe v. Liechtenstein* (dec.), no. 31981/96, ECHR 1999‑VI; *Melnychenko v. Ukraine*, no. 17707/02, § 56, ECHR 2004‑X; and *Doyle v. the United Kingdom* (dec.), no. 30158/06, 6 February 2007).

32.  Finally, the court considered that the exceptions to the fifteen-year period for certain categories of citizens were justified as the individuals concerned were resident in other States at the request of the United Kingdom in order to look after its national interests.

33.  In its judgment of 25 October 2012, the Court of Appeal upheld the judgment of the High Court on both the question of the existence of an interference with free movement rights and the question of justification. Lord Justice Mummery gave the judgment for the court and, on the latter issue, noted in particular:

“89. First, the Divisional Court was entitled to hold ... that the 15 year rule had a legitimate aim, i.e. to test the strength of a British citizen’s links with the UK over a significant period of time by measuring past commitment to the UK and seeing whether it was sufficiently diminished or diluted to justify removal of the right to vote in parliamentary elections. That aim was legitimate for the purpose of confining the parliamentary franchise to those citizens with an ascertainable, continuing, close and objective connection with the UK, whose government made decisions and whose Parliament passed laws that most directly affected those British citizens resident in the UK.

90. Secondly, the residence of a citizen is not ... an arbitrary measure of connection with a country: far from it, residence is a relevant, rational and practicable criterion for assessing the closeness of the links between a British citizen and the UK.

91. Thirdly, the 15 year rule is proportionate to the aim. The length of the period represents three Parliamentary terms. It provides a substantial opportunity for continued voting by British citizens who have moved to reside in another EU country.

92. Fourthly, it is impracticable for the franchise criteria to be other than bright line rules capable of reasonably consistent practical application. It would be unworkable and disproportionate for the electoral authorities to have to make individual merits assessments of the particular circumstances of each resident in another EU country on a case-by-case basis in order to determine how close a connection there is between that particular individual and the UK despite prolonged absence.

93. Fifthly, there is no objectionable inconsistency of treatment arising from the excepted categories of overseas residents, such as members of the armed services and Crown employees. In general, they do not move to reside overseas as a voluntary exercise of the right to free movement ... [T]heir circumstances are distinguishable from those of the claimant and others who, like him, have chosen, for their own personal reasons, to live in another Member State.”

B.  Italy

34.  A foreign national may acquire Italian citizenship after having been resident in Italy and enrolled in the register of the population of a municipality for four years in the case of nationals of European Union Member States. Citizenship may also be acquired after two years of marriage to an Italian citizenship. Dual citizenship is permitted.

35.  A foreign national wishing to acquire Italian citizenship must pay a fee of 200 euros plus a notarial fee of around 15 euros. Application forms are available on the website of the Ministry of Interior. An oath of allegiance to the Italian Republic must be sworn.

36.  All Italian citizens are entitled to vote in Italian parliamentary elections (unless excluded for such things as conviction for certain offences etc.).

III.  RELEVANT COUNCIL OF EUROPE MATERIAL

A.  The Parliamentary Assembly

37.  The Parliamentary Assembly of the Council of Europe (“the Assembly”) has adopted a number of resolutions and recommendations regarding migration issues, including implications for the right to vote.

38.  In 1982 it adopted Recommendation 951 (1982) on voting rights of nationals of Council of Europe member states. The recitals to the recommendation read, in so far as relevant, as follows:

“1. Noting that an estimated 9 million nationals of Council of Europe member states do not reside in their country of origin, but in some other member state of the Council;

2. Considering that these citizens cannot normally take part in elections or referenda held in their country of residence because they are not nationals of that country;

3. Noting that many of them are also unable, under national legislation, to take part from the territory of their country of residence in elections and referenda held in their country of origin because they have no domicile there;

...

5. Considering that millions of nationals of Council of Europe member states are thereby deprived of all civic rights;

6. Mindful that one of the major concerns of the Council of Europe is to preserve and strengthen democracy and civic rights in member states;

7. Emphasising the importance it attaches to the rights guaranteed by the European Convention on Human Rights and the First Protocol thereto, particularly freedom of expression, freedom of peaceful assembly and freedom of association, as well as the obligation for member states to hold free elections at regular intervals ;

8. Believing that steps should, therefore, be taken to ensure that every national of a member state is able to exercise his political rights, at least in his country of origin, when he resides in another Council of Europe member state ...”

39.  The Assembly recommended, *inter alia*, that the Committee of Ministers:

“c. consider the possibility of harmonising member states’ laws in the interests of maintaining the voting rights of their nationals living in another member state with regard to nation-wide elections and referenda, especially with a view to enabling votes to be cast by post or through diplomatic or consular missions;

d. envisage, if appropriate, the drawing up of a protocol to the European Convention on Human Rights whereby member states would undertake to respect such voting rights for their nationals living in another member state and refrain from hindering the exercise thereof by any measure whatever.”

40.  In Recommendation 1410 (1999) on links between Europeans living abroad and their countries of origin, the Assembly noted that “several tens of millions” of Europeans were living outside their countries of origin. It continued:

“3. The Assembly believes that it is in the interest of states to ensure that their nationals continue actively to exercise their nationality, so that it does not become merely passive or essentially a matter of feelings and emotions, and that those nationals can in fact play an important go-between role in host countries, working for better political, cultural, economic and social relations between their country of origin and the country where they live.”

41.  It recommended that the Committee of Ministers:

“iii. prepare a recommendation to the member states with the intention of fostering voluntary participation of expatriates in political, social and cultural life in their country of origin, by instituting and harmonising arrangements for specific representation, such as the unrestricted right to vote or specific parliamentary and institutional representation through various consultative councils ...

...

v. invite member states:

...

c. to draw up, at national level, an in-depth, systematic analytical description of the respective situations of expatriates, with a view to co-ordinating expatriate relations policies at European level and harmonising arrangements for the institutional and political representation of expatriates, for example by creating a real expatriate status through appropriate legal instruments;

d. to take account of their expatriates’ interests in policy-making and in national practices concerning:

...

iii. the right to vote in loco in the country of origin;

iv. the right to vote of expatriates in embassies and consulates in their host countries;

...”

42.  In Recommendation 1650 (2004) on links between Europeans living abroad and their countries of origin, the Assembly noted that the question of links between countries of origins and their expatriates was a relatively new problem, particularly in central and eastern Europe, that relations varied from strong and institutionalised to loose and informal and that there was no harmonisation in this respect at the pan-European level. It continued:

“4. The Parliamentary Assembly believes that it is in the interest of states to ensure that their expatriate nationals continue to actively exercise their rights linked to nationality and contribute in a variety of ways to the political, economic, social and cultural development of their countries of origin.”

43.  The recommendation further noted that expatriation was the outcome of increasing globalisation and should be viewed as a positive expression of modernity and dynamism, bringing real economic benefit for both host countries and the countries of origin. The Assembly regretted the lack of follow-up to Recommendation 1410 (1999) and recommended that the Committee of Ministers invite member states, *inter alia*:

“c. to take account of their expatriates’ interest in policy making, in particular concerning questions of nationality; political rights, including voting rights; economic rights, including taxation and pension rights; social rights, including social schemes; and cultural rights ...”

44.  It further recommended that the Committee of Ministers:

“ii. promote an exchange of views and co-operation between Council of Europe member states as regards political, legal, economic, social and cultural measures aimed at strengthening the links between European expatriates and their countries of origin;

iii. review the existing models of relations between expatriates and their countries of origin, with a view to making proposals for the introduction of legally-binding measures at the European level ...”

45.  In Resolution 1459 (2005) on abolition of restrictions on the right to vote, the Assembly stressed at the outset the importance of the right to vote and to stand in elections as a basic precondition for preserving other fundamental civil and political rights upheld by the Council of Europe. It noted that electoral rights were the basis of democratic legitimacy and representativeness of the political process and considered that they should, therefore, evolve to follow the progress of modern societies towards ever inclusive democracy. It stated:

“3. The Assembly considers that, as a rule, priority should be given to granting effective, free and equal electoral rights to the highest possible number of citizens, without regard to their ethnic origin, health, status as members of the military or criminal record. Due regard should be given to the voting rights of citizens living abroad.”

46.   The resolution continued:

“7. Given the importance of the right to vote in a democratic society, the member countries of the Council of Europe should enable their citizens living abroad to vote during national elections bearing in mind the complexity of different electoral systems. They should take appropriate measures to facilitate the exercise of such voting rights as much as possible ... Member states should co-operate with one another for this purpose and refrain from placing unnecessary obstacles in the path of the effective exercise of the voting rights of foreign nationals residing on their territories.”

47.  In conclusion, the Assembly invited the member and observer States concerned to:

“b. grant electoral rights to all their citizens (nationals), without imposing residency requirements;

c. facilitate the exercise of expatriates’ electoral rights by providing for absentee voting procedures ...”

48.  In its follow-up Recommendation 1714 (2005) on abolition of restrictions on the right to vote, the Assembly called upon the Committee of Ministers to appeal to member and observer States to, *inter alia*, review existing instruments with a view to assessing the possible need for a Council of Europe convention to improve international co-operation with a view to facilitating the exercise of electoral rights by expatriates.

49.  In Resolution 1591 (2007) on distance voting (i.e. the exercise of the right to vote when absent from the country) the Assembly reiterated that the right to vote was an essential freedom in every democratic system and invited member States to introduce distance voting.

50.  In 2008, the Assembly adopted two resolutions and two corresponding recommendations on the state of democracy in Europe, one on specific challenges facing European democracies (Resolution 1617 (2008) and Recommendation 1839 (2008)); and the other on measures to improve the democratic participation of migrants (Resolution 1618 (2008) and Recommendation 1840 (2008)). In these, the Assembly recalled that the essence of democracy was that all those concerned by a decision must be directly or indirectly part of the decision-making process. Accordingly, it considered representativeness to be of crucial importance and found it unacceptable that large groups of the population were excluded from the democratic process. It further observed that there were over sixty-four million migrants in Europe and that their increasing number resulted in a corresponding increasing need to ensure that they were given a “fair share” in the democratic process. While the Assembly focussed on the importance of the participation of migrants in the political process of the host country, it noted that democratic participation for migrants in their countries of origin was also important.

51.  In Resolution 1696 (2009) on engaging European diasporas, the Assembly noted that policies to manage the many challenges and opportunities that had emerged with migration had not kept pace with the development of the phenomenon. It recalled that it had been engaged in dealing with the issue of Europeans living abroad and their links to their homelands for the last fifteen years. It continued:

“4. The Assembly considers it essential to strike and maintain a proper balance between the process of integration in the host societies and the links with the country of origin. It is convinced that seeing migrants as political actors and not only as workers or economic actors enhances the recognition of their capacity in the promotion and transference of democratic values. The right to vote and be elected in host countries and the opportunity to take part in democratically governed European non-governmental organisations can enable diasporas to endorse an accountable and democratic system of governance in their home countries. Policies that grant migrants rights and obligations arising from their status as citizens or residents in both countries should therefore be encouraged.

5. The Assembly regrets that, notwithstanding its long-standing calls to revise the existing models of relations between expatriates and their countries of origin, relations between member states of the Council of Europe and their diasporas are far from being harmonised. Many member states from central and eastern Europe are only beginning to recognise the potential development and other benefits of engaging their diasporas in a more institutionalised manner, especially in the context of the current global economic crisis.

6. The Assembly reiterates that it is in the interest of member states to ensure that their diasporas continue to actively exercise the rights linked to their nationality and contribute in a variety of ways to the political, economic, social and cultural development of their countries of origin. It is convinced that globalisation and growing migration may have an impact on host countries in many positive ways by contributing to building diverse, tolerant and multicultural societies.”

52.  It encouraged member States, as countries of origin, to adopt a number of policy initiatives, including civil and political incentives to:

“9.1.1. develop institutions and elaborate policies for maximum harmonisation of the political, economic, social and cultural rights of diasporas with those of the native population;

9.1.2. ease the acquisition or maintenance of voting rights by offering out-of-country voting at national elections;

...”

53.  The corresponding Recommendation (1890 (2009)) recalled previous recommendations on the subject and instructed the European Committee on Migration to:

“5.2.1. define the status, rights and obligations of diasporas in Europe, both in their countries of origin and in host countries;

...

5.2.3. carry out a study on the experience of member states in setting up government offices for diasporas and the experience of granting voting rights to diasporas and access to other political participation mechanisms;

...”

54.  Finally, in its Resolution 1897 (2012) on ensuring greater democracy in elections the Assembly called on the member States to foster citizen participation in the electoral process, in particular by, *inter alia*:

“8.1.12. enabling all citizens to exercise their right to vote through proxy voting, postal voting or e-voting, on the condition that the secrecy and the security of the vote are guaranteed; facilitating the participation in the electoral process of citizens living abroad, subject to restrictions in accordance with the law, such as duration of residence abroad, whilst ensuring that, if polling stations are set up abroad, their establishment is based on transparent criteria; safeguarding the right to vote of vulnerable groups (people with disabilities, people who are illiterate, etc.) by adapting polling stations and voting material to their needs; abolishing legal provisions providing for general, automatic and indiscriminate disenfranchisement of all serving prisoners irrespective of the nature or gravity of their offences;”

55.  In a number of the above texts, the Assembly also addressed the question of the political participation of migrants in their host countries (see also Recommendation 1500 (2001) on participation of immigrants and foreign residents in political life in the member States).

B.  The Committee of Ministers

56.  In its reply to Recommendation 1650 (2004) on links between Europeans living abroad and their countries of origin (see paragraphs 42-44 above), the Committee of Ministers commented that the Recommendation raised important and timely issues that should be given serious consideration and therefore brought it to the attention of the governments of the member States. The Committee of Ministers agreed with the Assembly that growing expatriation could be a positive effect of globalisation that contributed to building diverse, tolerant and multicultural societies and recognised the role that migrants could play as vectors of development for both countries of origin and destination. It further agreed that the right balance between the integration into host societies and the links with the country of origin should be achieved and maintained, and charged the European Committee on Migration with examining the concrete mechanisms linked to the migratory processes at the pan-European level, with a view to identifying the legal measures that could contribute to such a balance.

57.  In its reply to Recommendation 1714 (2005) on abolition of restrictions on the right to vote (see paragraph 47 above), the Committee of Ministers agreed that the abolition of existing restrictions on the right to vote should be the subject of further activities of the Council of Europe. It also agreed that that member States should take measures to facilitate the exercise of voting rights of citizens living abroad, for example through postal, consular or e-voting. However, it did not see any pressing need to elaborate a convention to improve international co-operation on the issue.

58.  In its Final Declaration at the 8th Council of Europe Conference of Ministers responsible for migration affairs regarding “Economic migration, social cohesion and development: towards an integrated approach”, 4‑5 September 2008, the Committee of Ministers recognised that the Council of Europe had the potential to develop holistic and coherent policies in the field of migration based on human rights. The thematic report prepared as a main reference for the Conference contained a chapter on migration and social cohesion. On the question of links between the migrant and the country of origin, the report noted:

“286. At the same time, long term and permanent immigrants increasingly maintain multiple social, economic and political ties and sometimes, dual citizenship with both host and home countries, establishing social and communities that transcend geographical, cultural and political borders. As well, migrants are developing transnational activities and multicultural and multilingual skills. These evolving features of international migration also need to be taken into account in designing policies and practices to ensure social inclusion and cohesion in European countries.”

59.  The report also commented on the emergence of “transnationalism” in the area of migration:

“386. ... The term transnationalism refers to processes whereby migrants develop multiple social ties between the society from which they come and the host society, establishing social communities that transcend geographical, cultural and political borders. More people attain multiple identities, transnational relationships and dual or multiple citizenship. An increasing number of migrants are organising their lives with reference to two or more societies and are developing transnational activities and multicultural and multilingual skills. Dual citizenship and European ‘citizenship’ reflect greater freedom of movement, multicultural societies, employment mobility, activities in two or more countries, and so on. An increasing migratory circulation within the European area reflecting a gradual emergence of cosmopolitan, intercultural and global citizenship.”

C.  The Venice Commission

60.  The European Commission for Democracy though Law (“Venice Commission”) adopted Guidelines on Elections at its 51st Plenary Session on 5-6 July 2002. As regards the principle of universal suffrage, the Guidelines provided:

“Universal suffrage means in principle that all human beings have the right to vote and to stand for election. This right may, however, and indeed should, be subject to certain conditions ...”

61.  These conditions included conditions of age, nationality, residence and other grounds for deprivation of the right to vote. As to residence, the Guidelines noted:

“i. A residence requirement may be imposed.

ii. Residence in this case means habitual residence.

iii. A length of residence requirement may be imposed on nationals solely for local or regional elections.

iv. The requisite period of residence should not exceed six months; a longer period may be required only to protect national minorities.

v. The right to vote and to be elected may be accorded to citizens residing abroad.”

62.  The Guidelines were subsequently included, together with an explanatory report, in the Code of Good Practice in Electoral Matters adopted by the Venice Commission at its 52nd Plenary Session, 18‑19 October 2002.

63.  At its 61st Plenary Session, 3-4 December 2004, the Venice Commission endorsed two reports on the Abolition of Restrictions on the Right to Vote in General Elections (CDL-AD (2005) 012 and CDL-AD (2005) 011). One of the reports contained reflections on the right to vote of expatriates in their countries of origin. It noted:

“28. Most of the citizens in European countries who are temporarily working or staying abroad are registered in the Voters’ List in their country of origin. Those persons are mainly registered according to their last place of residence prior to the departure abroad. This clearly indicates the determination of the legislators to use residence as a basis for allocation of the citizens (who have a right to vote) in the Voters’ List ...”

64.  It continued:

“31. One question arises from the aforesaid facts: why do most of the states decide to adopt the concept that links the right of a citizen to vote with his or her residence? The methodology of voter registration determines the distribution of the polling stations, and accordingly results in the layout of the electoral districts. But, citizens who are abroad on Election Day in the same Council of Europe member states may exercise their right to vote in the diplomatic and consular offices or by mail. However, according to the legislation of the same countries, they would have to return to their country and cast their vote in the polling station located in the municipality where their last residence was before they left the country. Not all of them might be in a position to do so.

32. In our view, the country of origin should find a formula to encompass this category of voters who reside abroad and want to exercise their right to vote, but cannot come to their country on Election Day. It is up to the citizen to decide whether or not he/she wishes to exercise this right. The same approach should be applied to the legal requirement for passive suffrage ... This approach is particularly important for countries with a large numbers of its nationals living abroad, who, at the same time, maintain relations with [the] state ...”

65.  A subsequent opinion on the Assembly’s Recommendation 1714 (2005) (see paragraph 47 above) adopted by the Venice Commission in October 2005 noted:

“3. The right to vote as one of the fundamental political rights is also fundamental for the fulfilment of a number of civil and social rights. At the same time the principles of universality, equality, freedom and secret ballots are the four pillars of the European electoral heritage and they are introduced into the constitutions and electoral legislation of the member and observer states of the Council of Europe. In this respect the abolition of existing restrictions on the right to vote should be of interest to states and it should also serve as an issue for further activities of the Council of Europe and other international organisations.

4. In some member and observer states of the Council of Europe, the implementation of existing standards and general principles is deeply influenced by customs, and traditions, but most of all by the level of political culture. In a number of cases and situations in countries of Europe and elsewhere various norms and practices have been established which restrict the right to vote to certain categories of people. Such restrictions are problematic from a human rights perspective. European institutions and in this case the Parliamentary Assembly of the Council of Europe are working to overcome such restrictions.”

66.  The opinion concluded that the Venice Commission was following the achievements in the area of democratic elections and in respect of voting rights as one of the basic human rights which would continue to influence improvements in international and national legislation.

67.  A report on Electoral Law and Electoral Administration in Europe, adopted by the Venice Commission in June 2006 (CDL-AD (2006) 018), noted, on the question of overseas voters:

“57. External voting rights, e.g. granting nationals living abroad the right to vote, are a relatively new phenomenon. Even in long-established democracies, citizens living in foreign countries were not given voting rights until the 1980s (e.g. Federal Republic of Germany, United Kingdom) or the 1990s (e.g., Canada, Japan). In the meantime, however, many emerging or new democracies in Europe have introduced legal provisions for external voting (out-of-country voting, overseas voting). Although it is yet not common in Europe, the introduction of external voting rights might be considered, if not yet present. However, safeguards must be implemented to ensure the integrity of the vote .....”

68.  In June 2011 the Venice Commission adopted a report on Out‑of‑Country Voting (CDL-AD (2011) 022). The report noted the complexity of the issue of the right to vote of overseas electors and indicated that it was within the scope of the State’s own sovereignty to decide whether to grant the right to vote to citizens residing abroad. The report identified the following arguments in favour of out-of-country voting:

“63. Legal recognition of citizens is based on the principle of ‘nationality’. The citizens of a country therefore enjoy, in principle, all the civil rights recognised in that country.

64. The principle of ‘out-of-country voting’ enables citizens living outside their country of origin to continue participating in the political life of their country on a ‘remote’ basis ...

65. Out-of-country voting guarantees equality between citizens living in the country and expatriates.

66. It ensures that citizens maintain ties with their country of origin and boosts their feeling of belonging to a nation of which they are members regardless of geographical, economic or political circumstances.”

69.  Discussing the nature and effects of restrictions imposed, the report observed:

“70. In the case of states whose citizens live abroad in large numbers, to the extent that their votes could appreciably affect election results, it seems more appropriate to provide parliamentary representation for the citizens resident abroad by pre-defined numbers of members of parliament elected by them ...

71. Given that, in the case of national elections at least, it is exceptional for foreign nationals to have the right to vote in their place of residence, citizens residing abroad are likely to be unable to vote anywhere if they do not have the right to vote in their country of origin. Denying them that right is therefore equivalent to a derogation from the right to vote. It should be possible to find a solution more in keeping with the principle of proportionality by placing certain restrictions on voting rights of citizens residing abroad.

72. Restrictions of a formal nature or based on the voting procedure make it possible to exclude persons having no ties with the country of origin – who will probably not vote anyway. The mere fact of requiring registration on an electoral roll, usually for a limited period, calls for action on the part of potential voters.

73. One might also wonder whether, instead of excluding citizens residing abroad completely, it would not be preferable to restrict the right to vote to those who have lived in the country for a certain time, and to set a limit on the period for which they retain the right to vote after leaving the country ...”

70.  As regards the loss of the right to vote after a specified period of absence, the report added:

“76. ... it would nevertheless be preferable for the situation to be reconsidered, rather than for provision to be made for the right to vote to be purely and simply lost.”

71.  The report concluded that national practices regarding the right to vote of citizens living abroad and its exercise were far from uniform in Europe. However, developments in legislation pointed to a favourable trend in out-of-country voting, in national elections at least, as regards citizens who had maintained ties with their country of origin. The Commission accepted that the denial of the right to vote to citizens living abroad or the placing of limits on that right constituted a restriction of the principle of universal suffrage. However, it did not consider at this stage that the principles of the European electoral heritage required the introduction of such a right, namely a right for all expatriate citizens to vote in their State of nationality which was subject to no residence qualification. The Commission nonetheless suggested, in view of citizens’ European mobility, that States adopt a positive approach to the right to vote of citizens living abroad, since this right fostered the development of national and European citizenship

**IV.  PRACTICE IN COUNCIL OF EUROPE MEMBER STATES**

72.  In the context of the Venice Commission’s recent report on Out-of Country Voting (see paragraphs 68-71 above), a review of the legislation of the law and practice of the forty-seven member States of the Council of Europe was conducted. From this, together with other information at the Court’s disposal, one can draw the following broad picture of the right of non-residents to vote in national elections in the country of citizenship.

73.  In three States, voting by non-residents is either prohibited or restricted to a very limited category of persons (Armenia, Ireland and Malta).

74.  In thirty-five States no restrictions are placed on the period of absence from the country (Albania, Andorra, Austria, Azerbaijan, Belgium, Bulgaria, Cyprus, Czech Republic, Croatia, Estonia, Finland, France, Georgia, Greece, Iceland, Italy, Latvia, Lithuania, Luxembourg, Moldova, Monaco, Norway, Netherlands, Poland, Portugal, Romania, Russia, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey and Ukraine).

75.  Nine States allow non-residents to vote but impose restrictions. Seven States restrict the right to vote from overseas to those “temporarily” abroad (Bosnia and Herzegovina, Denmark, Hungary, Liechtenstein, Montenegro, Serbia and the former Yugoslav Republic of Macedonia). In three of these States the term “temporary” is not defined and no particular conditions are imposed on non-residents to demonstrate that their residence abroad is temporary (Bosnia and Herzegovina, Montenegro and Serbia). Two States grant a right to vote to overseas electors abroad for a long-term period but remove the right at the expiry of this period (Germany, which removes the right after twenty-five years, and the United Kingdom).

76.  In the forty-four States which allow some degree of voting by non‑residents, the modalities of voting differ, with some allowing votes by post or proxy, others requiring voting in person at embassies and consulates, and yet others permitting voting in person on national territory only (see Sitaropoulos and Giakoumopoulos *v. Greece* [GC], no. 42202/07, §§ 32-45, ECHR 2012 for further details).

**THE LAW**

**I.  ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL NO. 1 TO THE CONVENTION**

77.  The applicant complained that he was no longer permitted to vote in United Kingdom elections and alleged a violation of Article 3 of Protocol No. 1 to the Convention, which reads as follows:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

78.  The Government contested that argument.

A.  Admissibility

1.  Exhaustion of domestic remedies

79.  The Government contended that the applicant had failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention as he had failed to seek judicial review of the fifteen-year rule relying on EU law. In this respect, they pointed to the judicial review proceedings in *Preston* (see paragraphs 29-33 above), which at the time the Government submitted their observations had just been granted leave to proceed.

80.  The applicant denied that any effective remedy to provide redress to his complaint was open to him. He emphasised that the claimant in *Preston* was not seeking to rely on his right under Article 3 of Protocol No. 1 to argue that the disenfranchisement was disproportionate, but was relying on general EU law. In any event, he did not agree that the proceedings offered reasonable prospects of success, despite the fact that permission to bring the proceedings had been granted.

81.  The Court observes that the applicant’s complaint concerns a provision of primary legislation regulating the right to vote in parliamentary elections. This matter does not fall within the scope of EU law. The claimant in *Preston* sought to recast the issue as one concerning free movement rights, in order to engage EU law. Ultimately, his attempt failed, with judges in both the High Court and the Court of Appeal ruling that there was no evidence that the fifteen-year rule interfered with free movement rights (see paragraphs 30 and 33 above). In any case, given the reasons handed down by the Court of Appeal (as noted in paragraph 33 above) – reasons which transcend the issue of freedom of movement – it cannot be said that the applicant had a reasonable prospect of success had he undertaken to commence judicial review proceedings.

2.  Victim status

82.  The Government contended that the applicant was not a victim of an alleged violation by reason of his failure to apply to be registered to vote in any parliamentary elections since his emigration to Italy. They argued that the position was analogous to that of claims by widowers who complained to the Court about discriminatory access to various benefits (see, *inter alia*, *Cornwell v. the United Kingdom* (dec.), no. 36578/97, 11 May 1999; and *Hooper v. the United Kingdom* (dec.), no. 42317/98, 9 September 2008).

83.  The applicant maintained that he was directly affected by the existence of the impugned law as he had been resident outside the United Kingdom for more than fifteen years.

84.  In order to be able to lodge a petition by virtue of Article 34, a person, non-governmental organisation or group of individuals must be able to claim to be the victim of a violation of the rights set forth in the Convention. In order to claim to be a victim of a violation, a person must be directly affected by the impugned measure: the Convention does not envisage the bringing of an *actio popularis* for the interpretation of the rights it contains or permit individuals to complain about a provision of national law simply because they consider, without having been directly affected by it, that it may contravene the Convention. However, it is open to a person to contend that a law violates his rights, in the absence of an individual measure of implementation, if he is required either to modify his conduct or risks being prosecuted, or if he is a member of a class of people who risk being directly affected by the legislation (see *Burden v. the United Kingdom* [GC], no. 13378/05, §§ 33 and 34, 29 April 2008; and *Tănase v. Moldova* [GC], no. 7/08, § 104, ECHR 2010).

85.  The applicant, who has resided in Italy since 1982, is now precluded from voting in the United Kingdom on account of statutory provisions removing this right from those resident abroad for more than fifteen years. He makes no claim for pecuniary or non-pecuniary damage. His interest in pursuing his complaint is limited to the point of principle at issue, namely whether the primary legislation precluding from voting those who, like himself, have been resident outside the United Kingdom for more than fifteen years is compatible with Article 3 of Protocol No. 1. No purpose is served by requiring the applicant, prior to lodging his application with this Court, to make an application to be registered as an overseas voter which would be bound to fail in light of the explicit terms of the 1985 Act. There can be no doubt that he belongs to a class of people directly affected by the legislation.

86.  Given the nature of the complaint and the terms of the primary legislation, the applicant can claim to be a victim despite the absence of an individual measure of implementation in his case (see *Norris v. Ireland*, 26 October 1988, §§ 31-34, Series A no. 142; and *Burden*, cited above, § 34).

3.  Conclusion on admissibility

87.  The complaint cannot be rejected for failure to exhaust domestic remedies or for lack of victim status. No other ground for inadmissibility has been established. The complaint must therefore be declared admissible.

B.  Merits

1.  The parties’ submissions

(a)  The applicant

88.  **The applicant argued that no time-limit should be imposed on the right of EU citizens resident abroad to vote in their country of origin while they retained the nationality of that country.**  Addressing the Court’s decision in *Doyle*, cited above, he argued that the four factors identified to justify the residence requirement were now outdated. Globalisation, modern technology and low-cost travel companies made it easier for citizens resident overseas to maintain contact with their country of origin both remotely and by frequent visits. Those who considered a residence requirement to be justified failed to recognise the reality of many nationals living abroad in the exercise of their free movement rights guaranteed by EU law. Despite their residence abroad, journalists could continue to work for British newspapers, businessmen could be employed by British companies and lawyers could provide advice on English law. Notwithstanding long-term residence abroad, British nationals might still be considered domiciled in the United Kingdom, which had particular relevance to matters concerning tax and inheritance.

89.  **The applicant maintained that he had retained very strong ties with the United Kingdom.** He was a retired serviceman of the British army; he received a pension from the State, paid into a British bank account; he paid tax on his pension to the Inland Revenue; he had family members in the United Kingdom and was a member of a number of clubs and organisations there; and he was the representative in Italy of a British ex-servicemen organisation**. He pointed out that he was entitled to return to the United Kingdom to live and to receive treatment from the National Health Service. Matters such as pensions, banking, financial regulations, taxation and health, which were all the subject of political decisions in the United Kingdom, affected him.**

90.  The applicant also pointed to the extensive activities of Council of Europe bodies in this area and their support of expatriates’ right to exercise their nationality and right to vote (see paragraphs 38-71 above). **He referred to the fact that other member States allowed unrestricted overseas voting by their nationals.**

91.  **The possibility of obtaining Italian nationality could not render the fifteen-year rule in the United Kingdom a reasonable or proportionate restriction on the right to vote. Although he would be entitled to retain his British nationality, the acquisition of Italian nationality would have other consequences in Italian law that would be detrimental to him, including the application of Italian, rather than English, laws on succession. Further, he disputed the suggestion that he would be able to participate fully in the democratic process in Italy, explaining that he could not read, write or speak Italian to the same level as Italian citizens.**

92.  The applicant concluded that the time-limit imposed by the respondent State had the effect of **disenfranchising him completely**. Disenfranchisement was a very serious breach of human rights, requiring a discernible and sufficient link between the sanction of disenfranchising someone and the circumstances of the person being disenfranchised. He contended that the question went to the heart of a fundamental right, the removal of which had serious consequences. The small number of potential overseas electors who took the time and trouble to register as voters (see paragraphs 20-25 above) demonstrated that there was insufficient public interest to continue to exclude nationals overseas for more than fifteen years from voting. The decision in *Doyle* required reconsideration because it was clear that the residence requirement in the United Kingdom impaired the essence of the applicant’s fundamental right to vote and resulted in a violation of Article 3 of Protocol No. 1.

(b)  The Government

93.  The Government disagreed that the fifteen-year rule was incompatible with Article 3 of Protocol No. 1. They pointed to the wide margin of appreciation in this area, and the freedom enjoyed by States to organise and run their electoral systems in keeping with their own democratic vision (citing *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, § 61, ECHR 2005‑IX).

94.  In their view, the Court’s case-law clearly established that a residence condition was, in principle, justifiable as a proportionate limitation on the right to vote (citing *Hilbe*, *Melnychenko* and *Doyle*, all cited above). The fifteen-year period imposed in the United Kingdom reflected the view that during a lengthy period of absence an individual’s connection with the country was likely to diminish. The small number of non-residents who registered to vote provided some support for this view. It was undeniable that a non-resident absent for more than fifteen years was affected by the decisions of Government to a lesser extent than residents. It was therefore legitimate to conclude that the ability of non-residents to have a direct influence on democratic processes by voting should also diminish with time.

95.  The Government accepted that a rule imposing a time-limit after which some individuals were no longer permitted to vote might be perceived as having a more serious impact on some individuals, who had in fact retained strong ties with the United Kingdom. This was an inevitable feature of a rule of general application. The alternative was to impose a restriction which varied in individual cases, perhaps depending on actual ties with the United Kingdom, but this would be very difficult if not impossible to administer fairly in practice. Parliament had considered the issue on a number of occasions. Following extensive consideration of competing arguments, it had concluded that a fixed time-limit was appropriate and had set that time-limit at fifteen years. This was a substantial period and could only be considered a disproportionate restriction on the right to vote on the basis that voting by non-residents must be permitted regardless of the period of absence. This would be a radical departure from the case-law to date and would amount to an unacceptable abrogation of the margin of appreciation in this area.

96.  The Government pointed to the fact that, as regards those who moved elsewhere within the EU, the express policy of EU law was that they should be able to participate in some of the political processes of the State where they were resident, to facilitate their integration into society in that State. In this case, the applicant could also have acquired Italian nationality which would have entitled him to vote in Italian elections, without giving up his British nationality. He therefore had an opportunity to participate fully in the political life of the country which he had chosen to make his home for thirty years.

97.  The various political pronouncements of Council of Europe organs did not call into question the compatibility of the fifteen-year rule. While the Parliamentary Assembly, for example, had called upon member States to facilitate voting by non-residents, it had never suggested that the Convention imposed on them an absolute obligation to do so. On the contrary it recognised that proportionate limitations to the right to vote were permitted. The Committee of Ministers has focussed on the participation by migrants in the political life of countries to which they had emigrated. The Venice Commission had recently concluded that while the denial of a right to vote to citizens living abroad constituted a restriction on the principle of universal suffrage, it did not consider that the principles of the European electoral heritage required the introduction of such a right at this stage.

98.  The Government therefore invited the Court to find no violation of Article 3 of Protocol No. 1.

2.  The Court’s assessment

(a)  General principles concerning the right to vote

99.  Article 3 of Protocol No. 1 enshrines a characteristic principle of an effective political democracy and is accordingly of prime importance in the Convention system. Despite its general formulation, it implies individual rights, including the right to vote and the right to stand for election (see *Mathieu‑Mohin and Clerfayt v. Belgium*, 2 March 1987, §§ 47 and 51, Series A no. 113; and *Sitaropoulos and Giakoumopoulos*, cited above, § 63).

100**.  However, the rights bestowed by Article 3 of Protocol No. 1 are not absolute. There is room for implied limitations and Contracting States must be allowed a margin of appreciation in this sphere (**see *Hirst (no. 2)*, cited above, § 60). **For a measure to be deemed compatible with the right to vote, the Court must be satisfied that the conditions to which the right to vote is made subject do not curtail the right to such an extent as to impair its very essence and deprive it of its effectiveness**; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate (see *Tănase*, cited above, § 162; *Hirst (no. 2)*, cited above, § 62; *Yumak and Sadak v. Turkey* [GC], no. 10226/03, § 109, 8 July 2008; and *Sitaropoulos and Giakoumopoulos*, cited above, § 64).

101.  **The concept of “implied limitations” under Article 3 of Protocol No. 1 is of major importance for the determination of the relevance of the aims pursued by restrictions on the rights guaranteed by this provision** (see *Mathieu-Mohin and Clerfayt*, cited above, § 52; and *Sitaropoulos and Giakoumopoulos*, cited above, § 64). **Given that Article 3 of Protocol No. 1 is not limited by a specific list of “legitimate aims”, the Contracting States can justify a restriction by reference to any aim which is compatible with the principle of the rule of law and with the general objectives of the Convention** (see *Ždanoka v. Latvia* [GC], no. 58278/00, § 115, ECHR 2006‑IV; and *Sitaropoulos and Giakoumopoulos*, cited above, § 64).

102.  **When reviewing the proportionality of the measure, it must be borne in mind that numerous ways of organising and running electoral systems exist.** There is a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into its own democratic vision (see *Hirst (no. 2)*, cited above, § 61; and *Sitaropoulos and Giakoumopoulos*, cited above, § 66). **This means that the proportionality of electoral legislation (and of any limitations on voting rights) must be assessed also in light of the socio-political realities of a given country**. Furthermore, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond to any emerging consensus as to the standards to be achieved. In this regard, one of the relevant factors in determining the scope of the authorities’ margin of appreciation may be the existence or non-existence of common ground between, or even trends in, the laws of the Contracting States (see *Hirst (no. 2)*, cited above, §§ 78, 81 and 84; and *Sitaropoulos and Giakoumopoulos*, cited above, § 66). Whether the impugned measure has been subjected to parliamentary scrutiny is also relevant, albeit not necessarily decisive, to the Court’s proportionality assessment (see *passim* *Hirst (No. 2)*, cited above, especially §§ 78-79; *Doyle*, cited above; and *Alajos Kiss v. Hungary*, no. 38832/06, § 41, 20 May 2010).

103.  Finally, it should be recalled that the right to vote is not a privilege. In the twenty‑first century, the presumption in a democratic State must be in favour of inclusion (see *Hirst (no. 2)*, cited above, § 59; and *Sitaropoulos and Giakoumopoulos*, cited above, § 67). The exclusion from the right to vote of any groups or categories of the general population must be reconcilable with the underlying purposes of Article 3 of Protocol No. 1 (see *Ždanoka*, cited above, § 105; and *Sitaropoulos and Giakoumopoulos*, cited above, § 67). Any general, automatic and indiscriminate departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws it promulgates (see *Hirst (no. 2)*, § 62; and *Sitaropoulos and Giakoumopoulos*, cited above, § 68).

(b)  General principles concerning restrictions imposed by a residence requirement

104.  The Commission, in a series of cases beginning in 1961, found complaints concerning restrictions on the right to vote based on residence to be inadmissible as manifestly ill-founded (see *X. and Others v. Belgium*, no. 1065/61, Commission decision of 18 September 1961, Yearbook Vol. 4, p. 269; *X. v. the United Kingdom*, no. 7566/76, Commission decision of 11 December 1976, Decisions and Reports (D.R.) 9, p. 121; *X. v. the United Kingdom*, no. 7730/76, Commission decision of 28 February 1979, D.R. 15, p. 137; *X. v. the United Kingdom*, no. 8873/80, Commission decision of 13 May 1982, D.R. 28, p. 99; *Polacco and Garofalo v. Italy*, no. 23450/94, Commission decision of 15 September 1997, unpublished; and *Luksch v. Germany*, no. 35385/97, Commission decision of 21 May 1997, D.R. 89B, p. 175).

105.  **In subsequent cases before the Court, it also found the imposition of a residence restriction compatible in principle with Article 3 of Protocol No. 1** (see *Hilbe*, *Melnychenko* and *Doyle*, all cited above). **The justification for the restriction was based on several factors:** first, the presumption that non-resident citizens were less directly or less continually concerned with their country’s day-to-day problems and had less knowledge of them; second, the fact that non-resident citizens had less influence on the selection of candidates or on the formulation of their electoral programmes; third, the close connection between the right to vote in parliamentary elections and the fact of being directly affected by the acts of the political bodies so elected; and fourth, the legitimate concern the legislature might have to limit the influence of citizens living abroad in elections on issues which, while admittedly fundamental, primarily affect persons living in the country (see *Hilbe* and *Doyle*, both cited above; and *Melnychenko*, cited above, § 56). The Court has recognised that it is possible in an individual case that the applicant has not severed ties with his country of origin and that some of the factors indicated above are therefore inapplicable to his case. However, it took the view that the law could not take account of every individual case but must lay down a general rule (see *Hilbe* and *Doyle*, both cited above), while never discounting completely the possibility that in some circumstances the application of a general rule to an individual case could amount to a breach of the Convention.

106.  **Finally, the Court has previously implied that the ease with which an applicant can acquire the citizenship of his State of residence, and thus exercise his right to vote in that country, may be relevant to the proportionality of a residence requirement in his State of origin** (see *Doyle*, cited above**). The possibility of acquiring a new citizenship is not, however, decisive given that the acquisition of such citizenship may have adverse consequences in other areas of one’s life and that an applicant’s interest in casting his vote in the State to which he feels most closely connected must also be given due weight.**

(c)  Application of the general principles to the facts of the case

107.  Neither the applicant nor the Government expressly identified the legitimate aim of the restriction in the present case. However, the Court is satisfied that it pursues the legitimate aim of confining the parliamentary franchise to those citizens with a close connection with the United Kingdom and who would therefore be most directly affected by its laws (see paragraphs 30 and 33 above).

108.  The applicant contended that the restriction curtailed his right to vote to such an extent as to impair its very essence and deprive it of its effectiveness. **The Court observes that non-residents are permitted to vote in national elections for fifteen years following their emigration. If the applicant returned to live in the United Kingdom, his right to vote as a resident would be restored. In these circumstances it cannot be said that the restriction in the present case impairs the very essence of the applicant’s rights under Article 3 of Protocol No. 1. The central question in the present case, therefore, concerns the proportionality of the restriction imposed.**

109.  The applicant did not challenge the nature of the restriction imposed in the United Kingdom; nor did he raise any issue as to the meaning and extent of the word “resident” for the purposes of section 1(3) of the 1985 Act; rather, he contended that any restriction on voting in national elections based on residence was of itself disproportionate. **In these circumstances, the Court must first examine whether Article 3 of Protocol No. 1 requires Contracting States to grant the right to vote to non-resident citizens (henceforth “non-residents”) without any restriction based on residence. It must then examine whether in the instant case the current legislation, whereby non-residents are disenfranchised after fifteen years of non-residence, is a proportionate limitation on the right to vote which strikes a fair balance between competing interests.** The instant case differs from the case of *Sitaropoulos and Giakoumopoulos*, cited above, where the Court was asked to consider whether Article 3 of Protocol No. 1 placed States under an obligation to introduce a system enabling expatriate citizens to exercise their voting rights from abroad.

110.  The principal thrust of the reasoning adopted by the Court in *Doyle* to justify the imposition of a residence requirement has remained unchanged since the 1976 Commission decision in *X. v. the United Kingdom*, cited above. However, there is no doubt that since that time, migration has increased significantly. At the same time, the emergence of new technologies and cheaper transport has enabled migrants to maintain a higher degree of contact with their State of nationality than would have been possible for most migrants forty, even thirty, years ago. This has led a number of States including the United Kingdom to amend their legislation to allow for the first time non-residents to vote in national elections (see paragraphs 15 *et seq.* and 67 above). It is therefore appropriate to examine the nature and extent of the developments at international level and within the laws of the member States in order to determine whether there is any emerging trend or possibly even consensus which might affect the scope of the margin of appreciation afforded to States in this area (see paragraph 102 above).

111.  It is clear that the Parliamentary Assembly of the Council of Europe and more recently the Venice Commission have been active in seeking to resolve questions of participation in the political process and enjoyment of civic rights which arise as a result of migration. As early as 1982, the Assembly recommended that the Committee of Ministers explore the possibility of harmonising member States’ laws in favour of preserving the voting rights of nationals residing abroad (see paragraph 39 above). In 1999 it recommended that the Committee of Ministers invite member States to take account of their expatriates’ interests in policy making and in national practices concerning the right to vote in the country of origin (see paragraph 41 above). It re-examined the matter in 2004 and, as well as reiterating the substance of its 1999 recommendation, recommended that the Committee of Ministers consider making proposals for the introduction of legally-binding measures at European level concerning relations between expatriates and their country of origin (see paragraphs 42-44 above). In a 2005 resolution, the Assembly said that “due regard” had to be given to the voting rights of non-residents and that member States should take measures enabling non-residents to vote in national elections and facilitating the exercise of the right (see paragraphs 45-47 above). In a follow-up recommendation, it called on States to review existing instruments with a view to assessing the need for a Council of Europe Convention on the matter (see paragraph 48 above). Twin resolutions and recommendations in 2008 again drew attention to the question of democratic participation of non-residents in their countries of origin (see paragraph 50 above). In a 2009 resolution, the Assembly expressed regret at the failure of States to pursue harmonisation in this area and once again encouraged them to adopt policy initiatives to seek harmonisation and to offer out-of-country voting (see paragraphs 51-52 above). However, in a more recent resolution of 2012, the Assembly appears to have accepted that a condition based on residence abroad could be a justified restriction of the right to vote of non‑residents (see paragraph 54 above).

112.  While acknowledging the need to address the challenges in the political sphere posed by migration, the Committee of Ministers did not see the need for a Council of Europe instrument governing the right to vote of migrants (see paragraph 57 above).

113.  The Venice Commission Code of Good Practice in Electoral Matters 2002 makes reference to the need for certain conditions to be imposed on the right to vote and accepts that a residence requirement may be imposed. It provides that the right to vote “may” be accorded to citizens resident abroad (see paragraphs 60-62 above). A report endorsed by the Commission in 2004 drew attention to the growing debate regarding the exercise of voting rights by non-residents (see paragraphs 63-64 above). The Commission’s 2006 report on electoral law and administration observed that overseas voting rights were not yet common in Europe (see paragraph 67 above). Its 2011 report on out-of-country voting recognised that the grant of voting rights to non-residents was a matter of State sovereignty. It did, however, list a number of arguments in favour of the grant of such rights and identified the nature and effects of restrictions imposed. Although it indicated that the fixing of a time-limit for retention of the right to vote after a national had emigrated was preferable to the complete exclusion of non-residents, it also indicated that even in the former case, it was preferable that the situation be “reconsidered” at the expiry of the time-period rather than that the right to vote simply be lost. Having regard to the lack of uniformity in national practices, the Commission concluded that the principles of the European electoral heritage did not, at this stage, require the introduction of a right to vote for non-residents. It did, however, suggest that States adopt a positive approach to this right, in view of citizens’ European mobility (see paragraphs 68-71 above).

114.  The above review of the activities of Council of Europe bodies demonstrates that there is a growing awareness at European level of the problems posed by migration in terms of political participation in the countries of origin and residence. However, none of the material forms a basis for concluding that, as the law currently stands, States are under an obligation to grant non-residents unrestricted access to the franchise. The differing approaches and political agendas of the various bodies concerned reveal an important disparity in preferred approaches. The material highlights that the question of voting rights for non-residents in their States of nationality must be seen within the larger context of the discussion surrounding migrants’ political activities more generally. A key issue which still has to be addressed within this discussion is whether the focus should be on promoting participation in the State of origin, in the State of residence or in both. Further issues concern the modalities of the exercise by non‑residents of the right to vote, which give rise to practical and security considerations. The 2011 report by the Venice Commission made an important contribution to the debate but reached no firm conclusions as to how member States should seek to develop their laws and practices over the coming years. The challenges posed in this regard should not be underestimated.

115**.  Turning to the laws and practices of the member States in this area, there is a clear trend in favour of allowing voting by non-residents, with forty-four States granting the right to vote to citizens resident abroad otherwise than on State service** (see paragraphs 74-75 above). Of these, thirty-five States do not remove this right once a citizen has resided abroad for a certain period of time (see paragraph 74 above). Nine States appear to limit the right by reference to the duration of the citizen’s stay abroad (see paragraph 75 above). While the majority in favour of an unrestricted right of access of non-residents to voting rights appears to be significant, the legislative trends are not sufficient to establish the existence of any common European approach concerning voting rights of non-residents. In particular, there is no common approach as to the extent of States’ obligations to enable non-residents to exercise the right to vote (see paragraph 76 above and *Sitaropoulos and Giakoumopoulos*, cited above, § 75). **It therefore cannot be said that the laws and practices of member States have reached the stage where a common approach or consensus in favour of recognising an unlimited right to vote for non-residents can be identified.** Although the matter may need to be kept under review in so far as attitudes in European democratic society evolve, **the margin of appreciation enjoyed by the State in this area still remains a wide one.**

116.  **As far as the proportionality of the United Kingdom legislation is concerned, it allows non-residents to vote for fifteen years after leaving the country, which is not an unsubstantial period of time. That the applicant may personally have preserved a high level of contact with the United Kingdom and have detailed knowledge of that country’s day-to-day problems and be affected by some of them does not render the imposition of the fifteen-year rule disproportionate: while they require close scrutiny, general measures which do not allow for discretion in their application may nonetheless be compatible with the Convention** (see *James and Others v. the United Kingdom*, 21 February 1986, § 68, Series A no. 98; *Twizell v. the United Kingdom*, no. 25379/02, § 24, 20 May 2008; *Amato Gauci v. Malta*, no. 47045/06, § 71, 15 September 2009; *Allen and Others v. the United Kingdom* (dec.), no. 5591/07, § 66, 6 October 2009; *Sitaropoulos and Giakoumopoulos*, cited above, § 79; and paragraph 103 above. See also, *mutatis mutandis*, *Ždanoka*, cited above, §§ 114, 115(d) and 128). Having regard to the significant burden which would be imposed if the respondent State were required to ascertain in every application to vote by a non-resident whether the individual had a sufficiently close connection to country (see the findings of the High Court and the Court of Appeal in *Preston*, in paragraphs 30 and 33 above), the Court is satisfied that the general measure in this case serves to promote legal certainty and to avoid the problems of arbitrariness and inconsistency inherent in weighing interests on a case-by-case basis (see, *mutatis mutandis*, *Evans v. the United Kingdom* [GC], no. 6339/05, § 89, ECHR 2007‑I**). Finally the Court reiterates that the applicant has not raised, not even before the domestic courts, any issue as to the possible uncertainty or lack of clarity as to the meaning and extent of the word “resident” for the purpose of the 1985 Act (**see paragraph 109 above and compare *Melnychenko*, cited above).

117.  There is also extensive evidence before the Court to demonstrate that **Parliament has sought to weigh the competing interests and to assess the proportionality of the fifteen-year rule** (compare *Hirst (No. 2)*, cited above, § 79; and *Alajos Kiss*, cited above, § 41). The question of non‑residents’ voting rights has been examined twice by the Home Affairs Select Committee in the past thirty years, and on both occasions a report was produced (see paragraphs 16 and 20 above). The evolution of views in this area is demonstrated by the fact that the conclusion of the most recent report in 1998 was almost diametrically opposed to the conclusion reached in the Committee’s 1982 report. As a consequence of these reports and of consultation exercises, legislation was introduced in Parliament first granting a right to vote to non-residents in 1985 and subsequently, in 1989 and 2000, amending the time-period (see paragraphs 17-18 and 21 above). The question has been debated in Parliament on several occasions since 2000, in the context of amendments proposed to two draft bills on electoral law and a short debate specifically on non-residents’ voting rights (see paragraphs 22-28 above). This is not to say that because a legislature debates, possibly even repeatedly, an issue and reaches a particular conclusion thereon, that conclusion is necessarily Convention compliant. It simply means that that review is taken into consideration by the Court for the purpose of deciding whether a fair balance has been struck between competing interests. With regard to the issue under examination, the Court notes that the matter remains under active consideration by the present Government of the respondent State.

118.  In conclusion, having regard to the margin of appreciation available to the domestic legislature in regulating parliamentary elections, the **restriction imposed by the respondent State on the applicant’s right to vote may be regarded as proportionate to the legitimate aim pursued. The Court is thus satisfied that the impugned legislation struck a fair balance between the conflicting interests at stake, namely the genuine interest of the applicant, as a British citizen, to participate in parliamentary elections in his country of origin and the chosen legislative policy of respondent State to confine the parliamentary franchise to those citizens with a close connection with the United Kingdom and who would therefore be most directly affected by its laws. There has accordingly been no violation of Article 3 of Protocol No. 1 to the Convention in the present case.**

**II.  ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN TOGETHER WITH ARTICLE 3 OF PROTOCOL NO. 1 TO THE CONVENTION**

119.  The applicant further complained under Article 14 of the Convention taken together with Article 3 of Protocol No. 1 that he was being discriminated against compared to British citizens resident in the United Kingdom. Article 14 provides:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

120.  Following communication of his complaint, the applicant contended that he had also been discriminated against on the grounds of age because statistics would “most probably” show that a very significant percentage of British nationals who moved abroad did so after retirement.

121.  Only differences in treatment based on an identifiable characteristic, or “status”, are capable of amounting to discrimination within the meaning of Article 14. Moreover, in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations. Such a difference of treatment is discriminatory if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see, for example, *Burden*, cited above, § 60).

122.  In the present case, no evidence of any kind has been provided to substantiate the applicant’s claim that the fifteen-year rule discriminates on grounds of age. The Court is further satisfied that for the reasons discussed in the context of its analysis of the applicant’s complaint under Article 3 of Protocol No. 1, which justify the imposition of a residence requirement, the applicant cannot claim to be in an analogous position to British citizens resident in the United Kingdom.

123.  The complaints under Article 14 of the Convention taken together with Article 3 of Protocol No. 1 are accordingly manifestly ill-founded and must therefore be rejected as inadmissible pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

**III.  ALLEGED VIOLATION OF ARTICLE 2 OF PROTOCOL NO. 4 TO THE CONVENTION**

124.  The applicant further argued under Article 2 of Protocol No. 4 to the Convention that he had the right to choose his place of residence without being disenfranchised.

125.  The Court notes that the respondent State has not ratified Protocol No. 4 to the Convention. The applicant’s complaint is therefore incompatible *ratione personae* with the provisions of the Convention and its Protocols and must therefore be declared inadmissible pursuant to Article 35 §§ 3 (a) and 4.

**FOR THESE REASONS, THE COURT UNANIMOUSLY**

1.  *Declares* the complaint concerning Article 3 of Protocol No. 1 admissible and the remainder of the application inadmissible;

2.  *Holds* that there has been no violation of Article 3 of Protocol No. 1 to the Convention.

Done in English, and notified in writing on 7 May 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı Ineta Ziemele  
 Deputy Registrar President

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

**I.Z. F.A.****CONCURRING OPINION OF JUDGE KALAYDJIEVA**

I agree with the conclusion that there has been no violation of Article 3 of Protocol No. 1 to the Convention in the present case and I am fully prepared to accept the position of the United Kingdom Government expressed in paragraphs 94-97 of the judgment as sufficiently convincing for the purposes of the “implied limitations” under Article 3 of Protocol No. 1. The denial of a right to vote to citizens living abroad is clearly based on the assumption that their interest in the national political life is limited and there is nothing in the present case to make this assumption unreasonable. It also seems correct that an effort to afford an individualised approach in the assessment of the level of preserved individual interest in each case would require practical measures, which are not necessarily justifiable in view of their limited overall impact on the manner in which the authorities “undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature”.

The Court has previously expressed its views as follows (see Sitaropoulos *and Giakoumopoulos v. Greece* [GC], no. 42202/07, § 69, ECHR 2012):

“As regards restrictions on expatriate voting rights based on the criterion of residence, the Convention institutions have accepted in the past that these might be justified by several factors: firstly, the presumption that non-resident citizens are less directly or less continually concerned with their country’s day-to-day problems and have less knowledge of them; secondly, the fact that non-resident citizens have less influence on the selection of candidates or on the formulation of their electoral programmes; thirdly, the close connection between the right to vote in parliamentary elections and the fact of being directly affected by the acts of the political bodies so elected; and, fourthly, the legitimate concern the legislature may have to limit the influence of citizens living abroad in elections on issues which, while admittedly fundamental, primarily affect persons living in the country (see *Hilbe*, cited above; see also *X and Association Y. v. Italy*, application no. 8987/80, Commission decision of 6 May 1981, Decisions and Reports (DR) 24, p. 192, and *Polacco and Garofalo v. Italy*, no. 23450/94, Commission decision of 15 September 1997, DR 90-A, p. 5). More recently, the Court has taken the view that having to satisfy a residence or length-of-residence requirement in order to have or exercise the right to vote in elections is not, in principle, an arbitrary restriction of the right to vote and is therefore not incompatible with Article 3 of Protocol No. 1 (see *Doyle v. the United Kingdom* (dec.), no. 30158/06, 6 February 2007).”

I disagree with the majority on certain aspects of the use of the margin of appreciation as part of the balancing exercise through which they arrived at the conclusion that there had been no violation of Article 3 of Protocol No. 1. In the present case, this was possible as a result of the unnecessary introduction, *proprio motu*,of some unknown “legitimate aim” and an unjustified opposition between the obligation to organise elections and the individual right to vote.

In its earlier cases the Court noted that this provision was:

“not limited by any specific list of ‘legitimate aims’ such as those enumerated in Articles 8 to 11 of the Convention [and that] the Contracting States [were] therefore free to rely on an aim not contained in that list to justify a restriction, provided that the compatibility of that aim with the principle of the rule of law and the general objectives of the Convention [was] proved in the particular circumstances of a case” (see *Ždanoka v. Latvia* [GC], no. 58278/00, § 115, ECHR 2006‑IV, with further references).

In the present case the UK Government indicated practical difficulties, but not necessarily any specific aim pursued by the restriction. The grounds on which the majority found the restriction proportionate to an unknown aim (paragraph 118) thus remain unclear.

While it is true that the Convention bodies have interpreted this provision as one phrased in terms of the obligation of the High Contracting Parties to hold elections, but also as implying individual rights, including the right to vote, I am not convinced that this is sufficient to make them “competing” (see paragraph 117), or necessarily implies some genuine and inherent “conflict of interest” between an individual’s wish to participate in parliamentary elections in his/her country of origin and the chosen legislative policy to confine the parliamentary franchise to those citizens with a close connection to it (paragraph 118).

These two *proprio motu* steps in the analysis appear to lead the majority to have unnecessary recourse to the tool of the margin of appreciation in their reasoning, rather than relying on the elaborated concept of “implied limitations” under Article 3 of Protocol No. 1. As rightly pointed out by Judge Rozakis in his concurring opinion in the case of *Odièvre v. France* ([GC],no. 42326/98, ECHR 2003‑III), “when ... the Court has in its hands an abundance of elements leading to the conclusion that the test of necessity is satisfied by itself ... reference to the margin of appreciation should be duly confined to a subsidiary role”.

## 

## **CASE OF GAJCSI v. HUNGARY**

*(Application no. 62924/10)*

JUDGMENT

STRASBOURG

23 September 2014

*This judgment is final but it may be subject to editorial revision.*

In the case of Gajcsi v. Hungary,

The European Court of Human Rights (Second Section), sitting as a Committee composed of:

Helen Keller, *President,* András Sajó, Robert Spano, *judges,*

and Abel Campos, *Deputy Section Registrar,*

Having deliberated in private on 2 September 2014,

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

**PROCEDURE**

1.  The case originated in an application (no. 62924/10) against the Republic of Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Hungarian national, Mr László Gajcsi (“the applicant”), on 11 October 2010.

2.  The applicant was represented by Mr J. Fiala-Butora, a lawyer practising in Budapest. The Hungarian Government (“the Government”) were represented Mr Z. Tallódi, Agent, Ministry of Public Administration and Justice.

3.  The applicant complained under Article 3 of Protocol No. 1 about an allegedly unjustified interference with his electoral rights.

4.  On 25 June 2012 the application was communicated to the Government.

**THE FACTS**

**THE CIRCUMSTANCES OF THE CASE**

5.  The applicant was born in 1955 and lives in Kaposvár.

6.  **The applicant suffers from a so-called psycho-social disability**. On 3 October 2006 the Court found a violation of Article 5 § 1 concerning his psychiatric detention (see *Gajcsi v. Hungary*, no. 34503/03).

7.  On 12 January 2000 the Fonyód District Court **placed the applicant under partial guardianship**. **As an automatic consequence flowing from Article 70(5) of the Constitution, as in force at the relevant time, his name was deleted from the electoral register.**

8.  On 8 July 2008 the Kaposvár **District Court reviewed the applicant’s situation and restored his legal capacity in all areas but health care matters. This change, however, did not restore his electoral rights.**

9.  **The applicant could not vote** in the general elections held in Hungary on 11 April 2010, **due to the restriction on his legal capacity which resulted in the deprivation of his electoral rights.**

**THE LAW**

10.  The applicant complained that he was disenfranchised on account of his disability, in breach of Article 3 of Protocol No. 1. He relied on the Court’s case-law as enounced in the judgment *Alajos Kiss v. Hungary* (no. 38832/06, 20 May 2010).

The Government did not dispute the applicant’s arguments.

11.  The Court considers that the circumstances of the present application are virtually identical to those of the *Alajos Kiss* judgment (cited above) and sees no reason to reach a different conclusion in the present case. It follows that there has been a violation of Article 3 of Protocol No. 1.

12.  Relying on Article 41 of the Convention, the applicant claimed 3,000 euros (EUR) in respect of non-pecuniary damage.

13.  The Government contested the claim.

14.  The Court considers that the applicant must have sustained some non-pecuniary damage. Ruling on the basis of equity, it awards him EUR 2,700 under that head.

15.  The applicant also claimed EUR 1,000 for the costs and expenses incurred before the Court.

16.  The Government contested the claim.

17.  Regard being had to the documents in its possession and to its case-law, the Court considers that the sum claimed should be awarded in full.

18.  The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

**FOR THESE REASONS, THE COURT, UNANIMOUSLY,**

1.  *Declares* the application admissible;

2.  ***Holds* that there has been a violation of Article 3 of Protocol No. 1**;

3.  *Holds*

(a)  that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i)  EUR 2,700 (two thousand seven hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii)  EUR 1,000 (one thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b)  that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4.  *Dismisses* the remainder of the applicant’s claim for just satisfaction.

Done in English, and notified in writing on 23 September 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos Helen Keller  
 Deputy Registrar President

## 

## **CASE OF RIZA AND OTHERS v. BULGARIA**

*(Applications nos. 48555/10 and 48377/10)*

JUDGMENT

(Extracts)

STRASBOURG

13 October 2015

**FINAL**

13/01/2016

*This judgment has become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.*In the case of Riza and Others v. Bulgaria,

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

Guido Raimondi, *President,* Päivi Hirvelä, George Nicolaou, Ledi Bianku, Nona Tsotsoria,

Zdravka Kalaydjieva, Krzysztof Wojtyczek, *judges,*and Françoise Elens-Passos, *Section Registrar,*

Having deliberated in private on 8 September 2015,

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

**PROCEDURE**

1.  The case originated in two applications against the Republic of Bulgaria: the first, no. 48555/10, was lodged by a Bulgarian national, Mr Rushen Mehmed Riza, and a Bulgarian political party, *Dvizhenie za Prava i Svobodi* (Movement for Rights and Freedoms – “DPS”), and the second, no. 48377/10, was lodged by 101 other Bulgarian nationals, whose names, dates of birth and places of residence are appended. Those two applications were lodged with the Court on 14 August 2010 under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”).

2.  All the applicants were represented by Ms S. O. Solakova, a lawyer practising in Sofia. The Bulgarian Government (“the Government”) were represented by their Agents, Ms N. Nikola and Ms A. Panova, of the Ministry of Justice.

3.  Mr Riza and the DPS, on the one hand, and the other 101 applicants, on the other, alleged, in particular, that the Bulgarian Constitutional Court’s decision to annul the election results in 23 polling stations set up outside the country during the 2009 Bulgarian general elections had amounted to an unjustified infringement of their right to stand for election and their right to vote, respectively, which rights were safeguarded by Article 3 of Protocol No. 1 to the Convention.

4.  On 4 April 2011 application no. 48555/10 lodged by Mr Riza and the DPS was communicated to the Government. On 8 July 2014 application no. 48377/10 lodged by 101 Bulgarian nationals was also communicated to the Government. As permitted under Article 29 § 1 of the Convention, it was also decided that the Chamber would adjudicate simultaneously on the admissibility and the merits of the applications.

5. On 10 February 2015 the Chamber decided to join the two applications as permitted under Rule 42 § 1 of the Rules of Court and to invite the judge elected in respect of Bulgaria**,** Z. Kalaydjieva, to participate in the subsequent examination of the case pursuant to Rule 26 § 3 of the Rules of Court.

**THE FACTS**

**I.  THE CIRCUMSTANCES OF THE CASE**

A.  General background to the case

6.  The 101 applicants, whose names are appended, are Bulgarian nationals of Turkish origin and/or of Muslim faith who live or have lived in Turkey. They all exercised their right to vote at the 2009 Bulgarian general elections in 17 of the polling stations set up in Turkish territory, the election results in which were subsequently contested by the RZS political party and nullified by the Bulgarian Constitutional Court.

7.  According to the official statistics from the census carried out in Bulgaria in 2011, 588,318 persons stated that they were ethnic Turks, amounting to 8.8% of the persons who answered that question, and 577,139 persons stated that they were of Muslim religion. Since the late 1980s, the members of those communities have been involved in major migrations leading many of them to settle in Turkey. The Court has no official information on the exact number of Bulgarian citizens who are ethnic Turks or Muslims living temporarily or permanently in Turkey. Estimates of that number vary considerably, generally ranging from 300,000 to 500,000 individuals, in all the age brackets.

8.  The DPS was founded in 1990. Its statutes define it as a liberal political party endeavouring to help unite all Bulgarian citizens and to protect the rights and freedoms of minorities in Bulgaria as guaranteed by the Constitution and national legislation, as well as by the international instruments ratified by the Republic of Bulgaria.

9.  The DPS has put up candidates for all general and local elections in Bulgaria since its inception. It has won seats in the national Parliament in all the general elections held since 1990. Between 2001 and 2009 it took part in two successive coalition governments. Several of its leaders and members belong to the Bulgarian Turkish and Muslim minorities.

10.  Mr Riza was born in 1968 and lives in Sofia. A DPS member, he is also one of its Vice-Presidents and a member of the party’s central executive bureau. He is currently a DPS deputy of the National Assembly.

11.  These two applicants submit that most of the Bulgarian citizens currently living in Turkey have voted for the DPS at all the general elections held over the last twenty years.

B.  Bulgarian general elections on 5 July 2009

12.  By Decree of 28 April 2009 the Bulgarian President set 5 July 2009 as the date of the elections to the 41st National Assembly. The electoral law laid down a new hybrid electoral system: 31 deputies were to be elected on a first-past-the-post basis in single-member constituencies, and 209 deputies were to be elected on a proportional basis at national level in 31 multiple-member constituencies.

13. Bulgarian citizens living abroad were entitled to vote in the general elections, but only for parties and coalitions, and their votes were taken into account in the proportional distribution of sears among the different political formations at the national level ... Having obtained the consent of the competent authorities in the countries concerned, the Bulgarian diplomatic representations opened 274 polling stations in 59 countries, 123 of them in Turkey.

14.  On 20 May 2009 the Central Electoral Commission registered the DPS as participating in the general elections. The DPS presented lists of candidates in several single- and multiple-member constituencies. It was also included on the ballot paper designed for voting by Bulgarian citizens living abroad. Mr Riza was included in second position on the list of his party’s candidates for the 8th multiple-member constituency (Dobrich).

15.  Thirteen of the 101 applicants (see appended list) (nos., 13, 17, 21, 26, 30, 39, 51, 59, 74, 75, 89 and 94) submitted that they had all personally submitted prior declarations of intention to vote to the Bulgarian diplomatic representations in Turkey. The Bulgarian diplomates has asked them to take part in local electoral committees in Istanbul, Bursa, Çerkezköy, Çorlu and İzmir as presidents, secretaries or ordinary members, which they had agreed to do. On 4 July 2009 they had been invited to the offices of the Bulgarian diplomatic and consular representations, where Bulgarian diplomats had informed them about the formalities to be complied with on election day, and in particular how to draw up the electoral rolls. Some of the applicants affirmed that they had only been given one instruction on that subject, to the effect that persons attending the polling station on election day without preregistration should be included on the additional pages of the electoral roll, and that the last name added on election day should be suffixed with a “Z”.

16.  The 13 applicants submitted that their names had not been included on the list at the polling station where they were to function as members of the electoral committee. They had all voted in their respective polling stations by registering on election day and signing opposite their names and forenames. Furthermore, they submitted that they had carefully indicated their choices on their ballot papers, without any other type of indication, and slotted the papers into the ballot box.

17.  The 13 applicants also pointed out that there had been no particular problems on election day. Their respective electoral committees had been made up of Bulgarian nationals living in their respective towns and representatives of the Bulgarian Ministry of Foreign Affairs. Some of the polling stations had been visited by the Bulgarian Ambassador and Consul General, and others had been reported on by Bulgarian public television and radio teams, and no irregularities had been noted. At the close of polling on election day the local committees had counted the votes, filled in the requisite report forms and submitted the electoral documents to the Bulgarian diplomatic representatives.

18.  The other 88 applicants submitted that at the material time they had been living in Turkey. Some of them had sent prior statements of intention to vote to the Bulgarian diplomatic representations, but they had never been informed in return of which polling stations to vote in. On election day all the applicants in question had attended the nearest polling stations in their respective towns. Their names had been handwritten into the electoral rolls, and after voting they signed opposite their names.

19.  According to information available on the Central Electoral Commission website (<http://pi2009.cik.bg>), following the 5 July 2009 elections, six political parties and coalitions garnered more than the minimum 4% of votes cast and were included in the process of proportional distribution of seats in the National Assembly: the GERB party, the Coalition for Bulgaria, the DPS, Ataka, the Blue Coalition and the RZS party.

20.  The DPS obtained a total of 610,521 votes, or 14.45% of the valid votes, which made it the country’s third political party. It garnered 61.18% of the out-of-country voting, that is to say 93,926 votes, 88,238 of which were cast in polling stations in Turkish territory. It came out well ahead in the 17 polling stations – in Istanbul, Bursa, Çerkezköy, Çorlu and İzmir – in which the 101 applicants had voted. By decision of 7 July 2009 the Central Electoral Commission assigned the DPS 33 parliamentary seats under the proportional representation system, together with a further five seats won in the first-past-the-post constituencies.

21.  Following the apportionment of seats won by the DPS at the national level in the 31 multiple-member constituencies, the party won only one seat in the 8th constituency. However, another political formation, the Blue Coalition, having appealed to the Constitutional Court and the votes cast in a polling station in the 19th constituency having been recounted, the Central Electoral Commission conducted a reassignment of the seats won at the national level among the 31 multiple-member constituencies. This gave the DPS a second seat in the 8th constituency, where Mr Riza was in second place on his list of candidates, and removed one of the two seats initially won in the 19th multiple-member constituency. On 12 October 2009 Mr Riza was declared elected to the National Assembly. He was sworn in as a deputy and became a member of his party’s parliamentary group. On 20 January 2010 he was elected member of the Parliamentary Commission on Ethics and the Fight against Corruption and Conflicts of Interest.

C.  Procedure for contesting election results before the Constitutional Court

1.  The appeal lodged by the RZS party

22.  On 21 July 2009 the President and three other members of the RZS (*Red, Zakonnost, Spravedlivost* – “Order, Law and Justice”), a right-wing conservative party, requested the Attorney General to lodge with the Constitutional Court the appeal provided for in section 112 of the Electoral Law in order to annul the election of seven DPS deputes on the grounds of several irregularities which had occurred in the 123 polling stations operating in Turkish territory. The four appellants complained of several breaches of electoral legislation in connection with the setting up of the said polling stations and their handling of the voting: they claimed that the rule requiring a polling station to be opened for every one hundred prior statements of intention to vote had been flouted in Turkish territory; some electors had exercised their voting rights once in Bulgarian national territory and again in a polling station in Turkish territory; incorrect information had been included in the reports drawn up by the electoral committees concerning the number of voters in the polling stations in question; 23 of them had allegedly dealt with over 1,000 voters, which would have been a practical impossibility in view of the opening hours of the polling station and the time required to complete the requisite formalities for each voter, and the electoral committees attached to those polling stations had, in certain cases, reportedly allowed persons into the voting booths without valid Bulgarian identity papers. The appellants invited the Constitutional Court to verify the authenticity of the prior voting requests issued in Turkish territory, to check the electoral rolls drawn up in the region of Bulgaria where the individuals wishing to vote in Turkey had their permanent addresses, and to declare null and void the records drawn up by the electoral committees responsible for the polling stations opened in Turkish territory. According to the appellants, the large number of irregularities committed in the voting procedure in the 123 polling stations in question necessitated the annulment of the votes cast in them, which annulment would have changed the election results and led to the ousting of seven DPS deputies from their seats.

23.  On 22 July 2009 the Attorney General transmitted the request submitted by the President and three other members of the RZS party to the Constitutional Court.

2.  The initial phase of the proceedings before the Constitutional Court

24.  On 11 August 2009 the Constitutional Court declared the appeal admissible and designated as parties to proceedings the National Assembly, the Council of Ministers, the Ministry of Foreign Affairs, the Central Electoral Commission, the National Department responsible for Citizens’ Civil Status Data and two non-governmental organisations. It sent copies of the request and the relevant documents to the parties to proceedings and gave them a deadline of twenty days to submit their observations on the merits of the case. That court asked the National Department responsible for Citizens’ Civil Status Data to ascertain how many voters had voted in the national territory and then again in Turkish territory, and invited it to submit certified copies of the lists of persons having voted and the reports on voting drawn up by the polling stations in Turkish territory. The President of the Constitutional Court, R.Y., and Judge B.P. signed the admissibility decision, while issuing a separate opinion. They argued that the Attorney General should have submitted a reasoned request to the Constitutional Court rather than merely transmitting the request for annulment lodged by the RZS political party.

3.  Initial written observations by the DPS parliamentary group

25.  On 18 September 2009 the DPS parliamentary group of the National Assembly presented its written observations on the case. It first of all disputed the admissibility of the appeal lodged by the four appellants, arguing that the Attorney General had failed to conduct a prior assessment of the merits of the said request, merely transmitting it to the Constitutional Court, that the appeal had been lodged belatedly, after the deputies in question had been sworn in, and that the seven DPS deputies mentioned in the request had been designated randomly since the out-of-country votes had been used solely to apportion the seats among the various parties at the national level and not for the benefit of any given list of candidates. Secondly, the DPS parliamentary group submitted that the request had been ill-founded for the following reasons: the legal conditions for setting up the 123 polling stations in question had been fulfilled; there had been very few cases of double voting, and voting secrecy precluded determining for which party exactly those persons had voted; the number of persons included on the additional electoral rolls on election day had been higher than that of preregistered voters because the number of persons wishing to exercise their voting rights had far exceeded the number of voters having previously declared their intention to vote outside the country; and in several of the out-of-country polling stations the number of persons voting had exceeded one thousand, and that had not been the case only in the polling stations in Turkey.

4.  Expert reports commissioned by the Constitutional Court

26.  On 6 October 2009, at the request of the RZS party, the Constitutional Court ordered a threefold expert assessment to provide the answers to the following questions: (i) how many prior statements of intention to vote were submitted for the territory of Turkey, from which towns were they sent, and did their number correspond to the number of polling stations set up? (ii) were the identity papers of electors voting in the 123 polling stations valid? (iii) did the numbers of electors voting recorded in the minutes drawn up on election day correspond to the total number of preregistered electors and persons registered on the rolls on election day, and were there any polling stations in which none of the preregistered persons exercised their right to vote? (iv) what was the maximum number of persons who could vote in a polling station over election day? The three experts were given leave to consult all the documents on elections in Turkish territory which the diplomatic service of the Ministry of Foreign Affairs had submitted to the Central Electoral Commission.

27.  The expert report was submitted to the Constitutional Court some time later. It indicated that there had been a total of 27,235 prior declarations of intention to vote in respect of the territory of Turkey: 5,127 of those declarations had been received at the Bulgarian Embassy in Ankara, 15,556 at the Consulate General in Istanbul and 6,552 at the Consulate General in Edirne. The Bulgarian diplomatic services had opened 28 polling stations in the Ankara region, 72 in the Istanbul region and 23 in the Edirne region. The experts had noted that some polling stations had been opened without the threshold of 100 declarations of intention to vote having been reached.

28.  The experts were unable to answer the second question, on the validity of the Bulgarian identity papers of those voting in Turkey. They pointed out that it would have been very time-consuming to carry out the necessary verifications and would have required access to the population database administered by the Ministry of the Interior. Furthermore, in several cases the local electoral committees had merely mentioned the type of document presented, i.e. an identity card or passport, without recording the document number.

29.  As regards the third question, the experts replied that there had been some very slight differences – between one and five persons – between the numbers of persons voting recorded in the polling station minutes and the numbers of voters included in the electoral rolls. According to the experts, that might have been due to inadvertent omissions. Moreover, they observed that the additional electoral lists in 116 polling stations, which had been drawn up on election day and contained data on the persons who had turned out without having been preregistered, had not been signed by the chair or secretary of the local electoral committee. The experts noted that the personal data on electors contained in those lists had been handwritten, apparently unhurriedly, and those entries would have taken a considerable length of time to write. Furthermore, in some of the polling stations none of the preregistered persons had turned out to vote. In some other polling stations there had been no minutes on file, or else the first page of the minutes had been missing.

30.  As regards the fourth question put by the Constitutional Court, the experts concluded, from a reconstitution of the requisite formalities in dealing with voters and their ballot papers, that the minimum time required for voting would have been about fifty seconds. Having regard to the total duration of election day, that is to say thirteen hours, the experts estimated that a polling station could deal with a maximum of 936 voters. The maximum number of persons voting as thus calculated had been exceeded in 30 of the polling stations operating in Turkey.

31.  The National Department responsible for Citizens’ Civil Status Data presented the Constitutional Court with the results of its inquiry into cases of double voting. The department pointed out that 174 persons had voted several times and that 79 cases of double voting had been noted in Turkey.

32.  On 27 January 2010 the Constitutional Court decided to ask the three experts to examine an additional point: it asked them to recalculate the election results after deducting all the votes cast in 23 polling stations and some of those cast in another polling station, all located in Turkish territory. The court’s request covered: (i) all the votes cast in 18 polling stations where none of the preregistered voters had voted and where the additional lists of those voting had not been signed by the members of the local electoral committees and therefore lacked the probative value of official documents; (ii) all the votes cast in a polling station in which the minutes on voting were missing; (iii)  all the votes cast in two other polling stations where the first page of the minutes was missing; (iv)  all the votes cast in a polling station where the list of preregistered voters was missing; (v)  86 votes cast for the DPS by persons included in the unsigned additional list at another polling station where that party had garnered all the votes and where 124 preregistered persons had voted; (vi)  all the votes cast in another polling station where the list of preregistered voters had not been put on file and where the additional electoral list had not been signed by the members of the local electoral committee.

33.  On 2 February 2010 the experts submitted their supplementary conclusions to the Constitutional Court. In the introductory section of the report they pointed out that they had been mandated to deduct from the outcome of the election the votes cast in polling stations where: (i) none of the preregistered voters had voted and where the additional lists of those voting had not been signed by the members of the local electoral committees; (ii) the minutes were not put on file; (iii) the first page of the minutes was missing. The report presented estimates of the votes cast in 23 polling stations: (i) in 18 of those stations, none of the preregistered voters had voted and the additional list of voters had not been signed; (ii) in the case of another polling station, no minutes had been put on file and the additional list of voters had not been signed; (iii) for three other stations, the first page of the minutes was missing and the additional list of voters had not been signed; (iv) in another polling station, the first page of the minutes had not mentioned the number of persons having voted and none of the preregistered voters had voted. The experts considered that a total of 18,351 votes should be deducted from the election results, 18,140 of which had been case for the DPS. The Central Electoral Commission conducted the provisional reassignment of seats among the political parties on the basis of the expert report.

5.  Other written observations and requests submitted to the Constitutional Court

34.  On 9 February 2010 the parliamentary group of the DPS submitted supplementary observations challenging the Constitutional Court’s choice of criteria for excluding the votes cast in the aforementioned polling stations from the vote count. The DPS deputies pointed out that the outcome of the voting had been based on the data set out in the polling station minutes, and not on the electoral rolls. They added that electoral legislation did not require the chairs and secretaries of out-of-country local electoral committees to sign below the additional lists of voters drawn up on election day. At all events, in the deputies’ opinion, the shortcomings of members of the electoral administration could not lead to the annulment of electors’ votes.

35.  On 15 February 2010 the Central Electoral Commission presented its findings to the Constitutional Court. It pointed out that according to mathematical projections, the annulment of the votes cast in the 23 polling stations mentioned in the experts’ supplementary conclusions would deprive the DPS of one seat which would be assigned to the GERB political party and that in the 8th multiple-member constituency the DPS candidate concluded in second place on the party’s list, Mr Riza, would lose his parliamentary seat.

36.  The Central Electoral Commission presented the Constitutional Court with observations made by five of its twenty-five members on the merits of the case. Those five members voiced the opinion that the arguments put forward by the appellants and the experts’ conclusions could not be used to justify annulling the votes cast in the polling stations in question. They explained in particular that the lists of persons voting in the out-of-country polling stations had been drawn up by the Bulgarian diplomatic representatives accredited on the basis of the prior declarations of intention to vote which they had received. They nevertheless stated that no prior information had been given on the distribution of the voters in question around the various polling stations, as they could attend any polling station or choose not to vote at all, which in their view explained why in some stations none of the voters on the main list had voted. The members of the Electoral Commission considered that that should not lead to the invalidation of the ballots of other electors who had voted in the same polling station. They pointed out that under domestic legislation the election documents had to be packaged and sealed by the local electoral committees and then sent to the Central Electoral Commission. However, when the election documents had arrived from Turkey, it had been noted that the packages containing the documents had already been opened and then re-sealed by the diplomatic services of the Ministry of Foreign Affairs. At all events, the absence, attributable to the Bulgarian diplomatic services or the local electoral committees, of election documents from out-of-county polling stations could not have justified annulling votes cast in those stations, given that the election results from outside the country had been based on data transmitted via diplomatic telegrams to the Central Electoral Commission. Finally, the members of the Electoral Commission, referring to domestic legislation, submitted that the fact that a member of the Electoral Commission had not signed minutes of voting or the accompanying documents did not invalidate them and did not constitute grounds for annulling the votes cast in the station in question. They considered that the recalculation of the election results was based on arguments which had not been mentioned in the request to the Constitutional Court.

37.  On 15 February 2010 the DPS and six of its deputies applied to the Constitutional Court for leave to join the proceedings in question as a party. In that application the DPS stated that it fully endorsed the observations submitted by its parliamentary group on 18 September 2009 and 9 February 2010. On 16 February 2010 Mr Riza requested leave to join the proceedings as a party. In order to demonstrate his interest in taking part in the proceedings he referred explicitly to the additional expert report ordered by the Constitutional Court and the reapportionment of seats effected by the Central Electoral Commission on the basis of the experts’ findings. All those requests remained unanswered.

6.  16 February 2010 judgment of the Constitutional Court

38.  On 16 February 2010 the Constitutional Court, sitting in private session, adopted its decision in the case in question. It delivered its judgment on the same day.

39.  The Constitutional Court dismissed the pleas of inadmissibility put forward by the DPS parliamentary group in its observations of 18 September 2009 (see paragraph 25 above). It considered, first of all, that the procedure for applying to the court had been respected. Secondly, it observed that the case concerned the contestation of election results rather than the eligibility of an individual candidate, which enabled it to assess the case even though the deputies in question had been sworn in and were already in office. It joined to the merits of the case the third plea of inadmissibility concerning the lack of a direct link between the out-of-country votes and the election of the seven DPS deputies named in the initial request. Judges R.N. and B.P. set out separate opinions on the admissibility of the request for annulment of the election results. They considered that the Attorney General had merely transmitted the request submitted by the RZS party instead of himself lodging a reasoned application for the annulment of the elections.

40.  Considering that it should begin by clarifying the scope of the case, the Constitutional Court pointed out that it had been invited to find unlawful the election of a number of DPS deputies owing to several alleged irregularities in the polling stations operating in Turkish territory. Having regard to the specific mode of functioning of the Bulgarian electoral system, in which votes cast by Bulgarian citizens living abroad were taken into account solely for the proportional distribution of seats among political parties at the national level, it was impossible to determine in advance which deputies would be affected by the invalidation of some or all of the votes cast in Turkish territory. Thus, in the framework of that case, the Constitutional Court considered that it had been called upon to determine whether there had been any serious irregularities in the voting procedure in the 123 polling stations in Turkey. It held that a finding of such irregularities could lead to a change in the election results, a fresh apportionment of seats among the political parties and the annulment of the seats of deputies who had not been explicitly targeted by the initial application lodged by the leader and a number of candidates of the RZS party in the general elections.

41.  The Constitutional Court rejected all the arguments put forward in the initial statement of claim. It first of all noted that section 41 (8) (3) of the Electoral Law gave Bulgarian diplomatic representatives outside the country carte blanche to open as many polling stations as they considered necessary for the proper conduct of the elections.

42.  Secondly, it considered that the question whether a given voter had voted without a valid Bulgarian identity card was immaterial to the outcome of the proceedings, since voting secrecy ruled out ascertaining which party the person had voted for.

43.  The Constitutional Court stated that the experts had noted that in some polling stations none of those on the main electoral roll had voted, while in other stations only a few of those on the roll had voted. It pointed out that according to the experts the names added on election day had been written clearly and apparently unhurriedly, which would seem rather unlikely given the large number of such additions and the pressure under which the members of the electoral committees would have been working on election day. However, the Constitutional Court considered that such considerations were mere suspicions which had not categorically demonstrated that the results of voting in those polling stations had been manipulated.

44.  The Constitutional Court also noted that the experts had reached the conclusion that the maximum number of persons who could vote in one polling station was 936. However, it considered that in the absence of precise information on the alleged irregularities in the voting procedure in the polling stations with more than 1,000 persons voting, that finding did not provide grounds for invalidating the election results. At all event voting secrecy precluded determining for whom the persons registered after number 936 on the list of voters had cast their vote.

45.  For those reasons the Constitutional Court dismissed the application for the annulment of the seats of the seven deputies explicitly covered by the initial request submitted by the leader and candidates of the RZS party.

46.  However, it decided to deduct from the results obtained by each of the political parties respectively all the votes cast in 23 polling stations in Turkey, that is to say a total of 18,358 votes, 18,140 of which had been cast for the DPS. It pointed out that in those polling stations none of the voters preregistered on the main electoral rolls had voted, or else the first page of the minutes of the voting, certifying that the preregistered persons had voted, was missing. The court pointed out that in the 23 polling stations in question the additional lists of voters drawn up on election day did not bear the signatures of the chairs and secretaries of the local electoral committees, which deprived them of the probative value of official documents. The Constitutional Court accordingly considered that they could not be used in evidence to demonstrate that the registered persons had voted. That approach had allegedly also enabled it to determine how many votes had been deducted from the election results of each party or coalition and to reallocate the deputies’ seats in the National Assembly.

47.  The Constitutional Court rejected the additional objections raised by the DPS parliamentary group on 9 February 2010 (see paragraph 34 above). It considered that the irregularities noted in the electoral rolls in the various polling stations had also affected the legitimacy of the minutes drawn up by the electoral committee on completion of the voting because they contained data on the exact number of persons having voted in the polling station in question and the election results had been determined on the basis of the minutes. Even though domestic legislation did not explicitly require the members of the out-of-country local electoral committees to sign additional electoral lists, the module additional electoral list approved by the President of the Republic pursuant to the Electoral Law provided for such signatures. The Constitutional Court therefore took the view that such signature was a legal condition for the validity of such official documents. At all events, the signature was one of the fundamental and obvious components of any official document. The lack of those signatures on the additional voter lists drawn up in the 23 polling stations thus deprived them of their official probative value in respect of the fact that the registered persons had actually cast their votes.

48.  The Constitutional Court declared that the votes in question had been valid under domestic legislation but that they had been deducted from the election results owing to the irregularity of the voter lists and the voting minutes. It considered that the seats in the National Assembly had to be reallocated. For those reasons, and having taken into account the prior calculations submitted by the Central Electoral Commission, the Constitutional Court annulled the parliamentary seats of three deputies, including Mr Riza. It ordered the Central Electoral Commission to reapportion the seats in the National Assembly by deducting from the election results the 18,358 votes cast in the 23 polling stations in question.

49.  By decision of 19 February 2010, pursuant to the judgment of the Constitutional Court, the Central Electoral Commission declared three other candidates elected. Consequently to that redistribution of seats, the DPS was the only party to have lost a parliamentary seat and the GERB party, which had won the general elections, obtained an additional seat.

D.  Appeals lodged by Mr Riza and the DPS

50.  On 4 March 2010 the DPS and three of its deputies in the National Assembly in turn lodged the appeal provided for in section 112 of the Electoral Law and contested the lawfulness of the election of the three deputies which the Central Electoral Commission had declared elected by decision of 19 February 2010. Mr Riza lodged the same appeal in his own name.

51.  On 31 March and 27 April 2010 the Constitutional Court declared the two appeals inadmissible on the grounds that the dispute in issue had already been the subject of proceedings before it, leading to its judgment of 16 February 2010.

E.  Other relevant circumstances

52.  The 41st National Assembly constituted following the general elections of 5 July 2009 sat until 15 March 2013, when it was dissolved by Presidential Decree.

53.  The elections to the 42nd National Assembly were held on 12 May 2013. At those elections the DPS obtained 400,460 votes, that is to say 11.31% of the validly cast votes. It obtained 51,784 votes in Turkish territory. It sent 36 deputies to the National Assembly, where it was the third biggest parliamentary group. Mr Riza was elected deputy of the 8th multiple-member constituency, where he headed his party’s list.

54.  The lawfulness of those general elections, particularly as regards the polling stations opened in Turkish territory, was disputed before the Constitutional Court by a group of 48 deputies from the GERB party. The deputies requested the annulment of the elections in the 86 polling stations operating in Turkey owing to several alleged irregularities in the voting procedures: they submitted that the polling stations had been set up on the basis of forged prior declarations of intention to vote; they had opened despite their electoral committees lacking the minimum number of members; unidentified persons had canvassed the areas inhabited by Bulgarian citizens in Turkey, had obtained Bulgarian identity papers from various electors and had returned them to their owners the day before the elections telling them that they had voted; several voters had not shown any valid Bulgarian identity papers; the number of persons voting in some of the polling stations had exceeded, which was unrealistic in view of the time required to complete the formalities linked to the voting procedure; there had been several cases of double voting; the lists of electors registered on election day had not been properly drawn up and had not been signed by the chair and the other members of the electoral committee. The request referred explicitly to the reasoning of the judgment delivered by the Constitutional Court on 16 February 2010.

55.  By judgment of 28 November 2013 the Constitutional Court dismissed the appeal lodged by the 48 GERB deputies. It considered and rejected, on the basis of the evidence gathered, all the allegations of breaches of electoral legislation advanced by the appellants. It noted, *inter alia*, that the relevant members of all the electoral committees set up in Turkish territory had signed at the bottom of the lists of voters added on election day, which gave those documents the probative value of official documents.

56.  During the 42nd legislature the DPS took part in a coalition government which resigned in July 2014. Following those events the 42nd National Assembly was dissolved on 6 August 2014 by Presidential Decree.

57.  The elections to the 43rd National Assembly were held on 5 October 2014. The DPS obtained 487,134 votes, that is to say 14.84% of all valid votes cast, and sent 38 deputies to Parliament. No admissible appeal was lodged before the Constitutional Court against those election results. The DPS is currently the third biggest political party in the country and the second biggest opposition party.

58.  Mr Riza was elected as deputy in the 8th constituency, where he headed the DPS list.

**III.  RELEVANT WORK OF THE EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

59.  At its 51st and 52nd sessions on 5 and 6 July and 18 and 19 October 2002, the Commission European for Democracy through Law (the Venice Commission) adopted its guidelines in electoral matters and an explanatory report on those guidelines. These two documents together constitute the Venice Commission’s Code of Good Conduct in Electoral Matters, which was approved by the Parliamentary Assemblée and the Congress of Local and Regional Authorities of the Council of Europe in 2003.

60.  The relevant parts of the Code read as follows:

Guidelines

“2. Equal suffrage

Equal suffrage entails: ... equal voting rights ...; ... equal voting power ...; equal opportunities ...

3.3. An effective system of appeal

a. The appeal body in electoral matters should be either an electoral commission or a court. For elections to Parliament, an appeal to Parliament may be provided for in first instance. In any case, final appeal to a court must be possible.

b. The procedure must be simple and devoid of formalism, in particular concerning the admissibility of appeals.

c. The appeal procedure and, in particular, the powers and responsibilities of the various bodies should be clearly regulated by law, so as to avoid conflicts of jurisdiction (whether positive or negative). Neither the appellants nor the authorities should be able to choose the appeal body.

d. The appeal body must have authority in particular over such matters as the right to vote – including electoral registers – and eligibility, the validity of candidatures, proper observance of election campaign rules and the outcome of the elections.

e. The appeal body must have authority to annul elections where irregularities may have affected the outcome. It must be possible to annul the entire election or merely the results for one constituency or one polling station. In the event of annulment, a new election must be called in the area concerned.

f. All candidates and all voters registered in the constituency concerned must be entitled to appeal. A reasonable quorum may be imposed for appeals by voters on the results of elections.

g. Time-limits for lodging and deciding appeals must be short (three to five days for each at first instance).

h. The applicant’s right to a hearing involving both parties must be protected.

i. Where the appeal body is a higher electoral commission, it must be able ex officio to rectify or set aside decisions taken by lower electoral commissions.”

Explanatory report

“2. Equal suffrage

10. Equality in electoral matters comprises a variety of aspects. Some concern equality of suffrage, a value shared by the whole continent, while others go beyond this concept and cannot be deemed to reflect any common standard. The principles to be respected in all cases are numerical vote equality, equality in terms of electoral strength and equality of chances. On the other hand, equality of outcome achieved, for instance, by means of proportional representation of the parties or the sexes, cannot be imposed. ...

3.3. An effective system of appeal

61. If the electoral law provisions are to be more than just words on a page, failure to comply with the electoral law must be open to challenge before an appeal body. This applies in particular to the election results: individual citizens may challenge them on the grounds of irregularities in the voting procedures. It also applies to decisions taken before the elections, especially in connection with the right to vote, electoral registers and standing for election, the validity of candidatures, compliance with the rules governing the electoral campaign and access to the media or to party funding.

62. There are two possible solutions:

- appeals may be heard by the ordinary courts, a special court or the constitutional court;

- appeals may be heard by an electoral commission. There is much to be said for this latter system in that the commissions are highly specialised whereas the courts tend to be less experienced with regard to electoral issues. As a precautionary measure, however, it is desirable that there should be some form of judicial supervision in place, making the higher commission the first appeal level and the competent court the second.

63. Appeal to parliament, as the judge of its own election, is sometimes provided for but could result in political decisions. It is acceptable as a first instance in places where it is long established, but a judicial appeal should then be possible.

64. Appeal proceedings should be as brief as possible, in any case concerning decisions to be taken before the election. On this point, two pitfalls must be avoided: first, that appeal proceedings retard the electoral process, and second, that, due to their lack of suspensive effect, decisions on appeals which could have been taken before, are taken after the elections. In addition, decisions on the results of elections must also not take too long, especially where the political climate is tense. This means both that the time limits for appeals must be very short and that the appeal body must make its ruling as quickly as possible. Time limits must, however, be long enough to make an appeal possible, to guarantee the exercise of rights of defence and a reflected decision. A time limit of three to five days at first instance (both for lodging appeals and making rulings) seems reasonable for decisions to be taken before the elections. It is, however, permissible to grant a little more time to Supreme and Constitutional Courts for their rulings.

65. The procedure must also be simple, and providing voters with special appeal forms helps to make it so. It is necessary to eliminate formalism, and so avoid decisions of inadmissibility, especially in politically sensitive cases.

66. It is also vital that the appeal procedure, and especially the powers and responsibilities of the various bodies involved in it, should be clearly regulated by law, so as to avoid any positive or negative conflicts of jurisdiction. Neither the appellants nor the authorities should be able to choose the appeal body. The risk that successive bodies will refuse to give a decision is seriously increased where it is theoretically possible to appeal to either the courts or an electoral commission, or where the powers of different courts – e.g. the ordinary courts and the constitutional court – are not clearly differentiated. ...

67. Disputes relating to the electoral registers, which are the responsibility, for example, of the local administration operating under the supervision of or in co-operation with the electoral commissions, can be dealt with by courts of first instance.

68. Standing in such appeals must be granted as widely as possible. It must be open to every elector in the constituency and to every candidate standing for election there to lodge an appeal. A reasonable quorum may, however, be imposed for appeals by voters on the results of elections.

69. The appeal procedure should be of a judicial nature, in the sense that the right of the appellants to proceedings in which both parties are heard should be safeguarded.

70. The powers of appeal bodies are important too. They should have authority to annul elections, if irregularities may have influenced the outcome, i.e. affected the distribution of seats. This is the general principle, but it should be open to adjustment, i.e. annulment should not necessarily affect the whole country or constituency – indeed, it should be possible to annul the results of just one polling station. This makes it possible to avoid the two extremes – annulling an entire election, although irregularities affect a small area only, and refusing to annul, because the area affected is too small. In zones where the results have been annulled, the elections must be repeated.

71. Where higher-level commissions are appeal bodies, they should be able to rectify or annul *ex officio* the decisions of lower electoral commissions.”

**THE LAW**

**I.  ALLEGED VIOLATIONS OF ARTICLE 3 OF PROTOCOL NO. 1 TO THE CONVENTION**

72.  Mr Riza and the DPS alleged that the annulment of the election results in 23 polling stations had amounted to an unjustified infringement of their right to stand for elections as guaranteed by Article 3 of Protocol No. 1 to the Convention. Under the same provision, the other 101 applicants (whose names are appended) alleged that the annulment of their votes had amounted to a violation of their active electoral rights. Further relying on Article 13 of the Convention, Mr Riza and the DPS submitted that domestic law had provided them with no remedy capable of redressing the alleged violation of their rights.

73.  The Court observes from the outset that a distinction should be drawn between the present case and the case of *Grosaru v. Romania* (no. 78039/01, §§ 55-56, ECHR 2010), in which the post-electoral dispute involving the applicant had never been assessed by a court. In that case the Court conducted a separate examination of the complaint under Article 13. On the other hand, in cases concerning post-electoral disputes where domestic law entrusted consideration of such disputes to the judicial courts, the Court has opted for addressing the subject matter solely from the angle of Article 3 of Protocol No. 1 (see *Kerimova v. Azerbaijan*, no. 20799/06, §§ 31-32, 30 September 2010, and *Kerimli and Alibeyli v. Azerbaijan*, nos. 18475/06 and 22444/06, §§ 29 and 30, 10 January 2012).

74.  In the present case, the examination of the electoral dispute was assigned to the Constitutional Court, which delivered a final judgment. In the light of the specific facts of the case, and as it proceeded in the *Kerimova* and *Kerimli and Alibeyli* judgments (cited above), the Court considers that no separate issue arises under Article 13 of the Convention. It will, however, take into account the specific features of the proceedings conducted before the Bulgarian Constitutional Court in order to analyse the complaints under Article 3 of Protocol No. 1, which provides:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

A.  Admissibility

2.  Compliance with the other admissibility criteria

75.  The Government contested the victim status of Mr Riza, the DPS and the other 101 applicants.

76.  They submitted in particular that Mr Riza had stood in the 2009 general elections as a party candidate in a multiple-member constituency in Bulgarian territory where parliamentary seats had been allocated according to the proportional system. Bulgarian voters living abroad, particularly in Turkey, had voted not for lists of candidates put forward by the political parties but for the parties themselves. Thus electors who had voted for the DPS in the polling stations in question had not voted explicitly for Mr Riza. Accordingly, the latter could not have validly claimed that the decision which had led to the annulment of the votes cast for his party in 23 polling stations in Turkey had had a direct negative impact on his right to stand in the general elections.

77.  The Government added that the DPS also could not claim to have been the victim of a violation of its right to stand in elections, since it had taken part in the election under the same conditions as all the other parties and coalitions. By actively participating in the country’s political life and the elections, the party had implicitly agreed to obey the rules on the apportionment of seats and not to take advantage of any irregularities occurring during the voting procedure. The impugned judgment of the Constitutional Court had noted and remedied just such irregularities, and that decision had led to the annulment of the election of candidates from other political parties. Thus the impugned measure had not been aimed exclusively at the DPS and had not been implemented disproportionately and tendentiously.

78.  As regards the other 101 applicants who voted in polling stations where the results were annulled by the Constitutional Court, the Government submitted that their voting rights had in no way been infringed. They pointed out in particular that the State had made the necessary arrangements to enable those concerned to cast their votes in their country of residence. The applicants’ votes had not been declared null and void by the Constitutional Court’s judgment: the latter had been delivered in the framework of proceedings which had provided all the necessary safeguards against arbitrariness, and had merely deducted from the final outcome of the elections all the votes cast in the polling stations where the 101 applicants had voted on grounds of non-compliance with the legal obligation for the leaders of electoral committees to sign the additional lists of voters. Accordingly, the Constitutional Court’s judgment had not directly or sufficiently seriously infringed those applicants’ active electoral rights.

79.  Relying on the same arguments, the Government submitted, in the alternative, that the application lodged by the 101 electors should be rejected as being incompatible *ratione materiae*, manifestly ill-founded, and/or, pursuant to Article 35 § 3 (b) of the Convention, for lack of significant disadvantage.

80.  The Court notes that all those objections can be summed up in a single plea disputing the applicants’ victim status. It considers that that question is closely connected with the very substance of the complaints raised by the applicants under Article 3 of Protocol No. 1. It therefore holds that that objection should be joined to the merits of the complaints submitted by Mr Riza, the DPS and the other 101 applicants.

...

B.  Merits

1.  The parties’ submissions

(a)  The applicants

81.  The applicants alleged that the judgment delivered by the Constitutional Court on 16 February 2010 had given rise to an unjustified infringement of their rights as secured under Article 3 of Protocol No. 1.

82.  Mr Riza submitted that he had stood in the 2009 general elections as a candidate on the DPS list in the 8th multiple-member constituency in Dobrich. Following the elections he had been declared elected to the National Assembly, and his party, the DPS, had been represented by 38 deputies in the national Parliament, 33 of whom had benefited from the proportional allocation of seats. The impugned judgment of the Constitutional Court had subsequently modified the election results: the DPS’s total was reduced by 18,140 votes, which had led to the loss of one of its seats, Mr Riza’s, in the national Parliament. Mr Riza and the DPS considered that that situation amounted to an interference with the exercise of their right to stand in general elections.

83.  The other 101 applicants had exercised their voting rights during the Bulgarian general elections. They had chosen to vote in 17 of the polling stations opened in Turkish territory. The Bulgarian Constitutional Court had, by its judgment of 16 February 2010, annulled the voting in 23 of the polling stations in Turkish territory, including those in which the applicants had voted. Their votes had thus been annulled. The 101 applicants considered that that situation amounted to an interference with the exercise of their right to participate as voters in the general election.

84.  The applicants submitted that the decision-making process which had led to the modification of the election result had lacked adequate safeguards against arbitrariness. The procedure used by the Constitutional Court to reach its decision had been designed for assessing the constitutionality of legislation enacted by Parliament: the procedure had been completely unsuited to the assessment of an electoral dispute and, moreover, the regulations governing it had been defective. In the instant case, the precise subject matter of the dispute had not been determined from the outset of the proceedings, having only been established when the Constitutional Court had delivered judgment. The fact that the Constitutional Court had rejected all the appellants’ arguments put forward one by one, but decided to annul the voting in in 23 polling stations because of formal defects which had been mentioned for the first time in the proceedings by an expert report, at the initiative of the experts in question, revealed a lack of clarity and foreseeability in that regard. The appellants had thus been exempted from the obligation to present evidence of the irregularities allegedly committed in the polling stations in question. The Constitutional Court had appropriated the power to investigate and to adjudicate *ex officio* on compliance with the overall criteria governing the fairness of voting in all the polling stations in which the Bulgarian citizens living in Turkey had voted.

85.  The proceedings before the Constitutional Court had not been adversarial. Neither the DPS nor Mr Riza had been parties to the proceedings in spite of their express requests to that effect and despite the fact that, in their view, the dispute had concerned them directly. The only document in the case file to which they had had access was the initial statement of claim, which had been transmitted to them by the DPS deputies in the National Assembly. Those applicants had had no access to the other contents of the case-file, the additional arguments set forth by the appellants, the evidence gathered during the proceedings or the factual and legal issues discussed before the Constitutional Court. They had been deprived of any opportunity to defend their rights and legitimate interests in the framework of the proceedings. Furthermore, domestic law provided no remedy against the impugned judgment of the Constitutional Court.

86.  The DPS, Mr Riza and the other 101 applicants submitted that the irregularities in the voting procedure noted in the judgment of the Constitutional Court had been minimal and should not have led to the annulment of the votes cast in the polling stations in question or of the voting procedure itself. The Constitutional Court had failed to consider whether the impact of the irregularities noted had been sufficiently serious to require the annulment of the voting in the 23 polling stations.

87.  The applicants considered that none of those irregularities had pointed to any kind of electoral fraud. The Electoral Law did not require the chair and the secretary of the local electoral committee responsible for an out-of-country polling station to sign at the bottom of the list of voters registered on election day. Such a requirement applied to the “additional lists” drawn up solely in polling stations in the national territory. That was why almost all the lists of voters drawn up on election day in the polling stations in Turkey had not been signed. Moreover, the same requirement had not been complied with in polling stations in the national territory, although, according to the applicants, that had not affected the validity of the voting procedure in those stations. That being the case, the Constitutional Court’s affirmation that the signatures in question were a fundamental and obvious element for the validity of the voting lists had been completely arbitrary.

88.  The applicants submitted that the electoral documents required for calculating out-of-country electoral results were the minutes of voting signed by the members of the local electoral committee and the diplomatic telegram sent by the Bulgarian representations in the country concerned. They explained that those two documents contained information on the number of persons voting, the number of spoiled votes and the number of votes cast for each party. Enclosed with the list of voters comprising identification data on and the signature of each person voting, as well as the ballot papers in the ballot box, those documents had been sufficient to detect any instance of electoral fraud. All those documents had been available for the 23 polling stations and no electoral fraud had been discovered.

89.  The applicants added that the Constitutional Court had noted two further irregularities: the absence of minutes or of the first page of such minutes. In fact it was not the first but the second page of the minutes which provided the information required to calculate the results, that is to say the number of persons voting, the number of valid ballots, the number of spoiled votes, and the apportionment of votes among the different political parties. In the event that neither of the two pages of the minutes had been placed on file, the diplomatic telegram reproduced the same data. Those documents had indeed been filed away in respect of the 23 polling stations in question.

90.  The Constitutional Court had itself acknowledged that the votes cast in the 23 polling stations had been valid, but had decided to deduct them from the election results owing to omissions which had been attributable neither to the voters, including the 101 applicants in the present case, nor to Mr Riza and the DPS. Furthermore, the media had reported many cases of similar omissions, such as the accidental destruction by maintenance staff at the Bulgarian Embassy in Washington of all the electoral documents from the polling stations operating in US territory. The lawfulness of the voting procedure in US territory had never been challenged, and the votes cast in those polling stations had been taken into account for the apportionment of seats in the National Assembly.

91.  For those reasons, the applicants invited the Court to find that the impugned interference with the exercise of their respective rights to participate in the general elections as candidates/voters had not pursued any legitimate aim and had been totally unjustified under Article 3 of Protocol No. 1.

(b)  The Government

92.  The Government first of all disputed the existence of an interference with the exercise by the applicants of the rights secured under Article 3 of Protocol No. 1.

93.  They pointed out that the DPS had put up numerous candidates for the 2009 general elections in single- and multiple-member constituencies, and that Mr Riza had been included in that party’s list of candidates for the 8th multiple-member constituency. They denied that there had been any direct link between the annulment of the voting in the 23 polling stations in Turkish territory and the annulment of Mr Riza’s parliamentary seat. The Government considered that that decision had not affected the DPS’s political weighting, since it was still the third biggest political party in Bulgaria in terms of number of deputies elected to the National Assembly.

94.  As regards the other 101 applicants, the Government considered that they had exercised their voting rights and that their votes had not been annulled by the Constitutional Court. On the contrary, the Constitutional Court had emphasised that those votes had been valid but had nonetheless not been counted owing to serious negligence on the part of the members of the electoral committees responsible for the polling stations in which the applicants had voted.

95.  In the alternative, the Government submitted that even supposing there had been an interference with Mr Riza’s and the DPS’s passive electoral rights and with the other applicants’ active electoral rights, that interference had been justified in the light of the arguments set out below.

96.  The Government thus explained that the right to vote and the right to stand for election were guaranteed by the Bulgarian Constitution and that at the material time the voting procedure had been governed by the 2001 Electoral Law. Seats in the National Assembly had been allocated on the basis of all valid votes cast. That being the case, it had been vital for the lawfulness of the election to take into account only the valid votes in calculating the election results. In the Government’s view, that had been the only way to guarantee the protection of both the right to vote and the right to stand for election, inasmuch as it had ensured that deputies were elected to the national Parliament with the genuine support of the electorate.

97.  The Government added that the domestic courts had applied Bulgarian electoral legislation in a clear and foreseeable manner. They stated that the judgment of the Constitutional Court disputed by the applicants had been geared to ensuring compliance both with electoral legislation and with the lawfulness of the election.

98.  The Government further pointed out that according to the Electoral Law the Constitutional Court was the body competent to examine the lawfulness of the election of deputies. In the framework of its competences and pursuant to the above-mentioned legitimate aims, the Constitutional Court had conducted very careful scrutiny of the conditions for ensuring the regularity of voting in the polling stations operating in Turkish territory. It had ordered two expert assessments and examined their findings, and had received and taken into account the observations of all the parties concerned. Referring to the overall evidence amassed, it had noted serious omissions from the election material, particularly the lists of voters and the minutes of voting, which it submitted had affected the lawfulness of the voting procedure and necessitated the exclusion of the votes cast in 23 polling stations, including the 17 stations in which the 101 applicants in the present case had voted. The modification of the election results had led to a redistribution of parliamentary seats and the annulment of the seats of three deputies belonging to different political formations, that is to say the DPS, the RZS party and the Blue Coalition. The impact of the modification of the election results had thus been apportioned among several parties taking part in the general elections, and neither the DPS nor Mr Riza could validly claim that the impugned judgment had had the effect of exclusively infringing their rights and legitimate interests.

99.  The Government submitted that there had been no sign of arbitrariness in the manner in which the judgment in question had been adopted and reasoned. The Constitutional Court had merely applied domestic electoral legislation. The alleged interference with the exercise of the rights to vote and to stand for election had not violated the substance of those rights; it had pursued a legitimate aim and observed a proper proportionality between the general interest and the applicants’ rights.

100.  The Government added that the Bulgarian authorities were determined to fight electoral practices that were incompatible with democracy, making them liable to criminal prosecution. Those practices included vote-buying and “electoral tourism”, which consisted in organising transport out of the country for a large number of voters in order to skew the election results.

2.  The Court’s assessment

(a)  General principles emerging from the Court’s case-law

101.  The Court reiterates that Article 3 of Protocol No. 1 enshrines a characteristic principle of democracy and is accordingly of prime importance in the Convention system (see *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, § 47, Series A no. 113, and *Ždanoka v. Latvia* [GC], no. 58278/00, § 103, ECHR 2006‑IV). The role of the State, as ultimate guarantor of pluralism, involves adopting positive measures to “organise” democratic elections “under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature” (see *Mathieu-Mohin and Clerfayt*, cited above, § 54).

102.  Article 3 of Protocol No. 1 does not create any obligation to introduce a specific system such as proportional representation or majority voting with one or two ballots. The Contracting States have a wide margin of appreciation in that sphere. Electoral systems seek to fulfil objectives which are sometimes scarcely compatible with each other: on the one hand, to fairly accurately reflect the opinions of the people, and on the other, to channel currents of thought so as to promote the emergence of a sufficiently clear and coherent political will. In these circumstances the phrase “conditions which will ensure the free expression of the opinion of the people in the choice of the legislature” implies essentially the principle of equality of treatment of all citizens in the exercise of their right to vote and their right to stand for election. It does not follow, however, that all votes must necessarily have equal weight as regards the outcome of the election or that all candidates must have equal chances of victory. Thus no electoral system can eliminate “wasted votes” (see *Mathieu-Mohin and Clerfayt*, cited above, § 54).

103.  According to the case-law of the Court, the words “free expression of the opinion of the people” mean that elections cannot be conducted under any form of pressure in the choice of one or more candidates, and that in this choice the elector must not be unduly induced to vote for one party or another. The word “choice” means that the different political parties must be ensured a reasonable opportunity to present their candidates at elections (see *Yumak and Sadak v. Turkey* [GC], no. 10226/03, § 108, ECHR 2008). The Court has also ruled that once the wishes of the people have been freely and democratically expressed, no subsequent amendment to the organisation of the electoral system may call that choice into question, except in the presence of compelling grounds for the democratic order (see *Lykourezos v. Greece*, no. 33554/03, § 52, ECHR 2006‑VIII).

104.  Article 3 of Protocol No. 1 also covers subjective rights, including the right to vote and the right to stand for election (see *Mathieu-Mohin and Clerfayt*, cited above, §§ 46-51).

105.  The right to vote, that is to say the “active” aspect of the rights guaranteed by Article 3 of Protocol No. 1, is not a privilege. In the twenty-first century, the presumption in a democratic State must be in favour of inclusion (see *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, § 59, ECHR 2005‑IX). Clearly, Article 3 of Protocol No. 1 does not provide for the implementation by Contracting States of measures to allow expatriates to exercise their right to vote from their place of residence. Nevertheless, since the presumption in a democratic State must be in favour of inclusion, such measures are consonant with that provision (see *Sitaropoulos and Giakoumopoulos v. Greece* [GC], no. 42202/07, § 71, ECHR 2012).

106.  As regards the passive aspect of electoral rights, it is not restricted to the mere possibility of standing for election: once elected, the person concerned is also entitled to sit as a member of parliament (see *Sadak and Others v. Turkey (no. 2)*, nos. 25144/94, 26149/95 to 26154/95, 27100/95 and 27101/95, § 33, ECHR 2002‑IV, and *Lykourezos*, cited above, § 50 *in fine*). Moreover, the Court has accepted that, when electoral legislation or the measures taken by national authorities restrict individual candidates’ right to stand for election through a party list, the relevant party, as a corporate entity, could claim to be a victim under Article 3 of Protocol No. 1 independently of its candidates (see *Georgian Labour Party v. Georgia*, no. 9103/04, §§ 72-74, ECHR 2008).

107.  The Court then reiterates that the rights secured under Article 3 of Protocol No. 1 are not absolute. There is room for “implied limitations”, and Contracting States must be given a margin of appreciation in this sphere (see *Mathieu-Mohin* *and Clerfayt*, cited above, § 52; *Ždanoka*, cited above, § 103; and *Podkolzina v. Latvia*, no. 46726/99, § 33, ECHR 2002-II). However, it is for the Court to determine in the last resort whether the requirements of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate (see *Mathieu-Mohin and Clerfayt*, cited above, § 52,and *Ždanoka*, cited above, § 104).

108.  The Court must ensure that the decision-making process on ineligibility or contestation of election results is accompanied by criteria framed to prevent arbitrary decisions. In particular, such a finding must be reached by a body which can provide a minimum of guarantees of its impartiality. Similarly, the discretion enjoyed by the body concerned must not be exorbitantly wide; it must be circumscribed, with sufficient precision, by the provisions of domestic law. Lastly, the procedure for declaring a candidate ineligible must be such as to ensure a fair and objective decision and prevent any abuse of power on the part of the relevant authority (see *Podkolzina*, cited above, § 35; *Kovach v. Ukraine*, no. 39424/02, §§ 54-55, ECHR 2008; and *Kerimova*, cited above, §§ 44-45). The Court also reiterates that under the subsidiarity principle it is not its task to replace the domestic courts in assessing the facts or interpreting domestic law. In the specific context of electoral disputes, it is not called up to determine whether the irregularities in the voting procedure complained of by the parties amounted to violations of the relevant domestic legislation (see *Namat Aliyev v. Azerbaijan*, no. 18705/06, § 77, 8 April 2010). Its role in determining whether there was an unjustified interference in “the free expression of the opinion of the people in the choice of the legislature” is confined to establishing whether the decision given by the domestic court was arbitrary or manifestly unreasonable (see *Babenko v. Ukraine* (dec.), no.43476/98, 4 May 1999; *Partija “Jaunie Demokrati” and Partija “Musu Zeme” v. Latvia* (dec.), nos. 10547/07 and 34049/07, 29 November 2007; and *Kerimli and Alibeyli*, cited above, §§ 38-42).

(b)  Application of those principles to the present case

i.  The existence of an interference with the exercise of the rights secured under Article 3 of Protocol No. 1

109.  The Court considers that it should first of all seek to establish whether the situation complained of by the applicants amounts to an interference with their rights as guaranteed by Article 3 of Protocol No. 1.

- As regards the active electoral right

110.  The Court observes that at the material time the 101 applicants, whose names are appended to the present judgment, lived in Turkey. They voted in the 5 July 2009 general elections in 17 of the polling stations in Turkish territory. Their votes were initially taken into account in calculating the 4% electoral threshold. The votes cast by the applicants for the six successful parties were then taken into account in apportioning seats among those political parties at the national level ....

111.  In its judgment of 16 February 2010, which is the subject of the present application, the Bulgarian Constitutional Court decided to annul the elections in 23 polling stations opened by the Bulgarian diplomatic representations in Turkish territory and to deduct from the election results the votes cast in those polling stations, to a total of 18,358 votes. Those votes included those cast by the 101 applicants whose names are appended, as the 17 polling stations in which they had voted had been among the 23 in which the elections were annulled.

112.  The Government submitted that the situation in question did not amount to an interference with the exercise of the 101 applicants’ voting rights: they argued that the latter had exercised their right to vote, but that their votes had not been counted in the allocation of seats in the National Assembly because there had had been serious irregularities in the voting procedure in their polling stations. The Court begs to differ.

113.  The active electoral right as guaranteed by Article 3 of Protocol No. 1 is not confined exclusively to the acts of choosing one’s favourite candidates in the secrecy of the polling booth and slipping one’s ballot paper into the box. It also involves each voter being able to see his or her vote influencing the make-up of the legislature, subject to compliance with the rules laid down in electoral legislation. To allow the contrary would be tantamount to rendering the right to vote, the election and ultimately the democratic system itself meaningless.

114.  Those considerations lead the Court to note that the impugned judgment of the Constitutional Court did have a direct impact on the voting rights of the 101 applicants in question. Their votes were excluded from the election results: they were not taken into account in calculating the 4% electoral threshold, and those of the 101 votes which were cast for the first six parties in the elections were not taken into account in apportioning seats among those parties at the national level ....

- As regards the passive electoral right

115.  The Court observes that Mr Riza and the DPS stood in the 5 July 2009 Bulgarian general elections: the DPS was registered by the Central Electoral Commission as a party participating in the election, put up several candidates in the multiple- and single-member constituencies in Bulgarian territory and was included on the ballot paper specially designed for voting outside the national territory; Mr Riza was in second place on his party’s list of candidates in the 8th multiple-member constituency in Dobrich (see paragraph 14 above). After the initial publication of the election results and the first allocation of seats on 7 July 2009, the DPS obtained 33 seats in the National Assembly under the proportional system, and five further seats under the majority system (see paragraph 20 above). Mr Riza was not elected to Parliament (see paragraph 21 above). However, following a Constitutional Court appeal lodged by a candidate for another political party, which was ultimately successful, a second proportional distribution of seats was organised: the DPS lost one of its two seats in the 19th multiple-member constituency but obtained a second seat in the 8th multiple-member constituency, which was assigned to Mr Riza as the second candidate on his party’s list in that constituency (ibid.). Accordingly, as at 12 October 2009 the DPS’s score in the elections totalled 610,521 votes and the party had 38 deputies in Parliament, including Mr Riza. The latter was subsequently elected to one of the standing committees in the National Assembly.

116.  The Constitutional Court judgment affected the situation of those two applicants, who had stood for the general election in question. The DPS had 18,140 votes deducted from its total electoral score. The ensuing redistribution of seats led to changes in the composition of the national Parliament: the DPS lost one parliamentary seat to the political party which had won the elections under the proportional system, and Mr Riza lost his mandate as a deputy (see paragraphs 48 and 49 above). Thus the applicant party’s electoral score under the proportional system fell by some 3%; its parliamentary group was reduced from 38 deputies to 37, and Mr Riza forfeited his position as a representative in the National Assembly.

- The Court’s conclusion

117.  In the light of the above facts, the Court considers that the situation complained of by the applicants amounts to an interference with the exercise of their respective rights to vote in and stand for general elections as secured under Article 3 of Protocol No. 1. It also considers that the same arguments require it to reject the Government’s objection regarding the applicants’ lack of victim status (see paragraph 114 above).

ii.  Justification for the interference in question

118.  The Court must therefore satisfy itself that the interference in question did not limit the applicants’ active and passive electoral rights to the extent of affecting their very substance and depriving them of their effectiveness, that it pursued a legitimate aim and that the means used were not disproportionate to the aim pursued.

119.  The Court notes that the parties disagree as to the purpose of the impugned measures. The applicants considered that the annulment of the voting in 23 out-of-country polling stations had not pursued any legitimate aim, whereas the Government submitted that the scrutiny conducted by the Constitutional Court had been geared to ensuring compliance with electoral legislation.

120.  The Court observes that the proceedings before the Constitutional Court which led to the judgment complained of by the applicants were based on Article 149, (1) (7) of the Constitution and section 112 of the 2001 Electoral Law. Those provisions allowed any person standing in the general elections to contest the lawfulness of the election of deputies to the National Assembly .... Such disputes often concern compliance with the rules on voting and vote-counting in one or more polling stations, and may lead to the invalidation of some of the votes and a change in the total number of votes obtained by each individual candidate or political party. In proportional election systems, changing the electoral score of political formations, sometimes just in one single polling station, can lead to a redistribution of parliamentary seats and an increase or decrease in the number of seats allocated to the various parties or coalitions. That is exactly what happened in the present case. The impugned proceedings were brought by the President of the RZS political party and three of its candidates, seeking to contest the lawfulness of the election of seven DPS deputies under the proportional system in the framework of the Bulgarian election system. The appellants complained of several irregularities in the voting procedure in the 123 polling stations in which Bulgarian citizens living in Turkey had exercised their voting rights (see paragraph 22 above). Accordingly, the Court accepts that the proceedings before the Constitutional Court had the legitimate aim of ensuring compliance with electoral legislation and therefore the lawfulness of the voting and the election results.

121.  The Court considers that the next step must be to establish whether the decision-making process was surrounded by adequate safeguards against arbitrariness. In doing so it must ascertain whether that process complied with the requirements as set out in its well-established case-law (see paragraph 143 above).

122.  The applicants submitted that the proceedings before the Constitutional Court had been unsuited to the assessment of post-electoral disputes. They observed that the application of the procedural rules laid down in the Law on the Constitutional Court and its implementing regulations had resulted in a set of proceedings that had lacked any clearly determined purpose, remained inaccessible to the DPS and Mr Riza and been unappealable (see paragraphs 119 and 120 above). The Government considered that the two applicants had been involved in the proceedings to the extent required in order to defend their interests, as the Constitutional Court had considered their observations and replied to them in its judgment of 16 February 2010 (see paragraph 133 above).

123.  The Court observes from the outset that the applicant party disputed neither the independence nor the impartiality of the Bulgarian Constitutional Court dealing with the post-electoral case in question. It sees no reason to reach any different conclusion on that matter.

124.  The Court then notes that the Law on the Bulgarian Constitutional Court and its implementing regulations only provide for one type of proceedings for all cases submitted to it. The same procedural rules are therefore applicable to cases concerning the compatibility with the Constitution of domestic legislative provisions and to disputes concerning the lawfulness of general elections and election results. In the present case it is not the Court’s task to adjudicate *in abstracto* on the compatibility with the Convention and its Protocols of the legislature’s approach. It will confine itself to assessing whether, in the instant case, the proceedings in issue allowed the applicants to defend their legitimate interests effectively, as persons or parties participating in general elections.

125.  In the initial complaint on which the impugned proceedings were based, the leader of the RZS political party and three of its members contested the lawfulness of the election of seven DPS deputies, alleging serious violations of electoral legislation in all the polling stations operating in Turkish territory (see paragraph 22 above). The proceedings led to the annulment of the elections in 23 of the 123 polling stations in question and to the cancellation of Mr Riza’s parliamentary mandate, which had not been included in the initial complaint. The Court observes that that situation is the result of the combined effect of three specific aspects of the Bulgarian electoral system: the allocation under proportional representation at the national level of 209 parliamentary seats among the different political parties; the consideration of out-of-country votes solely for that allocation of seats at the national level; and the subsequent allocation of seats won by each party in the 31 multiple-member constituencies in Bulgaria. Having regard to those specific features of the Bulgarian electoral system, the decisions whether to annul one or more parliamentary mandates and which mandates to annul depended on the number of votes invalidated and their apportionment among the different parties. The Constitutional Court therefore had first of all to establish whether the voting procedure had been sufficiently seriously flawed to require the annulment of the results of voting. The Constitutional Court chose to limit the territorial scope of its assessment of observance of electoral legislation to the polling stations specially opened in Turkish territory because those stations had been explicitly mentioned in the initial complaint submitted to it. The Court will not question the domestic court’s choice in this respect.

126.  All the parties’ observations and the expert reports presented to the Constitutional Court concerned the question whether there had been irregularities in the voting procedure in the polling stations in Turkey, and if so, whether those irregularities had been sufficiently serious to justify annulling the results (see paragraphs 22 and 25-37 above). The reasoning set out by the Bulgarian Constitutional Court in its judgment of 16 February 2010 had been based on the same questions (see paragraphs 38-48 above). The Court considers that all these elements show that the subject matter of the dispute before the Constitutional Court, that is to say the alleged irregularity of the voting procedure in all the polling stations operating in Turkish territory, was known to all those taking part in the proceedings right from the outset.

127.  The wording of section 112 of the 2001 Electoral Law suggested that a dispute concerning the alleged unlawfulness of the election of a deputy necessarily involved the latter and the natural or legal persons disputing his or her election .... The applicant party relied on that provision to argue that the DPS and Mr Riza had been parties to the proceedings right from the outset, and at the very least since their explicit request to join the proceedings on 15 and 16 February 2010. However, it cannot be overlooked that Rule 21 (1) of the Rules of the Constitutional Court confers on it the discretionary power to determine the parties involved in proceedings before it .... It was in the framework of that power that the Constitutional Court designated a number of State institutions and bodies and two non-governmental organisations as parties to the proceedings (see paragraph 24 above).

128.  It is true that the Constitutional Court did not reply to the request submitted by Mr Riza and the DPS to be joined as parties to the proceedings. On the other hand, the National Assembly joined as a party to the proceedings on 11 August 2009 (see paragraph 24 above). The Court will not question the Constitutional Court’s choice in this regard. Owing to the specific features of the Bulgarian electoral system ... it was impossible to foresee which party or individual candidate would be affected by the final decision. In that framework, designating the National Assembly as a party to the proceedings before the Constitutional Court seemed logical because all the deputies were potentially concerned by the future judgment of that court and all the political parties which had participated in the allocation of seats under the proportional system were represented in the Assembly.

129.  On the date on which Parliament was officially designated as a party to the proceedings, the DPS had a parliamentary group comprising 38 deputies. Mr Riza, who is a Vice-President of the party, joined the ranks of his parliamentary group in October 2009 (see paragraphs 20 and 21 above). The two applicants acknowledged that it was through the intermediary of the parliamentary group that Mr Riza and the party organs had obtained a copy of the initial statement of claim (see paragraph 120 above). The Court notes that the DPS parliamentary group played a much more active role in the impugned proceedings before the Constitutional Court than the applicants would admit. Through the intermediary of the national Parliament the DPS parliamentary group presented observations on both the admissibility and the merits of the case, in which it countered the arguments set out in the appellants’ complaint (see paragraph 25 above). The Constitutional Court replied to those observations in its judgment of 16 February 2010 (see paragraphs 39-48 above). The DPS parliamentary group also pronounced on the additional expert assessment ordered by the Constitutional Court on 27 January 2010, contesting the criteria used in order to deduct from the election results the votes cast in the 23 polling stations in Turkey (see paragraph 34 above). Those criteria subsequently proved decisive for the outcome of the proceedings (see paragraphs 46-48 above).

130.  In the light of all the above factors, the Court notes that during the proceedings before the Constitutional Court the DPS parliamentary group actively defended the interests of its political party and those of Mr Riza, who was a party member. Moreover, it would appear that through the intermediary of the national Parliament, which was officially a party to the proceedings, the parliamentary group, and therefore the two applicants, had access to all the documents in the case file and were regularly updated on the progress of the proceedings (see, in particular, the content of their individual requests for leave to join the proceedings as parties in paragraph 37 above). Having regard to the circumstances of the case and notwithstanding that the two applicants were not officially parties to the impugned proceedings, the Court considers that they did actually participate in the proceedings through the intermediary of the DPS parliamentary group and that they had an opportunity to set forth their arguments against the annulment of the election results in the polling stations in Turkish territory and to contest effectively the arguments presented by the appellants.

131.  The DPS and Mr Riza also complained that no appeal had lain against the Constitutional Court’s judgment. The Court observes in that regard that none of the provisions of the Convention or the Protocols thereto require Contracting States to put in place an appeal system for electoral disputes, let alone provide for an appeal against Constitutional Court judgments, where States opt for assigning the adjudication of post-electoral disputes to such superior courts. It should also be noted that in its Code of Good Conduct in Electoral Matters, the Venice Commission recommends introducing the possibility of appealing to a tribunal solely where the first-instance decisions have been given by specialised bodies such as electoral committees (see paragraph 92 above).

132.  All the applicants contested the reasons on which the Constitutional Court had based its decision to annul the voting in 23 polling stations. The Court reiterates that it is not its task to replace the domestic courts in assessing the facts or interpreting domestic law, in this case the Bulgarian Electoral Law. It must, however, satisfy itself that the decision given by the domestic court was not arbitrary or manifestly unreasonable (see paragraph 143 above).

133.  The Court observes that the Bulgarian Constitutional Court noted the following irregularities in the electoral documents in order to justify the annulment of the voting in the 23 polling stations in question: the failure to put on file the minutes of voting in one polling station; no first page for the minutes of voting or no information on the first page concerning the number of persons voting; and failure of the chair and secretary of the local electoral commission to sign at the bottom of the list of voters registered on election day (see paragraph 46 above). The Bulgarian Constitutional Court accepted that the minutes of voting constituted the main document establishing the facts concerning voting in a given polling station, and that the absence of the first page of that document and the signatures at the bottom of the additional list of voters affected its probative value *vis-à-vis* the reality of the voting in the polling station in question (see paragraphs 46 and 47 above).

134.  The Court notes that the minutes of voting as defined by Bulgarian legislation plays a dual role in the voting process: the second page of the minutes sets out the results of the voting, and it is on the basis of those data that the Central Electoral Commission determines the election results ...; the first page of the minutes also contains the number of persons registered on the electoral roll and the number of those who actually voted on election day ... and thus serves as a basis for comparison with the electoral rolls in detecting various types of electoral fraud, such as ballot-box stuffing and the inclusion of fictitious voters on the lists of persons voting. In the present case, there were no minutes on file for just one of the polling stations in Turkish territory; as regards the other three, the first page of the minutes was missing; and in respect of another polling station the minutes failed to record the number of persons who had voted on election day (see paragraph 33 above).

135.  The Court observes that it was only in the last of those five polling stations that the irregularity concerning the minutes was, in all likelihood, committed on election day by the members of the local electoral commission and that that irregularity can therefore be considered as circumstantial evidence of electoral fraud. Given that the electoral documents from out-of-country polling stations had first of all been handed over to the Bulgarian diplomatic representatives at the close of voting on election day and only then been sent on to the Central Electoral Commission in Bulgaria ..., it cannot be ruled out that the minutes from the first of those polling stations and the first page of the minutes from the other three had gone missing at that stage. The Constitutional Court failed to look into that possibility, despite the reports from some of the members of the Central Electoral Commission that the electoral documents from Turkey had previously been opened and then resealed before being sent to the Commission (see paragraph 36 above).

136.  Without seeking to establish whether the minutes from those four polling stations had in fact been completed, signed and handed over in their entirety to the Bulgarian diplomatic services in Turkey by the corresponding local electoral commissions, the Constitutional Court merely noted their total or partial absence from the files of the competent State bodies, which automatically led to the annulment of the voting in those four polling stations. The Constitutional Court thus based that part of its decision on a factual finding which did not in itself demonstrate that there had been any kind of irregularity in the voting procedure in the four polling stations.

137.  The Constitutional Court decided to annul the elections in another 18 polling stations on the grounds that the lists of voters registered on the day of the elections had been signed neither by the chair nor the secretary of the local electoral commission. Its judgment acknowledged that the Electoral Law did not explicitly require such signatures. It nonetheless considered that such signature was one of the fundamental and obvious components of any official document and that the model “additional list of voters” approved by Presidential Decree provided for such signatures (see paragraph 47 above). The Constitutional Court thus applied by analogy the provisions on “additional lists of voters” and “under-the-line lists” drawn up in the polling stations in Bulgarian national territory ... to the specific case of the lists of non-preregistered voters drawn up on election day in the out-of-country polling stations. It annulled the voting in the 18 polling stations on the grounds that the irregularities noted in the voting lists had irremediably affected the probative value of the minutes of voting.

138.  It transpires from the case file that all the electoral documents from those 18 polling stations (ballot-papers, minutes and electoral lists) had been filed and placed at the disposal of the experts and the members of the Constitutional Court. The Court observes that the lack of the two signatures is the only irregularity that was found in those electoral documents. Moreover, the Constitutional Court acknowledged in its judgment that the absence of the signatures of the local electoral commission officials only cast doubt on the probative value of the lists of voters and consequently the accuracy of the data set out in the minutes of voting, and not the validity of the votes cast.

139.  Clearly, non-compliance with the formal requirements concerning electoral lists may point to fraud relating to the composition of the electorate. However, the Court considers that that was not necessarily the case in the specific context of the present case. It cannot be overlooked that at the material time there were omissions in the Bulgarian electoral legislation concerning the formalities to be observed by out-of-country local electoral commissions when registering voters on the electoral lists on election day. The Constitutional Court came up against that problem in the present case, and it resorted to application by analogy of the Electoral Law in order to fill the legal vacuum left by the legislature (see paragraph ... 47 ... above). However, the 18 lists of voters in question were not the only ones lacking the two signatures in question. In fact, this was a recurrent formal omission because the additional lists of voters had not been signed by the chairs and secretaries of the electoral commissions in a total 116 of the 123 polling stations in Turkish territory (see paragraph 29 above), which amounted to some 42% of all the out-of-country polling stations (see paragraph 13 above). The Court considers that that information only confirms its finding that domestic legislation was insufficiently clear on this specific point. Under those circumstances it considers that that omission, which is purely technical in nature, does not in itself demonstrate that the voting procedure in those 18 polling stations involved irregularities justifying the annulment of the election results.

140.  The Constitutional Court used an additional criterion to annul the election results in the 18 polling stations in question, that is to say the fact that none of the pre-registered voters had cast their votes in those stations. The Court nevertheless observes that domestic legislation did not require Bulgarian citizens to vote on election day, even where they had previously declared their intention to exercise their voting rights. The criterion in question is therefore a complementary one which cannot in itself reveal any particular irregularity in the voting procedure. The Constitutional Court used it exclusively to eliminate the votes cast by persons included on the unsigned additional lists.

141.  These facts are sufficient for the Court to conclude that the decision-making process implemented by the Bulgarian Constitutional Court did not comply with the standards developed in the Court’s case-law (see paragraph 143 above). In particular, the Constitutional Court annulled the election in 22 polling stations on purely formal grounds. Moreover, the elements on which that court relied to justify that part of its decision were not set out clearly and foreseeably enough in domestic law, and it had not been demonstrated that they had affected the electorate’s choice and distorted the election results.

142.  As regards the last polling station, where the results were annulled on the grounds that the number of persons voting was not mentioned on the first page of the minutes (see paragraphs 169 and 170 above), the Court observes that the Bulgarian Electoral Law in force at the material time infringed the recommendations of the Venice Commission’s Code of Good Conduct in Electoral Matters (see paragraph 92 above) by failing to provide for the possibility of organising fresh elections in the event of annulment of voting .... Such a possibility was not introduced into domestic legislation until 2011, and the rule was only applicable where the election results had been annulled in their entirety (ibid.). It is clear that the impossibility of holding fresh elections had at no stage been considered by the Constitutional Court in deciding whether the annulment of the election results, under the particular circumstances of the case, would be a measure proportionate to the aim sought to be achieved under Article 3 of Protocol No. 1, whose purpose is to ensure the free expression of voters’ wishes.

143.  The Court bears in mind that organising fresh elections in the territory of another sovereign country, even in a small number of polling stations, is always liable to come up against major diplomatic and operational obstacles and occasion additional cost. However, it considers that the holding of new elections in the last polling station, where there was cogent circumstantial evidence that the electoral commission was responsible for irregularities in the voting procedure on election day (see paragraph 170 above) would have reconciled the legitimate aim of annulling the election results, that is to say protecting the lawfulness of the electoral procedure, with the subjective rights of the voters and candidates in the general elections. The Court observes that the judgment of the Bulgarian Constitutional Court also failed to take that factor into account.

144.  On those grounds, the Court considers that the annulment by the Bulgarian Constitutional Court of the election results in the polling stations in question, the cancellation of Mr Riza’s parliamentary mandate and the DPS’ loss of a parliamentary seat assigned under the proportional system amounted to an interference in the exercise of the 101 applicants’ active electoral rights and of Mr Riza’s and the DPS’ passive electoral rights. Having regard to the lacunae noted in domestic law and the lack of any possibility of organising fresh elections, the impugned judgment, which was based on purely formal arguments, occasioned an unjustified infringement of the 101 applicants’ and Mr Riza’s and the DPS’ rights to take part in the general elections as voters and candidates respectively. There were therefore two separate violations of Article 3 of Protocol No. 1.

...

**III.  APPLICATION OF ARTICLE 41 OF THE CONVENTION**

145.  Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A.  Damage

146.  The first applicant, Mr Risa, claimed EUR 60,155 in respect of pecuniary damage, explaining that that amount was the equivalent of four years’ deputy’s salary which he would have received in the national Parliament. He also claimed EUR 15,000 in respect of non-pecuniary damage.

147.  In respect of pecuniary damage, the second applicant, the DPS, claimed an amount equal to that which it would have received in State subsidies for four years if the 18,140 votes cast for the party in the 23 polling stations in question had not been deducted from its electoral score. It presented two estimates of that sum computed in accordance with two different methods of calculation which, it submitted, depended on the changes in domestic legislation in connection with the calculation and payment of the State subsidy to political parties ...: EUR 395,507 under the first method and EUR 335,740 under the second.

148.  The other 101 applicants considered that the finding of a violation of their right as guaranteed by Article 3 of Protocol No. 1 would in itself amount to sufficient just satisfaction.

149.  The Government objected to the claims submitted by Mr Riza and the DPS. They invited the Court to declare that the finding of a violation would constitute sufficient just satisfaction. In the alternative, they submitted that the claims lodged by the first two applicants were excessive and unsubstantiated.

150.  As regards pecuniary damage, the Court observes that Mr Riza and the DPS claimed sums which they stated represented the earnings lost owing to the impugned judgment of the Bulgarian Constitutional Court for a period of four years, that is to say the whole of the 41st parliamentary term. The Court considers that those claims are not sufficiently substantiated, for the reasons set out below.

151.  First of all, the Court notes that the two applicants based their estimates on the presumption that the 41st National Assembly would complete its four-year term. In fact the Assembly was dissolved by Presidential Decree before it could complete its term (see paragraph 52 above). Secondly, the Court observes that Mr Riza, like all national parliamentary deputies, could not have been sure that he would complete his four-year term and that he did not specify the amount of alternative income he received between the time of cancellation of his mandate and the end of the 41st parliamentary term. Thirdly, the Court notes that the finding of a violation in the present case is based not only on the annulment of the elections in the polling stations in question but also on the fact that no new elections could be organised (see paragraphs 176-178 above). Thus the Court is not in a position to calculate the DPS’ lost earnings on the basis of the difference between the annulled votes and the votes which the party would have obtained following hypothetical new elections.

152.  The Court consequently considers that these two applicants’ claims in respect of pecuniary damage should be rejected.

153.  As regards compensation for alleged non-pecuniary damage, in view of the specific circumstances of the case the Court considers that the finding of a violation of the voting rights of the 101 applicants listed in the appendix and the finding of a violation of Mr Riza’s right to stand for election represent sufficient just satisfaction for the non-pecuniary damage which they sustained.

B.  Costs and expenses

154.  The DPS also claimed EUR 5,300 for costs and expenses, which sum corresponded to the legal fees incurred before the Court. The other 101 applicants claimed EUR 3,400 for costs and expenses, which sum they stated corresponded to legal fees incurred before the Court.

155.  The Government considered that the sums claimed under this head by the applicants were excessive and unsubstantiated.

156.  According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum.

157.  In the present case, the Court observes that all the applicants were represented by the same lawyer and that the pleas put forward by the applicants were largely identical. In view of those circumstances, the documents presented and its relevant case-law, the Court considers it reasonable to award the sum of EUR 6,000 EUR jointly to the DPS and the other 101 applicants.

C.  Default interest

158.  The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1.  *Decides* to join to the merits the Government’s objection concerning the applicants’ victim status with regard to the complaints under Article 3 of Protocol No. 1 to the Convention, and rejects it;

2.  *Declares*, unanimously, the application admissible as regards the complaints under Article 3 of Protocol No. 1 ...;

3.  *Holds*, unanimously, that there has been a violation of Article 3 of Protocol No. 1 as regards the voting rights of the 101 applicants whose names are appended to the judgment;

4.  *Holds*, by six votes to one, that there has been a violation of Article 3 of Protocol No. 1 as regards the right of Mr Riza and the DPS to stand for election;

5.  *Holds*, unanimously,

(a)  that the finding of a violation would constitute sufficient just satisfaction for the violation of the voting rights of the 101 applicants whose names are appended and for the violation of Mr Riza’s right to stand in the general elections;

(b) that the respondent State is to pay jointly to the DPS and to the 101 applicants whose names are appended hereto, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 6,000, to be converted into Bulgarian levs at the rate applicable at the date of settlement;

(c)  that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6.  *Dismisses*, unanimously, the remainder of the applicants’ claim for just satisfaction.

Done in French, and notified in writing on 13 October 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos Guido Raimondi  
 Registrar President

The following separate opinions are appended to the present judgment pursuant to Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court:

–  concurring opinion by Judge Wojtyczek;

–  partly dissenting opinion by Judge Kalaydjieva.

G.R.A.  
F.E.P.

APPENDIX

List of applicants in case no. 48377/10

1. Emrula Fikret HASAN, born in 1988, living in Kanyak
2. Fahrie Hasanova ABILOVA, born in 1956, living in Cherkovna
3. Mehmed Mehmed ADEM, born in 1970, living in Dropla
4. Ahmed Mustafa AHMED, born in 1953, living in Osenovets
5. Beyzat Myustedzheb AHMED, born in 1963, living in Golyam Porovets
6. Fatme Ismail AHMED, born in 1938, living in Dzhebel
7. Hasan Sali AHMED, born in 1936, living in Dzhebel
8. Niyazi Mehmedov AHMEDOV, born in 1952, living in Gorna Hubavka
9. Ikbale Yumerova AHMEDOVA, born in 1961, living in Pristoe
10. Fikri Mehmed ALI, born in 1968, living in Guliyka
11. Esat Mustafa ALIOSMAN, born in 1965, living in Balabanovo
12. Reshad Ferad ALIOSMAN, born in 1956, living in Duhovets
13. Stefka Yulianova ANGELOVA, born in 1978, living in Yakim Gruevo
14. Kalin Asenov ASENOV, born in 1959, living in Yablanovo
15. Marin Asenov ASENOV, born in 1954, living in Podayva
16. Velyo Zafirov AVRAMOV, born in 1952, living in Kliment
17. Shaban Sali BALABAN, born in 1961, living in Balabanovo
18. Mahir Muharem BILYAL, born in 1961, living in Sredoseltsi
19. Emil Semov BONEV, born in 1951, living in Vazovo
20. Mehmet BOYADZHA, born in 1991, living in Zarnevo
21. Yakim Angelov DAMYANOV, born in 1963, living in Duhovets
22. David Borisov DAVIDOV, born in 1948, living in Todorovo
23. Remzi Ibryam DERVISH, born in 1971, living in Bagriltsi
24. Ilyaz Myumyun DURMUSH, born in 1937, living in Ptichar
25. Syuleyman Hyusein DZHELIL, born in 1949, living in Duhovets
26. Nevin Yusnyu DZHINDZHI GERDZHIK, born in 1977, living in Dulovo
27. Shevked Myumyun EMURLA, born in 1955, living in Kardzhali
28. Zahari Minkov FIDANOV, born in 1951, living in Duhovets
29. Yuliyan Zamfirov GAYGYOV, born in 1956, living in Ratlina
30. Imren Sabri GORAL, born in 1984, living in Semerdzhievo
31. Myumin GYULER, born in 1990, living in Chernooki
32. Dincher Remzi HADZHIMEHMED, born in 1974, living in Dzhebel
33. Myumyun Ahmed HADZHIMEHMED, born in 1952, living in Balabanovo
34. Ismail Mehmed HALIM, born in 1949, living in Pchelina
35. Shevked Ahmedov HALIMOV, born in 1954, living in Izgrev
36. Ahmed Hyusein HAMZA, born in 1950, living in Ratlina
37. Martin Martinov HARIZANOV, born in 1947, living in Mortagonovo
38. Sami Shakirov HASANOV, born in 1942, living in Yasenovets
39. Hikmet Kasim IBRYAM, born in 1952, living in Kubrat
40. Ibryam Raim IBRYAM, born in 1946, living in Bezmer
41. Mehmed Myumyun IBRYAM, born in 1957, living in Chernooki
42. Filip Ivanov IGNATOV, born in 1955, living in Orlyak
43. Iliya Mirchev ILIEV, born in 1942, living in Sredkovets
44. Rumen Ananiev ILIEV, born in 1954, living in s. Kliment
45. Ali Mustafa ISA, born in 1954, living in Yablanovo
46. Ayshe Hamza ISA, born in 1954, living in Yablanovo
47. Maya Martinova ISAYEVA, born in 1952, living in Shumen
48. Ismail Adem ISMAIL, born in 1946, living in Isperih
49. Emine Hyusein KARAMOLLA, born in 1979, living in Benkovski
50. Nedko Filipov KARDZHIEV, born in 1958, living in Venets
51. Aynur Ismail KASIM, born in 1981, living in Zarnevo
52. Ahmed Shaban KUPLEDIN, born in 1938, living in Mortagonovo
53. Emil Yordanov KYOSEV, born in 1944, living in Provadiya
54. Mustafa Kyazamov KYUCHUKHASANOV, born in 1949, living in Yablanovo
55. Elif Ibryamova KYUCHYUKHASANOVA, born in 1952, living in Yablanovo
56. Emil Milkov MANOV, born in 1953, living in Sredkovets
57. Beyram Kerim MEHMED, born in 1955, living in Kitanchevo
58. Hyuray Mehmed MEHMED, born in 1989, living in Dropla
59. Lyutfi Zakir MEHMEDEMIN, born in 1951, living in Mortagonovo
60. Ahmed Karani MEHMEDOV, born in 1963, living in Hitrino
61. Sali Ibryamov MEHMEDOV, born in 1938, living in Veselina
62. Aygyul Mehmed MESRUR, born in 1967, living in Boil
63. Genadiy Asenov METEV, born in 1961, living in Beli Lom
64. Nikolay Marinov MIHAILOV, born in 1961, living in Sokolartsi
65. Boyan Evgeniev MIHAYLOV, born in 1957, living in Bistra
66. Snezhina Milanova MITEVA, born in 1953, living in Ratlina
67. Stiliyan Mladenov MLADENOV, born in 1947, living in Beli Lom
68. Redzheb Akif MUHAREM, born in 1954, living in Kapinovtsi
69. Ema Asenova MURATOGLU, born in 1970, living in Zarnevo
70. Sali Ahmedov MUSOV, born in 1944, living in Ratlina
71. Ahmed Ibryam MUSTAFA, born in 1950, living in Kardzhali
72. Efraim Dzhemail MUSTAFA, born in 1939, living in Kliment
73. Mustafa Esat MUSTAFA, born in 1989, living in Balabanovo
74. Mustafa Fikret MUSTAFA, born in 1981, living in Targovishte
75. Ahmed Durmush MYUMYUN, born in 1954, living in Kardzhali
76. Bayryam Beysim MYUMYUN, born in 1963, living in s. Izgrev
77. Ismet Myumyunov MYUMYUNOV, born in 1970, living in Spoluka
78. Lefter Marinov OGNYANOV, born in 1952, living in Yablanovo
79. Mladen Slavov OGNYANOV, born in 1951, living in Haskovo
80. Syuleyman Mustafa OSMAN, born in 1956, living in Chernooki
81. Vadet Nazif OSMAN, born in 1952, living in Duhovets
82. Miroslav Sabev PRESIYANOV, born in 1951, living in Konop
83. Svetlin Naydenov RADEV, born in 1957, living in Todorovo
84. Hyusein Hyusein REDZHEB, born in 1949, living in s. Duhovets
85. Redzheb Shakir REDZHEB, born in 1933, living in Takach
86. Nevise Hasan RUFAD, born in 1971, living in Dzhebel
87. Ivaylo Nikiforov SABEV, born in 1959, living in Nozharovo
88. Syuleyman Mehmed SADAK, born in 1948, living in Kardzhali
89. Byulent Ahmed SADETIN, born in 1985, living in Kitnitsa
90. Yakub Shaban SALI, born in 1950, living in Isperih
91. Sali Salimehmed SALISH, born in 1954, living in Aytos
92. Marko Minchev SEVDALINOV, born in 1962, living in Ludogortsi
93. Ibryam Arifov SHAKIROV, born in 1949, living in Ardino
94. Fari Redzheb SHEVKED, born in 1960, living in Rani list
95. Mitko Andreev TODOROV, born in 1933, living in Cherencha
96. Anton Asenov TSENKOV, born in 1934, living in Kliment
97. Shamsidin Salim VELI, born in 1951, living in Duhovets
98. Shefkie Shefket VELI, born in 1965, living in Shumen
99. Nadzhi Samiev YAHOV, born in 1954, living in Isperih
100. Mincho Adriyanov YOSIFOV, born in 1960, living in Duhovets
101. Alben Varadinov YURUKOV, born in 1955, living in Ratlina

CONCURRING OPINION OF JUDGE WOJTYCZEK

(Translation)

1.  In the present case, even though I voted for finding a violation of Article 3 of Protocol No. 1 I am not quite convinced by the majority’s reasoning.

2.  The majority organise their reasoning as follows: finding of the existence of an interference with the right protected, and then examination of whether the interference was justified. This approach raises a number of questions in the instant case.

First of all, finding an interference with a right presupposes a precise definition of the content of the right in question and its scope. The approach based on analysis of the interference usually comprises three steps, namely defining the content of the right in question and its scope (in German, *Schutzbereich*), establishing the existence of an interference (*Grundrechtseingriff*), and verifying the legitimacy of the interference *(Rechtfertigung*). However, in the present case the first step (defining the content of the right and its scope) is partly absent.

Secondly, the approach described, which was developed by German case-law and science of fundamental rights, is very useful in the case of rights which allow restrictions. Such rights, as defined by the Convention, are *prima facie* rights which protect the right-holder against illegitimate interferences and whose actual content in fact depends on the extent of the restrictions which can be imposed under the Convention. The specific content of certain rights may make the approach described above inapplicable. That applies in particular to the case of rights which may not be restricted: for such rights a finding of an interference is equivalent to a finding of a violation of the right in question, without any need to consider the legitimacy of the interference.

The wording of Article 3 of Protocol No. 1 places more emphasis on the objective guarantees on free elections than on citizens’ subjective rights. That provision nevertheless allows us to infer from those objective guarantees the existence of guarantees on the individual rights to vote and to stand for parliamentary elections. However, the exact content of those subjective rights must be established in the light of the objective guarantee on free elections. Electoral rights are therefore the rights to vote in the framework of free elections and to influence the composition of Parliament by voting. The passive electoral right is the right to compete for a parliamentary seat in a free election. The very notion of free elections presupposes a number of elements, including, for example, equal opportunities among candidates and parties and a voting procedure which ensures that the official results of the elections accurately reflect the votes cast by the voters. It also follows from Article 3 that universal suffrage and the limitations on the scope *ratio* *personae* of active and passive electoral rights can be analysed in accordance with the schema set out above (scope, interference, justification). On the other hand, that tripartite schema does not seem suited to apprehending irregularities in the voting procedure which cast doubt on the fairness of the election.

Moreover, it should be emphasised that electing the legislature is a long and complicated procedure which begins within the announcement of the date of the elections and ends with the final judicial decisions on any disputes concerning the outcome of the voting. The electoral procedure is not finished until the courts have decided on possible electoral disputes. The results announced by an electoral commission which are contested before a judicial body cannot be taken as the reference point for assessing interferences with the rights secured under Article 3 of Protocol No. 1.

Although the majority do not begin their argumentation by defining the active electoral right, such a definition is nonetheless set out in the judgment with sufficient precision for the assessment of the present case: the active electoral right is the right to vote and to influence the make-up of the legislature (see paragraph 148). The fact that some of the votes validly cast by the voters were not counted may amount to an interference with those persons’ exercise of the active electoral right.

Conversely, the reasoning of the judgment offers no definition of the passive electoral right, which rather undermines the conceptualisation of the interference with that right. In the majority’s view, the fact that the electoral score obtained by the Movement for Rights and Freedoms was decreased and Mr Riza lost his seat following the Constitutional Court’s decision constituted in itself an interference with those two applicants’ exercise of their passive electoral rights. It is difficult to follow this part of their argument. The judge’s decision to revise voting results declared by a national commission is a major element of the electoral process leading to proclamation of the final outcome of the elections. The fact that a candidate loses his mandate or that a party loses votes and seats as compared to the original official proclamation of the results following a decision by an electoral court does not in itself constitute an interference with the exercise of the passive electoral right. In the present case, the interference with the passive electoral rights of Mr Riza and the Movement for Rights and Freedoms did not consist of a reduction by a court of the electoral score as compared to the previously proclaimed official result but stemmed from a number of irregularities committed during the elections, which created a situation whereby the official final results did not accurately reflect the reality of the polling.

3.  The parliamentary elections held in Bulgaria in 2009 were assessed by the Organisation for Security and Cooperation in Europe (Republic of Bulgaria Parliamentary Elections, 5 July 2009, OSCE/ODIHR, Limited Election Observation Mission Final Report, Warsaw 30 September 2009) and by the Council of Europe (Observation of Parliamentary Elections in Bulgaria (5 July 2009), Ad hoc Committee of the Bureau of the Assembly, 16 September 2009, Doc. 12008). According to the general conclusions of those reports the elections complied with the main international standards, although a number of difficulties were noted. The OSCE report states, in particular: “According to the law, there is no obligation to register to vote and therefore no formal electoral list for out-of-country voters is compiled. Thus, any citizen may vote at a PEC [Precinct Election Commission] abroad upon presenting a Bulgarian passport or military identification. This was perceived by some interlocutors as a possible mechanism for multiple voting. Some 57,346 individuals pre-registered at embassies and were then deleted from the domestic voter lists”. The same report sets out the following recommendation: “(o)ut-of-country procedures should be further regulated to include safeguards against possible multiple voting”. For its part, the Ad hoc Committee of the Bureau of the Parliamentary Assembly of the Council of Europe stated in its report that “(t)he use of absentee voting certificates (AVCs) and out-of-country voting were widely regarded as possible mechanisms for multiple voting” (§ 28).

4.  The present case highlights a whole series of irregularities linked to out-of-country voting which led to a dispute concerning the validity and the tallying of 18,358 votes in 23 polling stations in Turkey: absence of voting minutes, missing first page of the minutes or lack of signatures on certain documents at the bottom of the list of registered voters. The majority also, quite rightly, noted a number of deficiencies in the electoral legislation in force in 2009, including the lack of clarity and precision of the Electoral Law on a number of points and the fact that the electoral court could not order the holding of new elections.

Nevertheless, the reasoning of the Court’s judgment is based on the idea that the irregularities in the electoral process were of a minor nature and did not justify the decision to exclude the 18,358 ballot papers in question. The majority take the view that the Constitutional Court should have decided to count all those votes except those cast in one polling station, where fresh elections should have been organised. If we adopt this reasoning the violation of Article 3 of Protocol No. 1 by Bulgaria stemmed from the judgment delivered by the Constitutional Court.

I take the view that the issues under Article 3 of Protocol No. 1 did not begin with the judicial review of the elections but well before that stage. In the light of the OSCE and Council of Europe reports, we must be careful not to underestimate the extent of the irregularities committed during the voting and the vote tallying in the polling stations in question. Those irregularities could have had an impact on the election results. It is difficult to determine the precise number of votes actually obtained by the different competing lists in the polling stations in question, or to establish whether the 18,358 ballot papers from those polling stations correspond to valid votes and accurately reflect the results of the voting. At any event, it would be safer in that case to use the expression “ballot papers” rather than “votes”.

When a political party appealed to the Bulgarian Constitutional Court, the latter felt obliged to react to the irregularities revealed. It should be emphasised at the same time that in the context of the various imperfections in the Bulgarian Electoral Law, that court’s margin of manoeuvre was limited. It faced the following choice: to accept the validity of the ballot papers in the polling stations in question, annul the elections in those stations, or accept the validity of the ballot papers in some of those polling stations and annul the elections in others. None of those three solutions would seem fully satisfactory, and therefore the judicial review was unable to remedy the irregularities committed at previous stages in the electoral process.

Under the conditions described above, the violation of Article 3 of Protocol No. 1 stemmed from the imperfections in the law and the irregularities committed during the various phases of the electoral procedure which had not been satisfactorily remedied during the judicial review of the election. It is not just the judgment of the Constitutional Court taken on its own but the whole electoral procedure which does not fully comply with the standards of Article 3 of Protocol No. 1 and which justifies a finding of a violation of that provision.

5.  The Venice Commission’s Code of Good Conduct in Electoral Matters recommends allowing for the partial or total annulment of an election and calling fresh elections. However, that solution also has a number of drawbacks. A new election necessarily throws up new issues and novel campaign themes and triggers different electoral behaviour. Those differences are particularly acute where votes cast on different dates are tallied together at the national level with a view to apportioning seats among the candidate lists. Furthermore, in the event of fresh elections organised out of the country, regard must be had to other problems beyond the difficulties rightly highlighted in paragraph 178 of the judgment. The make-up of the out-of-country electorate can quickly change as voters move around. Effective mechanisms must also be introduced to prevent electors having already voted once in the national territory or outside the country, in polling stations in which the voting has not been annulled, from voting again.

Under those conditions, it is vital that clear and precise legislation is put in place, providing effective guarantees for the lawfulness of all stages in the electoral procedure, thus minimising the risk of the election results having to be challenged in court.

PARTLY DISSENTING OPINION OF JUDGE KALAYDJIEVA

I agreed with the majority that the examination of the regularity of the voting process by the Constitutional Court of Bulgaria constitutes an interference with the applicants’ rights to democratic elections as guaranteed by Article 3 of Protocol no.1 to the Convention. In so far as this interference concerned a completed stage of the electoral process, in my view its necessity was justified by definition for the purposes of ensuring that the electoral process duly complied with all procedures, which are at the core of the authority voters place in elected officials. The majority did not express any doubts or concerns in this regard.

However, the very fact of “interference” with or restriction of individual rights does not in itself suffice to find that they were necessarily violated. Such a finding normally requires a further analysis of their lawfulness and proportionality to the pursued legitimate aim. In this regard I remain unconvinced that the exercise of a Constitutional Court’s competence and/or the rights guaranteed by Article 3 of Protocol 1 lend themselves to a similar analysis and the majority did not carry it out.

Instead, reaffirming formally the well-established principle that the requirements of Article 6 are not applicable to decisions of Constitutional courts, in §§ 153-179 the majority nonetheless deemed it appropriate to assess the manner, in which the Constitutional Court exercised its competence under the inapplicable criteria of this provision. Stopping only a step before formally declaring the impugned decision arbitrary, the scope of this analysis ranges from questioning the initial necessity to accept the request for examination of the regularity of the electoral process, through the scope of this examination and the sufficiency of its reasoning, to criticize the procedure applied by the Constitutional Court, culminate in rejection of the interpretation of the domestic law so as to finally reach an overall conclusion that this “interference amounted to a violation” of all applicants’ rights to democratic elections.

In my understanding and in the previous jurisprudence of this Court, each and all of these issues belong exclusively to the competence of the Constitutional Court and should remain there. I find certain irony in the fact that it is in my last dissenting opinion that I am for the first time compelled to remind that the ECHR cannot substitute itself for the competent national courts if it is to remain faithful to the principle of its own subsidiary role. However, the occasion seems overwhelmingly appropriate.

Like my learned colleague judge Wojtyczek, I believe that the present case concerns neither a “flagrant malfunctioning” of the Constitutional Court in exercising its competence to ensure a lawful electoral process, nor any arbitrary or wrong conclusion reached in the case before it. In this regard I fully agree with his conclusion that “[i]t is not just the judgment of the Constitutional Court ... but the whole electoral procedure which does not ... comply with the standards of Article 3 of Protocol No. 1”. For me the problematic aspects of the exercise of the applicants’ rights under Article 3 of Protocol No. 1 are rooted and limited to the absence of opportunities to hold re-elections. I have no doubt that in the present case the majority would have reached different conclusions had there been an opportunity for the applicants to participate in a second round of elections so as to correct the procedural flows found by the Constitutional Court.

Article 3 of Protocol No. 1 envisages first and foremost a “positive obligation” of states to “undertake to hold free elections” so as to “ensure the free expression of the opinion of the people in the choice of the legislature” as well as the implicit in Article 3 of Protocol No. 1 subjective rights to vote and to stand for election.

I regret being unable to follow the findings of my learned colleagues in the absence of due analysis of the scope of the positive obligation to “undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature” and the extent, to which it was met in the present case, of appropriate distinctions in the scope and nature of the individual rights guaranteed by this provision and the different potential effect of the decision of the Constitutional Court alone or in conjunction with the absence of opportunities to hold re-elections in implementing this decision.

I have voted for finding a violation of the rights of the 101 applicants in application no 48377/10 for reasons based on a humble attempt for such a different analysis. The operative part of the decision of the Constitutional Court explicitly states that (§ 48 of the judgment) “***the votes in question had been valid*** under domestic legislation but that they had been deducted from the election results owing to the irregularity of the voter lists and the voting minutes”. My understanding of this decision in Convention terms is that even if valid *per se*, the votes were not cast “in conditions which [ensured and allowed a verification of] the free expression of the opinion of the people in the choice of the legislature” and this required the entire flown process to be disregarded. However, in the absence of opportunities for re-elections capable of correcting these flows, a restoration of the 101 applicants’ opportunities to exercise their right to “influence” the choice of legislature was not envisaged. Thus, failing to meet the positive obligation to “undertake to hold [a new round of] free elections” in proper “conditions to ensure the free expression of the opinion of [the applicants’ and over 18 000 other voters] choice of the legislature”, the implementation of the decision of the Constitutional Court had the ultimate and direct effect of disregarding altogether the applicants’ rights to vote.

Article 3 of Protocol No. 1 protects also the right of Mr. Riza and the DPS party to stand as candidates in elections. However, it does not guarantee any right to win a seat in Parliament as they appear to complain. It should first of all be noted that it cannot be said that the quashing of the initially announced election of Mr. Riza and his seat as a candidate of the applicant party were the direct result of the quashed electoral process in the affected constituencies in the circumstances of a proportionate electoral system. This situation might have been different if Mr. Riza had won a seat for the applicant party in the affected constituency as a candidate in a majoritarian electoral system.

Nonetheless, in this regard the majority’s finding of a violation of the rights of these two applicants seems to be based on the premise that in quashing the result in favour of the two applicants, the decision of the Constitutional Court had a direct and unjustified detrimental effect on their right to stand for elections. I failed to join the majority in this finding since I fail to discern any such causal link. In contrast to the directly affected rights of the 101 applicants in application no. 48377/10 to vote, Article 3 of Protocol No. 1 does not guarantee a right to be elected and the majority failed to specify how this decision affected the right to stand for as candidates, or limited it contrary to the requirements of Article 3 of Protocol No.1. For the reasons pointed above, I fail to follow the majority’s conclusions on this decision and I share the opinion of judge Wojtyczek that ““[i]t is not just the judgment of the Constitutional Court ... which does not ... comply with the standards of Article 3 of Protocol No. 1”.

While it is true that the results of the elections, which were victorious for the applicants, were quashed, this decision was based on established procedural flows and did not affect the two applicants’ right to stand for elections on either national or local level in any manner like questioning the validity of the applicant party’s registration, or of Mr. Riza’s place on its list.

Like in the applications of the 101 voters, the focus of the scrutiny in the two applicants’ situation should in my view fall on the effect of the implementation of the Constitutional Court’s decision on the right to stand as equal candidates and not on their situation as former or potential winners in the elections. While meeting the undertaking to hold free [re]-elections would have been capable of remedying the situation of the 101 voters in directly restoring their effective opportunities to vote, it is not clear whether a new round of free elections might have resulted in the re-election of Mr. Riza and the restoration of the initial number of seats of representatives of the applicant party in Parliament. The Court may not speculate on the potential outcome of re-elections in the circumstances of the inherent lottery of the proportionate electoral system like the one in the present case. The applicants do not complain that they were deprived of an opportunity to stand for elections in a second round and the extent to which their chances to win in it fall under the scope of Article 3 of Protocol No.1 is questionable.

In the present case the absence of opportunities for re-elections to correct the established flow clearly curtailed the rights of the 101 applicants-voters so as to impair their very essence and deprive them of their effectiveness. However, this is not necessarily true in regard of the rights of applicants Riza and DPS to stand for elections in a proportionate electoral system. At the end of the day Article 3 of Protocol No. 1 guarantees an individual right to stand for elections, but not necessarily to win them.

5 October 2015

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## **CASE OF STRØBYE AND ROSENLIND v. DENMARK**

(Applications nos. 25802/18 and 27338/18)

JUDGMENT

Art 3 P1 • Vote • Disenfranchisement of persons divested of legal capacity affecting only a small group and subject to thorough parliamentary and judicial review • Measure not amounting to automatic blanket restriction affecting all mentally disabled or those under guardianship • Absence of European or international consensus on the matter • Wide margin of appreciation not overstepped • No requirement under Art 3 P1 for a specific and individualised assessment of voting capacity when depriving a person of his or her right to vote • Eventual reduction of restrictions after careful and gradual assessment not to be held against the Government

Art 14 (+ Art 3 P1) • Discrimination • Differential treatment in pursuit of a legitimate aim and proportionate

STRASBOURG

2 February 2021

**FINAL**

**06/09/2021**

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revisionIn the case of Strøbye v. Denmark,

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

Marko Bošnjak, President,  
 Jon Fridrik Kjølbro,  
 Aleš Pejchal,  
 Valeriu Griţco,  
 Branko Lubarda,  
 Pauliine Koskelo,  
 Saadet Yüksel, judges,  
and Stanley Naismith, Section Registrar,

Having regard to:

the applications (nos. 25802/18 and 27338/18) against the Kingdom of Denmark lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Danish nationals, Mr Tomas Strøbye (the first applicant) and Mr Martin Rosenlind (the second applicant), on 25 May 2018;

the decision to give notice to the Danish Government (“the Government”) of the applications;

the observations submitted by the respondent Government and the observations in reply submitted by the applicants;

the comments submitted by the European Network of National Human Rights Institutions (ENNHRI), which was granted leave to intervene by the President of the Section (Article 36 § 2 of the Convention and Rule 44 § 2 of the Rules of Court);

Having deliberated in private on 15 December 2020,

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

**INTRODUCTION**

1.  In 1984 and 2009, respectively, the applicants were deprived of their legal capacity. Consequently, they were not entitled to vote, inter alia, in the 2015 parliamentary elections. They brought their case before the domestic courts, maintaining that their disenfranchisement was in contravention of Article 29 of the Danish Constitution, the Convention, and/or the UN Disability Convention. The courts found against them.

2.  The applicants complained of a breach of their right to vote under Article 3 of Protocol No. 1 to the Convention, taken alone or read in conjunction with Article 14 of the Convention.

**THE FACTS**

3.  The first applicant was born in 1966. He lives in Frederiksberg. The second applicant was born in 1987. He lives in Greve. The applicants were represented by Mr Christian Dahlager, a lawyer practising in Copenhagen.

4.  The Government were represented by their Agent, Mr Michael Braad, from the Ministry of Foreign Affairs, and their Co-Agent, Mrs Nina Holst-Christensen, from the Ministry of Justice.

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

6.  The first applicant was declared legally incompetent to manage his financial and personal affairs by the Copenhagen City Court (Københavns Byret) on 20 March 1984, as the conditions for declaring him legally incompetent under sections 2(1)(i) and 46 of the then applicable Act on Legal Competence (myndighedsloven) and part 43 of the Administration of Justice Act (retsplejeloven) were found to have been met.

7.  In 1996, the Act on Legal Competence was replaced by the Guardianship Act (værgemålsloven), which distinguished between (i) persons who under the Act’s section 5 were subject to guardianship but remained legally competent, and (ii) persons who were both subject to guardianship under section 5 and had been deprived of their legal capacity under section 6. Only those who had been deprived of their legal capacity under section 6 were to be considered legally incompetent.

8.  The second applicant was placed under financial guardianship and deprived of his legal capacity by order of the District Court of Roskilde (Retten i Roskilde) on 23 March 2009. The District Court gave the following reasoning:

“On the basis of the [submitted] medical certificate, it is considered a fact that [the second applicant] is unable to manage his financial affairs because of mental disability, for which reason he requires financial guardianship and requires to be deprived of his legal capacity in order to prevent him from incurring more debt.

Accordingly, the conditions for financial guardianship set out in section 5(1) of the Guardianship Act and the conditions for deprivation of legal capacity set out in section 6(1) of the Guardianship Act have been met. For that reason, an order for financial guardianship and deprivation of legal capacity is granted.”

9.  Under section 29 of the Constitution, and section 1 of the Danish Act on Parliamentary Elections, persons who were legally incompetent did not have the right to vote in general elections.

10.  Consequently, the applicants were not entitled to vote, inter alia, in the parliamentary elections that took place on 18 June 2015.

11. By a statutory amendment (Act no. 391 of 27 April 2016), persons who were legally incompetent were given the right to vote in European Parliament elections and in local and regional elections, but not in national parliamentary elections.

12.  The applicants, joined by two other persons, instituted proceedings before the Danish courts, claiming that they had wrongfully been denied the right to vote in the parliamentary elections on 18 June 2015. They relied, inter alia, on Article 3 of Protocol No. 1 to the Convention, both taken alone and in conjunction with Article 14 of the Convention.

13.  The Danish Ministry of Social Affairs and the Interior (Social- og Indenrigsministeriet), against whom the above-mentioned proceedings were brought, contested the claims.

14.  Before the High Court of Eastern Denmark (Østre Landsret), a written statement submitted by the first applicant was read out. According to that statement, as read out by the first applicant’s mother:

“He suffered brain damage after being immunised during his first year [of life]. He currently lives at the Egmont folk high school [Højskolen] in Hou. He is able to write with [the help of a third party supporting his] hand and wrote the statement because, unfortunately, he was not able to travel from Jutland to attend the trial hearing. For many years, he has had to share a single vote in general elections with his mother, who is his guardian. They have not always had the same perception of the political landscape. It is humiliating for him not to have the right to cast his own vote, and he would therefore be very pleased if judgment were to be delivered in his favour. According to his papers, he was deemed to be unteachable. However, neuropsychologists and occupational therapists have now been persuaded [that he has some] intellect. He asks for justice.”

15.  Before the High Court, the second applicant stated:

“He lives in Greve in his own flat, which is part of a group home. A mentor comes every Wednesday to help him clean, do grocery shopping and read his mail. He is thirty-five years old [sic]. He works on the Glad Foundation reception desk every day from 8 a.m. until usually 2 p.m. or 3 p.m. There are always two employees at work on the reception desk, and on Fridays there are three. He felt sad and disappointed about not being allowed to vote in the general elections in June 2015, when everybody else was allowed to. He feels like an outcast from society. He reads the Metroexpress newspaper and is interested in politics. He watches the TV2 news before going to work, and he watches the “TV-Avisen” news on the DR1 channel in the evening. He was deprived of his legal capacity because it is difficult for him to manage his financial affairs. He requested a guardian himself. He asked his mentor to organise the [relevant] paperwork that had to be submitted to the State Administration (Statsforvaltningen). Later the case was heard in court.”

16.  In its judgment of 29 June 2017, the High Court dismissed the claim. The High Court gave the following reasoning:

“...The provisions of the Constitution [regarding the right to vote] (previously section 35 and section 30, and now section 29) have continuously been construed by the legislature to mean that persons deprived of their legal capacity under section 2 and section 34 of the former Act on Legal Competence and, since the effective date of the Guardianship Act, under section 6 of the Guardianship Act, do not have the right to vote in general elections. This understanding also seems to be supported to a predominant extent in printed legal literature on the subject.

The High Court concurs with this understanding of section 29 of the Constitution and finds, without taking into account the significance of Denmark’s international obligations, that there is no basis for a different interpretation of the provision.

...

Accordingly, and since the High Court finds that the provisions of the international conventions acceded to by Denmark and relied upon by the plaintiffs and the intervener do not imply that the very limited number of persons deprived in full of their legal capacity by a court order under section 6 of the Guardianship Act, but who otherwise meet the conditions for suffrage in general elections, also have an absolute and unconditional right to vote in general elections, and since such legal status is not recognised in the judgments of the Court relied upon by the parties and the intervener, the High Court finds for the Ministry of [Social] Affairs and the Interior.”

17.  The applicants appealed against the judgment to the Supreme Court, which by a judgment of 18 January 2018, upheld the decision of the High Court. The Supreme Court gave the following reasoning:

“The right to vote (claims 1 and 2)

Under section 29 of the Constitution, persons declared ‘legally incompetent’ do not have the right to vote in general elections. For the reasons given by the High Court, the Supreme Court concurs with the view that persons deprived of their legal capacity under section 6 of the Guardianship Act must be considered legally incompetent within the meaning of the Constitution, for which reason they do not have the right to vote in general elections. Section 1 of the Parliamentary Elections Act is worded accordingly.

Notwithstanding Denmark’s international obligations, the Supreme Court cannot allow the appellants’ arguments that section 1 of the Parliamentary Elections Act is inapplicable and that they had the right to vote in the 2015 general election. The Supreme Court therefore concurs with the judgment delivered by the High Court in favour of the Ministry of [Social] Affairs and the Interior as regards claims 1 and 2.

Entitlement to compensation (claim 3)

The question is now whether the appellants’ rights under, in particular, the European Convention for the Protection of Human Rights and Fundamental Freedoms were violated and, if so, whether the appellants are entitled to compensation.

Under Article 3 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Contracting States undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

According to the case-law of the European Court of Human Rights, this provision guarantees individuals the right to vote and to stand for election, but this right is not absolute, and the Contracting States must be allowed a margin of appreciation in that sphere – see in this respect, inter alia, paragraph 115 of the judgment delivered on 16 March 2006 in Ždanoka v. Latvia (application no. 58278/00) and paragraphs 57 and 62 of the judgment delivered on 6 October 2005 in Hirst v. the United Kingdom (no. 2). It furthermore appears from those judgments that restrictions on the right to vote should not automatically adhere to the same criteria as those applied with regard to interference with other Convention rights; that interference must be necessary in a democratic society. However, restrictions on the right to vote must not be arbitrary or disproportionate, or thwart the free expression of the people in the choice of the legislature. When determining whether a restriction on the right to vote is compatible with the Convention, the European Court of Human Rights takes into account whether the restriction pursues a legitimate aim and whether it is proportionate to that aim.

In the judgment of 20 May 2010 in Alajos Kiss v. Hungary, which concerned a provision of the Hungarian Constitution providing that persons placed under total or partial guardianship did not have the right to vote, the European Court of Human Rights was satisfied that the restriction pursued a legitimate aim. That aim was to ensure that only citizens capable of assessing the consequences of their decisions and of making conscious and judicious decisions should participate in public affairs. The European Court of Human Rights found, however, that the Hungarian measure was disproportionate, for which reason it constituted a violation of Article 3 of Protocol No. 1. In making that assessment, the European Court of Human Rights took into account the fact that the Hungarian Constitution did not distinguish between persons under total and persons under partial guardianship, and that there was no evidence that the competing interests had been weighed in order to assess the proportionality of the restriction. It furthermore appears from the judgment that 0.75% of the Hungarian population of voting age had been disenfranchised on account of being under guardianship, that the European Court of Human Rights considered that that was a significant figure, and that it could not be claimed that the restriction on the right to vote was negligible in its effects. The European Court of Human Rights found that the absolute disenfranchisement of all persons under partial guardianship without due consideration being given to [the degree of] their mental disability did not fall within an acceptable margin of appreciation, referring, inter alia, to the fact that the margin of appreciation allowed the Contracting States is substantially narrower if disenfranchisement applies to a particularly vulnerable group in society and that weighty reasons are required for such disenfranchisement. When the applicant lost his right to vote as a consequence of the automatic disfranchisement imposed, without access to any remedy, on persons under partial guardianship, he suffered a violation, for which reason the European Court of Human Rights did not speculate as to whether the applicant would still have been deprived of the right to vote even if a more limited restriction on the rights of the mentally disabled had been imposed, in line with the requirements of Article 3 of Protocol No. 1. The European Court of Human Rights also said that the treatment of those with intellectual or mental disabilities as a single class constituted a questionable classification and that the curtailment of their rights must be subject to strict scrutiny. The indiscriminate removal of voting rights without an individualised judicial evaluation and solely on the basis of a mental disability necessitating partial guardianship could therefore not be considered to constitute legitimate grounds for restricting the right to vote.

The Alajos Kiss judgment is the only judgment on disenfranchisement imposed as a consequence of guardianship, except for the judgments delivered by panels of three judges on 23 September 2014 in Gajcsi v. Hungary and on 21 October 2014 in Harmati v. Hungary, in which cases the Hungarian government did not dispute the alleged violation of the Convention.

The Supreme Court finds that the purpose of disenfranchising legally incompetent persons under section 29 of the Constitution falls within the framework of a measure deemed to pursue a legitimate aim, as set out by the European Court of Human Rights in Alajos Kiss. The question is now whether the requirement of proportionality has been met.

The first condition that must be met in order to deprive a person of his or her legal capacity under section 6 of the Guardianship Act is that the person must be unable to manage his or her own affairs owing to mental unsoundness or mental disability, etc. (see section 5), and the second condition is that a legal incapacitation order be necessary to prevent the person in question from exposing his or her assets, income or other financial interests to the risk of major loss, or to prevent financial exploitation. Persons subject to guardianship solely under section 5 are legally competent, whereas persons also deprived of their legal capacity under section 6 are legally incompetent. It follows from section 8(1) that a person cannot be deprived of his or her legal capacity if his or her interests can be sufficiently guarded through guardianship under section 5. As opposed to persons who are only subject to guardianship under section 5, persons deprived of their legal capacity under section 6 need more than a guardian to guard their interests; they are often persons who act contrary to their own best interests or risk being exploited by others.

Under section 10, a legal incapacitation order must be quashed if the prescribed conditions are no longer met. The legal incapacitation order in respect of [one of the two additional persons who joined the proceedings] has been quashed, in accordance with that provision, and he is now solely subject to guardianship under section 5 and consequently now has the right to vote in general elections.

Accordingly, strict requirements must be met in order to deprive a person of his or her legal capacity and to maintain in effect such a legal incapacitation order, and such requirements are closely related to the issue of whether the person in question is able to foresee the consequences of his or her decisions and to make conscious and judicious decisions.

The Guardianship Act, which was enacted in 1996, reduced the group of persons declared legally incompetent and consequently disenfranchised in general elections as compared with the group similarly disenfranchised under the former Danish Act on Legal Competence (myndighedsloven). In 1990, just under 3,300 persons had been declared legally incompetent, and in December 2017 about 1,850 persons had been deprived of their legal capacity.

Danish Act no. 391 of 27 April 2016 gave persons deprived of their legal capacity the right to vote in European Parliament elections and in local and regional elections. It appears from the preparatory notes to the Act that it was intended to bestow upon this group of individuals the right to vote to the extent possible under the Constitution.

The restriction on the right to vote set out in section 29 of the Constitution therefore reflects an arrangement [ordning] that is considerably narrower than the Hungarian measure deemed by the European Court of Human Rights in respect of Alajos Kiss to be disproportionate.

The Supreme Court finds that it follows from that judgment that an arrangement imposing a more limited restriction on the right to vote of persons suffering from a mental disability as compared with the then applicable Hungarian measure might be compatible with Article 3 of Protocol No. 1. It cannot be inferred from the judgment that in order for a restriction on the right to vote of persons deprived of their legal capacity to be considered compatible with Article 3 of Protocol No. 1, a specific and individual assessment must always have been made of the relevant person’s mental capacity to exercise the right to vote. The Supreme Court observes in this respect, as did the High Court, that a specific and individual assessment of whether a person’s mental capacity is sufficient [for that person] to exercise the right to vote may give rise to concern. The case-law of the European Court of Human Rights concerning restrictions on the right to vote and on eligibility to stand for election for reasons other than mental disability also supports the view that a specific and individual assessment is not always required to deprive a person of his or her right to vote – see in this respect paragraphs 112 and 114 of the judgment delivered in Ždanoka v. Latvia and paragraphs 98, 99 and 102 of the judgment delivered on 22 May 2012 in Scoppola v. Italy (no. 3).

The Supreme Court also observes that it follows from the legislation on elections and the constitutions of a number of other European countries that persons deprived of their legal capacity do not have the right to vote [it appears from the transcript that the Supreme Court referred to a report by the European Union Agency for Fundamental Rights of 21 May 2014 “The right to political participation for persons with disabilities: human rights indicators”, see paragraph 71 below].

Against this background, the Supreme Court finds no basis for ruling that the arrangement set out in section 29 of the Constitution is contrary to Article 3 of Protocol No. 1 or to Article 14 read in conjunction with Article 3 of Protocol No. 1. The Supreme Court also finds, as was also found by the High Court, that there is no basis for ruling that section 29 of the Constitution is contrary to the Convention on the Rights of Persons with Disabilities.

For this reason alone, the appellants are not entitled to compensation.”

18.  The Supreme Court judgment attracted renewed focus among politicians on the situation of persons who were both subject to guardianship and had been deprived of their legal capacity, and who did not have the right to vote in general elections. Consequently, several parties that were not government parties at that time introduced private members’ bill no. B 71, which sought that fewer persons subject to guardianship should be excluded owing to their disability from the right to vote in general elections. At the first reading of the bill in Parliament, the then Minister of Justice expressed the view that the bill served a commendable purpose, and he promised to examine the possibility of excluding fewer persons subject to guardianship from the right to vote in general elections. After the reading of the bill, a report was published saying that the Parliamentary Committee on Social Affairs, the Interior and Children (Social-, Indenrigs- og Børneudvalget) looked forward to discussing with the Government the outcome of the analytical work launched by the Government.

19.  In the light of this report, the Ministry of Justice carried out an analysis of the rules within this field. On 3 October 2018, the Ministry of Justice concluded, on the basis of that analysis, that section 29 of the Constitution did not constitute a bar to an amendment to or repeal of the guardianship rules aimed at allowing some of those persons who had been deprived of their legal capacity to again be allowed to manage their own assets in full or in part. The opinion of the Ministry of Justice was that a person subject to guardianship who was barred only in part from managing his or her assets was not “legally incompetent” within the meaning of the Constitution and could therefore retain the right to vote in general elections.

20.  Against that background, the then Minister of Justice introduced a bill to amend the Guardianship Act and the Parliamentary Elections Act; that amendment was passed by Parliament on 20 December 2018 and entered into force on 1 January 2019. The following appears from the explanatory notes to the bill:

“The first purpose of the bill is to introduce the possibility of depriving a person [only] partially of his or her legal capacity, one of the consequences being that such a person will retain the right to vote in general elections.

Therefore, it is the opinion of the Government that, according to the principles of democracy, the group of persons with suffrage in elections to a body elected by the people ought to be as wide as possible. The Government wishes to bestow the right to vote in nationwide elections in Denmark upon as many citizens as possible – [including] persons subject to guardianship – within the framework of the Constitution.

...

It appears from paragraph 2.4 of the report that as long as a group of persons are deprived of the right to manage their assets, it is a consequence of section 29 of the Constitution that those persons are barred from voting in general elections.

It therefore requires an amendment to the Constitution if the deprivation of a person’s legal capacity is not to lead to disenfranchisement.

However, section 29 of the Constitution is not a bar to an amendment to or repeal of the guardianship rules to the effect that some of the persons deprived of their legal capacity today would again be allowed to manage their own assets in full or in part.

However, in the opinion of the Ministry of Justice, such an arrangement must not have as a consequence [the scenario] that persons in need of the protection afforded by the deprivation of their legal capacity would be left in a situation in which they risked being exposed to financial exploitation or ... a potential risk of losing their assets.

It is observed that the group of around 1,900 persons who have been deprived of their legal capacity is a particularly vulnerable population group.

It is the opinion of the Ministry of Justice that it would constitute a major impairment of the protection of those persons if the possibility of depriving them of their legal capacity were to be abolished entirely. In such a case, those persons would no longer be prevented from entering into legal transactions and incurring financial commitments, even though they are not able to understand the consequences, thereby exposing their assets to risk. The relevant persons might also risk financial exploitation.

Therefore, the Ministry of Justice cannot recommend the full abolition of the possibility of depriving them of their legal capacity. ...”

21.  Accordingly, it was the assessment of the Ministry of Justice that the proposed possibility of the partial deprivation of legal capacity was most compatible with the aim of allowing as many citizens as possible the right to vote while protecting a small group of citizens in need of such protection by depriving them of their legal capacity.

22.  In the light of the above, the statutory amendment introduced the possibility of the partial deprivation of legal capacity. Thereby it became possible to limit an order restricting a person’s legal incapacity to comprise only particular assets or affairs, such as credit purchase transactions or taking out loans, or to specifying a maximum amount of agreements into which such a person could enter. Persons deprived only partially of their legal capacity remain legally competent and thus retain the right to vote in general elections. Only persons fully deprived of their legal capacity do not have the right to vote in general elections.

23.  The first applicant lodged an application with a district court for a change to his guardianship status following the statutory amendment. On 20 May 2019, the order regarding his legal incapacitation was quashed in its entirety, and he was consequently granted the right to vote in general elections.

24.  The second applicant also lodged an application for a change to his guardianship status. He is still subject to guardianship, but by a district court order of 9 November 2019, he was only partially deprived of his legal capacity pursuant to section 6(2)(2) of the Guardianship Act. Consequently, he was granted the right to vote in general elections.

**RELEVANT LEGAL FRAMEWORK AND PRACTICE**

The Constitution

25.  The fundamental rules on the right to vote in general elections are set out in section 29 of the Constitution, which, in so far as relevant, reads as follows:

Section 29

“(1) Any person who is a Danish national, has a permanent home in the realm and has reached the age to qualify for suffrage, as provided in subsection (2) hereof, shall have the right to vote in general elections unless he or she has been declared legally incompetent. It must be laid down by statute to what extent conviction [of a crime] and public assistance amounting to poor relief within the meaning of the law will lead to disfranchisement.”

26.  The provision was first introduced in the Constitutional Act, which was enacted on 5 June 1849. The wording of the part of the provision stipulating that persons declared legally incompetent do not have the right to vote was revised in 1915 and 1953.

27.  The following overview can be made of the development of the provision.

28.  In 1849, section 35 set out:

“Any man of good repute and Danish nationality has the right to vote in general elections when he attains the age of 30, unless he:-

[...]

(c) is barred from managing his [own] property”.

29.  In 1915, section 30 set out:

“Any man or woman of Danish nationality has the right to vote in general elections when he or she has attained the age of 25 and has a permanent home in Denmark, unless he or she:

...

(c) is barred from managing his or her [own] property owing to bankruptcy or a declaration of legal incompetence.”

30.  In 1953, as stated above, the first sentence of section 29(1) set out:

“Any person who is a Danish national, has a permanent home in the realm and has reached the age qualifying [him or her] for suffrage, as provided in subsection (2) hereof, shall have the right to vote in general elections, unless he or she has been declared legally incompetent ...”

31.  Section 35 of the first Danish Constitution of June 1849 set out the qualifications for suffrage. The conditions had been extensively discussed by the Constitutional Committee. One of the subjects discussed was whether suffrage was to be conditional on levels of income or assets (the so-called “census requirements”). By contrast with the census requirements, a less controversial issue was that of whether legally incompetent persons were to be barred from voting. A.F. Krieger, the spokesman of the Constitutional Committee, said in this respect (see the Report on the Parliamentary Debate, vol. 2, column 2184f):

“There is indeed general agreement that legally incompetent persons, children, women and criminals should be barred from voting.”

32.  The 1915 amendment to the Constitution (see Act no. 161 of 5 June 1915) added the stipulation that whenever a person was barred from managing his or her property it should be “owing to bankruptcy or a declaration of legal incompetence”. The preparatory notes to the provision (see the Official Report on Parliamentary Proceedings (Rigsdagstidende) 1914-15, column 3937) explained that the wording “owing to bankruptcy or a declaration of legal incompetence” had been added in order to ensure the suffrage of married women. The only reason for the amendment was therefore that women would qualify for suffrage even if they were barred from managing their own property because they had married.

33.  The provision was given its current wording by the 1953 amendment to the Constitution (see Act no. 169 of 5 June 1953). As regards the reason for this amendment, according to which it is a condition for suffrage that a person has not been “declared legally incompetent”, the preparatory notes read as follows (see in this respect the explanatory notes to section 29 in Report No. 66/1953 issued by the 1946 Commission on the Constitution):

“There is consensus that bankruptcy should no longer be considered grounds for exclusion. However, it is maintained that a declaration of legal incompetence will continue to lead to disenfranchisement. The bill does not combine this with the requirement that a person declared legally incompetent must have been barred from managing his or her [own] property, as does the current Constitution. Under the Act on Legal Competence, such a restriction on the right to manage one’s property is always linked to a declaration of legal incompetence.”

34.  It thus appeared from the preparatory notes that no amendment was contemplated to the condition that a person declared legally incompetent would also become disenfranchised, since a restriction on the right to manage one’s own property was an automatic consequence of a declaration of legal incompetence under the former Act on Legal Competence.

35.  The procedure for enacting amendments to the Constitution is set out in section 88 of the Constitution, which reads as follows:

“If Parliament passes a bill on a new constitutional provision and the Government wishes to proceed with the matter, a general election must be called. If the bill is passed without amendment by the Parliament that assembles after the general election, a referendum must be held on whether to approve or reject the bill within six months of its final passage. Detailed rules on the referendum process must be laid down by statute. If a majority of the persons casting a vote in the referendum and at least 40% of the electorate have voted in favour of the bill, as passed by Parliament, and if the bill receives royal assent, it shall form an integral part of the Constitution.”

The process of preparing and enacting an amendment to the Constitution is a time-consuming one. Moreover, history has shown that it is difficult to reach the required voter turnout in a referendum on an amendment to the Constitution.

The Parliamentary Elections Act

36.  Since the enactment of the 1849 Constitution, the conditions for suffrage laid down by the Constitution have been implemented by the enactment of an elections statute. Section 1 of the Parliamentary Elections Act reads as follows:

Section 1

“Any person who is a Danish national, has attained the age of eighteen and has a permanent home in the realm shall have the right to vote in general elections, unless he or she is legally incompetent.”

37.  The following overview can be made of the development of the provision.

38.  In 1849, section 5 set out:

“Therefore, no person subjected to guardianship or whose property is subject to insolvency or bankruptcy proceedings shall have the right to vote.”

39.  In 1915, section 2 set out:

‘No person shall have the right to vote if he or she:

...

(c) is barred from managing his or her property owing to bankruptcy or a declaration of legal incompetence.’

40.  In 1953, section 1(1) set out:

“Any person who is a Danish national, is of the age to qualify for suffrage, as provided for in subsection (2) hereof, and has a permanent home in the realm shall have the right to vote in general elections unless he or she:-

[...]

(b) is barred from managing his or her property owing to a declaration of legal incompetence.”

41.  In 1965, section 1(1) set out:

“Any person who is a Danish national, has attained the age of 21 and has a permanent home in the realm shall have the right to vote in general elections unless he or she has been declared legally incompetent.”

42.  In 1997, section 1 set out:

“Any person who is a Danish national, has attained the age of 18 and has a permanent home in the realm shall have the right to vote in general elections unless he or she is subject to guardianship combined with deprivation of legal capacity under section 6 of the Guardianship Act.”

43.  In 2019, section 1, set out:

“Any person who is a Danish national, has attained the age of 18 and has a permanent home in the realm shall have the right to vote in general elections unless he or she is legally incompetent.”

44.  The 1849 Elections Act of 16 June 1849 implemented section 35 of the Constitution, under which the right to vote was subject to “the right to manage one’s own property”. It followed from section 5 of the Elections Act that persons “subject to guardianship” did not have the right to vote. According to A.F. Krieger, the reason for the different wordings used was that the words used in the Constitution could have “a more specific meaning” (see the Report on the Parliamentary Debate, vol. 2, column 3407).

45.  In connection with the 1915 amendment to the Constitution, the provision of the Elections Act on suffrage was worded to render it identical with the wording of the constitutional provision on suffrage, as enacted (see Act no. 142 of 10 May 1915).

46.  The rules on elections to the Rigsdagen, the former parliamentary assembly, were replaced by the Parliamentary Elections Act (Act no. 171 of 31 March 1953) – in connection with the 1953 amendment to the Constitution, by which the Rigsdagen was replaced by the Folketinget as the Danish parliamentary assembly. By the enactment of the Parliamentary Elections Act, “bankruptcy” was omitted from the provisions regarding disenfranchisement, as bankruptcy should no longer lead to disenfranchisement, according to the findings of the 1946 Commission on the Constitution (see the explanatory notes to section 1 of the Parliamentary Elections Act provided in Report No. 74 of 2 February 1953 of the Commission on the Elections Act). However, the wording still said that the relevant person must not be “barred from managing his or her [own] property owing to a declaration of legal incompetence”.

47.  The expression “the right to manage one’s [own] property” was removed by a statutory amendment in 1965. Accordingly, this provision was given the same wording as section 29 of the Constitution, the only condition now being that a person must not have been “declared legally incompetent”.

48.  Section 1(1) of the Parliamentary Elections Act retained this wording, except for amendments to the age qualifying citizens for suffrage, until 1997. In 1997, the provision was reworded to say that persons who were both subject to guardianship and who had been deprived of their legal capacity under section 6 of the Guardianship Act did not have the right to vote. The amendment was made in the light of the enactment of the Guardianship Act. The amendment to the Parliamentary Elections Act took into account the fact that the Committee on the Act on Legal Competence had assessed, in particular, the meaning of the wording of the Constitution in the light of the new Guardianship Act.

49.  Section 1 of the Parliamentary Elections Act, as currently worded, came into force on 1 January 2019 (see section 2 of Act no. 1722 of 27 December 2018) to reflect the new possibility to only partially deprive a person of his or her legal capacity. The provision is drafted to the effect that persons declared legally incompetent are disenfranchised, whereas persons deprived only partially of their legal capacity are deemed to be still legally competent and thus have the right to vote in general elections.

The Guardianship Act

50.  In 1996, the Act on Legal Competence was replaced by the Guardianship Act, which distinguished between (i) persons who under section 5 were subject to guardianship but remained legally competent, and (ii) persons who were subject to guardianship under section 5 and were also deprived of their legal capacity under section 6.

51. The Guardianship Act defined three kinds of guardianship for adults. Guardianship under section 5 was the standard arrangement. It read as follows:

Section 5

“(1) A guardianship order can be made in respect of any person unable to manage his or her own affairs owing to mental unsoundness, including severe dementia, or mental disability or other severe impairment, if necessary.

(2) A guardianship order can be made in respect of any person who is unsuited to manage his or her own financial affairs owing to illness or other severe decline and who makes a request [for such an order] himself or herself – if necessary instead of appointing a surrogate decision-maker for such a vulnerable adult under section 7.

(3) A guardianship order can be restricted to financial matters, including specific assets or affairs. Such an order can also be restricted to personal matters, including specific personal affairs.

(4) Unless otherwise specifically provided, the guardian shall act on behalf of the relevant person in respect of affairs covered by the guardianship order.

(5) Persons subject to guardianship under this provision are legally competent, unless deprived of their legal capacity under section 6.”

Accordingly, section 5 of the Guardianship Act allowed for individual guardianship arrangements adapted to individual needs. Persons subject to guardianship under section 5 of the Act could enter into legal transactions on their own, and they had the right to vote in general elections

52.  At the relevant time, section 6 of the Guardianship Act was worded as follows:

Section 6

“(1) Persons subject to guardianship over their financial affairs under section 5 can be deprived of their legal capacity, if necessary, to prevent them from exposing their assets, income or other financial interests to the risk of a major loss, or to prevent financial exploitation. The deprivation of a person’s legal capacity cannot be restricted to particular assets or affairs.

(2) A person deprived of his or her legal capacity is legally incompetent and does not have the right to enter into legal transactions or to manage his or her assets, unless otherwise provided.

(3) Legal incapacitation orders must be registered (see section 48 of the Registration of Property Act).”

53.  Under section 8 of the Guardianship Act, a guardianship order must be granted on the basis of the principle of implementing the least intrusive measure. One implication is that a person cannot be deprived of his or her legal capacity under section 6 if it is possible to safeguard his or her interests to a sufficient extent through guardianship under section 5.

54.  From the preparatory notes to the Act, it appeared that it was based on Report No. 1247/1993 on Guardianship issued by the Committee of the Ministry of Justice on the Act on Legal Competence (Myndighedslovudvalget). The report read, in its relevant part, as follows:

“9.2.2. For the purpose of the Committee’s considerations of concepts and terminology, it was particularly relevant to assess the wording of the Constitution. It is irrelevant whether a person is only declared legally incompetent to manage his or her financial affairs (see section 2 of the current Act on Legal Competence) or also declared legally incompetent to manage his or her personal affairs, see section 46. A declaration of legal incompetence relied upon as grounds for exclusion from the right to vote in pursuance of section 29 of the Constitution is based on the assumption, as is also the condition of having attained the age of majority, that a certain level of mental skills is a prerequisite for suffrage. According to the preparatory notes, it must be assumed that it is the restriction on a person’s right to manage his or her assets (when declared legally incompetent) that gave rise to combining a declaration of legal incompetence with disenfranchisement. It must also be taken into account that the reason for declaring a person legally incompetent under section 2 of the current Act on Legal Competence must extend beyond limited mental faculties or mental capacity, such as bibulousness, bodily deficiency, illness or another infirmity. Moreover, as mentioned above in parts 2 and 4, by no means everyone with limited mental capacity is declared legally incompetent. Against this background, Max Sørensen [a Danish professor of constitutional law, international law and a judge] mentions that the rational arguments for section 29 of the Constitution are weak and that the provision can only be understood in view of the historical development, as the 1849 Constitution and the 1866 Constitution disenfranchised persons barred from managing their property for the reason that a person who was not deemed able by the legal system to attend to his own financial affairs should not have any influence on the national government either. ...

...

9.4.5. As mentioned in paragraph 9.2 above, section 29 of the Constitution on the right to vote is not deemed to constitute a bar to the Committee’s determination of concepts, including the decision not to use the concept of “declared legally incompetent”. However, it must be a consequence of the conditions set out in the Constitution that any person deprived of his or her legal capacity, within the meaning contemplated by the Committee (see section 6 of the draft), or barred from controlling his or her personal affairs, according to the wording of the provision drafted by the dissenting Committee members (see section 6a of the draft), must be disenfranchised under the legislation on elections.”

55.  Subsequent to statutory amendment by Act no. 1722 of 27 December 2018, which entered into force on 1 January 2019, section 6 of the Guardianship Act read as follows:

Section 6

“(1) Persons subject to guardianship over their financial affairs under section 5 can be deprived of their legal capacity, if necessary, to prevent them from exposing their assets, income or other financial interests to the risk of a major loss, or to prevent financial exploitation. The deprivation of a person’s legal capacity can be restricted to particular assets or affairs.

(2) A person deprived of his or her legal capacity under the first sentence of subsection (1) is legally incompetent and does not have the right to enter into legal transactions or to manage his or her own assets, unless otherwise provided. A person partially deprived of his or her legal capacity under the second sentence of subsection (1) is legally competent, but does not have the right to enter into legal transactions or to manage his or her assets to the extent provided.

(3) Legal incapacitation orders must be registered (see section 48 of the Danish Registration of Property Act [Tinglysningsloven])”

56.  Owing to the statutory amendment, it became possible to partially deprive persons of their legal capacity – as opposed to the previous legal situation, in which it had been possible only to fully deprive persons of their legal capacity. One of the consequences of the statutory amendment was that persons who were both subject to guardianship and had been partially deprived of their legal capacity were still legally competent and accordingly entitled to vote in general elections.

57.  The reason for the statutory amendment was the political desire that emerged following the Supreme Court judgment of 18 January 2018 to bestow the right to vote in general elections upon as many citizens as possible, as far as the Constitution allowed.

58.  According to information received from the Agency of Family Law (Familieretshuset), which considers applications for the revision of guardianship orders, the Agency had received a total of seventeen applications by 16 September 2019 for changing guardianship orders involving the total deprivation of legal capacity to guardianship orders involving the partial deprivation of legal capacity. Fourteen of those applications have been decided on, and one guardianship order combined with the total deprivation of legal capacity has been changed to an order on guardianship involving the partial deprivation of legal capacity, the consequence being that the relevant person now has the right to vote in general elections. In three cases, the legal incapacitation order has been terminated in its entirety.

Concerning the right to vote in European Parliament and local and regional elections

59.  Act no. 391 of 27 April 2016 gave persons deprived of their legal capacity (under section 6 of the Guardianship Act) the right to vote in European Parliament elections and in local and regional elections. It appears from the preparatory notes to the Act that it was intended to bestow upon this group of individuals the right to vote to the extent possible under the Constitution. The relevant part of the statutory amendment (Bill no. 130 of 24 February 2016) reads as follows:

“The Government wishes to bestow the right to vote in nationwide elections in Denmark upon as many citizens as possible within the framework of the Constitution. Accordingly, it is proposed to amend the legislation on elections to allow persons who are [both] subject to guardianship [and have been deprived of] of their legal capacity under section 6 of the Guardianship Act, but who otherwise meet the conditions for suffrage, the right to vote in European Parliament elections and in local and regional elections.

There has been a demand for some time, including from the Danish Institute for Human Rights, for an amendment to the legislation on elections to allow persons [who are both] subject to guardianship and have been deprived of their legal capacity under section 6 of the Guardianship Act the right to vote in all nationwide elections and referendums in Denmark. Under current law, it is a condition for having the right to vote in all nationwide elections and referendums in Denmark that one is not subject to guardianship combined with deprivation of legal capacity under section 6 of the Guardianship Act.

It is the assessment of the Government that the Constitution does not make it possible to bestow the right to vote in general elections upon persons deprived of their legal capacity as a consequence of a guardianship order under section 6 of the Guardianship Act. On the other hand, the Constitution cannot be considered to constitute a bar to bestowing the right to vote in local and regional elections and in European Parliament elections upon persons [who are both] subject to guardianship [and have been deprived] of their legal capacity under section 6 of the Guardianship Act. Reference is made to the reply of 17 March 2014 from the Ministry of Justice to question no. 644 (general questions) from the Legal Affairs Committee of the Danish Parliament.

It furthermore follows from the Constitution that the parliamentary electorate – that is to say persons having the right to vote in general elections – are the ones who are entitled to vote in constitutional referendums.

In order to bestow upon persons [who are] subject to guardianship [and have been deprived] of their legal capacity under section 6 of the Guardianship Act a more extensive right to vote, it is proposed to bestow upon this group of persons the right to vote in local and regional elections and in European Parliament elections.”

60.  The following appears from the reply of 17 March 2014 from the Minister for Justice to question no. 644 from the Legal Affairs Committee of the Danish Parliament:

“Question no. 644 (general questions) from the Legal Affairs Committee of the Danish Parliament:

Is the Minister willing to consider amendments to the Guardianship Act or other compensatory measures in view of the 2012 report by the Danish Institute for Human Rights entitled “Autonomy and Guardianship” (Selvbestemmelse og værgemål), which points out on page 49 that “Disenfranchisement as a consequence of guardianship is contrary to the Convention on the Rights of Persons with Disabilities and [to] the ECHR”?

Answer:

1. Section 29(1) of the Constitution provides that any person who is a Danish national, has a permanent home in the realm and has attained the age of 18 has the right to vote in general elections unless he or she has been declared legally incompetent.

As appears from the Report of the Committee on the Act on Legal Competence (Report No. 1247/1993), which formed the basis for the relevant Guardianship Act, it must be assumed on the basis of the preparatory notes to section 29(1) of the Constitution that it is the restriction on a person’s right to manage his or her own assets (when declared legally incompetent) that gave rise to combining a declaration of legal incompetence with disenfranchisement.

The deprivation of a person’s legal capacity under section 6 of the Guardianship Act is effected in cases in which the guardianship order applies to financial affairs. Therefore, it must be a consequence of section 29 of the Constitution that any person deprived of his or her legal capacity under section 6 of the Guardianship Act will become disenfranchised under the legislation on elections (see in this respect also pp. 156-57 of the Report of the Committee on the Act on Legal Competence). Accordingly, the Constitution does not make it possible to bestow the right to vote in general elections upon persons deprived of their legal capacity because they are subject to guardianship under section 6 of the Guardianship Act.

2. However, it is the opinion of the Ministry of Justice that the Constitution cannot be considered to constitute a bar to bestowing the right to vote in elections for local councils, regional councils and the European Parliament upon persons subject to guardianship under section 6 of the Guardianship Act. Amendments involving such an extension of the right to vote would have to be implemented by statute. This issue falls within the remit of the Ministry of Economic Affairs and the Interior.

3. It is the opinion of the Ministry of Justice that there is no basis for assuming – contrary to the findings in the report of the Danish Institute for Human Rights – that the Danish rules on disenfranchisement of persons subject to guardianship under section 6 of the Guardianship Act are contrary to the European Convention on Human Rights.

In its 2012 report, the Danish Institute for Human Rights refers to the judgment delivered by the European Court of Human Rights on 20 May 2010 in Alajos Kiss v. Hungary (application no. 38832/06). However, it is the assessment of the Ministry of Justice that it is not a consequence of Alajos Kiss that the Danish rules on suffrage and guardianship cannot be maintained, one reason being that that case concerned the national legislation of Hungary, under which any form of guardianship automatically led to disenfranchisement. This is not the case in Denmark, where only the orders on guardianship under section 6 of the Guardianship Act mentioned above will concurrently lead to disenfranchisement. Moreover, Hungary had more lenient rules for issuing guardianship orders than Denmark.

4. As regards the United Nations Convention on the Rights of Persons with Disabilities, it should be noted that on 20 September 2013, in its communication No. 4/2011, the Committee on the Rights of Persons with Disabilities issued its views (in respect of Zsolt Bujdosó and five others v. Hungary) concerning the right to vote of persons with intellectual disabilities.

The Committee on the Rights of Persons with Disabilities said in its communication that it is contrary to the Convention for a State party to exclude persons with intellectual disabilities from suffrage. It would appear that that view applies regardless of whether or not the relevant persons have the mental capacity to vote, as the Committee found that the State party should merely provide specific assistance to such vulnerable persons.

In the opinion of the Ministry of Justice, the views issued by the Committee on the Rights of Persons with Disabilities give rise to essential questions pertaining to section 29 of the Constitution, which, as mentioned above, provides that any person who is a Danish national, has a permanent home in the realm and has attained the age of 18 has the right to vote in general elections unless he or she has been declared legally incompetent.

Unlike judgments delivered by the European Court of Human Rights, views issued by the Committee on the Rights of Persons with Disabilities are, however, not binding on Denmark.

5. Against this background, the Ministry of Justice has not considered any amendment to the Guardianship Act.”

The historical and political context

61.  The statutory basis for the right to vote in general elections and referendums is section 29 of the Constitution. The possibility of amending section 29 of the Constitution has been regularly considered. At the time of the most recent amendment to the Constitution in 1953, the legislature maintained the position that a declaration of legal incompetence should lead to disenfranchisement. The issue of the franchise of legally incompetent persons was further considered in more detail in connection with the readings and enactment of the Guardianship Act, which came into force in 1996. Most recently, Parliament had a robust debate in 2016 (in respect of a potential amendment to section 29(1) of the Constitution) concerning legally incompetent persons’ right to vote during the readings of the bill that ultimately bestowed upon them the right to vote in elections for the European Parliament and in local and regional elections. It appears from the report of that parliamentary debate that the 2016 Parliament did not have a political majority among its members for a constitutional amendment concerning the right to vote under section 29(1) of the Constitution. Only a small minority of twenty-one MPs from two parties (from a total of 179 MPs) expressed a desire to work towards such an amendment to the Constitution. Such a process is time-consuming, and history has shown that it has been difficult to reach the required voter turnout in referendums, despite the political majority in Parliament for other proposed amendments to the Constitution.

62.  Since 1849, the Elections Act has also continuously attracted political attention and has been adapted, reflecting developments in society, to bestow the right to vote in general elections upon as many persons deprived of their legal capacity as possible.

63.  Upon its enactment in 1996, the Guardianship Act instantly reduced the size of the group of persons who were deemed to be legally incompetent and consequently disenfranchised in general elections. In 1990, just under 3,300 persons had been declared legally incompetent, and in December 2017 about 1,850 persons had been deprived of their legal capacity. An additional purpose of the 2019 amendments to the Guardianship Act and the Parliamentary Elections Act was to reduce the size of the group of persons disenfranchised owing to the deprivation of their legal capacity as far as the Constitution allowed.

64.  It was likewise the purpose of the 2016 amendment, by which the right to vote in elections for the European Parliament and in local and regional elections was bestowed upon persons who had been deprived of their legal capacity, that the right to vote should be bestowed upon this group of persons to the extent possible under the Constitution.

65.  The rules governing suffrage for persons deprived of their legal capacity have thus been considered, discussed and adapted on a regular basis in order to grant the right to vote to the greatest extent possible, as far as the Constitution allowed.

**RELEVANT INTERNATIONAL AND EUROPEAN MATERIAL**

66.  The United Nations Convention on the Rights of Persons with Disabilities (the “CRPD”), which was ratified by Denmark on 24 July 2009, provides as follows:

Article 1 - Purpose

... “Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others.”

Article 12 - Equal recognition before the law

“1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests. ...”

Article 29 - Participation in political and public life

“States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake to:

a.  Ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, inter alia, by:

i.  Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use;

ii.  Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate;

iii.  Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice;

b.  Promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs, including:

i.  Participation in non-governmental organizations and associations concerned with the public and political life of the country, and in the activities and administration of political parties;

ii.  Forming and joining organizations of persons with disabilities to represent persons with disabilities at international, national, regional and local levels.”

67.  Council of Europe Recommendation R(99)4 of the Committee of Ministers to Member States on Principles Concerning the Legal Protection of Incapable Adults (issued on 23 February 1999) (“Recommendation R(99)4”) provides as follows:

Principle 3 – Maximum preservation of capacity

“... 2.  In particular, a measure of protection should not automatically deprive the person concerned of the right to vote, or to make a will, or to consent or refuse consent to any intervention in the health field, or to make other decisions of a personal character at any time when his or her capacity permits him or her to do so.”

68.  Opinion no. 190/2002 of the European Commission for Democracy through Law (“Venice Commission”) on the Code of Good Practice in Electoral Matters provides as follows:

I.1. Universal suffrage – 1.1. Rule and exceptions

d. Deprivation of the right to vote and to be elected:

“i. provision may be made for depriving individuals of their right to vote and to be elected, but only subject to the following cumulative conditions:

ii. it must be provided for by law;

iii. the proportionality principle must be observed; conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them;

iv. The deprivation must be based on mental incapacity or a criminal conviction for a serious offence.

v. Furthermore, the withdrawal of political rights or finding of mental incapacity may only be imposed by express decision of a court of law.”

69.  Council of Europe Recommendation R(2006)5 of the Committee of Ministers to Member States on the Council of Europe Action Plan to Promote the Rights and Full Participation of People with Disabilities in Society: Improving the Quality of Life of People with Disabilities in Europe 2006-2015 (issued on 5 April 2006) provides as follows:

3.1. Action line No.1: Participation in political and public life

3.1.3. Specific actions by member states

“... iii. to ensure that no person with a disability is excluded from the right to vote or to stand for election on the basis of her/his disability; ...”

70.  In its report of 30 October 2014 on Denmark, the United Nations Committee on the Rights of Persons with Disabilities expressed, inter alia, the following concern under the heading “Participation in political and public life” (“Article 29):

“The Committee is concerned that under the Constitution, the Parliamentary Elections Act and other electoral laws, and the Guardianship Act (section 6), persons under guardianship are not allowed to vote or to stand for election in parliamentary, municipal, regional or European Parliament elections, or referendums. The Committee is also concerned that election materials are reportedly rarely accessible to blind persons or to persons with learning and intellectual disabilities, that polling stations are often not physically accessible, that ballots may not be accessible to blind persons, and that persons under guardianship may not be able to freely choose the kind of voting assistance that they would wish to use.

The Committee recommends that the State party amend the relevant laws, including the Parliamentary Elections Act and other laws governing municipal, regional and European Parliament elections, so that all persons with disabilities can enjoy the right to vote and stand for election regardless of guardianship or other regimes. It also recommends that the State party ensure, through legislative and other measures, the accessibility of ballots and election materials, and of polling stations, and that it ensure that freely chosen, adequate and necessary assistance is provided in order to facilitate voting by all persons.”

71.  A report by the European Union Agency for Fundamental Rights of 21 May 2014 on

“The right to political participation for persons with disabilities: human rights indicators” stated among other things (pages 40‑41):

“Seven out of the 28 EU Member States – Austria, Croatia, Italy, Latvia, the Netherlands, Sweden and the United Kingdom – guarantee the right to vote for all persons with disabilities, including those without legal capacity.

In Croatia, legal reform in December 2012 abolished the exclusion of persons without legal capacity from the right to vote, meaning that people deprived of legal capacity were able to participate in the European Parliament and local elections in 2013. Similarly, amendments to the Latvian Civil Code which came into force in 2013 end the denial of the right to vote for those deprived of legal capacity. The relevant electoral legislation has not yet been amended, however, meaning people deprived of legal capacity can be barred from voting.

A second group of EU Member States have a system whereby an assessment is made of the individual’s actual ability to vote. In Hungary, a system where everyone under guardianship was prohibited from voting was changed in 2012; now judges decide whether persons with “limited mental capacities” are allowed to vote. In Slovenia, the legal test for judges deciding whether to restrict the right to vote is whether the person with a disability is capable of understanding the meaning, purpose and effect of elections.

A further 15 EU Member States prohibit people with disabilities who have been deprived of their legal capacity from voting. The Member States are Belgium, Bulgaria, Cyprus, Denmark, Estonia, Germany, Greece, Ireland, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania and Slovakia. This exclusion is either set out in the country’s constitution or in electoral legislation. The German Federal Election Law is an example of this second approach. Persons for whom a custodian to manage all their affairs is appointed, not just by temporary order, are automatically deprived of their voting rights.”

The Court observes that it seems that other European States, including Albania, Moldova, Serbia and Turkey, also had legislation restricting the right to vote in respect of persons who had been deprived of their legal capacity.”

**THE LAW**

**JOINDER OF THE APPLICATIONS**

72.  Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

ARTICLE 3 OF PROTOCOL NO. 1 TO THE CONVENTION

73.  The applicants complained that the Supreme Court judgment of 18 January 2018 had breached their right to vote under Article 3 of Protocol No. 1 to the Convention, which reads as follows:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

**Admissibility**

1.  Submissions by the parties

74.  The Government submitted that the complaint should be declared inadmissible as manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

75.  The applicants disagreed.

2.  The Court’s assessment

76.  The Court notes that the 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.

Merits

1. Submissions by the parties

77.  The applicants did not dispute that the restriction in question pursued a legitimate aim, but maintained that the disenfranchisement had been unjustified and arbitrary.

78.  The State should enjoy a narrow margin of appreciation in this matter, since any exclusion of persons with disabilities from public life had to be subject to close scrutiny; that principle also applied to any assessment of whether such exclusion was compatible with international human rights guarantees.

79.  In the present case, the disenfranchisement had been an automatic consequence of the applicants being deprived of their legal competence. There had been no assessment of the applicants’ ability to vote.

80.  The authorities had been aware that there was no clear and absolute link between a person’s ability to organise his or her own finances and that person’s political rights. Nevertheless, there had been no proper legal debate at the domestic level regarding the appropriateness of the exclusion.

81.  Moreover, the Ministry of Justice had continuously refused to amend the relevant legislation; its sole argument for that refusal had been that that would require an amendment to the Constitution, which would be difficult from a practical point of view. Thus, in 2014, even though the United Nations Committee on the Right of Persons with Disabilities had made critical remarks about the legislation at issue, its report and remarks had not prompted any further considerations on the part of the Ministry of Justice. Likewise in 2016, when persons deprived of their legal capacity had been given the right to vote in elections for the European Parliament and in local and regional elections, they had still been denied the right to vote in general elections, as it had been argued that that would require an amendment to the Constitution. It had not been until after the Supreme Court judgment of 18 January 2018 that a thorough analysis of the legislation had been made by the Ministry of Justice. For the first time there had been a substantive and meaningful debate regarding the disenfranchisement of persons deemed to be legally incompetent, which had led to amendments to the Guardianship Act and the Parliamentary Act, which had entered into force on 1 January 2019.

82.  In the applicants’ view their case was thus identical to the Court’s judgment in Alajos Kiss v. Hungary (no. 38832/06, 20 May 2010). They found it of no specific importance that the affected group or person in Denmark was narrower than the affected group of persons in Hungary. The essential point was that their disenfranchisement had been arbitrary and an automatic result of their financial incapacity.

83.  The Government submitted that there had been no violation of Article 3 of Protocol No. 1 to the Convention, since the restriction on the right to vote had been proportionate to the legitimate aim pursued.

84.  Section 29 of the Constitution, which excluded persons who had been declared legally incompetent from voting (in addition to persons who had not attained the age of majority) had the legitimate aim of ensuring that voters in general elections had the required level of mental skills. In that connection, it had been necessary to link the grounds for exclusion to clear-cut criteria that were objective, clear and predictable.

85.  As regards the proportionality of the restriction, the Government referred to the Supreme Court’s reasoning in its judgment of 18 January 2018.

86.  They emphasised that the present case differed significantly from that of Alajos Kiss (cited above). Under the Danish arrangement, only a small group of persons were disenfranchised – namely those who were both subject to guardianship and had been deprived of their legal capacity under section 6 of the Guardianship Act. However, a person could not be deprived of his or her legal capacity if his or her interests could be sufficiently guarded through guardianship under section 5. The deprivation of legal capacity was thus a measure that affected a narrow group of persons, amounting to 0.046% of the Danish population of voting age, whereas 0.75% of the Hungarian population was subject to disenfranchisement. Moreover, the Danish legislature had considered on an ongoing basis the issue of disenfranchisement and had sought to extend the franchise as much as possible, as far as the Constitution allowed – hence, inter alia, the most recent amendment to the Constitution in 1953, and the amendment of rules on guardianship in 1996, and again in 2016 and 2019.

87.  The Government reiterated that disenfranchisement as an automatic legal consequence could be in accordance with Article 3 of Protocol No. 1, provided that it was proportionate, and not of a general, automatic and indiscriminate nature (see, inter alia, Scoppola v. Italy (no. 3), no. 126/05, § 102, 18 January 2011). The Danish rules setting out the conditions for depriving a person of his or her legal capacity were very strict and closely related to the issue of whether the person in question was able to foresee the consequences of his or her decisions and to make conscious and judicious decisions. Such decisions had to be made by a court. Moreover, under the relevant Danish legislation there were objective, clear and predictable criteria for qualifying for suffrage, and the circumstances automatically giving rise to disenfranchisement were detailed in the law.

88.  As regards the applicants’ submissions that there was no difference between the right to vote in general elections and the right to vote in elections for the European Parliament, the Government recalled that the legislature had seriously considered that matter during the readings of the bill by which the right to vote in European Parliament elections had been granted in 2016. At that time the right to vote had been extended to the greatest extent possible, without having to resort to an amendment to the Constitution.

89.  Lastly, the Government pointed to the fact that other European countries had made exceptions for persons without legal capacity with regard to the right to vote, and that Contracting States should be allowed a wide margin of appreciation in determining what procedures should be followed in order to assess mentally disabled persons’ fitness to vote.

2. Submissions by the third party

90. The European Network of National Human Rights Institutions, a Belgium-based NGO, submitted, inter alia, that recent changes in legislation, jurisprudence and practices across the Contracting Member states showed that there was a consensus, and common values, emerging around the principle that the voting rights of persons with disabilities should be guaranteed – including those of persons who were subject to a restriction or removal of their legal capacity. That consensus could equally be inferred from various resolutions, opinions, statements and recommendations from international and regional human rights bodies, which had repeatedly emphasised that the automatic link between the right to vote and one’s legal capacity disproportionately infringed upon the political rights of persons with disabilities.

3.  The Court’s assessment

(a) General principles

91.  The Court refers to its relevant case-law, as outlined in the judgment of Hirst v. the United Kingdom (no. 2) [GC], no. 74025/01, ECHR 2005‑IX:

“57.  [T]he Court has established that [Article 3 of Protocol No. 1] guarantees individual rights, including the right to vote and to stand for election (see Mathieu-Mohin and Clerfayt v. Belgium, judgment of 2 March 1987, Series A no. 113, pp. 22-23, §§ 46-51). ...

58.  The ... rights guaranteed under Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law ...

59.  ... [T]he right to vote is not a privilege. In the twenty-first century, the presumption in a democratic State must be in favour of inclusion. ... Universal suffrage has become the basic principle (see Mathieu-Mohin and Clerfayt, cited above, p. 23, § 51, citing X v. Germany, no. [2728/66](https://hudoc.echr.coe.int/eng#{"appno":["2728/66"]}), Commission decision of 6 October 1967, Collection 25, pp. 38-41).

60.  Nonetheless, the rights bestowed by Article 3 of Protocol No. 1 are not absolute. There is room for implied limitations and Contracting States must be allowed a margin of appreciation in this sphere.

61.  ... The Court reaffirms that the margin in this area is wide (see Mathieu-Mohin and Clerfayt, cited above, p. 23, § 52, and, more recently, Matthews v. the United Kingdom [GC], no. [24833/94](https://hudoc.echr.coe.int/eng#{"appno":["24833/94"]}), § 63, ECHR 1999-I; see also Labita v. Italy [GC], no. [26772/95](https://hudoc.echr.coe.int/eng#{"appno":["26772/95"]}), § 201, ECHR 2000-IV, and Podkolzina v. Latvia, no. [46726/99](https://hudoc.echr.coe.int/eng#{"appno":["46726/99"]}), § 33, ECHR 2002-II). ...

62.  It is, however, for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate (see Mathieu-Mohin and Clerfayt, p. 23, § 52). In particular, any conditions imposed must not thwart the free expression of the people in the choice of the legislature – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage. For example, the imposition of a minimum age may be envisaged with a view to ensuring the maturity of those participating in the electoral process or, in some circumstances, eligibility may be geared to criteria, such as residence, to identify those with sufficiently continuous or close links to, or a stake in, the country concerned (see Hilbe v. Liechtenstein (dec.), no. [31981/96](https://hudoc.echr.coe.int/eng#{"appno":["31981/96"]}), ECHR 1999-VI, and Melnychenko v. Ukraine, no. [17707/02](https://hudoc.echr.coe.int/eng#{"appno":["17707/02"]}), § 56, ECHR 2004-X). Any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws it promulgates. Exclusion of any groups or categories of the general population must accordingly be reconcilable with the underlying purposes of Article 3 of Protocol No. 1 (see, mutatis mutandis, Aziz v. Cyprus, no. [69949/01](https://hudoc.echr.coe.int/eng#{"appno":["69949/01"]}), § 28, ECHR 2004-V).”

92.  In addition to the principle above about the margin of appreciation being wide in this area, the Court recalls that the quality of the parliamentary and judicial review of the necessity of a general measure, such as the disputed disenfranchisement imposed as a consequence of declaring a person legally incompetent, is of particular importance, including to the operation of the relevant margin of appreciation (see, among others, Animal Defenders International v. the United Kingdom [GC], no. 48876/08, § 108, ECHR 2013 (extracts), and Correia de Matos v. Portugal [GC], no. 56402/12, §§ 117 and 129, 4 April 2018).

93.  Another factor which has impact on the scope of the margin of appreciation is the Court’s fundamentally subsidiary role in the Convention protection system. The Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in the Convention and the Protocols thereto, and in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the Court. Through their democratic legitimation, the national authorities are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions (see, inter alia, Lekić v. Slovenia [GC], no. 36480/07, § 108, 11 December 2018).

(b) Application of the general principles to the present case

94.  In the present case the applicants had been declared legally incompetent. Consequently, they were disenfranchised and prevented from voting in general elections. Their right to vote had thus been restricted by law. The Court will proceed to determine whether this measure pursued a legitimate aim in a proportionate manner, having regard to the principles identified above.

Lawfulness

95.  Unlike other provisions of the Convention, such as Article 5, Articles 8 to 11, or Article 1 of Protocol No. 1, the text of Article 3 of Protocol No. 1 does not contain an express reference to the “lawfulness” of any measures taken by the State. However, the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention and its Protocols (see, among many other authorities, Amuur v. France, 25 June 1996, § 50, Reports of Judgments and Decisions 1996‑III, and Abil v. Azerbaijan (no. 2), no. 8513/11, § 66, 5 December 2019).

96.  In the present case, it is not in dispute between the parties that the applicants’ disenfranchisement was lawful. It was prescribed by section 29 of the Constitution and section 1 of the Danish Act on Parliamentary Elections. The Court finds no reason to hold otherwise (see, for example, a contrario, Seyidzade v. Azerbaijan, no. 37700/05, §§ 31-40, 3 December 2009.

 Legitimate aim

97.  The Court points out that Article 3 of Protocol No. 1 does not (as do other provisions of the Convention) specify or limit the aims that a restriction must pursue; a wide range of purposes may therefore be compatible with Article 3. The Government submitted that the measure complained of had pursued the legitimate aim of ensuring that voters in general elections had the required level of mental skills. The applicants accepted that view, and the Court sees no reason to hold otherwise (see also Alajos Kiss, cited above, § 38, in which the Court accepted “that the measure complained of pursued the legitimate aim of ensuring that only citizens capable of assessing the consequences of their decisions and making conscious and judicious decisions should participate in public affairs”).

 Proportionality

98.  From the outset, it should be noted that at time of the parliamentary elections that took place on 18 June 2015 (in which the applicants could not vote), persons who were subject to guardianship under section 5 the Guardianship Act were deemed to be legally competent. Accordingly, they could vote in general elections.

99.  Only persons covered by section 5 and who had also been declared legally incompetent under section 6 of the Guardianship Act were excluded from voting in general elections.

100.  In order for a person to be declared legally incompetent under section 6, two conditions had to be fulfilled. The first condition was that the person in question had to be unable to manage his or her own affairs owing to reasons, such as mental unsoundness or mental disability, set out under section 5, and the second condition was that a legal incapacitation order was necessary to prevent the relevant person from exposing his or her assets, income or other financial interests to the risk of a major loss, or to prevent financial exploitation. It followed from section 8(1) of the Act that a person could not be deprived of his or her legal capacity if his or her interests could be sufficiently safeguarded through guardianship under section 5. Under section 10, a legal incapacitation order had to be quashed if the prescribed conditions were no longer met. Domestic law thus required an assessment of proportionality and proscribed an obligation to implement the least intrusive measure, in other words, the principle of proportionality applied to the imposition, content and lifting of the measures.

101.  As regards the quality of the parliamentary review, having regard, inter alia, to the historical and political context, the Guardianship Act and its preparatory notes (see paragraphs 50-54 and 61-63 above), and the reply of 17 March 2014 from the Minister for Justice to question no. 644 from the Legal Affairs Committee of the Danish Parliament (see paragraph 60 above), the Court finds it established that the review of the necessity of the general measure at issue, namely the disenfranchisement imposed as a consequence of declaring a person legally incompetent, and its compliance with section 29 of the Constitution, was indeed thorough.

102.  It also notes that the number of persons who had been declared legally incompetent was rather low, and the disenfranchisement in question therefore affected a small group of persons, amounting to 0.046% of the Danish population of voting age.

103.  The Court will proceed to examine the quality of the judicial review, and will have particular regard to the Supreme Court’s reasoning.

104.  In its judgment of 18 January 2018, the Supreme Court (see paragraph 17 above) explicitly took into account the applicable principles under Article 3 of Protocol No. 1 and the relevant Convention case-law.

105.  The Supreme Court observed that “strict requirements must be met in order to deprive a person of his or her legal capacity and to maintain in effect such a legal incapacitation order, and such requirements are closely related to the issue of whether the person in question is able to foresee the consequences of his or her decisions and to make conscious and judicious decisions”.

106.  The Supreme Court found that the purpose of disenfranchising legally incompetent persons under section 29 of the Constitution pursued a legitimate aim, as set out by the Court in Alajos Kiss (cited above).

107.  The Supreme Court also found that such disenfranchisement had been proportionate. In that respect it gave weight to the fact, as stated above, that the requirements for declaring a person legally incompetent were strict, that the restriction on the right to vote set out in section 29 of the Constitution therefore affected a low number of persons, and that the legislature had intended to afford the right to vote to the extent possible under the Constitution, notably when passing the Guardianship Act in 1996, and when passing Act no. 391 of 27 April 2016, which had given persons deprived of their legal capacity the right to vote in elections for the European Parliament and in local and regional elections. The case thus differed significantly from the situation in Alajos Kiss (cited above). Moreover, the Supreme Court considered that it could not be inferred from the Court’s case-law that in order for a restriction on the right to vote in respect of persons deprived of their legal capacity to be considered compatible with Article 3 of Protocol No. 1, a specific and individual assessment always had to be made of the relevant person’s mental capacity to exercise the right to vote. It observed in that respect, as did the High Court, that a specific and individual assessment of whether a person’s mental capacity was sufficient to exercise the right to vote might give rise to

concern.

108.  Lastly, the Supreme Court observed that other European countries also had legislation restricting the right to vote in respect of persons who had been deprived of their legal capacity.

109.  Against this background, the Supreme Court found no violation of Article 3 of Protocol No. 1 (or of Article 14 of the Convention).

110.  The Court notes from the above that the Supreme Court thoroughly examined the proportionality and justification of the limitation of the applicants’ voting rights, and performed a balancing of interests, in the light of the Court’s case‑law, including Alajos Kiss (cited above). The quality of the judicial review of the disputed general measure and its application in the present case therefore militate in favour of a wide margin of appreciation.

111.  A further factor of relevance to the scope of the margin of appreciation is the existence or not of common ground between the national laws of the Contracting States. Relying on the report by the European Union Agency for Fundamental Rights of 21 May 2014 on “The right to political participation for persons with disabilities: human rights indicators”, the Supreme Court noted that other European countries also had legislation restricting the right to vote in respect of persons who had been deprived of their legal capacity. At the time, besides Denmark, it concerned Belgium, Bulgaria, Cyprus, Estonia, Germany, Greece, Ireland, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania and Slovakia (see paragraph 71 above). The Court observes that it also seems to be the case in other European States, including Albania, Moldova, Serbia and Turkey. Accordingly, it cannot be concluded that there was common ground between the national laws of the Contracting States to uncouple disenfranchisement from deprivation of legal capacity.

112.  Nor does the Court discern any common ground at the international and European level in this respect.

It recalls, on the one hand, that Article 29 of the United Nations Convention on the Rights of Persons with Disabilities sets out that States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others. Moreover, in its report of 30 October 2014 on Denmark, the United Nation Committee on the Rights of Persons with Disabilities expressed concern that persons who were deprived of their legal capacity under section 6 of the Guardianship Act were not allowed, at the time, to vote or to stand for election in parliamentary, municipal, regional or European Parliament elections, or referendums (see paragraphs 66 and 70 above).

On the other hand, the Court observes that the Venice Commission in its Opinion no. 190/2002 had a more cautious approach, accepting that under certain cumulative conditions, provision may be made for depriving individuals of their right to vote (see paragraph 68 above).

113.  The Court notes the applicants’ submission that the margin of appreciation should have been narrow, presumably narrower than that applied by the Supreme Court. The Court agrees that although the margin of appreciation is generally wide under Article 3 of Protocol No. 1 (see, for example, Ždanoka v. Latvia [GC], no. 58278/00, §§ 105-106, ECHR 2006‑IV), it is substantially narrower when a restriction on fundamental rights applies to a particularly vulnerable group in society, such as the mentally disabled (see Alajos Kiss, cited above, §§ 41 and 42). In the present case, however, the Court reiterates that the mentally disabled were not in general subject to disenfranchisement; nor were persons under guardianship by virtue of section 5 of the Guardianship Act – as stated above, only those persons covered by section 5, who, after an individualised judicial evaluation, had also been found legally incompetent by a court under section 6 of the Guardianship Act, were subject to disenfranchisement. The Court therefore agrees with the Government and the Supreme Court, that the legislation at issue significantly differed from the legislation examined in Alajos Kiss (cited above), where all persons, whether under full or partial guardianship, were subject to an automatic, blanket restriction in respect of suffrage. In the Court’s view, there is therefore no basis for finding that the Supreme Court in its judgment of 18 January 2018 overstepped the margin of appreciation afforded to it.

114.  It is correct, though, as pointed out by the applicants, that apart from the individualised judicial evaluation of their legal capacity under section 6 of the Guardianship Act, domestic law did not require a separate individualised assessment of their voting capacity. The Court reiterates in this respect that under Article 3 of Protocol No. 1 to the Convention, it is not a requirement for depriving a person of his or her right to vote that a specific and individual assessment of their voting capacity has been carried out (see, for example, in the context of prisoners’ voting rights, Hirst v. the United Kingdom (no. 2) [GC], cited above, § 62). Moreover, as pointed out above, there is a lack of European consensus, including as to whether to detach disenfranchisement from deprivation of legal capacity (see paragraphs 71 and 111 above). In this context, the Court also notes that a general measure may, in some situations, be found to be a more feasible means of achieving a legitimate aim than a provision requiring a case‑by‑case examination, a choice that, in principle, is left to the legislature in the Member State, subject to European supervision (see, inter alia, Correia de Matos v. Portugal, cited above, § 129, Animal Defenders International v. the United Kingdom [GC], cited above, § 108).

115.  Lastly, the applicants alleged that there had never been a true legal debate at the domestic level about the appropriateness of the disenfranchisement of persons who had been deprived of their legal capacity. It also appears that they alleged that the only reason why the legislation, under which they were disenfranchised, had not been amended was that the Ministry of Justice had found that an amendment to the Constitution would be impractical. The Court reiterates from the outset that in cases arising from individual petitions its task is not to review the relevant legislation or an impugned practice in the abstract. Instead, it must confine itself, as far as possible, without losing sight of the general context, to examining the issues raised by the case before it (see, for example, Donohoe v. Ireland, no. [19165/08](http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"appno":["19165/08"]}), § 73, 12 December 2013; Nejdet Şahin and Perihan Şahin v. Turkey [GC], no. 13279/05, §§ 69-70, 20 October 2011; Taxquet v. Belgium [GC], no. [926/05](http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"appno":["926/05"]}), § 83 in fine, ECHR 2010; and Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria, no. 40825/98, § 90, 31 July 2008).

116. Nevertheless, having regard anew to the historical and political context, the Court does consider it a fact that the legislator constantly sought to allow as many persons as possible to be able to vote while at the same time aiming to protect the small group of persons who were in need of guardianship combined with a deprivation of their legal capacity. The restrictions on the right to vote of persons deprived of their legal capacity were thus gradually reduced in 1996 when the Guardianship Act entered into force, and in 2016, when persons deprived of their legal capacity were given the right to vote in elections for the European Parliament and in local and regional elections.

117.  Moreover, after the parliamentary elections that took place on 18 June 2015 (in which the applicants could not vote), an Act that entered into force on 1 January 2019 provided for the possibility of depriving a person “only” partially of his or her legal capacity, with the intended consequence that such a person would retain the right to vote in general elections. Consequently, the applicants are now eligible to vote in general elections.

118.  It is correct, as pointed out by the applicants, that until the amendment of the legislation on 1 January 2019, the legislators considered that one of the main obstacles for providing persons deprived of their legal capacity with the right to vote in general elections was Article 29 of the Constitution. The Court can also endorse the applicants’ view that objectively seen it is difficult to justify that although in 2016 they were granted the right to vote in European Parliament elections, they were nevertheless still considered ineligible to vote in general elections, and in local and regional elections.

119.  The Court recalls, however, that with each legal amendment, including the one leading to the right to vote in European Parliament elections in 2016, the issue of disenfranchisement was carefully assessed by the legislature in its laudable effort throughout many years to limit the restrictions on the right to vote. The fact that the development obtained required thorough legal reflection and time, cannot, in the Court’s view, be held against the Government to negate the justification and proportionality of the restriction at issue. The Court also takes account of the changing perspective in society, which makes it difficult to criticise that the legislation only changed gradually (see, mutatis mutandis, Petrovic v. Austria, 27 March 1998, § 4, Reports of Judgments and Decisions 1998‑II).

120.  The Court is therefore satisfied that the above elements significantly differed from the situation in Alajos Kiss (cited above, § 41), where the Court observed that there was no evidence that the legislature had ever sought to weigh the competing interests or to assess the proportionality of the restriction in question.

121. Having regard to the above, the Court concludes that there has been no violation of Article 3 of Protocol No. 1 to the Convention.

ALLEGED VIOLATION OF ARTICLE 14 READ IN CONJUNCTION WITH ARTICLE 3 OF PROTOCOL No. 1 TO THE CONVENTION

122.  The applicants also complained that the Supreme Court judgment of 18 January 2018 had breached their right under Article 14, read in conjunction with Article 3 of Protocol No. 1 to the Convention. Article 14 of the Convention reads as follows:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

**A. Admissibility**

1. Submissions by the parties

123.  The Government submitted that the application should be declared inadmissible as manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

124.  The applicants disagreed.

2.  The Court’s assessment

125.  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. Submissions by the parties

126.  The parties referred notably to their submissions under Article 3 of Protocol No. 1 to the Convention.

2.  The Court’s assessment

General principles

127.  The Court reiterates that Article 14 complements the other substantive provisions of the Convention and the Protocols thereto. It has no independent existence, since it has effect solely in relation to “the enjoyment of the rights and freedoms” safeguarded by those provisions. The application of Article 14 does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention. The prohibition on discrimination in Article 14 thus extends beyond the enjoyment of the rights and freedoms that the Convention and Protocols require each State to guarantee (see, inter alia, Biao v. Denmark [GC], no. 38590/10, § 88, 24 May 2016).

128.  According to established case-law, a difference in the treatment of persons in relevantly similar situations is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see, inter alia, Molla Sali v. Greece [GC], no. 20452/14, § 135, 19 December 2018; Fábián v. Hungary [GC], no. 78117/13, § 113, 5 September 2017; and Fabris v. France [GC], no. 16574/08, § 56, ECHR 2013 (extracts)).

129.  The Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment (see, for example, Molla Sali (cited above) § 136; Fábián, cited above, § 114; and Hämäläinen v. Finland [GC], no. 37359/09, § 108, ECHR 2014). The scope of this margin will vary according to the circumstances, the subject-matter and the background (see, inter alia, Carson and Others v. the United Kingdom [GC], no. 42184/05, § 61, ECHR 2010).

(b) Application of the general principles to the present case

130.  Referring to the reasoning set out under its examination of Article 3 of Protocol No. 1 to the Convention, the Court is satisfied that the difference in the treatment of the applicants, who had been deprived of their legal capacity at the relevant time, pursued a legitimate aim, and that there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

131.  Accordingly, there has been no violation of Article 14 read in conjunction with Article 3 of Protocol No. 1 to the Convention of the Convention.

**FOR THESE REASONS, THE COURT, UNANIMOUSLY,**

1. Decides to join the applications;

2. Declares the applications admissible;

3. Holds that there has been no violation of Article 3 of Protocol No. 1 to the Convention;

4. Holds that there is no violation of Article 14 read in conjunction with Article 3 of Protocol No. 1 to the Convention.

Done in English, and notified in writing on 2 February 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith Marko Bošnjak  
 Registrar President

## **CASE OF CAAMAÑO VALLE v. SPAIN**

(Application no. 43564/17)

JUDGMENT  
Art 3 P1 • Vote • Justified disenfranchisement of person with intellectual disability, based on thorough, individualised assessment by domestic courts • Free expression of the opinion of the people • Margin of appreciation for States • Systems disenfranchising persons with mental disabilities must apply only to those effectively unable to make a free and self-determined electoral choice, as in present case

Art 14 (+ Art 3 P1) • Art 1 P12 • Discrimination • Justified difference in treatment based on mental capacity

STRASBOURG

11 May 2021

**FINAL**

**11/08/2021**

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Caamaño Valle v. Spain,

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

Paul Lemmens, President,  
 Georgios A. Serghides,  
 Dmitry Dedov,  
 Georges Ravarani,  
 María Elósegui,  
 Anja Seibert-Fohr,  
 Peeter Roosma, judges,  
and Milan Blaško, Section Registrar,

Having regard to:

the application (no. 43564/17) 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 Maria del Mar Caamaño Valle (“the applicant”), on 9 June 2017;

the decision to give notice of the application to the Spanish Government (“the Government”);

the observations submitted by the respondent Government and the observations in reply submitted by the applicant;

the comments submitted by the Commissioner for Human Rights of the Council of Europe who intervened as a third party;

Having deliberated in private on 19 January and on 30 March 2021,

Delivers the following judgment, which was adopted on the last-mentioned date:

**INTRODUCTION**

1.  The application concerns the right to vote of the applicant’s daughter, placed under partial guardianship owing to her intellectual disability. The applicant relied on Article 3 of Protocol No. 1, read alone or in conjunction with Article 14 of the Convention and Article 1 of Protocol No. 12.

THE FACTS

2.  The applicant was born in and lives in Santiago de Compostela. She is the mother of M., a mentally disabled young woman born in A Coruña (La Coruña) in 1996. The applicant was represented by Ms L. Gonzalez-Lagana Vicente, a lawyer practising in A Coruña.

3.  The Government were represented by their Agent, Mr R.-A. León Cavero, State Counsel and head of the Human Rights Department at the Ministry of Justice.

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

5.  In December 2013, given the fact that M., the applicant’s daughter, would soon turn 18, the applicant lodged a request with a judge of First-Instance Court No. 6 of Santiago de Compostela (“the First-Instance Judge”) that she be deprived of her legal capacity. The applicant requested that her legal guardianship over her daughter be extended, but specifically asked that her daughter not be deprived of her right to vote.

6.  On 2 September 2014, the First-Instance Judge decided that the applicant’s daughter should be placed under the extended partial legal guardianship of her mother and that, in the light of the evidence and the case file, M.’s right to vote should be revoked.

7.  In an extensively reasoned judgment, the First-Instance Judge held that, given the specific circumstances of the case, the applicant’s daughter was not capable of exercising her right to vote. Having examined the Convention on the Rights of Persons with Disabilities (CRPD) (see paragraph 23 below) in the light of the Spanish legal system, the First-Instance Judge explained the difference between the CRPD’s general concept of disability and the Spanish legal institution of incapacitation (incapacitación), which is intended to guarantee the rights of disabled people. He also referred to the case-law of the Supreme Court (according to which the CRPD and the institution of incapacitation, as regulated under the Spanish legal system, are compatible); he furthermore stated that a person who has been declared incapacitated (incapacitado) in the course of judicial proceedings (and who is not able to manage himself or herself) cannot be compared to a person who suffers a disability but is capable of managing himself or herself. The First-Instance Judge indicated in particular that:

“It is necessary to bring on this particular controversial aspect the most recent and consolidated scientific doctrine and jurisprudence, citing, inter alia, the recent Supreme Court judgment 341/2014, of 1 July 2014, which states that ... (as is clear from the New York Convention and as was maintained by Supreme Court judgment 421/2013 of 24 June) Article 29 of the CRPD guarantees to persons with disabilities all political rights, and the possibility to enjoy them, under equal conditions, and as a logical corollary thereto ... the right to vote ...; sections 3(1)(b) and 2 of Institutional Law 5/85 of 19 July 1985 on the General Electoral System states that those declared incapacitated by virtue of a final judicial decision shall be deprived of the right to vote, provided that the decision expressly declares the relevant person’s incapacity to exercise it, and that the judges or courts deciding on that person’s incapacity or on confinement proceedings expressly rule on that person’s incapacity to exercise his right to vote. The loss of the right to vote is not an automatic or necessary consequence of incapacity ... It is for the judge in charge of the case to analyse and assess the situation of the person under his consideration and to rule on the advisability of denying that person his right to exercise of this fundamental right, ... which is a rule and not the exception ...”

8.  The First-Instance Judge considered that in respect of the instant case, the limitations imposed on M. in respect of her right to vote were based neither on the requirement of a higher cognitive or intellectual capacity nor on M.’s lack of knowledge regarding her voting options (that is to say her choice of candidate or party) nor on any hypothetical irrationality in respect of such choices, but on the strict and objective establishment of her lack of capacity in respect of political affairs and electoral matters. The court’s medical expert and the First-Instance Judge had ascertained the notable – and at that time insuperable – deficiencies of M. (without, in accordance with section 761 of the Civil Procedural Law, prejudging any possible subsequent change in her capacity) in respect of her exercising an electoral choice. The First-Instance Judge acknowledged that depriving a person of her voting rights could not be an automatic consequence of a judicial declaration of legal incapacity and that decisions dealing with such situations had therefore to be extensively reasoned. He noted that the task at hand was not that of examining the knowledge of the applicant’s daughter about a specific political system, but to assess the circumstances of the case. The restriction of her right to vote was not justified by the fact that she hardly knew anything about the Spanish political system, but because she was highly influenceable and not aware of the consequences of any vote that she might cast. The First-Instance Judge emphasised in his judgment that such decisions were always subject to judicial review.

9.  In October 2014, the applicant lodged an appeal with the Regional Court (Audiencia Provincial) of A Coruña. She asked the court to expressly recognise her daughter’s right to vote, submitting that under Articles 12 and 29 of the CRPD, the right to vote of persons with disabilities was recognised and that States had to provide them with the support necessary for the full exercise of that right to be guaranteed.

10.  On 11 March 2015, the Regional Court of A Coruña dismissed the applicant’s appeal. The Regional Court considered that a decision to deprive a person of his or her right to vote was legal and compatible with the CRPD, provided that that person’s capacity to exercise the right to vote had been subjected to individual review by a judicial body; it noted that the first-instance judgment had been sufficiently reasoned. The Regional Court emphasised that the intellectual ability of the applicant’s daughter was equivalent to that of child aged between six and eight.

11.  In April 2015, the applicant lodged an appeal on points of law with the Supreme Court. She argued that all citizens had the right to vote under Article 23 of the Spanish Constitution (taken in conjunction with Article 10 § 2 thereof, which provided that fundamental rights recognised under the Constitution should be interpreted in accordance with the international conventions ratified by Spain). Moreover, she considered it to be contrary to the principle of non-discrimination that disabled people were prevented from exercising the fundamental right to vote.

12.  On 17 March 2016, the Supreme Court dismissed the applicant’s appeal, upholding the decision of the Regional Court and ruling that the reasoning of the contested judgment had contained a thorough analysis of the case and had correctly balanced the interests at stake.

13.  On 28 April 2016 the applicant lodged an amparo appeal alleging a violation of Article 23 of the Spanish Constitution, defending her daughter’s right to vote. It was dismissed by the Constitutional Court on 28 November 2016 (notified on the 22 December 2016).

14.  In its reasoned decision (auto), the Constitutional Court stated as follows:

“... 2.  With regard to doubt about the constitutionality of sections 3(1)(b) and 2 of Institutional Law 5/1985 ... on the general electoral system (the LOREG) under Article 23 § 1 of the Spanish Constitution, the applicant assumes that this constitutional provision guarantees to all citizens the right of active suffrage, without any limitation or exception ...

...

Sections 2 and 3 of the LOREG limit the ... right to vote to those who, besides holding Spanish nationality ..., have reached the minimum legal age, have been included in the electoral census, and are not affected by the circumstances provided by section 3 (including having been judicially deprived of the right to vote in incapacity proceedings or being confined owing to a psychiatric disorder). Thus, the constitutional model of universal suffrage is not per se incompatible with an individual being deprived of the right to vote for a reason legally provided for, especially when such deprivation is covered by the standard legal guarantees.

3.  On the basis of the considerations listed in the previous paragraph, the arguments employed in the appeal are insufficient to effectively question the constitutionality – owing to the infringement of Articles 23 §§ 1 and 14 of the Spanish Constitution – of the above-mentioned legal provisions (paragraphs (1)(b) and (2) of section 3 of the LOREG), which enable courts and tribunals to restrict the exercise of a person’s right to vote on the basis of that person’s legal incapacity – in particular, on the basis of the specific circumstances of each person and after the completion of the appropriate judicial procedure determining his or her incapacity (or the authorisation of his or her confinement on the basis of mental illness).

With regard to the alleged interpretation of Article 23 of the Spanish Constitution in accordance with the CRPD – and, in particular, in accordance with Article 29 thereof – which was adopted in New York on 13 December 2006 and ratified by Spain ... on 9 April 2008 ..., it is necessary to take into account, first of all, the distinction between ‘disability’ (a) in the sense of the Convention – a very broad concept that includes any ‘long-term physical, mental, intellectual or sensory impairment’ that may prevent any actual equality, and (b) ‘disability’ in the sense of the Spanish Civil Code (CC) – that is to say ‘persistent physical or mental illnesses or impairments that prevent the person from caring for himself/herself’ (Article 200 of the CC) with regard to his/her exercise of the right in question under section 3 of the LOREG. The latter deals with the ability of ... each person to cast a vote as a ‘free expression of the will of the elector’, which is also guaranteed by the CRPD (Article 29 (a) (iii)), the purpose of which is ..., in line with the mandate specified by Article 9 § 2 of the Spanish Constitution: to remove obstacles that prevent or hinder free and secret voting without fear (Article 29 (a) (ii) and (iii)) by persons with disabilities and to ensure that they are ‘assisted in voting by a person of their choice, ... where necessary and at their request’.

...

It should be stressed that section 3 of the LOREG does not deprive the ‘disabled’ of their right to vote as a group or on the basis of any disability. On the contrary, it gives the judicial authorities the task of deciding on such a restriction of the exercise of the fundamental right on an individual basis, because of the specific circumstances of each person and after due process has been observed. This provision does not stipulate the deprivation of this right of suffrage in its active aspect in respect of people suffering from any disability, but only to those in respect of whom it has been so decided, by a judgment, after the appropriate proceedings have been conducted with due respect to the guarantees of adequate defence and evidence, and by virtue of the specific dysfunctionality from which they suffer and which affects their intellectual and volitional capacity with respect to the exercise of the right to vote. Therefore, the restriction should only affect those persons who lack the minimum level of understanding and will necessary to freely exercise their vote, as provided by Article 23 § 1 of the Spanish Constitution. Furthermore, the nature of the measures referred to in Article 29 (a) (i) to (iii) of the CRPD is such ... that their purpose is to ensure the effective exercise of the right to vote as a true reflection of the free will of a person with a disability and not, on the contrary, the mere insertion of the ballot paper into the ballot box.

4.  ... The case-law of the Civil Chamber of the Supreme Court ... requires that a decision not to allow someone to exercise his fundamental right to vote be preceded by an individualised examination of that person’s situation and by an assessment of the competing interests in play. ...

... It is necessary to point out that an assessment of the specific circumstances from which the contested decisions imply the inability to exercise the right to vote in the present case not only does not manifest any arbitrariness, irrationality, or obvious error in the wording of those decisions, but also complies with the principle of reinforced reasoning, which is required when a restriction of the exercise of fundamental rights is involved ...

... The contested judicial decisions take into consideration the data that they extract from the evidence – in particular from the forensic report and the examination carried out by the judge himself, as well as ... the statement given by the applicant’s daughter at the hearing – in order to reach a decision that cannot be categorised as unreasonable.

As is clear from the judgments appealed against and as was explicit in the first-instance judgment, the disputed decision does not depend on the person’s threshold of knowledge or instruction, which is not required for other citizens not subject to incapacity proceedings. The said knowledge is only one piece of information which, together with others – particularly medical-psychiatric expert reports – can be reasonably used to evaluate a person’s aptitude ... This can also be applied to the question of ‘influence exerted by third parties’ ... It is not ... a question of identifying an absence of knowledge ... on the part of a person lacking capacity, but of recognising that through these elements (among others) ... the degree of development of the mental faculties of the person in question can be ascertained.”

15.  The Constitutional Court concluded that there had not been any violation of the fundamental rights alleged.

**RELEVANT LEGAL FRAMEWORK AND PRACTICE**

Relevant Domestic Law

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

Article 14

“All Spanish citizens are equal before the law and they may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance.”

Article 23

“1. Citizens have the right to participate in public affairs, directly or through representatives freely elected in periodic elections by universal suffrage.

2. They likewise have the right to access on equal terms to public office, provided that they meet the requirements provided by law.”

17.  The relevant provisions of the Civil Code read as follows:

Article 199

“No one may be declared incapacitated, except under a court judgment for reasons set forth in the law.”

Article 200

“Persistent physical or mental illness or deficiencies that prevent a person from caring for himself constitute reasons for ruling that person legally incapacitated.”

Article 232

“Guardianship shall be exercised under the supervision of the Public Prosecutor, who shall act ex officio or at the request of any interested party.

The Public Prosecutor may require at any time a guardian to inform him of the situation of the minor or incapacitated person in question and of the state of the administration of the guardianship.”

Article 233

“The judge may establish, in the resolution establishing a guardianship or in another subsequent resolution, any supervision and control measures deemed suitable for the benefit of the person under guardianship. Likewise, he may at any time require the guardian to inform him of the situation of the minor or incapacitated person and the state of the administration of the guardianship.”

18.  The relevant provisions of Institutional Law 5/1985 of 19 June 1985 on the general electoral system (the LOREG), as worded at the material time, read as follows:

Section 2 – Right to vote

“1. All Spanish citizens of legal age not falling within any of the categories listed in the following section have the right to vote.”

Section 3 – Disenfranchisement

“1. The following have no right to vote:

...

b) Persons declared incapacitated by a final judicial decision, provided that that decision specifically declares the person in question incapable of exercising suffrage.

c) Persons residing in a mental hospital by order of a court, in the event that the court explicitly declares in its order that the person in question is incapable of exercising the right to vote.

2. For the purposes of this section, courts or tribunals having jurisdiction to declare a person’s legal incapacity or to order a person’s residence in a mental hospital must specifically decide whether that person is incapable of exercising the right to vote, and if that is the case, they shall require that fact to be noted in the Civil Register.”

19.  Institutional Law 2/2018 of 5 December 2018 modified the LOREG so that it guaranteed the right to vote to persons with a disability, eliminating the provisions of the LOREG relating to the possibility of depriving disabled people of the right to vote. Institutional Law 2/2018, which entered into force on 7 December 2018, amended the wording of section 3 of the LOREG, so that it now reads, where relevant, as follows:

“(i). Sub-paragraphs (b) and (c) of section 3 § 1 are deleted.

(ii). The second paragraph of section 3 shall read as follows:

Everyone shall be entitled to exercise his right to vote, knowingly, freely and voluntarily, whatever the manner in which that vote is cast and whatever means of support he may require.

An eighth, additional, provision is added with the following wording:

As of the entry into force of Organic Law 5/1985 of 19 June modifying the Organic Law on the General Electoral System in order to adapt it to reflect the International Convention on the Rights of Persons with Disabilities, any limitations on the exercise of the right to vote established by judicial resolution (on the basis of section 3(1)(b) and (c) of Organic Law 5/1985 – no longer in force) shall cease to have effect. Those persons whose right to vote has been limited or annulled owing to disability shall fully regain that right by virtue of the law”.

20.  The relevant provisions of the Code of Civil Procedure read as follows:

Article 759

“1. In incapacity proceedings, in addition to examining evidence adduced in accordance with the provisions of Article 752, the court shall hear the next-of-kin of the allegedly incapacitated person, examine the person himself and agree on which expert opinions in respect of the claims made in the application for a declaration of incapacity should be ordered and on what other measures provided by law should be undertaken. A decision on a declaration of incapacity shall never be made without first securing, with the agreement of the relevant court, an expert medical opinion.

2. Where an application for a declaration of incapacity requests the appointment of a person or persons to assist or represent the incapacitated person and to look after him, the next-of-kin of the allegedly incapacitated person, the allegedly incapacitated person himself if there is sufficient reason, and such other persons as the court considers appropriate shall be heard regarding the matter.

3. If the judgment on incapacity is appealed against, the evidence referred to in the preceding paragraphs of this Article shall also be secured by the second-instance court.”

Article 760

“1. The judgment declaring a person’s incapacity shall specify the extent and limits of that incapacity, as well as the system of guardianship or tutelage to which the incapacitated person is to be subjected, and shall rule, where appropriate, on the need for confinement, without prejudice to the provisions of Article 763.

2. In the case referred to in paragraph 2 of the preceding Article, if the court allows the application, the judgment declaring a person’s incapacity or the prodigality [prodigalidad] shall indicate the person or persons who, under the law, are to assist or represent the incapacitated person and look after him.

3. The judgment declaring a person’s prodigality shall determine the acts that the prodigal [pródigo] cannot perform without the consent of the person who is to assist him.”

Article 761

“1. A finding of incapacity shall not preclude the possibility of new proceedings being instituted, in the event of new circumstances, for the purpose of terminating or modifying the scope of the incapacity already established.

2. The persons referred to in Article 757 § 1, those exercising guardianship or who have custody of the disabled person, the Public Prosecutor’s Office or the disabled person himself shall be requested to initiate the proceedings referred to in the preceding paragraph.

If the incapacitated person has been deprived of the capacity to appear in court, he must obtain express judicial authorisation to act in the proceedings on his own behalf.

3. The mandatory evidence referred to in Article 759 shall be adduced ex officio, both during the first-instance proceedings and, where appropriate, in the second-instance proceedings.

The judgment to be delivered shall rule on whether or not the declaration of incapacity should be revoked, or whether or not the extent and limits of the incapacity should be modified.”

International Legal Instruments AND COMPARATIVE PRACTICE

21.  The relevant provisions of the International Covenant on Civil and Political Rights (CCPR), adopted on 19 December 1966, and ratified by Spain on 13 April 1977, read as follows:

Article 25

“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.”

22.  In recent concluding observations – notably in those on the fifth periodic report of Portugal, adopted on 2-27 March 2020 (CCPR/C/PRT/CO/5) – the Human Rights Committee made the following observations with respect to persons with psychosocial or intellectual disabilities:

“18. ... The Committee further notes with concern the undue restrictions imposed on the right to vote for people with mental disabilities.

19. The State party should:

...

(c) Ensure that it does not discriminate against persons with mental, intellectual or psychosocial disabilities by denying them the right to vote on grounds that are disproportionate or have no reasonable and objective relation to their ability to vote, taking account of article 25 of the Covenant.”

23.  The relevant provisions of the Convention on the Rights of Persons with Disabilities (CRPD), adopted on 13 December 2006 and ratified by Spain on 9 April 2008, read as follows:

Article 1 – Purpose

“The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”

Article 2 – Definitions

“For the purposes of the present Convention:

...

‘Discrimination on the basis of disability’ means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.

‘Reasonable accommodation’ means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”

Article 12 – Equal recognition before the law

“1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests.

...”

Article 29 – Participation in political and public life

“States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake:

a. To ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, inter alia, by:

i. Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use;

ii. Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate;

iii. Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice;

b. To promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs, including:

i. Participation in non-governmental organizations and associations concerned with the public and political life of the country, and in the activities and administration of political parties.

ii. Forming and joining organizations of persons with disabilities to represent persons with disabilities at international, national, regional and local levels.”

24.  In its General Comment No. 1 (2014) on Article 12 of the CRPD (Equal recognition before the law), adopted on 19 May 2014, the Committee on the Rights of Persons with Disabilities made the following comment on Article 29 of the CRPD:

Article 29: Political participation

“48. Denial or restriction of legal capacity has been used to deny political participation, especially the right to vote, to certain persons with disabilities. In order to fully realize the equal recognition of legal capacity in all aspects of life, it is important to recognize the legal capacity of persons with disabilities in public and political life (Article 29). This means that a person’s decision-making ability cannot be a justification for any exclusion of persons with disabilities from exercising their political rights, including the right to vote, the right to stand for election and the right to serve as a member of a jury.

49. States parties have an obligation to protect and promote the right of persons with disabilities to access the support of their choice in voting by secret ballot, and to participate in all elections and referendums without discrimination. The Committee further recommends that States parties guarantee the right of persons with disabilities to stand for election, to hold office effectively and to perform all public functions at all levels of government, with reasonable accommodation and support, where desired, in the exercise of their legal capacity.”

25.  Recommendation R (99)4 of the Committee of Ministers to member States on Principles Concerning the Legal Protection of Incapacitated Adults (adopted on 23 February 1999) provides as follows:

Principle 3 – Maximum preservation of capacity

“... 2. In particular, a measure of protection should not automatically deprive the person concerned of the right to vote, or to make a will, or to consent or refuse consent to any intervention in the health field, or to make other decisions of a personal character at any time when his or her capacity permits him or her to do so.”

26.  The Code of Good Practice in Electoral Matters, adopted by the European Commission for Democracy through Law (the Venice Commission) at its 51st and 52nd sessions (5-6 July and 18-19 October 2002, opinion no. 190/2002), provides as follows:

“I.1. Universal suffrage – 1.1. Rule and exceptions

d. Deprivation of the right to vote and to be elected:

“i. provision may be made for depriving individuals of their right to vote and to be elected, but only subject to the following cumulative conditions:

ii. it must be provided for by law;

iii. the proportionality principle must be observed; conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them;

iv. The deprivation must be based on mental incapacity or a criminal conviction for a serious offence.

v. Furthermore, the withdrawal of political rights or finding of mental incapacity may only be imposed by express decision of a court of law.”

27.  The European Union Agency for Fundamental Rights noted (in its report of 21 May 2014 entitled “The right to political participation for persons with disabilities: human rights indicators”) that the right to vote is often linked in national legislation to legal capacity; consequently, people who have been deprived of their legal capacity (either wholly or in part) are prohibited from voting.

This report stated, in its relevant parts, as follows (pages 40-41; footnotes omitted):

“Seven out of the 28 EU Member States – Austria, Croatia, Italy, Latvia, the Netherlands, Sweden and the United Kingdom – guarantee the right to vote for all persons with disabilities, including those without legal capacity.

In Croatia, legal reform in December 2012 abolished the exclusion of persons without legal capacity from the right to vote, meaning that people deprived of legal capacity were able to participate in the European Parliament and local elections in 2013. Similarly, amendments to the Latvian Civil Code which came into force in 2013 end the denial of the right to vote for those deprived of legal capacity. The relevant electoral legislation has not yet been amended, however, meaning people deprived of legal capacity can be barred from voting.

A second group of EU Member States have a system whereby an assessment is made of the individual’s actual ability to vote. In Hungary, a system where everyone under guardianship was prohibited from voting was changed in 2012; now judges decide whether persons with “limited mental capacities” are allowed to vote. In Slovenia, the legal test for judges deciding whether to restrict the right to vote is whether the person with a disability is capable of understanding the meaning, purpose and effect of elections.

A further 15 EU Member States prohibit people with disabilities who have been deprived of their legal capacity from voting. The Member States are Belgium, Bulgaria, Cyprus, Denmark, Estonia, Germany, Greece, Ireland, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania and Slovakia. This exclusion is either set out in the country’s constitution or in electoral legislation”.

28.  The situation since that report has slightly changed (see a report of the Agency for Fundamental Rights of 2019 titled “Who will (not) get to vote in the 2019 European Parliament elections? Developments in the right to vote of people deprived of legal capacity in EU Member States”). It seems that, apart from Spain (2018), also France (2019) and Germany (2019) granted the right to vote to persons with mental disabilities. Denmark (2016 and 2018) eased the restrictions on the right to vote for persons with mental disabilities, and Belgium (2018) moved from a system of automatic disenfranchisement to one of disenfranchisement upon an individual assessment by a judge. The Supreme Court of Slovakia (2017) struck down legal provisions tying the right to vote to legal capacity.

**THE LAW**

On the request for the application to be struck out of the list

29.  The Government argued that the application should be struck out, in accordance with the provisions of Article 37 § (1) (a) and (b) of the Convention, since the applicant’s daughter had been legally recognised as having the right to vote and the judicial decisions that had given rise to that procedure had been automatically annulled. The Government argued in particular that Institutional Law 2/2018 of 5 December 2018 had modified the LOREG, eliminating the provisions of the LOREG relating to the possibility of depriving disabled people of the right to vote and guaranteeing the right to vote to persons with a disability.

30.  The Court notes that for a certain period of time the applicant’s daughter was not permitted to vote. Various elections were held in Spain and in Europe between 2014 and 2018 (namely, elections to the European Parliament in May 2014, Spanish general elections in 2015 and 2016). In none of these elections was the applicant’s daughter, despite being of legal age, able to exercise her right to vote.

31.  Therefore, the application does not fall under Article 37 § 1; it is true that the relevant legislation was amended in 2018 and that since then, all disabled persons have been allowed to vote, but the fact remains that the applicant’s daughter was not able to vote in several elections held after she had reached her majority until the amendment of the law in 2018.

32.  The Court considers in any event that respect for human rights, as defined by the Convention and the Protocols thereto, requires it to continue the examination of the application (Article 37 § 1 in fine).

On the applicant’s standing to bring the present application

33.  The Court notes that the application was brought by Ms Maria del Mar Caamaño Valle in her own name, acting on behalf of her daughter, M. It accepts that under Spanish law, as is evidenced by the proceedings under review, the applicant has been exercising the rights of her disabled daughter.

34.  It is worth noting that the judicial process at each domestic instance – prior to the lodging of the instant application – consisted precisely of the domestic proceedings initiated at the time in question by the mother with the intention of extending her custody over her disabled daughter. That process ended with the declaration of her daughter’s incapacity and the extension of the parental-guardianship. It therefore considers that the applicant had the required capacity to lodge the present application. It will proceed, however, under the assumption that the actual victim of the alleged violation in this case is M.

**ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL No. 1 AND ARTICLE 14 OF THE CONVENTION and article 1 of protocol No. 12**

35.  The applicant complained of a violation of Article 3 of Protocol No. 1. She also complained of a violation of Article 3 of Protocol No. 1. in conjunction with Article 14 of the Convention and Article 1 of Protocol No. 12, asserting that the prohibition, in force at the relevant time, on people with disabilities voting had been discriminatory.

The relevant provisions read as follows:

Article 3 of Protocol No. 1

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

Article 14 of the Convention

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as ...other status.”

Article 1 of Protocol No. 12

“1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.”

Admissibility

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

Merits

The parties’ submissions

The applicant

37.  The applicant noted that despite the universality of the right to vote, as recognised by the Constitution, the LOREG stated that people whose legal capacity had been modified could be deprived of the right to vote by a judicial decision. Such a restriction constituted unquestionable discrimination on the basis of disability, did not pursue a legitimate aim and was disproportionate.

38.  The applicant reiterated that international treaties on human rights served as interpretative criteria in respect of the rights safeguarded by the Convention. In that regard, the CPRD, which had been largely ratified worldwide, defined the standards of protection to be afforded to people with disabilities, guaranteed the right to vote of people with disabilities, and established that States were responsible for guaranteeing the exercise of this right in conditions of equality and non-discrimination.

39.  In the applicant’s opinion, it was an “impossible chimera” (quimera imposible) to attempt to limit a person’s right to vote through an evaluation of his or her capabilities or ability to think freely. She maintained that voting constituted an individual and personal choice and that political pluralism was an expression of human diversity in terms of elections and respect for elections.

The Government

40.  The Government stated that people with disabilities in Spain enjoyed the same fundamental rights as other citizens. The key point in the present case was that the term “disability”, as used in the CRPD, was not the equivalent of the term “incapacity”, as used by Spanish legal system.

41.  The Government noted that under Article 200 of the Civil Code, incapacity proceedings were designed to guarantee the rights of people suffering persistent mental illness or deficiencies preventing them from looking after themselves (see paragraph 17 above). Such proceedings were undertaken before a judge, a public prosecutor took part in such proceedings in order to help the person whose legal capacity was at stake, and the judgment delivered had to be properly reasoned and based on evidence. The judge examined the person concerned and the specific circumstances of the case and considered what was in that person’s best interests, the object of the judgment being only to guarantee that person’s rights. Any such judgment could be revised to reflect the evolution of the disabilities suffered by the subject of the judgment.

42.  The Government referred to the principles established by the Court’s conclusions in respect of the case of Alajos Kiss v. Hungary (no. 38832/06, §§ 38 et seq., 20 May 2010), and, in particular, to the wide margin of appreciation enjoyed by the national legislature in determining whether restrictions on the right to vote could be justified. In that respect, the Government submitted that preventing a person under guardianship from voting (depending on his or her specific circumstances) would be acceptable, particularly in a case such as the present one, in which the said restriction was not automatic but was only applicable to individuals following the completion of a judicial procedure that observed all due guarantees. Referring to Cernea v. Romania (no. 43609/10, §§ 34-36, 27 February 2018), the Government maintained that the applicant’s daughter had not suffered discrimination on the grounds of her disability.

43.  The Government reiterated that the case-law of the Court ensured that member States respected the minimum standard of protection of fundamental rights required by the European Convention on Human Rights. They submitted that the Court should not raise that standard by itself. The Court had the faculty to interpret the Convention as a living instrument, but only when there was a European consensus regarding a subject; however, even if that was the case, such an increase in the standard of protection could not be imposed by the Court.

44.  The Government described the process that was compulsory in Spain in order for someone to be declared incapable or for a person’s legal capacity to be modified. It furthermore pointed out the following guarantees: (i) only a party entitled to initiate that process could do so – that is to say the public prosecutor or a relative of the person in question, and (ii) the judge had to personally examine the person in question and be guided by a physician and by a report on the status of that person. The aim of the process was to protect the person, regardless of the aims sought by the initiator of the proceedings. The deprivation of the right to vote of the person in question was not an automatic consequence of the process; it depended on the specifics of each case. The decision was always revisable if the circumstances of the person in question changed. The Government also explained that the Venice Commission – in accordance with the Code of Good Practice in Electoral Matters – agreed with the approach followed under the Spanish legal system. Furthermore, the Government submitted that in the light of the Court’s judgment in the case of Alajos Kiss (cited above), it was not possible to argue that there had been any violation of the fundamental rights of the applicant’s daughter. The Government noted that Spanish law satisfied the standard set by Article 3 of Protocol No. 1.

45.  The Government furthermore noted that a new law (Institutional Law 2/2018) had entered into force, modifying the LOREG by guaranteeing the right of suffrage to persons with disabilities. Consequently, all persons suffering from a mental disability of whatever degree now had the right to vote, and all previous final judicial decisions declaring such a disability were deemed to be null and void. All persons who were in the same situation as the applicant automatically benefitted from the provisions of the new law.

The third party’s submissions

46.  The Commissioner for Human Rights of the Council of Europe (“the Commissioner”) considered that developments within the UN system and the Council of Europe demonstrated a clear evolution in terms of the clarification of international obligations and that there was a consensus among the Contracting States within the context of commonly agreed international standards to the effect that the withdrawal of political rights on the basis of a disability (including cognitive impairment) and mental health status was unacceptable, even when it stemmed from a judicial decision.

47.  In the opinion of the Commissioner, when a large category of persons – such as the nearly 100,000 persons in Spain with intellectual and psychosocial disabilities – was excluded from the electoral process, not only were they deprived of any possibility of influencing the political process and the chance of shaping the policies and measures that directly affected their lives, but society as a whole was deprived of a legislature that reflected its full diversity. Therefore, such measures certainly interfered with the free expression of the opinion of the people in the sense of Article 3 of Protocol No. 1. They also perpetrated age-old stigmas against persons with intellectual and psychosocial disabilities; such stigmas were damaging to the whole of society. Voting was also an important symbol of empowerment and inclusion and could affect the motivation of persons with disabilities to participate in public life and contribute to the societies in which they lived.

48.  In conclusion, the Commissioner was of the opinion that Article 3 of Protocol No. 1 to the Convention should be interpreted in the light of Article 29 of the CRPD and other international standards that provided that the right to vote of persons with disabilities should be upheld without exception. The Commissioner furthermore asserted that the practice of depriving persons with intellectual and psychosocial disabilities of their right to vote on the basis of a judicial decision could not be considered to be compatible with a legitimate aim in a modern democracy and amounted to discrimination; interfering with the ability of the persons concerned to freely express their opinions had serious negative effects on those persons, on society and on democracy. Accordingly, States should be reminded of their positive obligations to ensure that persons with disabilities (including intellectual and psychosocial disabilities) could effectively exercise their right to vote; they could realise those obligations by undertaking general measures securing the accessibility of electoral procedures, reasonable accommodation, and the provision of individual support where necessary.

The parties’ comments on the Commissioner’s intervention

49.  The applicant agreed with the Commissioner that the rights under the Convention of persons with disabilities should be interpreted in the light of the CRPD, and emphasised that Article 3 of Protocol No. 1, read in conjunction with Article 14 of the Convention and Article 1 of Protocol No. 12, should be interpreted as guaranteeing the right to vote of persons with disabilities, without exception and on an equal basis.

50.  The Government reiterated that the role of the Court consisted of guaranteeing minimum common standards of protection of human rights – not legislating or harmonising legislation. They noted that Article 29 of the CRPD did not specify that any person with disabilities had the right to vote, but it did specify that persons who were entitled to vote should be furnished with sufficient means to enable them to exercise that right. The Government asserted in this regard that Spain provided all the means necessary to enable disabled persons to exercise their right to vote and their right to stand for election and to undertake public duties.

51.  The Government emphasised that the Spanish legal system provided everyone reaching the age of eighteen automatically acquired the right to vote. Disenfranchisement could only be effected by a judge after the lodging of a request by an interested party (that is to say a parent, guardian or public prosecutor); under the relevant law, not all types of intellectual or psychosocial disabilities constituted grounds for disenfranchisement – only when they were persistent and so serious that the person in question was not able to take care of himself or herself unaided; a decision to disenfranchise a person was to be taken by a judge in a procedure in which all due guarantees would be observed, and which would be subject to judicial review at a minimum of three levels of jurisdiction and subject to review in the event that the relevant circumstances changed.

The Court’s assessment

The interpretation of the Convention in the light of relevant rules and principles of international law

52.  Despite its specific character as a human rights instrument, the Convention is an international treaty that is to be interpreted in accordance with the relevant standards and principles of public international law and, in particular, in the light of the Vienna Convention on the Law of Treaties of 23 May 1969. Pursuant to the Vienna Convention, the Court must establish the ordinary meaning to be given to terms within their context and in the light of the object and purpose of the provision from which they are taken. Thus, the Court has never considered the provisions of the Convention to constitute the sole framework of reference for the interpretation of the rights and freedoms enshrined therein. On the contrary, it must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties (see, among many other authorities, Demir and Baykara v. Turkey [GC], no. 34503/97, § 67, ECHR 2008, Al‑Dulimi and Montana Management Inc. v. Switzerland [GC], no. 5809/08, § 134, 21 June 2016, Magyar Helsinki Bizottság v. Hungary [GC], no. 18030/11, § 123, 8 November 2016, and N.D. and N.T. v. Spain [GC], nos. 8675/15 and 8697/15, § 172, 13 February 2020).

53.  At the same time, the Court reiterates that it has authority to ensure that the text of the European Convention on Human Rights is respected (see Aliyeva and Aliyev v. Azerbaijan, no. 35587/08, § 74, 31 July 2014). It is the Convention which the Court can interpret and apply; it does not have authority to ensure respect for international treaties or obligations other than the Convention (see Güzelyurtlu and Others v. Cyprus and Turkey [GC], no.36925/07, § 235, 29 January 2019).

54.  The Court acknowledges that other instruments can offer wider protection than the Convention (regarding the CRPD, for example, see Rooman v. Belgium [GC], no. 18052/11, § 205, 31 January 2019), but the Court is not bound by interpretations given to similar instruments by other bodies, having regard to the possible difference in the contents of the provisions of other international instruments and/or the possible difference in role of the Court and the other bodies (see Muršić v. Croatia [GC], no. 7334/13, § 113, 20 October 2016). The Court understands that the Convention should be interpreted, as far as possible, in harmony with other rules of international law.

Alleged violation of Article 3 of Protocol No. 1

General principles

55.  The Court has established that Article 3 of Protocol No. 1 guarantees individual rights, including the right to vote and to stand for election (see, inter alia, Mathieu-Mohin and Clerfayt v. Belgium, 2 March 1987, § 51, Series A no. 113, and Selahattin Demirtaş v. Turkey (no. 2) [GC], no. 14305/17, § 385 22 December 2020). However, the rights guaranteed under Article 3 of Protocol No. 1 are not absolute. There is room for implied limitations, and the Contracting States have a margin of appreciation in this sphere, which generally is a wide one (see the above-cited cases of Mathieu-Mohin and Clerfayt, § 52, and Selahattin Demirtaş, § 387). The Court reiterates, however, that if a restriction on the right to vote applies to a particularly vulnerable group in society that has suffered considerable discrimination in the past, such as the mentally disabled, then the State’s margin of appreciation is substantially narrower (see Alajos Kiss, cited above, § 42).

56.  It is for the Court to finally determine whether the requirements of Article 3 of Protocol No. 1 have been complied with. It has to satisfy itself that the limitations imposed on the exercise of the rights under Article 3 of Protocol No. 1 do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate (see Mathieu-Mohin and Clerfayt, cited above, § 52, and Selahattin Demirtaş, cited above, § 387).

57.  In addition, any conditions imposed must not thwart the “free expression of the people in their choice of legislature” (see Selahattin Demirtaş, cited above, § 388). In other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage. Any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws that it promulgates. The exclusion of any groups or categories of the general population must accordingly be reconcilable with the underlying purposes of Article 3 of Protocol No. 1 (see, among other authorities, Hirst v. the United Kingdom (no. 2) [GC], no. 74025/01, § 62, ECHR 2005 IX, and Scoppola v. Italy (no. 3) [GC], no. 126/05, § 84, 22 May 2012). More specifically, election results should not be obtained through votes cast in a manner that runs counter to the fairness of elections or the free expression of the will of voters.

58.  The Court has stated that “since the Convention is first and foremost a system for the protection of human rights, it must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any emerging consensus as to the standards to be achieved. In this regard, one of the relevant factors in determining the scope of the authorities’ margin of appreciation may be the existence or non-existence of common ground between the laws of the Contracting States” (see Sitaropoulos and Giakoumopoulos v. Greece [GC], no. 42202/07, § 66, ECHR 2012).

59.  The Court reiterates that the presumption in a democratic State must be in favour of the inclusion of all, and that universal suffrage is the basic principle (see Hirst (no. 2), cited above, § 59; Sitaropoulos and Giakoumopoulos, cited above, § 67, and Scoppola (no. 3), cited above, § 82). This does not mean, however, that Article 3 of Protocol No. 1 guarantees to persons with a mental disability an absolute right to exercise their right to vote. Under this provision, these persons are not immune to limitations of their right to vote, provided that the limitations comply with the conditions set out above (see paragraphs 58 and 59 above). It is not for the Court to express an opinion on whether Article 29 of the CRPD imposes stricter obligations on the States that are parties to that convention. For the purpose of the interpretation of Article 3 of Protocol No. 1, the Court notes the fact that there is at present no consensus among the States Parties to Protocol No. 1 in the sense of an unconditional right of persons with a mental disability to exercise their right to vote. On the contrary, a majority of these States seems to allow for restrictions based on the mental capacity of the individual concerned (see paragraph 27 above).

60.  The margin of appreciation left to the States is not unlimited. The Court has already stated that an absolute bar on voting by any person under partial guardianship, irrespective of his or her actual faculties, does not fall within any acceptable margin of appreciation (see Alajos Kiss, cited above, § 42). Likewise, an indiscriminate removal of voting rights, without an individualised judicial evaluation and solely based on a mental disability necessitating partial guardianship, cannot be considered compatible with the legitimate grounds for restricting the right to vote (ibid., § 44).

61.  By contrast, the Court has accepted as legitimate the aim of “ensuring that only citizens capable of assessing the consequences of their decisions and making conscious and judicious decisions should participate in public affairs” (ibid., § 38).

Application to the present case

62.  The Court will now examine whether the disenfranchisement of the applicant’s daughter pursued a legitimate aim in a proportionate manner, having regard to the principles identified above. It will also examine whether the limitation of the applicant’s daughter’s right to vote interfered with the free expression of the opinion of the people.

Legitimate aim

63.  The Court points out that Article 3 of Protocol No. 1 does not, as do other provisions of the Convention, specify or limit the aims that a restriction must pursue. A wide range of purposes may therefore be compatible with Article 3 (see Hirst (no. 2), cited above, § 74, and Alajos Kiss, cited above, § 38).

64.  The Court accepts that the measure complained of pursued the aim of ensuring that only citizens capable of assessing the consequences of their decisions and of making conscious and judicious decisions should participate in public affairs. It is therefore satisfied that the measure pursued a legitimate aim (see paragraph 61 above).

Proportionality

65.  The Court observes that at the relevant time the Spanish system did not establish an automatic bar on voting in respect of persons under guardianship in situations similar to that of the applicant’s daughter, but took into account such persons’ actual faculties, which were to be analysed during judicial proceedings brought in order for such persons to be declared incapable.

66.  The Court notes, with respect to legal incapacitation in general of persons with disabilities, that the presumption in Spanish law is that they have the legal capacity and ability to act, except in cases where the degree of disability is such that it prevents them from caring for themselves. Accordingly, those who suffer from a mental illness that prevents them from caring for themselves may be declared incapable and placed under the guardianship of a tutor or a curator (see paragraph 17 above). However, guardianship does not automatically lead to disenfranchisement.

67.  At the time of the events in question, Spanish law provided for the deprivation of the right to vote only in respect of the most serious cases of disability and in respect of persons ruled incapacitated by a final judicial decision (always revisable according to the personal circumstances) declaring specifically that the person in question was incapable of exercising the right to vote (see paragraph 18 above).

68.  The Court notes that Spain in 2018 eliminated the possibility of restricting disabled people’s right to vote (see paragraph 19 above). This means that the applicant’s daughter has been entitled to exercise her right to vote since the entry into force of the Law 2/2018 amending the LOREG. Nevertheless, the fact that the law was amended in 2018 in such a way as to return voting rights to all persons with a mental disability, without exception, does not imply that the previous system was incompatible with the requirements of Article 3 of Protocol No. 1.

69.  The Court reiterates that in respect of the restriction of the rights of mentally disabled persons the margin of appreciation is relatively narrow (see paragraph 55 above); an individualised judicial evaluation of the cognitive capacity is therefore required, and it must be demonstrated that the limitation is not solely based on a mental disability necessitating partial guardianship (see Alajos Kiss, cited above, § 44).

70.  The Court will therefore examine whether the domestic courts thoroughly examined the justification of the limitation of the daughter’s rights, in the light of the Convention principles.

71.  As indicated above, the applicant’s daughter did not lose her right to vote as the result of the imposition of an automatic, blanket restriction on the franchise of those under guardianship but as the result of an explicit decision taken in the course of separate incapacity proceedings that were initiated at the request of her parents (contrast Alajos Kiss, cited above, § 43). The Court notes that those proceedings were initiated in December 2013 (shortly before M. reached the age of 18) after her parents lodged an application for her to be deprived of her legal capacity and for their guardianship over her to be extended. Her parents initiated the proceedings because they were aware that their daughter had serious problems that rendered her unable to manage her life on her own.

72.  As noted above, four different judicial bodies were involved in the assessment of the “fitness to vote” (see Alajos Kiss, cited above, § 41) of the applicant’s daughter. The First-Instance Judge examined the applicant’s daughter’s legal capacity in depth and – after weighing the interests at stake and evaluating the evidence and reports made within that process – ruled that the guardianship should be extended and that M. should be deprived of her right to vote because she had a lack of cognitive skills to understand the meaning of a vote and was prone to be influenced very easily (see paragraphs 6-8 above). That decision was confirmed by the Regional Court on appeal (see paragraph 10 above). The latter’s decision was upheld by the Supreme Court after an appeal on points of law. The Supreme Court examined the substance of the appeals lodged by the applicant and found that the decision of the Regional Court had contained a thorough analysis of the case and had correctly balanced the interests at stake (see paragraph 12 above). Finally, the Constitutional Court dismissed an amparo appeal, after having found that the contested judicial decisions were based on an individualised examination of the applicant’s daughter’s situation and did not manifest any arbitrariness, irrationality or obvious error (see paragraph 14 above).

73.  Having regard to the foregoing, in particular the fact that the removal of the applicant’s daughter’s voting rights was based on her lack of understanding of the meaning of a vote and her susceptibility to being influenced, the Court concludes that her disenfranchisement was not disproportionate to the legitimate aim pursued.

The free expression of the opinion of the people

74.  The Court emphasises that an overriding obligation under Article 3 of Protocol No. 1 is to “ensure the free expression of the opinion of the people”. Any limitation of the right to vote must therefore be analysed not only from the perspective of the individual concerned, but also from the perspective of democratic society as a whole, since each individual’s right is embedded within the broader framework of the electoral system. That system must be “aimed at identifying the will of the people through universal suffrage” (see paragraph 57 above). Such a result can only be obtained through a voting process that allows for the people freely expressing their opinion in the choice of the legislature.

75.  It is for each State to determine how the “free” expression of the opinion of the people is to be ensured while at the same time making provision that the opinion expressed represents the one “of the people”. The survey of 28 Member States of the European Union shows that while a number of States put the emphasis on the right of all people to participate in the elections, other States put the emphasis on the requirement of a free and self-determined electoral choice by the voters, thus prohibiting persons with certain mental disabilities from participating in the elections (see paragraphs 27-28 above). Article 3 of Protocol No. 1 does not impose either one of these systems. The Court considers that both systems fall within the margin of appreciation of the States, as long as -in the second system- the conditions for disenfranchisement are such that they apply only to those persons who are effectively unable to make a free and self-determined electoral choice.

76.  Having regard to the reasons for the exclusion of the applicant’s daughter from the electoral process (see paragraphs 71-73 above), the Court considers that the contested measure does not thwart the free expression of the opinion of the people.

Conclusion

77.  In the light of the above, the Court considers that the decision taken by the domestic courts in the present case falls within the margin of appreciation of the States to regulate the right to vote. The disenfranchisement of the applicant’s daughter took place on the basis of her personal circumstances and by means of judgments that were delivered following a thorough analysis of her mental capacity. Contrary to the applicant’s assertion, M. was not deprived of the right to vote simply because she belonged to a certain group of persons. Her disenfranchisement cannot be considered to thwart the free expression of the opinion of the people in the choice of the legislature.

78.  Having regard to the foregoing, the Court concludes that there has been no violation of Article 3 of Protocol No. 1 to the Convention.

Alleged violation of Article 14 of the Convention in conjunction with Article 3 of Protocol No. 1, and of Article 1 of Protocol No. 12

79.  The Court has stated that, in spite of the difference in scope between Article 14 of the Convention and Article 1 of Protocol No. 12 to the Convention, the meaning of the notion of “discrimination” in Article 1 of Protocol No. 12 is intended to be identical to that in Article 14 (see paragraphs 18 and 19 of the Explanatory Report to Protocol No. 12). In applying the same term under Article 1 of Protocol No. 12, the Court therefore sees no reason to depart from the established interpretation of “discrimination”.  It can be inferred that, in principle, 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 Napotnik v. Romania, no. 33139/13, § 69 and 70, 20 October 2020).

80.  The Court reiterates that in the enjoyment of the rights and freedoms guaranteed by the Convention, Article 14 affords protection against different treatment, without objective and reasonable justification, of individuals in analogous, or relevantly similar, situations. In other words, the requirement to demonstrate an analogous position does not require that the comparator groups be identical. For the purposes of Article 14, a difference in treatment is discriminatory if it “has no objective and reasonable justification” – that is to say if it does not pursue a “legitimate aim” or if there is not a “reasonable relationship of proportionality” between the means employed and the aim sought to be realised (see Napotnik, cited above, § 71).

81.  The Court has also established in its case-law that only differences in treatment based on an identifiable characteristic, or “status”, are capable of amounting to discrimination within the meaning of Article 14 (see Fábián v. Hungary [GC], no. [78117/13](https://hudoc.echr.coe.int/eng#{%22appno%22:[%2278117/13%22]}), § 113, 5 September 2017).

82.  The Court notes, in respect of the instant case, that the right to vote of the applicant’s daughter was restricted because of her limited mental capacity. The difference in treatment between the daughter (whose right to vote was restricted) and persons who had the right to vote was therefore based on the respective mental capacity of each person. The Court considers that (in respect of restrictions on the right to vote) a difference in treatment based on such grounds pursues a legitimate aim and that there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The assessment underlying the Court’s conclusion that the interferences with the right to vote of the applicant’s daughter were justified under Article 3 of Protocol No. 1 took into account the applicant’s daughter special status (that is to say the fact that the degree of her legal capacity had been modified). These considerations are equally valid within the context of Article 14 and, even assuming that the applicant’s daughter can be deemed to be in a comparable position to other persons whose legal capacity has not been modified, justify the difference of treatment complained of.

83.  In view of the foregoing, the Court concludes that there has been no violation of either Article 14 of the Convention, read in conjunction with Article 3 of Protocol No. 1, or Article 1 of Protocol No. 12.

**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 3 of Protocol No. 1;

3. Holds, by six votes to one, that there has been no violation of either Article 14 of the Convention, read in conjunction with Article 3 of Protocol No. 1, or Article 1 of Protocol No. 12.

Done in English, and notified in writing on 11 May 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško Paul Lemmens  
 Registrar President

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

P.L.  
M.B.

**DISSENTING OPINION OF JUDGE LEMMENS**

1.  To my regret, I am unable to agree with the finding of the majority that there has been no violation of either Article 3 of Protocol No. 1 to the Convention or Article 14 of the Convention and Article 1 of Protocol No. 12.

I must admit from the outset that the majority’s opinion is based on solid reasoning and that it is in line with the Court’s existing case-law.[[5]](#footnote-5) I believe, however, that the interpretation of the Convention in this area requires updating, and that an updated interpretation would necessarily lead to a different outcome in the present case.

Article 3 of Protocol No. 1

2.  Article 3 of Protocol No. 1 provides that “the High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature”.

The present case deals with a limitation of the right to vote, based on the applicant’s daughter’s lack of capacity in respect of political affairs and electoral matters (see the decision of the first-instance court, referred to in paragraph 8 of the judgment). Such a limitation can be accepted only if it does not curtail the right in question to such an extent as to impair its very essence and deprive it of its effectiveness, if it is imposed in pursuit of a legitimate aim, and if the means employed are not disproportionate (see paragraph 56 of the judgment). In addition, the limitation in question must not thwart the “free expression of the opinion of the people” (see paragraph 57 of the judgment).

The limitation of the applicant’s daughter’s right to vote

3.  With respect to the first aspect, the justifiability from the point of view of the individual in question, the majority consider that the right to vote can be restricted on the basis of a person’s mental capacity, if the aim is to ensure that “only citizens capable of assessing the consequences of their decisions and making conscious and judicious decisions should participate in public affairs” (see paragraph 61 of the judgment, referring to Alajos Kiss v. Hungary, no. 38832/06, § 38, 20 May 2010).

4.  This point of view conflicts with the interpretation given by the Committee on the Rights of Persons with Disabilities (hereafter “the CRPD” Committee) to Articles 12 and 29 of the Convention on the Rights of Persons with Disabilities (hereafter “the CRPD”).

Article 12 § 2 provides that States Parties shall recognise that persons with disabilities enjoy legal capacity, on an equal basis with others, in all aspects of life. According to the CRPD Committee, “legal capacity includes the capacity to be both a holder of rights and an actor under the law” (General Comment No. 1 (2014) on Article 12: Equal recognition before the law, § 12, CRPD/C/GC/1).

The CRPD Committee further notes that “recognition of legal capacity is inextricably linked to the enjoyment of many other human rights provided for in the [CRPD]” (ibid., § 31). With respect to Article 29, which guarantees the right of persons with disabilities to “effectively and fully participate in political and public life on an equal basis with others” (Article 29 (a), the CRPD Committee is of the opinion “that a person’s decision-making ability cannot be a justification for any exclusion of persons with disabilities from exercising their political rights, including the right to vote ...” (ibid., § 48, quoted in paragraph 24 of the judgment).

The statements referred to above should be read in conjunction with the CRPD Committee’s views in Zsolt Bujdosó and Others v. Hungary, adopted a year earlier (communication no. 4/2011, views adopted on 9 September 2013, CRPD/C/10/D/4/2011). That case was brought by a number of persons suffering from intellectual disability and placed under partial or general guardianship. They complained about their disenfranchisement on the basis of disability. The CRPD Committee held that “an exclusion of the right to vote on the basis of a perceived or actual psychosocial or intellectual disability, including a restriction pursuant to an individualised assessment, constitutes discrimination on the basis of disability”. A provision “which allows courts to deprive persons with intellectual disability of their right to vote ..., is in breach of Article 29 of the [CRPD]” (ibid., § 9.4).

The conclusion to be drawn from the above is simple: under the CRPD, all persons with disabilities, without exception, should have the right to vote, and no one should be deprived of that right on the basis of any perceived or actual intellectual disability.

5.  The majority admit that the Convention should be interpreted, as far as possible, in harmony with other rules of international law (see paragraph 54 of the judgment). They underline, however, that the Court is “not bound by interpretations given to similar instruments by other bodies” (ibid.). I have no problem agreeing with that statement in general. It is for the Court to decide for itself how a provision of the Convention is to be interpreted, and it may conclude that the Convention provision is to receive an interpretation that is different from another human-rights body’s interpretation of a similar provision.

The majority distance themselves from the CRPD Committee’s position on the issue at stake, summarised above. They do so because of a lack of “consensus among the States Parties to Protocol No. 1 in the sense of an unconditional right of persons with a mental disability to exercise their right to vote”; they in fact see a consensus in the other direction, namely a prevailing view among the States Parties that “restrictions based on the mental capacity of the individual concerned” are permissible (see paragraph 59 of the judgment).

I respectfully disagree. In my opinion the Court should have aligned its approach to that of the CRPD Committee, for the reasons that I will now try to set out.

6.  In the first place, voting is more than just expressing a certain preference on a particular day, every few years. As is confirmed by the title of Article 29 of the CRPD, it forms part of the broader right to participate in political and public life.

As eloquently stated by Martha Nussbaum, the exclusion of persons with cognitive disabilities from the right to vote means that these persons “are simply disqualified from the most essential functions of citizenship”, “they do not count”, “their interests are not weighed in the balance”, “they are not regarded as fully equal citizens, with a dignity commensurate with that of others” (see M. Nussbaum, “The Capabilities of Persons with Cognitive Disabilities”, Metaphilosophy, vol. 40, 2009, (331), at 347).

Respect for human dignity is a strong argument for fully respecting each person’s right to vote.

7.  Secondly, as underlined by the CRPD Committee in its general comment on Article 12 of the CRPD, there is a difference between legal capacity and mental capacity:

“Legal capacity and mental capacity are distinct concepts. Legal capacity is the ability to hold rights and duties (legal standing) and to exercise those rights and duties (legal agency). It is the key to accessing meaningful participation in society. Mental capacity refers to the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors. ... Article 12 of the [CRPD] makes it clear that “unsoundedness of mind” and other discriminatory labels are not legitimate reasons for the denial of legal capacity (both legal standing and legal agency). Under Article 12 of the [CRPD], perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity” (General Comment No. 1 (2014), cited above, § 13).

I regret that the majority do not draw the above distinction. They accept the complete removal of the applicant’s daughter’s right to vote on the basis of her cognitive disability. This is exactly the kind of situation that the CRPD Committee denounced in 2014: “In most of the State party reports that the CRPD Committee has examined so far, the concepts of mental and legal capacity have been conflated so that where a person is considered to have impaired decision-making skills, often because of a cognitive or psychosocial disability, his or her legal capacity to make a particular decision is consequently removed” (see General comment No. 1 (2014), cited above, § 15).

A much less far-reaching measure is possible, which fully respects the person’s legal capacity to vote, while at the same ensuring that that capacity is exercised by a person “capable of assessing the consequences” of any vote cast (see the terms used by the first-instance court in the present case, quoted in paragraph 8 of the present judgment). In this respect I should like again to refer to Nussbaum, who argues that in the case of a person with “profound cognitive disabilities” a surrogate may be designated who would be able to vote on that person’s behalf. Such an arrangement would reflect the principle “one person, one vote”, a principle that is not observed when the person with a disability is excluded altogether from voting (see M. Nussbaum, cited above, p. 347; see also M. Nussbaum, Creating Capabilities. The Human Development Approach, Belknap Press, Cambridge, Mass., 2011, 24).

It should be noted that such an arrangement would be fully compatible with the CRPD. Article 12 § 3 of the CRPD provides that States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity. The CRPD Committee explains that “support” is a broad term. It may encompass, depending on the type and intensity of the disability of the person, assistance by a trusted person in exercising his or her legal capacity (General comment No. 1 (2014), cited above, § 17). In the case of the exercise of the right to vote by a person with a cognitive disability, the trusted person can – and should – vote according to his or her interpretation of that person’s “will and preferences” (Article 12 § 4 of the CRPD; see General comment No. 1 (2014), cited above, § 21).

8.  Thirdly, I must also address the majority’s reliance on a lack of consensus among the States Parties to Protocol No. 1 in favour of an unconditional right of persons with a mental disability to exercise their right to vote.

In a matter such as the one at issue, which is the subject of a specific treaty, adherence to that treaty should be a strong indicator of the existence or lack of consensus. The CRPD has to date been ratified by 45 of the 47 member States of the Council of Europe (the only two States that are not party to the CRPD are Liechtenstein and Ukraine). It is true that a number of these 45 States have made declarations or reservations with respect to Articles 12 and/or 29 (for an overview of the declarations and reservations, see the dedicated website of the United Nations Treaty Collection, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en>). This does not alter the fact that a very large majority of States Parties to Protocol No. 1 unreservedly agreed with the principles contained in the CRPD.[[6]](#footnote-6)

9.  A different question is to what extent the States Parties also live up to the obligations to which they have committed themselves by ratifying the CRPD.

The majority refer to a report adopted in 2014 by the European Union Fundamental Rights Agency (hereafter, “the FRA”; see paragraphs 27 and 59 of the judgment). At that time only seven of the 28 EU Member States guaranteed the right to vote for all persons, including those without legal capacity. The FRA considered this to be a problematic situation, referring to the concerns expressed by the CRPD Committee (FRA, The right to political participation for persons with disabilities: human rights indicators, 2014, 39-41). It reminded the States concerned of the need to “amend national legislation depriving people of the right to vote based on a disability, or a proxy such as assessed ‘capacity’” (ibid., 8). In a later report, adopted in 2019, the FRA noted “slow but steady progress in realising the right to vote for all” (FRA, Who will (not) get to vote in the 2019 European Parliament elections? Developments in the right to vote of people deprived of legal capacity in EU Member States, 2019, 3; see paragraph 28 of the judgment). Based on its analysis of reforms at the national level linked to the ratification of the CRPD, the FRA found that the reforms “demonstrate a clear trend towards reducing restrictions on the right to vote of people with disabilities deprived of legal capacity” (ibid., 3). Spain in particular was mentioned, as the State in which “the most comprehensive removal of restrictions to the right to vote took place” (ibid., 3; see the reference to the 2018 reform in paragraphs 19 and 68 of the judgment).

In my opinion, if anything can be learnt from the FRA reports, it is that there is a “slow but steady” trend to align national legislation with the CRPD, that is, to implement the obligations arising from the CRPD in domestic law.

10.  Fourthly, I regret that the majority do not take the same approach as two other independent bodies of the Council of Europe.

The first body I am referring to is the Venice Commission. The majority quote from the Code of Good Practice in Electoral Matters, adopted by the Commission in 2002 (see paragraph 26 of the judgment). The Code allows for the deprivation of individuals of their right to vote “by express decision of a court of law”, on the basis of “mental incapacity” (item I.1.1, d, iv and v).

The relevant item has, however, been the object of two “interpretative declarations”, specifically “on the participation of people with disabilities in elections”. The first of these declarations was adopted by the Venice Commission on 15-16 October 2010. It provided, very much in line with the wording of the Code itself, that “no person with a disability can be excluded from the right to vote ... on the basis of her/his physical and/or mental disability unless the deprivation of the right to vote ... is imposed by an individual decision of a court of law because of proven mental disability” (Venice Commission, Interpretative Declaration to the Code of Good Practice in Electoral Matters on the Participation of People with Disabilities in Elections, § 2, CDL-AD(2010)036). That position was criticised by the Council of Europe’s Committee of experts on the participation of people with disabilities in political and public life (CAHPAH-PPL) for not being “in line with the spirit” of the CRPD, in particular the provisions of Articles 12 and 29 (see Venice Commission, Information Note concerning the Interpretative Declaration of the Code of Good Practice in Electoral Matters on the Participation of People with Disabilities in Elections, p. 2, CDL(2011)043). Consequently, the Venice Commission reconsidered the matter. In a new version of the interpretative declaration, adopted on 16-17 December 2011, it stated: “Universal suffrage is a fundamental principle of the European Electoral Heritage. People with disabilities may not be discriminated against in this regard, in conformity with Article 29 of the [CRPD] and the case-law of the European Court of Human Rights” (Venice Commission, Revised Interpretative Declaration to the Code of Good Practice in Electoral Matters on the Participation of People with Disabilities in Elections, § 2, CDL-AD(2011)045; the reference to the Court’s case-law is to Alajos Kiss, cited above, §§ 43-44). The Venice Commission thus stands for a more nuanced approach than would appear from the wording of the Code of Good Practice.

The other Council of Europe organ is the Commissioner for Human Rights. She intervened as a third party in the present case. In that capacity she argues resolutely that Article 3 of Protocol No. 1 should be interpreted in the light of Article 29 of the CRPD and that “the right to vote of persons with disabilities should be upheld without exception” (see paragraph 48 of the judgment).

11.  In conclusion, while I agree that the Spanish system under review pursued a legitimate aim (see paragraph 64 of the judgment), in my opinion it had a disproportionate effect on the applicant’s daughter’s right to vote.

The obligation to ensure the free expression of the opinion of the people

12.  Turning to the second aspect of the analysis under Article 3 of Protocol No. 1, it is necessary to examine to what extent the restriction at issue has a bearing on the “free expression of the opinion of the people”.

As is pointed out by the majority, any condition imposed on the individual right to vote “must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage (see paragraph 57 of the judgment, with references to the Court’s case-law).

The key notion in the text of Article 3 of Protocol No. 1 is that of “the opinion of the people”. As I understand that notion, it refers to the opinion, or the diversity of opinions, of the electorate as a whole. Article 3 requires that the electoral system is organised in such a way that the result of the election “fairly faithfully” reflects “the opinions of the people” (see Mathieu-Mohin and Clerfayt v. Belgium, 2 March 1987, § 54, Series A no. 113; Yumak and Sadak v. Turkey [GC], no. 10226/03, § 112, ECHR 2008; and Cernea v. Romania, no. 43609/10, § 35, 27 February 2018).

The majority translate this requirement into one that concerns the capability of each individual voter to “make a free and self-determined electoral choice” (see paragraph 75 of the judgment). They thus reduce the notion of “opinion of the people” to that of an aggregation of the individual opinions of each voter. In doing so, they in fact return to the question of the justification for the restriction of the individual voters’ right to exercise their right to vote. This concerns the first aspect to be analysed under Article 3 of Protocol No. 1 (as discussed in paragraphs 3-11 above), and adds nothing to it. The collective dimension of the “opinion of the people” is completely lost.

13.  What is required by respect for the “free expression of the opinion of the people” is that the various groups in society, with their different views on how society should be organised and how the benefits and the burdens should be divided among the various categories of citizens, are fairly represented in the body set up to represent “the people” and to take important political decisions.

In this respect, I agree with the view of the Commissioner for Human Rights, namely that excluding a large category of persons, such as persons with intellectual and psychosocial disabilities, from the electoral process, not only deprives these persons “of any possibility of influencing the political process and the chance of shaping the policies and measures that directly [affect] their lives”, but also deprives “society as a whole ... of a legislature that [reflects] its full diversity” (see paragraph 47 of the judgment).

An electoral system providing for the disenfranchisement of a whole category of vulnerable persons is hardly able to ensure “the free expression of the opinion of the people”.

Conclusion

14.  For the above reasons, I must conclude that there has been a violation of Article 3 of Protocol No. 1.

Article 14 of the Convention and Article 1 of Protocol No. 12

15.  The majority conclude that there has been no violation of either Article 14 of the Convention or Article 1 of Protocol No. 12. They basically hold that the reasons which justified an interference with the right to vote as guaranteed by Article 3 of Protocol No. 1, “are equally valid within the context of Article 14 [and Article 1 of Protocol No. 12]” (see paragraph 82 of the judgment).

16.  I feel compelled to disagree on this point as well.

In electoral matters, equality is of particular importance. By barring the applicant’s daughter from the exercise of her right to vote, the State reduced her to a second-class citizen. Unlike other citizens, she cannot make her voice heard, not even via a trusted person.

I cannot see an objective and reasonable justification for the impugned difference in treatment. In my opinion, there has been a violation of Article 14 of the Convention and Article 1 of Protocol No. 12.

Concluding remarks

17.  This case is important not only for people with cognitive disabilities but also for the Court. How does it see its role as a guarantor of human rights?

In Alajos Kiss, decided in 2010, the Court took a major step by holding that the automatic disenfranchisement of the applicant, merely because he was under partial guardianship, could not be considered to be within an acceptable margin of appreciation of the domestic authorities (see Alajos Kiss, cited above, § 42). It added that “the treatment as a single class of those with intellectual or mental disabilities is a questionable classification, and [that] the curtailment of their rights must be subject to strict scrutiny” (ibid., § 44). It nevertheless suggested that a removal of voting rights after “an individualised judicial evaluation, and solely based on a mental disability necessitating partial guardianship”, could be considered compatible with Article 3 of Protocol No. 1 (ibid., § 44). In the present case the majority make that suggestion an explicit statement.

Since 2010, however, a number of things have changed. The CRPD, which had already entered into force in 2008, has been given a concrete content by the CRPD Committee. While some of the CRPD Committee’s interpretations may not be directly transposable to the Convention, others are. The CRPD Committee’s interpretation of the right to vote of persons with disabilities is one such relevant analysis.

The majority prefer not to follow the CRPD Committee’s views. They opt for a cautious approach. As long as there is no consensus among the States Parties to the Convention to adapt their laws to the CRPD as interpreted by the CRPD Committee, they do not consider it the Court’s task to read into Article 3 of Protocol No. 1 an obligation for the States to do so.

18.  The CRPD is based on the model of “inclusive equality”, implying among other things “the full recognition of humanity through inclusion in society” (CRPD Committee, General comment No. 6 (2018) on equality and non-discrimination, § 11, CRPD/C/GC/6).

In a recent publication, which for obvious reasons I read with more than usual interest, Jenny Goldschmidt explains that inclusion also means “removing the barriers” that prevent people from enjoying their rights (see J. Goldschmidt, “The Implementation of the CRPD in the ECHR: Challenges and Opportunities”, in K. Lemmens, St. Parmentier and L. Reyntjens (eds.), Human Rights with a Human Touch. Liber Amicorum Paul Lemmens, Intersentia, Cambridge, 2020, (611), at 613). She focuses on the relevance of the CRPD, with its emphasis on inclusion, for the interpretation and application of the Convention (ibid., 614). She concludes her research as follows: “The CRPD challenges the [Court] to reconsider its own jurisprudence, as can be required to incorporate differences instead of reaffirming inequality by allowing exceptions or accommodations, which leave the excluding normative frames untouched. The progressive realisation of the rights of the [Convention] demands a more fundamental re-thinking of the cases and laws that are considered and an unveiling of the neutrality of the underlying perspectives. In some cases, the [Court] seems aware of this, but ... it seems often reluctant to take a more substantive approach” (ibid., 631).

To reconsider the case-law is sometimes necessary. The present case evidently offered an opportunity to do so. Article 12 § 2 of the CRPD obliges the States Parties to the CRPD to recognise the legal capacity of all persons with disabilities, on an equal basis with others. While the States Parties to Protocol No. 1 enjoy a certain margin of appreciation in the sphere of limitations of the right to vote, the Court has already accepted that that margin is relatively narrow when the restriction applies to the mentally disabled (see paragraph 55 of the judgment, referring to Alajos Kiss, cited above, § 42). Given the obligations imposed on the States by Article 12 of the CRPD, as clarified by the CRPD Committee, the Court should have indicated that the margin for restrictions under Article 3 of Protocol No. 1 has been further reduced.

19.  The irony of this case is that while the Court is reluctant to update its case-law in accordance with the CRPD, the respondent State has in the meantime already adapted its legislation. The State did not wait for a ruling by the Court. The majority do not consider this development worth of much attention. They simply state that the fact that the law was amended “does not imply that the previous system was incompatible with the requirements of Article 3 of Protocol No. 1” (see paragraph 68 of the judgment).

The Court occasionally warns itself against failing “to maintain a dynamic and evolutive approach”, as this would “risk rendering it a bar to reform or improvement” (see, among other authorities, Stafford v. the United Kingdom [GC], no. 46295/99, § 68, ECHR 2002‑IV; Christine Goodwin v. the United Kingdom [GC], no. 28957/95, § 74, ECHR 2002‑VI; and Bayatyan v. Armenia [GC], no. 23459/03, § 98, ECHR 2011). I am afraid that the present judgment could constitute a bar to the alignment of the Convention and domestic laws with the inclusive approach to equality as introduced by the CRPD in human-rights law.

## **CASE OF SELYGENENKO AND OTHERS v. UKRAINE**

(Applications nos. 24919/16 and 28658/16)

JUDGMENT

Art 1 P12 • Prohibition of discrimination • Discriminatory refusal to allow applicants to participate in local elections at their place of their actual residence in which they were registered as internally displaced persons (IDPs) • Applicants as IDPs in a significantly different situation from citizens living at their registered places and other mobile population groups who could return to their registered places of residence to vote in local elections there • Failure to treat applicants differently, given the non-voluntary nature of their move, by making an exception to the election residence rule • Applicants’ inability to participate in their new communities’ local affairs during the enforced absence from their permanent homes albeit such participation being an important element of IDPs’ integration

STRASBOURG

21 October 2021

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

In the case of Selygenenko and Others v. Ukraine,

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

Síofra O’Leary, *President,* Mārtiņš Mits, Ganna Yudkivska, Stéphanie Mourou-Vikström, Ivana Jelić, Arnfinn Bårdsen, Mattias Guyomar, *judges,*and Victor Soloveytchik, *Section Registrar,*

Having regard to:

the applications (nos. 24919/16 and 28658/16) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by four Ukrainian nationals, Ms Oleksandra Vyacheslavivna Selygenenko, Ms Anastasiya Romanivna Martynovska, Ms Darya Oleksandrvna Svyrydova and Ms Yevgeniya Oleksandrivna Terekhova (“the applicants”), on 23 April 2016 (the first three applicants) and 14 May 2016 (Ms Terekhova), respectively;

the decision to give notice to the Ukrainian Government (“the Government”) of the applications;

the parties’ observations;

Having deliberated in private on 28 September 2021,

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

1. **INTRODUCTION**

1.  The applicants complained under Article 1 of Protocol No. 12 to the Convention that they had not been allowed to participate in local elections at the place of their actual residence, in which they were registered as internally displaced persons (IDPs).

1. **THE FACTS**

2.  Details about the applicants are indicated in the appended table. They live in Kyiv. Ms Terekhova, who was granted legal aid, was represented by Ms V. P. Lebid and Mr M. O. Tarakhkalo, lawyers from the Ukrainian Helsinki Human Rights Union, Kyiv. The other three applicants were represented by Mr S.A. Zayets, a lawyer from the Regional Centre for Human Rights, Kyiv, and Mr. J. Evans and Mr K. Levine, lawyers from the European Human Rights Advocacy Centre, London.

3.  The Government were represented by their Agent, Mr I. Lishchyna, from the Ministry of Justice.

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

5.  The applicants had lived respectively in Crimea and Donetsk and had had their registered places of residence there. After Crimea came under *de facto* Russian jurisdiction and the conflict in Eastern Ukraine started (hereinafter - events of 2014), all four applicants moved to Kyiv and registered there as IDPs on various dates in 2014 and 2015 (see the appended table for individual details) and were issued with IDP certificates. All of them maintained that their respective registered places of residence continued to be located in Crimea and Donetsk, as was indicated in their “internal passports” (identity documents for use in Ukraine – hereafter “passports”), while their IDP certificates indicated that the place of their actual residence was in fact Kyiv.

6**.  They all lodged applications to be included in the lists of voters who would participate in local elections in Kyiv scheduled to take place in October-November 2015, but their applications were dismissed on the grounds that their respective registered places of residence were not in Kyiv but elsewhere.**

7.  On 25 October 2015 one of the applicants, Ms Terekhova, lodged a complaint with the Central Electoral Commission. She alleged, *inter alia*, that her right to vote had been violated, given the fact that, because she was an IDP, she had not been allowed to participate in local elections.

8.  The Central Electoral Commission replied that under section 3 of the Local Election Act, a person’s place of residence for the purposes of voting in local elections was to be determined according to the registered place of residence, as indicated in the person’s passport. It furthermore noted that elections on the territories that were outside the Government’s control could be conducted only after the regaining of such control and the restoration of constitutional order on those territories; as soon as Parliament decided to conduct elections there, Ms Terekhova would be able to realise her right to vote in local elections.

9.  All four applicants lodged administrative claims with their respective local courts in Kyiv seeking to oblige the respective electoral commissions to include them in the voters’ lists for the local elections. On various dates the first-instance courts dismissed the applicants’ claims, and those decisions were upheld on appeal by the Kyiv City Court of Appeal (for all relevant dates and names of the relevant institutions see the appended table).

10.  All the applicants in their administrative claims submitted that they had been forced to move to Kyiv from their respective registered places of residence because of the events of 2014. In Kyiv they were registered as IDPs, and on their IDP certificates their places of actual residence were indicated as being located in Kyiv. The applicants noted that they had a right to vote in the upcoming elections as they met all the criteria set forth in Article 70 of the Constitution. They also considered that since they resided in Kyiv (as confirmed by their IDP certificates) they “belonged” to the respective territorial communities there. They pointed to the provisions of the Ensuring the Rights and Freedoms of Internally Displaced Persons Act, which guaranteed them the right to participate in free elections – including local elections (see paragraph 24 below).

11.  The first-instance courts, with reference to the domestic legislation described below, reiterated that the right to vote in local elections in Ukraine was conferred on citizens of Ukraine who “belonged” to their respective local communities and who resided within their respective voting constituencies. A person’s residence within his local constituency and “belonging” (*належність*) to his respective community was confirmed by his registered place of residence, as indicated in his passport. The courts noted that everyone enjoyed the right to freedom of movement and of choice of residence but was required by law to register at any new place of residence, with that new information to be recorded in one’s passport. As to IDPs, their temporary place of residence was indicated in their respective IDP certificates, but without that residence having to be registered in their passports. Under the Local Elections Act (see relevant provisions in paragraphs 14 and 15 below), persons who were not in the constituency of their electoral address on the day of elections could not participate in local elections. The applicants had their registered places of residence as being, respectively, in Crimea and Donetsk and had their electoral addresses there. Therefore, they could not participate in local elections in Kyiv. Their administrative claims were accordingly dismissed.

12.  The appellate court reiterated the reasoning of the first-instance courts and noted that whether or not a citizen “belonged” to a particular territorial community (*територіальна громада*) and whether his residence was within that community was determined by his registered place of residence. The appellate court furthermore noted that a person’s place of residence, as indicated in his passport, had a key legal meaning for the purposes of deciding disputes regarding whether a person could be included in a list of voters, since a voter’s registered place of residence defined that person’s election address. The court concluded that the applicants did not “belong” to their respective territorial communities in Kyiv as they did not have their registered places of residence there, and that they were therefore not entitled to vote in those communities’ local elections. Decisions of the court of appeal were final and not subject to any further appeal.

1. **RELEVANT LEGAL FRAMEWORK AND PRACTICE**
   1. **Domestic law and practice**
      1. Constitution of Ukraine, 1996

13.  Under Article 70 the right to vote is conferred on all citizens of Ukraine who have attained the age of eighteen, with the exception of those who have been declared legally incompetent by a court.

* + 1. Local Elections Act, 2015 (in force until 1 January 2020)

14.  Section 3 of the Act provided that whether a citizen “belongs” to a particular territorial community and whether that citizen had his or her residence within that community was determined by whether or not he or she had his or her registered place of residence there. Under the same Article, the identity of a voter and his or her citizenship and registered place of residence were confirmed by information in his or her national passport.

15.  Paragraph 3 of Section 30 of the Act provided insofar as relevant as follows:

“3. A voter who is outside the settlement in which he or she resides on the day of the election shall not participate in the local elections...

The provisions of paragraph 3 of Section 7 of the On the State Register of Voters Act do not apply in local elections.”

* + 1. State Register of Voters Act, 2007

16.  Under paragraph 3 of section 7 the place of voting of a voter can be temporarily changed without a change being made to his or her electoral address.

17.  Under paragraph 2 of section 8 of the Act the electoral address of a voter is determined by his registered place of residence and the address of the voter’s home, in accordance with the Freedom of Movement and Free Choice of Residence in Ukraine Act.

18.  With adoption of the Electoral Code in 2019 (see paragraph 28 below) section 7 of the Act was supplemented by a new paragraph 4, similar to that which was previously contained in the Local Elections Act (see paragraph 15 above) which stipulates that a temporary change of the place of voting does not apply to local elections.

19.  Furthermore, section 8 of the Act was supplemented by a new paragraph 3 which foresees:

“At the request of a voter, the body which maintains the Register may determine a different electoral address than the one determined in accordance with paragraph 2 of this section.”

* + 1. Freedom of Movement and Free Choice of Residence in Ukraine Act, 2004

20.  Under section 6 of the Act, any person who moves to a new place of residence must register it as such by submitting documents to the relevant registration authority. No one may have more than one official residence; if a person has several *de facto* places of residence, he or she must choose which of those he or she wishes to register as his or her official address.

* + 1. Local Self-Government Act, 1997

21.  Under section 1 of the Act a “territorial community” is defined as (i) inhabitants united by permanent residence within the boundaries of a village, settlement or city (which must be independent administrative-territorial units), or (ii) a voluntary association of inhabitants of several villages that share a single administrative centre.

* + 1. Ensuring the Rights and Freedoms of Internally Displaced Persons Act, 2014 (“the IDP Act”)

22.  Section 1 of the Act defines an “internally displaced person” as a person with permanent residence in Ukraine who has been expelled or forced to leave his or her place of residence as a result of – or in order to avoid the negative consequences of – armed conflict, temporary occupation, widespread violence, human rights violations or emergencies of a natural or man-made nature.

23.  Under section 5 of the Act, an IDP certificate certifies the place of residence of its holder for the period of existence of the grounds specified in section 1 of the Act.

24.  Section 8 of the Act guarantees to IDPs the right to vote. In its original wording of 2014, it read as follows:

“An internally displaced person shall exercise his or her right to vote in elections of the President of Ukraine, people’s deputies of Ukraine, local elections and referenda by changing the place of voting without changing the electoral address in accordance with paragraph 3 of section 7 of the State Register of Voters Act.”

25.  With adoption of the Electoral Code in 2019 (see paragraph 28 below) the reference to paragraph 3 of section 7 of the State Register of Voters Act was replaced with the general reference “in accordance with the procedure established by law.”

* + 1. Ensuring the Rights and Freedoms of Citizens and the Legal Regime in respect of the Temporarily Occupied Territories within Ukraine Act, 2014

26.  Paragraph 5 of section 8 of this Act stipulates that no local or regional elections or referenda should be conducted within the temporarily occupied territories.

* + 1. Decision of the Supreme Court of 25 July 2018 in case no. K/9901/17330/18

27.  The claimant in this case challenged the refusal by the Lutsk department of the State Register of Voters to include her name in the voters’ list for local elections to be held at the place of her actual residence as an IDP (where she had resided for more than a year). The Administrative Court of Cassation (which forms part of the Supreme Court) in its decision upheld the finding of the lower-instance courts that the fact that a person “belonged” to a particular territorial community was confirmed by that person’s registered place of residence, as indicated in his or her passport; the court also upheld the lower-instance courts’ finding that the place of residence noted in a person’s passport was of key legal significance in respect of the resolution of election-related disputes concerning a person’s inclusion in a voters’ list.

* + 1. Electoral Code of Ukraine, 2019

28.  On 19 December 2019 the Ukrainian Parliament adopted the Electoral Code (came into force on 1 January 2020), which introduced amendments to some of the legal instruments cited above (see paragraphs 17, 18 and 25 above) and allowed IDPs to participate in local elections without changing their registered place of residence in their passports.

* 1. **International documents**
     1. Recommendation 419 (2018) by the Congress of Local and Regional Authorities of the Council of Europe, entitled “Voting rights at the local level as an element of the successful long-term integration of migrants and IDPs in Europe’s municipalities and regions”

29.  The Recommendation reads, in so far as relevant, as follows:

“1. In the context of mass migration that currently occurs in the area of the Council of Europe for political, humanitarian and socio-economic reasons as well as due to military conflicts, an increasing number of people have settled or have been re-settled with varying degrees of permanence in countries or regions other than their country or region of origin. Considering effective integration policies for Internally Displaced Persons (IDPs), voting rights are a natural starting point for a successful long-term integration as voting encourages IDPs to actively participate in the life of their community.

2. Even though IDPs are frequently disenfranchised because they face legal and practical challenges with regard to voting rights, international standards and best practices promote the enforcement of their right to political participation. In particular, the existence of a “genuine link” between IDPs and the place where they cast a ballot at local level is of critical importance with respect to voting rights as a successful element of their integration.

...

4. The Congress recognises the responsibility municipalities and regions bear with regard to promoting the integration, participation and non-discrimination of IDPs and encouraging good relations between them and local residents.

...

6. Against this background, the Congress has specifically examined the international standards and best practices with regard to voting rights at local level of IDPs. As a consequence, it recommends that the Committee of Ministers invite the governments of member States to ensure that:

- residence requirements do not prevent IDPs from exercising their voting rights, in particular that procedures for changing residence are appropriate so that IDPs can easily move their registration between their constituency of origin and their current constituency (and vice versa) without undue obstacles or delays;

- legal provisions do not require IDPs to choose between expressing their voting rights and being eligible for IDP status ...”

* + 1. Recommendation Rec (2006)6 of the Committee of Ministers to member [S]tates on internally displaced persons

30.  This recommendation, adopted by the Committee of Ministers on 5 April 2006, reads, in so far as relevant, as follows:

“The Committee of Ministers ...

Considering that a large number of citizens of the Council of Europe member [S]tates cannot fully benefit from their human rights as a consequence of the fact that they have been forced or obliged to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or man-made disasters, without crossing an internationally recognised state border;

...

Recognising that internally displaced persons have specific needs by virtue of their displacement;

...

Recommends that governments of member [S]tates be guided, when formulating their internal legislation and practice, and when faced with internal displacement, by the following principles:

...

2. Internally displaced persons shall not be discriminated against because of their displacement. Member states should take adequate and effective measures to ensure equal treatment among internally displaced persons and between them and other citizens. This may entail the obligation to consider specific treatment tailored to meet internally displaced persons’ needs;

...

9. Member states should take appropriate legal and practical measures to enable internally displaced persons to effectively exercise their right to vote in national, regional or local elections and to ensure that this right is not infringed by obstacles of a practical nature...”

* + 1. Code of Good Practice in Electoral Matters

31.  This document, adopted by the European Commission for Democracy through Law (Venice Commission) at its 51st Plenary Session (5-6 July 2002) and submitted to the Parliamentary Assembly of the Council of Europe on 6 November 2002, includes the Commission’s guidelines as to the residence requirement in respect of voting and standing in elections:

“c. Residence:

i. a residence requirement may be imposed;

ii. residence in this case means habitual residence;

iii. a length of residence requirement may be imposed on nationals solely for local or regional elections;

iv. the requisite period of residence should not exceed six months; a longer period may be required only to protect national minorities; ...”

32.  The explanatory report to the Code further elaborates:

“c. Thirdly, the right to vote and/or the right to stand for election may be subject to residence requirements, residence in this case meaning habitual residence. Where local and regional elections are concerned, the residence requirement is not incompatible a priori with the principle of universal suffrage, if the residence period specified does not exceed a few months; any longer period is acceptable only to protect national minorities. Conversely, quite a few states grant their nationals living abroad the right to vote, and even to be elected. This practice can lead to abuse in some special cases, e.g. where nationality is granted on an ethnic basis. Registration could take place where a voter has his or her secondary residence, if he or she resides there regularly and it appears, for example, on local tax payments; the voter must not then of course be registered where he or she has his or her principal residence.

The freedom of movement of citizens within the country, together with their right to return at any time is one of the fundamental rights necessary for truly democratic elections. If persons, in exceptional cases, have been displaced against their will, they should, provisionally, have the possibility of being considered as resident at their former place of residence.”

1. **THE LAW**
   1. **JOINDER OF THE APPLICATIONS**

33.  Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

* 1. **ALLEGED VIOLATION OF ARTICLE 1 OF** **protocol No. 12 to THE CONVENTION**

34.  The applicants complained under Article 1 of Protocol No. 12 to the Convention that they had not been allowed to participate in local elections in Kyiv, where they were registered as IDPs. That provision reads as follows:

“1.  The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2.  No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.”

* + 1. Admissibility

35.  The Government did not object to the admissibility of the applications.

36.  The Court notes that the applications are neither manifestly ill‑founded nor inadmissible on any other grounds listed in Article 35 of the Convention. They must therefore be declared admissible.

* + 1. Merits
       1. The applicants’ submissions

37.  The applicants maintained that no local elections were held at their registered place of residence and that it was not easy for them to change their registered place of residence even if they wished to. Furthermore, changing their place of residence would entail the risk of losing their IDP status, as having one’s registered place of residence in the occupied territories was a prerequisite for obtaining IDP status. They furthermore maintained that their registered residence had an important symbolic meaning for them as it signified their bond with their abandoned home and that changing their registered place of residence would mean a loss of their property and their right to live in it. They also noted that they could get access to all other services provided by the State, such as medical care, on the basis of the address indicated in the IDP certificate, so the right to vote in local elections was the only right to which they were not entitled in their current territorial community.

38.  The applicants submitted that they could not be compared to other people who did not reside at their own registered places of residence, as they had been forced to leave their homes and could not go back to them. As no elections were held at their registered places of residence, they could not participate in local elections at all, which also distinguished them from those who could return to their registered places of residence and vote in local elections.

39.  The applicants agreed that it was necessary to regulate the participation of citizens in local elections; they considered, however, that the way that such participation was regulated under national law and current administrative and judicial practice was to their detriment and did not take into account their situation as IDPs. They considered themselves to be more integrated into the local community – in which they had been residing for more than a year, and were paying local taxes and were using medical, social and other services provided by local authorities – than people whose registered place of residence was in Kyiv but who lived elsewhere. Even so, the latter were considered as belonging to the local community in Kyiv and could vote there, while the applicants did not enjoy of that right.

40.  The applicants considered that they belonged to a uniquely disadvantaged and vulnerable group that required the Government to take particular measures in order to ensure their equal participation in local elections. Therefore, they considered that the difference in treatment to which they were subjected had no reasonable and objective justification.

* + - 1. The Government’s submissions

41.  The Government maintained that under the law in force, IDPs were not allowed to vote in local elections without changing their registered place of residence. The applicants were thus not treated differently from any other Ukrainian citizen living outside his or her registered place of residence. The Government furthermore noted that the applicants had not complained that they had been treated differently but rather that they should – because of their IDP status – be treated differently from other people living outside their registered place of residence. According to the Government, IDPs did not constitute a vulnerable group that under the Court’s case-law would require special treatment and positive discrimination.

* + - 1. The Court’s assessment

1. General principles

42.  **The Court reiterates that whereas Article 14 of the Convention prohibits discrimination in the enjoyment of “the rights and freedoms set forth in [the] Convention”, Article 1 of Protocol No. 12 extends the scope of protection to “any right set forth by law”. It thus introduces a general prohibition on discrimination** (see *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, § 53, ECHR 2009).

43.  **The term “discrimination” used in Article 14 is also used in Article 1 of Protocol No. 12. The Court reiterates that notwithstanding the difference in scope between those provisions, the meaning of this term in Article 1 of Protocol No. 12 was intended to be identical to that in Article 14 (see paragraph 18 of the Explanatory Report to Protocol No. 12). The Court sees no reason to depart from the settled interpretation of “discrimination”, as developed in the jurisprudence concerning Article 14 in applying the same term under Article 1 of Protocol No. 12** (ibid., § 55; see also *Zornić v. Bosnia and Herzegovina*, no. 3681/06, § 27, 15 July 2014).

44.  **In order for an issue of discrimination to arise under Article 14, there must be a difference in the treatment of persons in analogous, or relevantly similar, situations** (see, *mutatis mutandis*, *Molla Sali v. Greece* [GC], no. 20452/14, § 133, 19 December 2018, with further references, and *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 175, ECHR 2007‑IV). **The right not to be discriminated against is also violated when States, without an objective and reasonable justification, fail to treat differently persons whose situations are significantly different. The prohibition of discrimination 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, *mutatis mutandis*, *Berkman v. Russia*, no. 46712/15, § 49, 1 December 2020, with further references).

45.  Lastly, the Court notes that **the responsibility of the State would also be engaged if the discrimination complained of resulted from a failure on the State’s part to secure to the applicant under domestic law the rights set forth in the Convention. When examining this question under Article 1 of Protocol No. 12 to the Convention, such a failure on the State’s part may concern “any right set forth by law”** (*Baralija v. Bosnia and Herzegovina*, no. 30100/18, § 50, 29 October 2019).

1. Application of those principles to the present case

46.  **The Court notes that it is not disputed that the applicants had a general right set forth by the Constitution (namely the right to vote), and that they met the general conditions for the exercise of that constitutional right (see paragraph 13 above). It sees no reason to hold otherwise.**

47.  **It is not disputed, either, that the applicants were treated in the same way as any other person residing outside their registered place of residence, in so far as the right to vote in local elections was concerned.**

48.  **The residence requirement for voters in local elections under Ukrainian law does not imply any requisite period of residence, but solely the fact that voters’ place of residence within the given constituency has been formally registered.** From the relevant decisions of the administrative bodies and the courts it is clear that such an understanding of the domestic law is predominant. Moreover, as the Supreme Court noted in its review of a decision delivered by the lower-instance courts in respect of a case similar to that of the applicants (see paragraph 18 above), the registered place of residence indicated in a person’s passport has been of key significance in the resolution of election disputes concerning the inclusion of such a person in a constituency’s list of voters; that is because it serves as confirmation that that person “belongs” to a particular local community and thus to the electoral constituency contained therein.

49.  Thus, **the domestic law and practice that applied at the material time clearly provided that persons who did not have a registered place of residence and, hence an electoral address, in the constituency where they actually lived were not allowed to participate in local elections, regardless of any other factors or circumstances.** Even though the participation of IDPs in local elections was guaranteed by section 8 of the IDP Act, it provided that IDPs could do so “by changing a place of voting without changing the electoral address” (see paragraph 24 above). Thus, this provision was not fully aligned to the relevant legislation on local elections which consistently provided that the mentioned procedure of changing a voting address did not apply to local elections (see paragraphs 15 and 17 above). **Therefore, as the Government submitted, in practice IDPs were not treated in this respect any differently from any other group of people who lived outside their registered places of residence and could not participate in local elections at places of their actual residence. However, failure to treat differently persons whose situation is significantly different may amount to discrimination** (see, *mutatis mutandis*, *Thlimmenos v. Greece* [GC], no. 34369/97, § 44, ECHR 2000‑IV). Furthermore, **the Court has previously accepted that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered to be discriminatory, regardless of whether or not it is specifically aimed at that group, and that discrimination potentially contrary to the Convention may result from a *de facto* situation** (see *D.H. and Others*, cited above, § 175).

50.  **The question is therefore whether the applicants, as IDPs, were in a significantly different situation and therefore required treatment that would put them, *de facto*, on an equal footing with other citizens of Ukraine in respect of the enjoyment of their right to vote in local elections, as guaranteed by the national law.**

51.  The Court takes note of the arguments presented by the applicants as to (i) why they should be allowed to keep their registered places of residence respectively in Crimea and Donetsk and (ii) the fact that they would risk losing their IDP status in the event that they changed their registered residential addresses (see paragraph 37 above). **Indeed, the applicants found themselves in a situation that was clearly different from that faced by other mobile population groups, as they were forced to leave their registered places of residence and no local elections were organised at their places of residence, as those territories were outside of the Government’s control** (see paragraphs 8 and 38 above). **Therefore, despite the provisions of the IDP Act (see paragraph 24 above), the applicants in practice were not entitled to participate in local elections without changing their electoral addresses which were linked exclusively to their registered places of residence at the material time** (see paragraph 17 above).

52.  **The above considerations demonstrate that the applicants, as well as any other IDPs, were in a significantly different situation from citizens living at their registered places and even from other mobile groups of population who could come back to their registered places of residence and vote in local elections there. It follows that measures to put them on an equal footing with others in order to be able effectively to enjoy a right guaranteed by national law – the right to vote in local elections – were necessary in order to avoid discriminating against them.**

53.  The Court reiterates that there are numerous ways of organising and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into their own democratic vision (see, *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, §.61, ECHR 2005‑IX). Therefore, the States are allowed a wide margin of appreciation in this area.

54.  The Court notes that the Government made efforts to secure the rights of IDPs by enacting the special IDP Act (see, paragraphs 22 to 24 above), which intended to guarantee, among other things, the right of IDPs to participate in local elections. The IDP Act, however, was not supported at the material time by further amendments to the relevant legislation on local elections, which required that the citizens should “belong” to a local community in order to able to participate in local elections (see paragraph 14 above) and, as a result, the intended guarantee did not materialise. In these circumstances, the requirement of “belonging” to a local community, which was undoubtedly legitimate in principle, could be satisfied in only one way: through the registration of one’s place of residence as being located within the local community in question. There was no exception to this rule and no alternative means existed of proving that the person in question was sufficiently integrated into the local community and “belonged” to it. Therefore, the adoption of the IDP Act did not in itself put the applicants on an equal footing as others in the enjoyment of the right to vote in local elections.

55.  **As a result, even though they had resided in Kyiv for about a year (or even longer), were payers of local taxes and consumers of local services (see paragraph 39 above) and thus were concerned with the community’s day to day problems and had sufficient knowledge of them** (see and compare, *Sitaropoulos and Giakoumopoulos v. Greece* [GC], no. 42202/07, § 79, ECHR 2012), **they had no possibility to participate in the local affairs of their new communities for the period of their enforced absence from their permanent homes, despite the fact that such participation was deemed to constitute an important element of IDPs’ integration** (see paragraphs 22 to 25 above).

56.  The Court notes that the relevant legislation was later amended to unlink the electoral address from the registered place of residence upon request of a voter, which allowed IDPs to seek inclusion in the voters’ list for local elections (see paragraph 28 above). These amendments, however, took place more than four years after the impugned events and cannot affect the Court’s conclusions in the present case.

57.  **In sum, the Court finds that at the material time, by failing to take into consideration their particular different situation, the authorities discriminated against them in the enjoyment of their right to vote in local elections, guaranteed under domestic law.**

58.  **There has accordingly been a violation of Article 1 of Protocol No. 12 to the Convention**.

* 1. **APPLICATION OF ARTICLE 41 OF THE CONVENTION**

59.  Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

* + 1. Damage

60.  Ms Terekhova claimed 25,000 euros (EUR) in respect of non‑pecuniary damage. The other three applicants asked to be awarded, in respect of non-pecuniary damage, whatever amounts that the Court saw fit.

61.  The Government considered that there had been no violation of the Convention and that these claims had therefore to be rejected.

62.  The Court considers it equitable to award EUR 4,500 to each of the applicants in respect of non-pecuniary damage, plus any tax that may be chargeable.

* + 1. Costs and expenses

63.  Ms Terekhova claimedEUR 8,700 for the costs and expenses incurred before the Court. She submitted a time sheet from her representatives.

64.  The other three applicants claimed, jointly, 5,083.84 pounds sterling (GBP) as well as EUR 683.06 (the equivalent of GBP 590.17), and 75,750 Ukrainian hryvnias (UAH – the equivalent of GBP 2,041.76), related to their legal representation before the Court. They submitted several time sheets from their lawyers and several invoices for translation expenses.

65.  The Government submitted that there was no proof that the amounts claimed had been actually paid to the applicants’ representatives. They also doubted the reasonableness of those expenses.

66.  According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. The Court also points out that under Rule 60 of the Rules of Court any claim for just satisfaction must be itemised and submitted in writing together with the relevant supporting documents or vouchers, failing which the Chamber may reject the claim in whole or in part (see *Malik Babayev v. Azerbaijan*, no. 30500/11, § 97, 1 June 2017). In the present case the applicants failed to produce any contract with their representatives or any other documents showing that they had paid or were under a legal obligation to pay the fees charged by their representatives (see *Merabishvili v. Georgia* [GC], no. 72508/13, § 372, 28 November 2017). As regards the part of the claim for translation of various documents, the Court does not consider that the translation of those documents was necessary for its proceedings (see *Allahverdiyev v. Azerbaijan*, no. 49192/08, § 71, 6 March 2014, and *Sakit Zahidov* *v. Azerbaijan*, no. 51164/07, § 70, 12 November 2015). Therefore, the Court dismisses the claim for costs and expenses.

* + 1. Default interest

67.  The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

1. **FOR THESE REASONS, THE COURT, UNANIMOUSLY,**
2. Decides to join the applications;
3. Declares the applications admissible;
4. Holds that there has been a violation of Article 1 of Protocol No. 12 to the Convention;
5. Holds
   1. that the respondent State is to pay to each of the applicants, within three months from the date on which the judgment becomes final, in accordance with Article 44 § 2 of the Convention, EUR 4,500 (four thousand five hundred euros), which is in total EUR 18,000 (eighteen thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage,to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
   2. that from the expiry of the above-mentioned three months until settlement, simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points;
6. Dismisses, the remainder of the applicants’ claim for just satisfaction.

Done in English, and notified in writing on 21 October 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik Síofra O’Leary  
 Registrar President

# **ELECTORAL RIGHTS OF PRISONERS**

## **CASE OF ANCHUGOV AND GLADKOV v. RUSSIA**

*(Applications nos. 11157/04 and 15162/05)*

JUDGMENT

STRASBOURG

4 July 2013

FINAL

09/12/2013

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*

In the case of Anchugov and Gladkov v. Russia,

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

Isabelle Berro-Lefèvre, *President,* Mirjana Lazarova Trajkovska, Julia Laffranque, Linos-Alexandre Sicilianos, Erik Møse, Ksenija Turković, Dmitry Dedov, *judges,*and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 11 June 2013,

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

**PROCEDURE**

1.  The case originated in two applications (nos. 11157/04 and 15162/05) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Russian nationals, Mr Sergey Borisovich Anchugov and Mr Vladimir Mikhaylovich Gladkov (“the applicants”), on 16 February 2004 and 27 February 2005 respectively.

2.  The first applicant was represented by Mr Ye. Stetsenko, a lawyer practising in Chelyabinsk. The second applicant, who had been granted legal aid, was represented by Mr V. Shukhardin, a lawyer practising in Moscow. The Russian Government (“the Government”) were represented by Ms V. Milinchuk, former Representative of the Russian Federation at the European Court of Human Rights, in the proceedings in application no. 11157/04, and by Mr G. Matyushkin, the Representative of the Russian Federation at the European Court of Human Rights, in the proceedings in application no. 15162/05.

3.  The applicants complained, in particular, that, as they were convicted prisoners in detention, they were debarred from voting in elections. They relied on Article 10 of the Convention and Article 3 of Protocol No. 1, taken alone and in conjunction with Article 14 of the Convention.

4.  The President of the First Section decided to give notice of the applications to the Government on 22 October 2007 and 19 October 2009 respectively. It was also decided to rule on the admissibility and merits of the applications at the same time (Article 29 § 1).

5.  On 11 June 2013 the Chamber decided to join the proceedings in the applications (Rule 42 § 1).

**THE FACTS**

**I.  THE CIRCUMSTANCES OF THE CASE**

6.  The first applicant was born in 1971 and lives in Chelyabinsk. The second applicant was born in 1966 and lives in Moscow.

A.  The applicants’ criminal history

1.  The first applicant

7.  On 10 January 1995 **the first applicant was arrested on suspicion of having committed a criminal offence and remanded in custody.**

8.  By a judgment of 23 June 1998 the applicant **was convicted at first instance on a charge of murder and several counts of theft and fraud and sentenced to death**. On 20 December 1999 his conviction was upheld on appeal, but **the death sentence was commuted to fifteen years’ imprisonment.**

9.  On the date of his latest correspondence with the Court, the first applicant was serving a sentence of imprisonment in penitentiary facility YuK-25/1 in Orenburg.

2.  The second applicant

10.  On 20 January 1995 **the second applicant was arrested on suspicion of having committed a criminal offence and remanded in custody**.

11.  On 27 November 1995 the second applicant **was convicted at first instance and sentenced to five years’ imprisonment**. The sentence was upheld on appeal on 19 June 1996.

12.  **In another set of criminal proceedings**, on 13 November 1998 the second applicant was **convicted of murder, aggravated robbery, participation in an organised criminal group and resistance to police officers and sentenced to death.** On 15 February 2000 his conviction was upheld on appeal, but **the death sentence was commuted to fifteen years’ imprisonment, of which fourteen were to be served in prison and the last year in a correctional facility.**

13.  **On 23 April 2008 the second applicant was released from prison on parole.**

B.  The applicants’ attempts to participate in elections

14.  **The first and second applicants were kept in pre-trial detention centres from 10 January 1995 to 20 December 1999 and from 20 January 1995 to 22 March 2000 respectively. During those periods the first applicant voted twice in parliamentary elections and the second applicant voted several times in parliamentary and presidential elections and in regional elections of an executive official.**

**15.  On an unspecified date the first applicant was transferred to a penitentiary facility to serve his prison sentence. Since that date he has been debarred, as a convicted prisoner, from participating in any elections pursuant to Article 32 § 3 of the Russian Constitution (“the Constitution”).**

**16.  On 22 March 2000 the second applicant was transferred to a prison to continue serving his sentence. From that date, and until his release from prison on 23 April 2008, the second applicant was debarred from voting in elections under the provisions of the aforementioned Article.**

17.  In particular, **the applicants were ineligible to vote in the elections of members of the State Duma** – the lower chamber of the Russian parliament – held on 7 December 2003 and 2 December 2007 **and in the presidential elections** of 26 March 2000, 14 March 2004 and 2 March 2008. **The second applicant was also unable to vote in additional parliamentary elections held in the electoral constituency of his home** **address** on 5 December 2004.

C.  The applicants’ applications to the Constitutional Court

**18.  Both applicants challenged, at various times, the aforementioned constitutional provision before the Russian Constitutional Court (“the Constitutional Court”) stating that it violated a number of their constitutional rights.**

19.  In letters of 15 March and 6 April 2004, sent to the first and second applicants respectively, the Secretariat of the Constitutional Court replied that the applicants’ complaints fell outside the Constitutional Court’s competence and therefore had no prospects of success.

20.  The second applicant appealed against that decision to the President of the Constitutional Court.

21.  By a decision of 27 May 2004 the Constitutional Court declined to accept the second applicant’s complaint for examination, stating that it had no jurisdiction to check whether certain constitutional provisions were compatible with others.

22.  On 19 July 2004 the Secretariat of the Constitutional Court forwarded the court’s decision to the second applicant. In a letter of 5 August 2004 a regional office of the Department of Execution of Sentences sent the Secretariat’s letter of 19 July 2004 to the second applicant’s prison. According to the second applicant, this correspondence, including the decision of 19 July 2004, was delivered to him on 1 September 2004.

D.  Proceedings against election commissions

23.  The second applicant then repeatedly brought court proceedings against election commissions at various levels complaining of their refusals to allow him to vote in parliamentary and presidential elections. His complaints were rejected either on formal grounds or on the merits. Final decisions were taken by the appellate courts on 1 December 2007 and 3 April, 5 May, 4 June and 29 September 2008. The domestic courts mainly referred to Article 32 § 3 of the Constitution and the fact that the second applicant was a convicted prisoner, and stated that the domestic law debarred him from voting in elections. In its decision of 1 December 2007 the Lipetsk Regional Court also held as follows:

“In the judgment of the European Court of Human Rights dated 6 October 2005 in the case of Hirst v. the United Kingdom the applicant’s disenfranchisement on account of his serving a sentence of imprisonment was found to be in breach of Article 3 of Protocol No 1 to the Convention.

The European Court noted in that judgment that prisoners in general continued to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention.

It was also pointed out that a blanket statutory disenfranchisement of all convicted prisoners in prisons (of the United Kingdom) applies automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances. Such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1.

... The Russian Federation accepts ... as binding the jurisdiction of the European Court of Human Rights regarding questions of interpretation and application of the Convention and its Protocols in situations of alleged violations of those legal instruments by the Russian Federation where the alleged violation has taken place after their entry into force in respect of the Russian Federation.

However, the aforementioned judgment of the European Court does not allow a conclusion to be reached as to the unreasonableness of restrictions on electoral rights established in the legislation of the Russian Federation in respect of individuals serving a sentence of imprisonment after their conviction by a court.

Apart from the foregoing, the said judgment of the European Court provides that any restrictions on other rights of prisoners (save for the right to liberty) must be justified, although such justification may well be found in considerations of security, in particular the prevention of crime and disorder, which inevitably flow from the circumstances of imprisonment.

Also, it is noted that Article 3 of Protocol No. 1, which enshrines the individual’s capacity to influence the composition of the law-making power, does not therefore exclude that restrictions on electoral rights could be imposed on an individual who has, for example, seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations. The severe measure of disenfranchisement must not, however, be resorted to lightly and the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned.

Therefore, without ruling out the very possibility of restricting electoral rights of convicted prisoners, the European Court attaches decisive weight to the proportionality and reasonableness of establishing this measure in law.

The criteria which the European Court has considered as decisive when determining a question of proportionality of, and justification for, limiting electoral rights of convicted prisoners – the nature and seriousness of their offence and their individual circumstances – were taken into account when [the second applicant’s] punishment was chosen, in accordance with provisions of the [Russian] legislation which were not analysed in the aforementioned judgment.

According to [a relevant provision] of the Russian Penitentiary Code, it is individuals convicted of particularly serious offences, or of particularly serious repeat offences, and sentenced to a term of imprisonment exceeding five years ... who serve their sentence in prison.

It should also be noted that, in accordance with Article 10 § 3 of the International Covenant on Civil and Political Rights of 16 December 1966, the penitentiary system must comprise treatment of prisoners the essential aim of which must be their reformation and social rehabilitation.

[A relevant provision] of the Russian Code of Criminal Procedure also lists the reform of a convicted prisoner as one of the aims of punishment, together with the prevention of further crimes.

Therefore, taking into account the aforementioned criteria, [it can be concluded that] the temporary (for the period of imprisonment) restriction of the electoral rights established in the legislation of the Russian Federation in respect of individuals serving a sentence of imprisonment is, from its inception, reasonable, justified and in the public interest, being a preventive measure aimed at reforming convicted prisoners and deterring them from committing crimes and breaching public order in the future, including in the period when elections are held.

The same [reasoning] applies to the restriction of [the second applicant’s] electoral rights.”

E.  Other proceedings

24.  The second applicant also attempted to bring proceedings complaining of the refusal of the head of a local election commission to give him copies of certain documents.

25.  On 27 December 2007 the Lipetsk Regional Court returned the second applicant’s claim, stating that it should be lodged with a lower court.

26.  On 4 June 2008 the Supreme Court upheld the above decision on appeal.

F.  The applicants’ applications to the European Court

27.  In his first letter to the Court dated 16 February 2004, and dispatched, as is clear from the postmark, on 17 February 2004, **the first applicant described the circumstances of his case and complained about his disenfranchisement and inability to vote** in a number of elections held in Russia. He later reproduced this in an application form of 30 April 2004, which was received by the Court on 23 June 2004.

28.  **The second applicant complained about his disenfranchisement and inability to vote** in elections in an application form which he dated 29 December 2004 and which, as is clear from the postmark, he sent on 27 February 2005. The Court received the application form on 30 March 2005.

29.  **Subsequently, the applicants updated their applications referring to new elections in which they were still ineligible to vote.**

II.  RELEVANT DOMESTIC LAW

A.  Constitution

30.  Article 15 (Chapter 1) of the Russian Constitution of 12 December 1993 provides:

“1.  The Constitution of the Russian Federation shall have supreme legal force and direct effect and shall be applicable within the entire territory of the Russian Federation. Statutes and other legal instruments adopted in the Russian Federation shall not contradict the Constitution of the Russian Federation.

...

4.  Generally recognised principles and norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation establishes other rules than those envisaged by the [domestic] law, the rules of the international treaty or agreement shall be applicable.”

31.  Article 32 (Chapter 2) of the Constitution provides:

“...

2.  Citizens of the Russian Federation shall have the right to elect and to be elected to bodies of state governance and bodies of local self-government, as well as to take part in a referendum.

3.  ... citizens detained in a detention facility pursuant to a sentence imposed by a court shall not have the right to vote or to stand for election.

...”.

32.  Article 33 (Chapter 2) of the Constitution reads as follows:

“Citizens of the Russian Federation shall have the right to appeal in person and make individual and collective appeals to State bodies and local bodies of self-government”.

33.  Article 134 (Chapter 9) of the Constitution reads as follows:

“Proposals on amendments to and revision of the provisions of the Constitution of the Russian Federation may be submitted by the President of the Russian Federation, the Federation Council, the State Duma, the Government of the Russian Federation, legislative (representative) bodies of constituent entities of the Russian Federation, and by groups of deputies numbering no less than one fifth of the total number of deputies of the Federation Council or of the State Duma”.

34.  Article 135 (Chapter 9) of the Constitution provides:

“1.  The provisions of Chapters 1, 2 and 9 of the Constitution of the Russian Federation may not be revised by the Federal Assembly.

2.  Where a proposal to revise any provisions in Chapters 1, 2 and 9 of the Constitution of the Russian Federation is supported by three fifths of the total number of deputies of the Federation Council and the State Duma, a Constitutional Assembly shall be convened in accordance with a federal constitutional law.

3.  The Constitutional Assembly may either confirm the inviolability of the Constitution of the Russian Federation or draw up a new draft of the Constitution of the Russian Federation which shall be adopted by two thirds of the total number of deputies to the Constitutional Assembly or submitted to a nationwide vote. In the event of a nationwide vote, the Constitution of the Russian Federation shall be considered as adopted if more than half of those voting have voted for it, provided that more than half of the electorate have taken part in the voting.”

B.  Other legal instruments

35.  The provisions of Article 32 § 3 of the Constitution are reproduced in section 4(3) of the Federal Law of 12 June 2002 on Fundamental Guarantees of Electoral Rights and Eligibility to Participate in a Referendum of the Citizens of the Russian Federation and in section 3(4) of the Federal Law of 10 January 2003 on Presidential Elections in the Russian Federation.

III.  INTERNATIONAL AND OTHER RELEVANT MATERIALS

A.  Vienna Convention on the Law of Treaties (1969)

36.  Article 27 (“Internal law and observance of treaties”) of the Vienna Convention on the Law of Treaties reads as follows:

“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. ...”

B.  Work of the United Nations International Law Commission

37.  At its fifty-third session, in 2001, the International Law Commission (“the ILC”) adopted a text entitled “Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries”. The text was submitted to the United Nations General Assembly as a part of the ILC’s report covering the work of that session. The report was published in the “Yearbook of the International Law Commission, 2001”, vol. II, Part Two, as corrected. In its relevant parts, the aforementioned text read as follows:

Article 3: Characterization of an act of a State as internationally wrongful

“The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.”

In its commentary to this article the ILC noted, in particular:

“(1)  Article 3 makes explicit a principle ... that the characterization of a given act as internationally wrongful is independent of its characterization as lawful under the internal law of the State concerned ... [A] State cannot, by pleading that its conduct conforms to the provisions of its internal law, escape the characterization of that conduct as wrongful by international law ...”

...

(3)  That conformity with the provisions of internal law in no way precludes conduct being characterized as internationally wrongful is ... well settled ... The principle was reaffirmed many times:

“...

... a State cannot adduce ... its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force [*Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig* *Territory, Advisory Opinion, 1932, P.C.I.J., Series A/B, No. 44*, p. 24].”

...

(9)  As to terminology, in the English version the term “internal law” ... covers all provisions of the internal legal order, whether written or unwritten and whether they take the form of constitutional or legislative rules, administrative decrees or judicial decisions.”

C.  International Covenant on Civil and Political Rights (adopted by the General Assembly of the United Nations on 16 December 1966)

38.  The relevant provisions of the International Covenant on Civil and Political Rights read as follows:

Article 10

“1.  All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

...

3.  The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation ...”

Article 25

“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 [race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status] and without unreasonable restrictions:

(a)  To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b)  To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c)  To have access, on general terms of equality, to public service in his country.”

D.  United Nations Human Rights Committee

39.  In its General Comment no. 25 (1996) on Article 25 of the International Covenant on Civil and Political Rights, the Human Rights Committee expressed the following view:

“14.  In their reports, States parties should indicate and explain the legislative provisions which would deprive citizens of their right to vote. The grounds for such deprivation should be objective and reasonable. If conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence. Persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote.”

40.  In its views on the *Yevdokimov and Rezanov v. Russian Federation* case (21 March 2011, no. 1410/2005), the Human Rights Committee, referring to the Court’s judgment in *Hirst (no. 2)* [GC] (cited above), stated:

“7.5 ... the State party, whose legislation provides a blanket deprivation of the right to vote to anyone sentenced to a term of imprisonment, did not provide any arguments as to how the restrictions in this particular case would meet the criterion of reasonableness as required by the Covenant. In the circumstances, the Committee concludes there has been a violation of article 25 alone and in conjunction with article 2, paragraph 3, of the Covenant...”

E.  Venice Commission Code of Good Practice in Electoral Matters

41.  This document, adopted by the European Commission for Democracy through Law (“the Venice Commission”) at its 51st plenary session (5-6 July 2002) and submitted to the Parliamentary Assembly of the Council of Europe on 6 November 2002, lays down the guidelines developed by the Commission concerning the circumstances in which people may be deprived of the right to vote or to stand for election. The relevant passages read as follows:

“i.  provision may be made for depriving individuals of their right to vote and to be elected, but only subject to the following cumulative conditions:

ii.  it must be provided for by law;

iii.  the proportionality principle must be observed; conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them;

iv.  the deprivation must be based on mental incapacity or a criminal conviction for a serious offence;

v.  Furthermore, the withdrawal of political rights or finding of mental incapacity may only be imposed by express decision of a court of law.”

F.  Law and practice in the Contracting States

42.  A comparative law study was carried out in the context of the proceedings before the Grand Chamber of the Court in the case of *Scoppola v. Italy (no. 3)* ([GC], no. 126/05, §§ 45-48, 22 May 2012). Nineteen of the forty-three Contracting States examined in that study place no restrictions on the right of convicted prisoners to vote: Albania, Azerbaijan, Croatia, Cyprus, Czech Republic, Denmark, Finland, Ireland, Latvia, Lithuania, Moldova, Montenegro, Serbia, Slovenia, Spain, Sweden, Switzerland, “the former Yugoslav Republic of Macedonia” and Ukraine.

43.  Seven Contracting States (Armenia, Bulgaria, Estonia, Georgia, Hungary, Russia and the United Kingdom) automatically deprive all convicted prisoners serving prison sentences of the right to vote.

44.  The remaining seventeen member States (Austria, Belgium, Bosnia and Herzegovina, France, Germany, Greece, Italy, Luxembourg, Malta, Monaco, Netherlands, Poland, Portugal, Romania, San Marino, Slovakia and Turkey) have adopted an intermediate approach: disenfranchisement of prisoners depends on the type of offence and/or the length of the custodial sentence.

45.  In some of the States in this category the decision to deprive convicted prisoners of the right to vote is left to the discretion of the criminal court (Austria, Belgium, France, Germany, Greece, Luxembourg, Netherlands, Poland, Portugal, Romania and San Marino). In Greece and Luxembourg, in the event of particularly serious offences disenfranchisement is applied independently of any court decision.

G.  Other materials

46.  For other relevant materials see Scoppola (no. 3) [GC], cited above, §§ 43, 49-60.

**THE LAW**

**I.  ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL NO. 1 TO THE CONVENTION**

47.  **The applicants complained that their disenfranchisement on the ground that they were convicted prisoners violated their right to vote and, in particular, that they had been unable to vote in a number of elections held on various dates in 2000 to 2008** (see paragraph above). They relied on Article 3 of Protocol No. 1 to the Convention, which reads as follows:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

A.  Admissibility

1.  Compatibility ratione materiae

(a)  The Government’s objection

48.  The Government submitted that the Constitution was the highest-ranking legal instrument within the territory of Russia and took precedence over all other legal instruments and provisions of international law. In particular, the Constitution took precedence over international treaties to which Russia was a party, including the Convention. Accordingly, in the Government’s submission, a review of the compatibility of Article 32 of the Constitution with the provisions of the Convention fell outside the Court’s competence.

49.  The applicants argued that, on ratification of the Convention, Russia had not made any reservations regarding the applicability of the provisions of Protocol No. 1, including Article 3 of that Protocol, within its territory, and therefore the Government were not justified in arguing that that provision was inapplicable because it conflicted with the Russian Constitution. The applicants maintained that, having ratified the Convention, Russia was under an obligation to integrate the principles set forth in the Convention into its domestic legal system. They also submitted that, by virtue of Article 15 § 4 of the Russian Constitution, the Convention took precedence over any domestic legal instrument in Russia.

50.  The Court reiterates that Article 1 requires the States Parties to “secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”. That provision makes no distinction as to the type of rule or measure concerned and does not exclude any part of the member States’ “jurisdiction” from scrutiny under the Convention (see *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 153, ECHR 2005 VI; *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, § 128, ECHR 2010 (extracts); and *Nada v. Switzerland* [GC], no. 10593/08, § 168, ECHR 2012). It is, therefore, with respect to their “jurisdiction” as a whole – which is often exercised in the first place through the Constitution – that the States Parties are called upon to show compliance with the Convention (see *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 29, Reports of Judgments and Decisions 1998 I).

51.  Furthermore, in accordance with Article 19 of the Convention, the Court’s duty is “to ensure the observance of the engagements undertaken by the High Contracting Parties ...” (see *Open Door and Dublin Well Woman v. Ireland*, 29 October 1992, § 69, Series A no. 246 A). In cases arising from individual petitions, its task is not to review the relevant legislation or an impugned practice in the abstract. Instead, it must confine itself, as far as possible, without losing sight of the general context, to examining the issues raised by the case before it (see, among other authorities, *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], no. 13279/05, § 69, 20 October 2011).

52.  Turning to the present case, the Court agrees with the applicants that, once having acceded to the Convention, and in the absence of any reservations regarding Protocol No. 1 thereto, Russia undertook to “secure to everyone within its jurisdiction” the rights and freedoms defined, in particular, in that Protocol. It also accepted the Court’s competence to adjudicate on its compliance with that obligation. Therefore the Court’s task in the present case is not to review, *in abstracto*, the compatibility with the Convention of the relevant provisions of Article 32 of the Russian Constitution, but to determine, *in concreto*, the effect of those provisions on the applicants’ rights secured by Article 3 of Protocol No. 1 to the Convention (ibid., § 70).

53.  Having regard to the foregoing, the Court thus rejects the Government’s relevant objection.

(b)  Scope of the present case

54**.  According to the Court’s established case-law, Article 3 of Protocol No. 1 only concerns “the choice of the legislature**” (see, for instance, *Paksas v. Lithuania* [GC], no. 34932/04, § 71, ECHR 2011 (extracts)). **In the present case the applicants complained that pursuant to Article 32 § 3 of the Russian Constitution they were debarred from voting in the election of deputies of the State Duma and in the election of the Russian President. It therefore has to be determined whether the Court is competent *ratione materiae* to examine the present case. The Court notes the absence of any objection in this respect on the part of the Government**. It must, however, examine this issue. It reiterates in this connection that since the scope of its jurisdiction is determined by the Convention itself, in particular by Article 32, and not by the parties’ submissions in a particular case, the mere absence of a plea of incompatibility cannot extend that jurisdiction (see, *mutatis mutandis*, *Blečić v. Croatia* [GC], no. 59532/00, § 67, ECHR 2006‑...).

**55.  The Court further has no doubt that Article 3 of Protocol No. 1 is applicable to the election of members of the State Duma, which is the lower chamber of the Russian parliament. However, as regards the election of the Russian President, the Court reiterates that the obligations imposed on the Contracting States by Article 3 of Protocol No. 1 do not apply to the election of a Head of State** (see *Baškauskaitė v. Lithuania*, no. 41090/98, Commission decision of 21 October 1998; *Guliyev v. Azerbaijan* (dec.), no. 35584/02, 27 May 2004; *Boškoski v. the former Yugoslav Republic of Macedonia* (dec.), no. 11676/04, 2 September 2004; *Niedźwiedź v. Poland* (dec.), no. 1345/06, 11 March 2008; *Paksas*, cited above, § 72; and *Krivobokov v. Ukraine* (dec.), no. 38707/04, 19 February 2013).

56.  It follows that, **in so far as the applicants complained about their ineligibility to vote in presidential elections, this part of the application is incompatible *ratione materiae*** with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected pursuant to Article 35 § 4. **The Court therefore has competence to address the applicant’s complaint under Article 3 of Protocol No. 1, on condition that it complies with the other admissibility criteria, only in so far as it concerns the applicants’ inability to vote in elections of members of the State Duma.**

2.  Exhaustion of domestic remedies

(a)  Submissions by the parties

57.  In their additional observations relating to application no. 11157/04, the Government seemed to suggest that the first applicant could have sought to have his violated rights restored at the domestic level. On the one hand, they conceded that there was no individual remedy capable of providing redress to the first applicant in his situation. On the other hand, the Government stressed that “there [was] an opportunity for the citizens of the Russian Federation to amend the existing legal order in their country”. In this latter respect, they referred to Article 134 of the Constitution, which provided that the Constitution may be amended at the suggestion of the Russian President, both chambers of the national parliament, the Russian Government, the legislatures of the regions of Russia, and a group of one fifth of the members of either of the two chambers of the Russian parliament. They further argued that, under Article 33 of the Constitution, Russian citizens had the right to address their suggestions and complaints to the competent authorities in Russia. The Government thus argued that, taking into account the applicant’s active civic position, before applying to the Court, he should have addressed his complaint to the “elected institutions of the Russian authorities, such as the Russian President, or the lower chamber of the Russian parliament”.

58.  The first applicant maintained that there were no effective domestic remedies that had to be exhausted in his situation and referred to the Government’s concession to that effect.

(b)  The Court’s assessment

59.  The Court reiterates that **where the Government claim non-exhaustion they must satisfy the Court that the remedy proposed was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was capable of providing redress in respect of the applicant’s complaints and offered reasonable prospects of success** (see *Greens and M.T. v. the United Kingdom*, nos. 60041/08 and 60054/08, § 66, ECHR 2010 (extracts), with further references).

60.  In the present case the Government suggested that, in order to comply with the exhaustion requirement under Article 35 § 1 of the Convention, the first applicant should have appealed, under Article 33 of the Russian Constitution (see paragraph 32 above), to the Russian President or the State Duma in an attempt to have “the existing legal order in the country” amended, as Article 134 of the Russian Constitution (see paragraph 33 above) vested power in those two State institutions to submit proposals on amendments and/or revision of the Russian Constitution. In other words, according to the Government, before complaining about his disenfranchisement to the Court, the first applicant should have tried to have the Russian Constitution changed at the domestic level.

61.  **The Court fails to see how, in the circumstances, the suggested remedy can be “effective” within the meaning of Article 35 § 1 of the Convention** (see paragraph 59 above). Firstly, its accessibility is more than doubtful, as it is clear that such an appeal could not have prompted an examination of the applicant’s particular situation for the purposes of Article 3 of Protocol No. 1. Moreover, any follow-up to such an appeal would depend entirely on the discretionary powers of the State authorities referred to by the Government, and, in any event, under Article 134 of the Russian Constitution neither the Russian President nor the State Duma have any power to amend or revise the Russian Constitution, but only to make proposals to that end. Also, as is clear from Article 135 of the Russian Constitution, revision of Article 32 § 3 of the Russian Constitution, in Chapter 2 thereof, would involve a particularly complex procedure (see paragraph 34 above).

**62.  Secondly, even if they were to take any action in reply to the first applicant’s appeal, there is no evidence that any of the aforementioned State authorities were in a position to provide adequate redress to the first applicant in his individual situation, as clearly none of the aforementioned State authorities is entitled to ban or suspend the application of Article 32 § 3 of the Russian Constitution either in general or on a case-by-case basis.**

**63.  For the above reasons, the prospects of success of the remedy advanced by the Government would, in the Court’s view, be minimal. It thus regards this remedy as clearly inadequate and ineffective and finds that the first applicant was under no obligation to pursue it. It therefore rejects the Government’s objection in this regard.**

3.  Compliance with the six-month rule

(a)  Submissions by the parties

64.  The Government maintained that the applicants had submitted their applications outside the six-month time-limit laid down in Article 35 § 1 of the Convention.

65.  They pointed out first of all that there were discrepancies between the dates accepted by the Court as those on which the present applications had been lodged, that is, 16 February 2004 and 27 February 2005 respectively; the dates indicated on the application forms as those on which the applicants had filled them in, that is, 30 April and 29 December 2004 respectively; and the dates on which, as can be seen from the Court’s stamp on the application forms, these had been received by the Court, that is 23 June 2004 and 30 March 2005 respectively. In the Government’s view, it is the latter dates that should be taken as the dates of introduction of the present applications.

66.  They further maintained that the six-month period should run from the dates of the latest elections indicated by the applicants in their application forms as those in which, pursuant to Article 32 § 3 of the Constitution, they had been unable to vote. In the Government’s submission, the applicants’ attempts to challenge Article 32 § 3 of the Constitution before the Russian Constitutional Court could not be taken into account for the purpose of calculating the six-month time-limit, as an application to that court was not an effective remedy in their situation.

67.  Accordingly, the first applicant, in the Government’s opinion, should have lodged his application within six months from 7 December 2003, the date of the parliamentary elections in which he, being a convicted prisoner, had been unable to vote. They thus argued that his application had been lodged out of time, given that the Court had received it on 23 June 2004. As regards the second applicant, the Government did not indicate the exact date on which he should have lodged his application. They maintained, however, that the alleged violation of the second applicant’s rights could not be said to have been of a continuing nature, as “the elections were held at strictly established intervals” and the number of elections from which the second applicant had been debarred “had been strictly limited”.

68.  The first applicant disputed the Government’s objection, stating that he had sent his introductory letter in February 2004 and had therefore complied with the six-month time-limit. The second applicant remained silent on the issue.

(b)  The Court’s assessment

(i)  Dates of introduction of the applications

69.  **As regards the Government’s argument that the dates of introduction of the present applications should be those of receipt by the Court of the present applications, the Court reiterates that, in accordance with Rule 47 § 5 of the Rules of Court, the date of introduction of the application is as a general rule considered to be the date of the first communication from the applicant setting out, even summarily, the object of the application. The date of introduction is accordingly the date on which the first letter was written by the applicant or, where there is an undue delay between this date and the date on which the letter was posted, the Court may decide that the date of posting shall be considered to be the date of introduction** (see *Gaspari v. Slovenia*, no. 21055/03, § 35, 21 July 2009; *Calleja v. Malta* (dec.), no. 75274/01, 18 March 2004; *Arslan v. Turkey* (dec.), no. 36747/02, ECHR 2002-X (extracts); and *Andrushko v. Russia*, no. 4260/04, § 32, 14 October 2010).

**70.  It notes also that, when lodging their applications with the Court, applicants are expected to take reasonable steps to inform themselves, *inter alia*, about the time-limit provided for in Article 35 § 1 of the Convention and act accordingly to comply with that time-limit** (see *Sabri Güneş v. Turkey* [GC], no. 27396/06, § 61, 29 June 2012). However, **applicants cannot be held responsible for any delays that may affect their correspondence with the Court in transit**; to hold otherwise would mean unjustifiably shortening the six-month period set forth in Article 35 § 1 of the Convention and negatively affecting the right of individual petition.

71.  In the present case, **the Court observes that the first applicant had clearly described the circumstances of his case and formulated his relevant complaint in his letter of 16 February 2004, which was dispatched the next day.** The application form dated 30 April 2004 referred to by the Government merely reproduced his original submissions. Against this background, **the Court sees no reason to doubt that the application was indeed produced by the first applicant on 16 February 2004, and it therefore accepts that date as the date of introduction of his application** (see, for a similar conclusion in a comparable situation, *Ismailova v. Russia* (dec.), no. 37614/02, 31 August 2006).

72.  **As regards the second applicant, the Court observes that in his first letter to the Court the second applicant submitted the Court’s official application form describing the circumstances of his case and complaining about the disenfranchisement**. The application form was **dated 29 December 2004, but, as is clear from the postmark, was not dispatched until 27 February 2005. In the absence of any explanation from the second applicant in respect of that delay of nearly two months, the Court considers it reasonable to accept the latter date as the date of introduction of his application.**

(ii)  Compliance with the six-month time-limit

73.  In so far as the Government argued that the applicants had failed to comply with the relevant requirement of Article 35 § 1 of the Convention, having lodged their applications more than six months after the elections in which they were ineligible to vote had taken place, the Court reiterates that, as a rule, the six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies. Where no effective remedy is available to the applicant, the period runs from the date of the acts or measures complained of, or from the date of the knowledge of that act or its effect on or prejudice to the applicant (see *Dennis and Others v. the United Kingdom* (dec.), no. 76573/01, 2 July 2002). In cases featuring a continuing situation, the six-month period does not apply and runs only from the cessation of that situation (see *Sabri Güneş* [GC], cited above, § 54). The concept of a “continuing situation” refers to a state of affairs in which there are continuous activities by or on the part of the State which render the applicant a victim (see *Posti and Rahko v. Finland*, no. 27824/95, § 39, ECHR 2002‑VII).

74.  In the present case the applicants complained that, as convicted prisoners, they were or had been disenfranchised pursuant to Article 32 § 3 of the Russian Constitution, and, in particular, that they had been ineligible to vote in the parliamentary elections of 7 December 2003 and 2 December 2007, as regards both of them, and in the additional parliamentary elections of 5 December 2004 as regards the second applicant.

75.  **The Court accepts the Government’s argument that, in so far as the applicants complained about their inability to take part in particular parliamentary elections, they should have lodged their applications within six months from the date of the elections concerned: an act occurring at a given point in time. The Court also notes the absence of any effective remedies in this respect. It is clear that the court proceedings against elections commissions instituted by the second applicant were doomed to failure and therefore were not a remedy that had to be pursued. Indeed, as the domestic courts later confirmed, the election commissions’ refusals to include the second applicant in the lists of voters were based on law, namely, Article 32 § 3 of the Russian Constitution** (see paragraph 23 above).

76.  In the light of the foregoing and having regard to the dates of introduction of the present application, **the Court thus finds that the second applicant’s complaint about his inability to vote in the parliamentary elections of 7 December 2003 was lodged out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.**

77.  On the other hand, the Court observes that the applicants’ complaint about their disenfranchisement concerned a general provision, namely, Article 32 § 3 of the Russian Constitution, which did not give rise in their case to any individual measure of implementation amenable to an appeal that could have led to a “final decision” marking the start of the six-month period provided for in Article 35 § 1 of the Convention (see *Paksas*, cited above, § 82). It is clear that the impugned provision produced a continuing state of affairs, against which no domestic remedy was in fact available to the applicants, as acknowledged by the Government (see paragraph 66 above). It is furthermore clear, on a more general level, that such a state of affairs can end only when the provision in question no longer exists or when it is no longer applicable to the applicants, that is, after their release.

**78.  In the present case, there was obviously not the slightest prospect that Article 32 § 3 of the Russian Constitution would be repealed, amended, or revised during the period of the applicants’ detention following their conviction. Therefore the aforementioned state of affairs in their case could only cease to exist after their release.** In particular, as regards the second applicant, it did not arise before 23 April 2008, when he was released on parole (see paragraph 13 above), which is several years after he lodged his relevant complaint. As regards the first applicant, it appears, in the absence of any evidence to the contrary, that he is still imprisoned, and therefore the state of affairs complained of obtains.

**79.  In such circumstances, the Court cannot conclude that this part of the application is out of time.**

4.  Conclusion

80.  The Court notes that, in so far as the applicants complained about their disenfranchisement and, in particular, their ineligibility to vote in the parliamentary elections held on 7 December 2003 and 2 December 2007, as regards the first applicant, and on 5 December 2004 and 2 December 2007, as regards the second applicant, this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. **It must therefore be declared admissible.**

B.  Merits

1.  Submissions by the parties

(a)  The applicants

81.  The applicants maintained that their disenfranchisement was in breach of Article 3 of Protocol No. 1. They argued, in particular, that their case was similar to the case of *Hirst v. the United Kingdom (no. 2)* ([GC], no. 74025/01, ECHR 2005‑IX). **Moreover, according to the applicants, the fact that in Russia the ban on electoral rights of convicted prisoners in detention was imposed by a constitutional provision, which could not be changed, only confirmed its absolute nature.** In that connection **they stressed that the ban was imposed on all prisoners serving their sentences in detention, irrespective of whether they had been convicted of minor offences or particularly serious offences, and irrespective of the length of their sentence. They pointed out that in Russia the measure in question affected some 734,300 prisoners.**

82.  The applicants further contended that this restriction could not be regarded as part of the punishment for a criminal offence, given that the Russian Criminal Code clearly stipulated that every form of punishment for criminal offences was set forth in that Code.

83.  The applicants contested the Government’s argument that convicted prisoners lacked the information necessary to make an objective choice during elections. In that connection they referred to the relevant provisions of the penitentiary legislation to the effect that those detained in penitentiary institutions should be given adequate access to information. The applicants also rejected **the Government’s argument to the effect that the choice by convicted prisoners in detention could be negatively influenced by leaders of the criminal underworld, stating that this phenomenon could also affect any citizen at liberty.**

**84.  The applicants submitted that, even though they had been convicted, they had not ceased to be members of civil society and retained their Russian citizenship, and therefore they should have the right to vote. They added that, being unable to vote, convicted prisoners could not in fact be distinguished from aliens or stateless persons, and therefore a blanket ban on their electoral rights *de facto* deprived them of their Russian citizenship.**

(b)  The Government

85.  The Government argued that the present case could be distinguished from the case of *Hirst (no. 2)*, although there is no significant difference as regards the factual circumstances of these two cases. In the Government’s view, it was important to note that, whilst in the United Kingdom it was an “ordinary” legal provision that imposed a ban on electoral rights of convicted prisoners in detention, in Russia such a restriction was enacted in the Constitution: the basic law of Russia. The Government stressed that a draft of the Russian Constitution of 1993 had been thoroughly prepared by specially created institutions, such as the Constitutional Commission of the Congress of People’s Deputies, which had comprised public representatives – legislators and experts – and the Constitutional Council, the composition of which had been even broader. After years of debate and experts’ work, the draft had then been submitted for nationwide public discussion and debate in which every Russian national could have expressed his or her opinion. Thereafter the Constitution, in its present form, had been adopted following a nationwide vote. The Government thus argued that the majority of the Russian citizens who had taken part in that vote had clearly expressed their support for the provisions of the Constitution, including the one disenfranchising convicted prisoners serving a prison sentence.

86.  The Government also pointed out that, whilst in the United Kingdom provisions of the relevant legal act could be amended by the parliament, Article 32 of the Russian Constitution was enacted in its Chapter 2, which was not subject to any review by the legislature. According to Article 135 of the Russian Constitution, amendments or revision of its Chapter 2 would necessitate adoption of a new Constitution (see paragraph 34 above).

87.  The Government further cited the Court’s case-law to the effect that a State enjoyed a wide margin of appreciation in imposing conditions on the right to vote, and that there were numerous ways of organising and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe which it was for each State to mould into their own democratic vision. The Government argued that the relevant provisions of Article 32 of the Russian Constitution corresponded to the democratic vision of Russia, and that the restriction in question pursued a legitimate aim and was not disproportionate.

88.  As regards the aim of the alleged interference, the Government pointed out that, according to the Court’s case-law, Article 3 of Protocol No. 1 did not, like other provisions of the Convention, specify or limit the aims which a restriction must pursue, and a wide range of purposes may therefore be compatible with that Article (see, for instance, *Podkolzina v. Latvia*, no. 46726/99, § 34, ECHR 2002‑II). In the Government’s submission, the restriction in question had been applied as a measure of constitutional liability and pursued the aims of enhancing civic responsibility and respect for the rule of law. They stated that in Russia the policy of imposing a ban on electoral rights of convicted prisoners in detention had been consistently adhered to since the beginning of the nineteenth century, the legislature examining the matter with due diligence each time it came to its attention. The Government further submitted that the ban on electoral rights was one of the elements of punishment of an individual who had committed a crime: by committing a crime liable to a term of imprisonment, an individual consciously condemned himself to certain restrictions of his rights, including his right to liberty and electoral rights.

89.  The Government further maintained that the impugned measure was aimed at protecting the interests of civil society and the democratic regime in Russia. Indeed, it was unacceptable that an individual who had disregarded the norms of law and morals and had been isolated from society with a view to ensuring his correction should participate in governing society by voting in elections. The Government stressed the need to strike a balance between the public interest in having conscientious and law-abiding citizens as public representatives and the private interests of certain categories of individuals excluded from the election process by law.

90.  The Government also referred to the existence of an informal hierarchy in penitentiaries in almost every State with the result that pressure could be exercised by criminal underworld leaders on individuals serving a custodial sentence that could negatively influence the freedom and objectiveness of the latter’s choice in elections, hence the limitation under examination was also aimed at preventing such a situation. They also pointed out that convicted prisoners in detention had limited access to information as compared with individuals at liberty and therefore their choice could also be distorted by the lack of sufficient information about candidates.

91.  The Government further argued that the measure complained of was proportionate to the aims it pursued. In particular, they pointed out that it was applied strictly for the period of imprisonment and was removed as soon as a person affected by it was released from prison. They further stressed that the ban on electoral rights affected only those who had been convicted of criminal offences sufficiently serious to warrant an immediate custodial sentence. Moreover, in their choice of the measure of punishment to be imposed in each particular criminal case, the domestic courts carefully examined all relevant circumstances, including the nature and degree of public dangerousness of the crime, the defendant’s personality, and so forth. The Government thus argued that in such circumstances there were no grounds on which to consider the ban absolute, arbitrary or indiscriminate.

92.  The Government further argued that the number of convicts serving their sentence in detention was incomparably lower than the overall number of Russian citizens, so it could not be said that the provisions of Article 32 § 3 of the Russian Constitution prevented the free expression of the opinion of the people of Russia. The Government also expressed doubts as to whether it was possible to build civil society and the State on the principles of the rule of law on the basis of the choice made by those who, by committing serious crimes, had opposed the interests of society and demonstrated, in an extreme form, their disrespect for society.

2.  The Court’s assessment

(a)  General principles

**93.  The Court reiterates that Article 3 of Protocol No. 1 guarantees subjective rights, including the right to vote and to stand for election** (see *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, §§ 46-51, Series A no. 113).

94.  It further notes that **the rights guaranteed by this Article are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law** (see *Hirst (no. 2)* [GC], cited above, § 58, and *Scoppola (no. 3)* [GC], cited above, § 82). In addition, **the right to vote is not a privilege.** In the twenty-first century, **the presumption in a democratic State must be in favour of inclusion and universal suffrage has become the basic principle** (see *Mathieu-Mohin and Clerfayt*, cited above, § 51; *Hirst (no. 2)* [GC], cited above, § 59; and *Scoppola (no. 3)* [GC], cited above, § 82). The same rights are enshrined in Article 25 of the International Covenant on Civil and Political Rights (see paragraph above).

**95.  Nevertheless, the rights enshrined in Article 3 of Protocol No. 1 are not absolute. There is room for implied limitations and the Contracting States must be afforded a margin of appreciation in this sphere.** The Court has repeatedly affirmed that the margin in this area is wide (see *Mathieu‑Mohin and Clerfayt*, cited above, § 52; *Matthews* [GC], cited above, § 63; *Labita v. Italy* [GC], no. 26772/95, § 201, ECHR 2000-IV; and *Podkolzina*, cited above, § 33). There are numerous ways of organising and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into its own democratic vision (see *Hirst (no. 2)* [GC], cited above, § 61, and *Scoppola (No. 3)* [GC], cited above, § 83).

96.  However, **it is for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate** (see *Mathieu-Mohin and Clerfayt*, cited above, § 52). In particular, any conditions imposed must not thwart the free expression of the people in the choice of the legislature – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage. **Any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws it promulgates. Exclusion of any groups or categories of the general population must accordingly be reconcilable with the underlying purposes of Article 3 of Protocol No. 1** (see *Hirst (no.2)* [GC], cited above, § 62, and *Scoppola (No. 3)* [GC], cited above, § 84).

97.  The Court has already addressed the issue of the disenfranchisement of convicted prisoners. In particular, in the *Hirst (no. 2)* case, it noted that there is no question that a prisoner forfeits his Convention rights merely because of his status as a person detained following conviction. Nor is there any place under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for automatic disenfranchisement based purely on what might offend public opinion (see *Hirst (no. 2)* [GC], cited above, § 70). According to the Court, this standard of tolerance does not prevent a democratic society from taking steps to protect itself against activities intended to destroy the rights or freedoms set forth in the Convention. **Article 3 of Protocol No. 1, which enshrines the individual’s capacity to influence the composition of the law-making power, does not therefore exclude that restrictions on electoral rights could be imposed on an individual who has, for example, seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations. The severe measure of disenfranchisement must not, however, be resorted to lightly and the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned** (ibid., § 71).

**98.  The Court also considered that where Contracting States had adopted a number of different ways of addressing the question, the Court must confine itself “to determining whether the restriction affecting all convicted prisoners in custody exceed[ed] any acceptable margin of appreciation, leaving it to the legislature to decide on the choice of means for securing the rights guaranteed by Article 3 of Protocol No. 1”** (ibid., § 84, and *Greens and M.T.*, cited above, §§ 113 and 114).

99.  In examining the particular circumstances of the *Hirst (no. 2)* case, the Court considered that the legislation of the United Kingdom depriving all convicted prisoners serving sentences of the right to vote (section 3 of the 1983 Act) was “a blunt instrument [which stripped] of their Convention right to vote a significant category of persons and [did] so in a way which [was] indiscriminate”. It found that the provision “impose[d] a blanket restriction on all convicted prisoners in prison. It applie[d] automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances.” It concluded that “such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1” (ibid., § 82). The Court also noted that “[the voting bar] concern[ed] a wide range of offenders and sentences, from one day to life and from relatively minor offences to offences of the utmost gravity” (ibid., § 77).

100.  The principles set out in the *Hirst* *(no. 2)* case were later reaffirmed in the *Scoppola* *(no. 3)* [GC] judgment. The Court reiterated, in particular, that when disenfranchisement affected a group of people generally, automatically and indiscriminately, based solely on the fact that they are serving a prison sentence, irrespective of the length of the sentence and irrespective of the nature or gravity of their offence and their individual circumstances, it was not compatible with Article 3 of Protocol No. 1 (see *Scoppola* *(no. 3)* [GC], cited above, § 96). The Court found no violation of that Convention provision in the particular circumstances of this latter case however, having distinguished it from the *Hirst* *(no. 2)* case. It observed that in Italy disenfranchisement was applied only in respect of certain offences against the State or the judicial system, or offences punishable by a term of imprisonment of three years or more, that is, those which the courts considered to warrant a particularly harsh sentence. The Court thus considered that “the legal provisions in Italy defining the circumstances in which individuals may be deprived of the right to vote show[ed] the legislature’s concern to adjust the application of the measure to the particular circumstances of [each] case, taking into account such factors as the gravity of the offence committed and the conduct of the offender” (ibid., § 106). As a result, the Italian system could not be said to have a general automatic and indiscriminate character, and therefore the Italian authorities had not overstepped the margin of appreciation afforded to them in that sphere (ibid., §§ 108 and 110).

(b)  Application in the present case

101.  Turning to the present applications, the Court observes that the **circumstances are, on their face, very similar to those examined in the *Hirst*** *(no. 2)* [GC] judgment. **Indeed, the applicants were stripped of their right to vote by virtue of Article 32 § 3 of the Russian Constitution which applied to all persons convicted and serving a custodial sentence, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances** (compare *Hirst (no. 2)* [GC], cited above, § 82 and, compare, by contrast, *Scoppola* *(no. 3)* [GC], cited above, §§ 105-10). The Court notes the finding of the Lipetsk Regional Court during the examination of the second applicant’s complaint to the effect that, **as a convicted prisoner, he was ineligible to vote in elections, that he had served his custodial sentence in prison – a type of detention facility in which only individuals convicted of particularly serious offences punishable by a term of imprisonment exceeding five years were detained** (see paragraph above). **This finding can be understood as suggesting that the ban on voting rights only applies to convicted prisoners serving their custodial sentence in prison, that is, to those convicted of particularly serious offences and sentenced to a term of imprisonment of more than five years. However, such an interpretation is not in conformity with the wording of Article 32 § 3 of the Russian Constitution** (see paragraph 31 above), **and the respondent Government adduced no domestic case-law indicating that only those convicted of serious offences were disenfranchised.**

102.  Having regard to the Government’s submissions (see paragraphs 88-90 above), **the Court is prepared to accept that the measure under examination pursued the aims of enhancing civic responsibility and respect for the rule of law and ensuring the proper functioning and preservation of civil society and the democratic regime, and that those aims could not, as such, be excluded as untenable or incompatible with the provisions of Article 3 of Protocol No. 1** (see *Hirst (no. 2)* [GC], cited above, §§ 74-75, and *Scoppola (no. 3)* [GC], cited above, §§ 90-92).

103.  **However, the Court cannot accept the Government’s arguments regarding the proportionality of the restrictions in question**. In particular, in so far as the Government referred to its **wide margin of appreciation in the relevant field and to a historical tradition in Russia of imposing a ban on electoral rights of convicted prisoners in detention dating back to the beginning of the nineteenth century (see paragraphs 87 and 88 above), and contended that the relevant provisions of Article 32 of the Russian Constitution corresponded to Russia’s current democratic vision (see paragraph 87 above), the Court reiterates that although the margin of appreciation is wide, it is not all-embracing** (see *Hirst (no. 2)* [GC], cited above, § 82). Moreover, as has already been noted in paragraph 94 above, the right to vote is not a privilege; in the twenty-first century, the presumption in a democratic State must be in favour of inclusion and universal suffrage has become the basic principle. **In the light of modern-day penal policy and of current human rights standards, valid and convincing reasons should be put forward for the continued justification of maintaining such a general restriction on the right of prisoners to vote as that provided for in Article 32 § 3 of the Russian Constitution** (ibid., § 79).

104.  Further, in so far as the Government argued that the measure in question affected a limited number of Russian citizens (see paragraph 92 above), **the Court notes that the Government did not indicate any figures to illustrate that assertion, whereas, according to the applicants, some 734,300 prisoners – a number undisputed by the Government – were disenfranchised by virtue of the aforementioned constitutional provision. The Court finds that this is a significant figure and that the measure in question cannot be claimed to be negligible in its effects** (ibid., § 77).

105.  Also, as regards the Government’s argument that only those who had been convicted of criminal offences sufficiently serious to warrant an immediate custodial sentence were disenfranchised (see paragraph 91 above), with the result that the bar could not be said to be indiscriminate, the **Court notes that while it is true that a large category of persons – those in detention during judicial proceedings – retain their right to vote, disenfranchisement nonetheless concerns a wide range of offenders and sentences, from two months (which is the minimum period of imprisonment following conviction in Russia) to life and from relatively minor offences to offences of the utmost seriousness. In fact, as has already been noted in paragraph 101 above, Article 32 § 3 of the Russian Constitution imposes a blanket restriction on all convicted prisoners serving their prison sentence** (ibid., §§ 77 and 82).

106.  In so far as the Government contended that, in their choice of the measure of punishment, the domestic courts usually took into consideration all relevant circumstances, including the nature and degree of public dangerousness of the criminal offence, the defendant’s personality, and so on (see paragraph 91 above), **the Court is prepared to accept that, when sentencing, the Russian courts may indeed have regard to all those circumstances before choosing a sanction. However, there is no evidence that, when deciding whether or not an immediate custodial sentence should be imposed, they take into account the fact that such a sentence will involve the disenfranchisement of the offender concerned, or that they can make any realistic assessment of the proportionality of disenfranchisement in the light of the particular circumstances of each case. It is therefore not apparent, beyond the fact that a court considers it appropriate to impose a sentence of imprisonment, that there is any direct link between the facts of any individual case and the removal of the right to vote** (ibid, § 77).

107.  **The Court emphasises that its considerations in the previous paragraph are only pertinent for the purpose of dealing with the Government’s relevant argument; they are not to be regarded as establishing any general principles.** The Court reiterates in this connection that **removal of the right to vote without any *ad hoc* judicial decision does not, in itself, give rise to a violation of Article 3 of Protocol No. 1** (see *Scoppola (no. 3)* [GC], cited above, § 104). With a view to securing the rights guaranteed by Article 3 of Protocol No. 1, **the Contracting States may decide either to leave it to the courts to determine the proportionality of a measure restricting convicted prisoners’ voting rights, or to incorporate provisions into their laws defining the circumstances in which such a measure should be applied. In this latter case, it will be for the legislature itself to balance the competing interests in order to avoid any general, automatic and indiscriminate restriction** (ibid., § 102).

108.  **The Court further notes the Government’s argument that the present case is distinguishable from *Hirst (no. 2)*, as in Russia a provision imposing a voting bar on convicted prisoners is laid down in the Constitution – the basic law of Russia adopted following a nationwide vote – rather than in an “ordinary” legal instrument enacted by a parliament, as was the case in the United Kingdom** (see paragraph 85 above). **In that connection the Court reiterates that, according to its established case-law, a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations** (see, among other authorities, *Nada*, cited above, § 168). As has been noted in paragraph 50 above, Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of a member State’s “jurisdiction” – which is often exercised in the first place through the Constitution – from scrutiny under Convention. The Court notes that this interpretation is in line with the principle set forth in Article 27 of the 1969 Vienna Convention on the Law of Treaties (see paragraph 36 above).

**109.  Further, as to the Government’s argument that the adoption of the Russian Constitution was preceded by extensive public debate at various levels of Russian society (see paragraph 85 above), the Court observes that the Government have submitted no relevant materials which would enable it to consider whether at any stage of the debate referred to by the Government any attempt was made to weigh the competing interests or to assess the proportionality of a blanket ban on convicted prisoners’ voting rights** (see *Hirst (no. 2)* [GC], cited above, § 79). **Nor can the Court discern in the Government’s argument any other factor leading it to another conclusion.**

110.  In such circumstances, **the Court is bound to conclude that the respondent Government have overstepped the margin of appreciation afforded to them in this field and have failed to secure the applicants’ right to vote guaranteed by Article 3 of Protocol No. 1.**

111.  **The Court notes the Government’s argument that the restriction complained of is enacted in a chapter of the Russian Constitution, amendments to or revision of which may involve a particularly complex procedure** (see paragraph 86 above). It reiterates in this connection that **its function is in principle to rule on the compatibility with the Convention of the existing measures. It is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order in order to discharge its obligation under Article 46 of the Convention** (ibid., § 83). As has been noted in paragraph 107 above, there may be various approaches to addressing the question of the right of convicted prisoners to vote. **In the present case, it is open to the respondent Government to explore all possible ways in that respect and to decide whether their compliance with Article 3 of Protocol No. 1 can be achieved through some form of political process or by interpreting the Russian Constitution by the competent authorities – the Russian Constitutional Court in the first place – in harmony with the Convention in such a way as to coordinate their effects and avoid any conflict between them.**

**112.  Having regard to the above, the Court concludes that there has been a violation of Article 3 of Protocol No. 1 to the Convention.**

**II.  ALLEGED VIOLATION OF ARTICLES 10 AND 14 OF THE CONVENTION**

113.  **The applicants also complained under Article 10 that their disenfranchisement breached their right to express their opinion, and that they had been discriminated against as convicted prisoners, contrary to Article 14 of the Convention**. The relevant Articles read as follows:

Article 10

“1.  Everyone has the right to freedom of expression ...

2.  The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

Article 14

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

114.  The Government appear to have contested the applicability of Article 10 in the present case. In any event, they argued, with reference to the *Hirst (no. 2)* [GC] judgment, that there were no separate issues in the present case under Articles 10 and 14 of the Convention.

115.  The second applicant submitted that he did not insist on pursuing his complaints under the aforementioned Articles any further.

116.  Having regard to the parties’ submissions and to its conclusion under Article 3 of Protocol No. 1 in paragraph

112 above, the Court considers that this part of the application is admissible and that no separate issue arises under Articles 10 and 14 of the Convention in the circumstances of the present case (see *Hirst (no. 2)* [GC], cited above, §§ 87 and 89).

**III.  OTHER ALLEGED VIOLATIONS OF THE CONVENTION**

117.  The second applicant also complained under Article 10 of the Convention that his right to receive information had been violated by a public official’s refusal to give him certain documents. He complained under Article 6 of the Convention that there were various irregularities in the court proceedings brought by him.

118.  Having regard to the materials in its possession, **the Court finds that this part of the application does not disclose any appearance of a violation of the Convention provisions.** It follows that this part of the application is manifestly ill-founded and **should be rejected** in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

**IV.  APPLICATION OF ARTICLE 41 OF THE CONVENTION**

119.  Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A.  Damage

120.  The applicants claimed 30,000 euros (EUR) and EUR 20,000 respectively in compensation for non-pecuniary damage.

121.  The Government contested the first applicant’s claims under this head. They argued, with reference to the *Hirst (no. 2)* [GC] judgment, that, should any violation of the first applicant’s rights be found in the present case, the mere finding of a violation would suffice. They did not comment on the second applicant’s relevant claims.

122.  Having regard to the circumstances of the present case, the Court considers that the finding of a violation constitutes sufficient just satisfaction in the present case for any non-pecuniary damage sustained by the applicants (see *Hirst (no. 2)* [GC], cited above, §§ 93-94 and *Greens and M. T.*, cited above, § 98).

B.  Costs and expenses

123.  The applicants did not submit any claims under this head. Accordingly, there is no call to make any award in this respect.

**FOR THESE REASONS, THE COURT UNANIMOUSLY**

1.  *Decides* to join the proceedings in the applications;

2.  *Declares* the complaints under Articles 10 and 14 of the Convention and the complaint under Article 3 of Protocol No. 1 to the Convention, in so far as it concerned the applicants’ disenfranchisement and their ineligibility to vote in the parliamentary elections held on 7 December 2003 and 2 December 2007, as regards the first applicant, and on 5 December 2004 and 2 December 2007, as regards the second applicant, admissible and the remainder of the application inadmissible;

3.  *Holds* that there has been a violation of Article 3 of Protocol No. 1 to the Convention;

4.  *Holds* that no separate issues arise under Articles 10 and 14 of the Convention;

5.  *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicants, and *dismisses* the applicants’ claim for just satisfaction.

Done in English, and notified in writing on 4 July 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen Isabelle Berro-Lefèvre  
 Registrar President

## **CASE OF MCLEAN V. UK**

DECISION

*This version was rectified on 26 June 2013*

*under Rule 81 of the Rules of Court.*

Applications nos. 12626/13 and 2522/12  
Joseph MCLEAN against the United Kingdom  
and Kevin COLE against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 11 June 2013 as a Chamber composed of:

Ineta Ziemele, *President,* David Thór Björgvinsson, Päivi Hirvelä, Ledi Bianku, Vincent A. De Gaetano, Paul Mahoney, Faris Vehabović, *judges,*  
and Françoise Elens-Passos, *Section Registrar,*

Having regard to the above applications lodged on 31 January 2013 and 28 October 2011,

Having deliberated, decides as follows:

**THE FACTS**

1.  The applicant in the first case, Mr Joseph McLean, is a British national, who was born in 1980. He was represented before the Court by Taylor & Kelly, a firm of solicitors based in Coatbridge.

2.  The applicant in the second case, Mr Kevin Cole, is a Jamaican national, who was born in 1974. He was represented before the Court by Leigh Day & Co, a firm of solicitors based in London.

3.  Both applicants are in detention following their conviction for various criminal offences.

A.  The circumstances of the case

4.  **The applicants complained that, as convicted prisoners, they had been subject to a blanket ban on voting in elections** and had been, or would be, prevented from voting in one or more of the following: elections to the European Parliament on 4 June 2009; the parliamentary election on 6 May 2010; elections to the Scottish Parliament on 5 May 2011; a nationwide referendum on the alternative vote on 5 May 2011; local government elections on various dates; and future elections.

B.  Relevant domestic law and practice

1.  Voting legislation

(a)  General elections and local government elections

5.  **Pursuant to sections 1-4 of the Representation of the People Act 1983 a convicted person, during the time that he is detained in a penal institution in pursuance of his sentence, is legally incapable of voting at any parliamentary or local election.**

(b)  Elections to the Scottish Parliament

6.  Section 11 of the Scotland Act 1998 provides that only persons who, on the day of the poll, would be entitled to vote as electors at a local government election and are registered in the register of local government electors are entitled to vote as electors at an election to the Scottish Parliament.

(c)  Elections to the European Parliament

7.  Section 8(1) of the European Parliamentary Elections Act 2002 provides, in so far as relevant, that a person is entitled to vote at an election to the European Parliament if, on the day of the poll, he would be entitled to vote as an elector at a parliamentary election.

(d)  The alternative vote referendum

8.  In so far as relevant, section 2 of the Parliamentary Voting System and Constituencies Act 2011 provided that only those who, on the date of the alternative vote referendum, were entitled to vote as electors at a parliamentary election were entitled to vote in the alternative vote referendum of 5 May 2011.

2.  Local governments

9.  Each of the four jurisdictions of the United Kingdom (England, Scotland, Wales and Northern Ireland) is subdivided into a number of local authorities. The specific system in place varies depending on the jurisdiction in question.

10.  The system of local government was created by statute. Local authorities’ internal organisation and competences are regulated by statutes enacted by the Parliament of the United Kingdom and by the Parliaments and Assemblies of the three devolved jurisdictions (Scotland, Wales and Northern Ireland).

11.  The functions and powers of local authorities are of a predominantly administrative nature and generally cover areas such as waste management and collection, housing, local planning, council tax collection, licensing, transport and social services. In respect of these various areas, local authorities carry out their duties in accordance with primary legislation governing the area in question and can only act in so far as they are authorised to do so by statute or by subordinate legislation.

12.  Local authorities have the power to make by-laws, which are essentially laws of local application. By-laws usually have to be confirmed by a Government minister or the ministers of the devolved jurisdictions before they can take effect.

C.  Recent developments

13**.  On 23 November 2010 the Court** (Fourth Section) adopted a pilot judgment in *Greens and M.T. v. the United Kingdom*, nos. 60041/08 and 60054/08, ECHR 2010 (extracts). It **found a violation of Article 3 of Protocol No. 1 in respect of the blanket ban** on voting **applicable to convicted prisoners as regards parliamentary elections and elections to the European Parliament. It also imposed a deadline for action, indicating that the United Kingdom had to introduce legislative proposals to amend** the incompatible legislation within six months of the date on which the judgment became final, with a view to the enactment of the law according to any time-scale determined by the Committee of Ministers.

14.  On 22 November 2012 the Government published a draft bill on prisoners’ voting eligibility. The draft bill includes three proposals: (1) ban from voting those sentenced to four years or more; (2) ban from voting those sentenced to more than six months; or (3) ban from voting all prisoners. The proposals cover both local and parliamentary elections. Although the draft bill is currently drafted to extend to England and Wales only, the introduction and explanatory notes make it clear that the final bill would extend to the whole of the United Kingdom. The devolved jurisdictions are therefore involved in the pre-legislative process.

15.  On 6 December 2012 the Committee of Ministers, responsible for supervising the execution of the judgment, adopted a decision in which it noted the range of options proposed in the draft bill; endorsed the view that the third option aimed at retaining the blanket ban was not compatible with the Convention; invited the Government to keep it regularly informed of the proposed time-scale; and decided to resume consideration of the case at the latest at its September 2013 meeting.

16.  On 16 April 2013 a motion to nominate the six members of the House of Commons to serve on a joint committee which will conduct pre‑legislative scrutiny of the draft bill was agreed. On 14 May 2013 a motion to nominate the six members of the House of Lords to serve on the committee was agreed. The committee held its first meeting on 15 May 2013 and will report by 31 October 2013.

17.  On 10 June 2013, there was a hearing before the Supreme Court in the case of *McGeoch v. The Lord President of the Council and another*. The claimant is a serving prisoner who claims that the prohibition on prisoners voting is incompatible with European Union law.

**COMPLAINTS**

18.  The first applicant complained under Article 3 of Protocol No. 1 of the Convention of a violation of his right to vote in respect of elections to the Scottish Parliament on 3 May 2007 and 5 May 2011; the European Parliament on 4 June 2009; the United Kingdom Parliament on 6 May 2010; and local government bodies; and in respect of the continuing refusal to allow him to exercise his right to vote. He also complained of a violation of Articles 6 and 13 because he was refused legal aid to pursue domestic proceedings in respect of his complaints.

19.  The second applicant complained under Article 3 of Protocol No. 1 of the Convention of a violation of his right to vote in respect of local government elections in May 2011 and May 2012; in respect of the alternative vote referendum in May 2011; and in respect of the continuing refusal to allow him to exercise his right to vote. He also complained under Article 13 that he was denied an effective remedy in respect of his complaints.

**THE LAW**

A.  Joinder of the applications

20.  Given their similar factual and legal background, the Court decides that the two applications should be joined pursuant to Rule 42 § 1 of the Rules of Court.

B.  Complaints regarding the elections to the Scottish Parliament on 3 May 2007 and 5 May 2011; the European Parliament on 4 June 2009; and the United Kingdom Parliament on 6 May 2010

21.  It is not known whether the first applicant was in detention following a conviction on the date of the elections in 2007, 2009, 2010 and 2011. As the legislation precluding the participation of prisoners in the franchise applies only to prisoners in detention following conviction, any applicant not in post-conviction detention on the date of the relevant election suffered no adverse effect as a result of the legislation. If the first applicant was not in post-conviction detention on the dates of the impugned elections, his complaints are inadmissible pursuant to Article 34 on the basis that he cannot claim to be a victim of any violation of Article 3 of Protocol No. 1.

22.  Even if the applicant was in post-conviction detention at the time of the impugned elections, the Court must assess whether he has complied with Article 35 § 1 of the Convention. Pursuant to that Article, the Court may only deal with a matter where it has been introduced within six months from the date of the final decision in the process of exhaustion of domestic remedies (see generally *Tucka (No. 1) v. the United Kingdom* (dec.), no. 34586/10, 18 January 2011). Where no effective remedy is available to the applicant, the time-limit expires six months after the date of the acts or measures complained of, or after the date of knowledge of that act or its effect or prejudice on the applicant (see *Younger v. the United Kingdom* (dec.), no. 57420/00, ECHR 2003-I; and *Toner v. the United Kingdom* (dec.), no. 8195/08, § 27, 15 February 2011).

23.   As the Court made clear in its judgment in *Greens and M.T. v. the United Kingdom*, nos. 60041/08 and 60054/08, §§ 68-71, 111-115, 118 and 120-122, ECHR 2010 (extracts), legislative amendment of section 3 of the 1983 Act is required in order to prevent further violations of Article 3 of Protocol No. 1 arising in the context of general elections. The blanket restriction imposed by section 3 of the Representation of the People Act 1983 has been extended to elections to the Scottish Parliament by section 11 of the Scotland Act 1998 and to elections to the European Parliament by section 8(1) of the European Parliamentary Elections Act 2002, both of which are parasitic upon the section 3 of the 1983 Act.

24.  In its decision in *Toner*, cited above, § 29, the Court found that as there was no remedy for the alleged violation of the applicant’s right to vote, the six-month deadline in that case for lodging an application at this Court began to run on the date of the elections to the Northern Ireland Assembly in which the applicant, a convicted prisoner, was unable to participate. Similarly, in the case of the first applicant, the Court is satisfied that the six-month deadline for lodging an application at this Court began to run on the dates of the elections in question.

25.  However, although the most recent election about which the first applicant complains took place on 6 May 2011, he did not lodge his application until 31 January 2013. His complaints concerning the refusal to allow him to vote in the specified elections were lodged more than six months after the date of the elections about which he complains. The first applicant’s complaints about the elections to the Scottish Parliament, the European Parliament and the United Kingdom Parliament[[7]](#footnote-7) have therefore been lodged outside the time-period allowed by Article 35 § 1 of the Convention and must be declared inadmissible pursuant to Article 35 § 4.

C.  Complaints concerning local government elections

**26.  The applicants complained that they were not permitted to vote in local elections on various dates. The Court must decide whether elections to local government bodies can be considered to fall within the scope of Article 3 of Protocol No. 1,** which provides:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

27.  **The Court recalls that the word “legislature” in Article 3 of Protocol No. 1 does not necessarily mean the national parliament**: the word **has to be interpreted in the light of the constitutional structure of the State in question** (see *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, § 53, Series A no. 113; and *Matthews v. the United Kingdom* [GC], no. 24833/94, § 40, ECHR 1999‑I). It has therefore found the term to encompass the Flemish Council in Belgium, on the basis that constitutional reform had vested in it sufficient competence and powers to make it, alongside the French Community Council and the Walloon Regional Council, a constituent part of the Belgian “legislature”, in addition to the House of Representatives and the Senate (*Mathieu-Mohin and Clerfayt*, cited above, § 53). Similarly, regional councils were held to form a constituent part of the legislature in Italy (*Vito Sante* *Santoro v. Italy*, no. 36681/97, §§ 52-53, ECHR 2004‑VI).

28.  However, local government organs have generally been found not to form part of the legislature of the State in question. Thus, highlighting the absence of any legislative power and the nature of the delegated powers exercised by them under the ultimate control of Parliament, the former Commission held that local authorities in Northern Ireland; municipal councils in Belgium; and metropolitan county councils in England could not be considered as part of the “legislature” (see, respectively, *X. v. the United Kingdom*, no. 5155/71, Commission decision of 12 July 1976, DR 6, p. 13; *Clerfayt, Legros and Others v. Belgium*, no. 10650/83, Commission decision of 17 May 1985, DR 42, p. 212; and *Booth-Clibborn and Others v. the United Kingdom*, no. 11391/85, Commission decision of 5 July 1985, DR 43, p. 236). More recently, adopting the same approach, the Court has found Article 3 of Protocol No. 1 to be inapplicable to local and mayoral elections in Russia; regional elections in France; elections to the Provincial Council in Italy; and elections to municipal and district councils and regional assemblies in Poland (see, respectively, *Cherepkov v. Russia* (dec.), no. 51501/99, ECHR 2000‑I; *Malarde v. France* (dec.), no. 46813/99, 5 September 2000; *Santoro v. Italy*, no. 36681/97, 16 January 2003; and *Mółka v. Poland* (dec.), no. 56550/00, ECHR 2006‑IV).

29.  Turning to examine the relevant local authorities in the United Kingdom (see paragraphs 9-12 above), it is noteworthy that their legislative function is restricted to the making of by-laws, which are applicable only in their local authority area, and that the scope of this function is rigidly limited by statute (see paragraph 12 above). The Court reiterates that the power to make regulations and by-laws which is conferred on the local authorities in many countries is to be distinguished from legislative power, which is referred to in Article 3 of Protocol No. 1 to the Convention, even though legislative power may not be restricted to the national parliament alone (see *Cherepkov* and *Mółka*, both cited above). It is further of relevance that local authorities in the United Kingdom are the repositories of powers which are essentially of an administrative nature and concern the organisation and provision of local services. These powers are granted by statute or other subordinate legislation which defines closely and restrictively their field of application.

30.  **The Court therefore finds that local government bodies in the United Kingdom do not form part of the “legislature”. These complaints are accordingly inadmissible as incompatible *ratione materiae* with the provisions of the Convention and its Protocols under Article 35 §§ 3 (a) and 4.**

D.  Complaint concerning the alternative vote referendum

**31.  The second applicant complained that he was not permitted to vote in the alternative vote referendum.**

32.  The Convention organs have emphasised on a number of occasions that Article 3 of Protocol No. 1 is limited to elections concerning the choice of the legislature and does not apply to referendums (see *X. v. the United Kingdom*, no. 7096/75, Commission decision of 3 October 1975, Decisions and Reports (DR) 3, p. 165; *Bader v. Germany*, no. 26633/95, Commission decision of 15 May 1996, unreported; *Castelli and Others v. Italy*, nos. 35790/97 and 38438/97, Commission decision of 14 September 1998, DR 94, p. 102; *Hilbe v. Liechtenstein* (dec.), no. 31981/96, ECHR 1999‑VI; and *Borghi v. Italy* (dec.), no. 54767/00, ECHR 2002‑V (extracts)).

33.  **There is nothing in the nature of the referendum at issue in the present case which would lead the Court to reach a different conclusion here. It follows that complaint concerning the alternative vote referendum is incompatible *ratione materiae* with the provisions of the Convention and its Protocols within the meaning of Article 35 § 3 (a) and must be rejected pursuant to Article 35 § 4.**

E.  Complaint concerning future elections

**34.  The applicants complained of a continuing situation, making reference to their ineligibility to vote at future unspecified elections.**

35.  There is no doubt that for as long as the legislation remains unchanged, those who remain in post-conviction detention will continue potentially to be victims of a violation of Article 3 of Protocol No. 1. However, the effect of the voting prohibition will only be felt if a further election to a “legislature” occurs before amended legislation has been enacted.

36.   Following the adoption of the Court’s pilot judgment in *Greens and M.T.*, cited above, a draft bill has been published and a joint committee has been charged with carrying out pre-legislative scrutiny of the bill. The committee will report by 31 October 2013 (see paragraphs 14-16 above). Further, the Committee of Ministers is actively supervising the steps taken by the United Kingdom authorities to implement the Court’s rulings in *Hirst* and *Greens and M.T.* It will next assess the position in September 2013 (see paragraph 15 above).

37.  In light of these developments and given that the Court has already delivered **two rulings finding the respondent State to be in violation of Article 3 of Protocol No. 1** (*Hirst* and *Greens and M.T.*), there is nothing to be gained from examining applications concerning future elections at this time. If amending legislation is not brought into force prior to any future elections to the “legislature”, it will be open to applicants to lodge, within six months of the date of the election, a new application with the Court.

38.  In these circumstances, the Court concludes that the applicants’ complaints are premature and must be rejected pursuant to Article 35 § 4 of the Convention.

F.  Other complaints

39.  The applicants also complained under Articles 6 and 13 of the Convention about their access to legal aid and the availability of effective remedies. Having regard to its findings in *Greens and M.T.*, cited above, §§ 90-92, and in the light of all the material in its possession, the Court finds that these complaints do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

40.  It follows that the complaints are 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**

1. *Decides* to join the applications;

2. *Declares* the applications inadmissible.

Françoise Elens-Passos Ineta Ziemele  
 Registrar President

## **CASE OF SÖYLER v. TURKEY**

*(Application no. 29411/07)*

**JUDGMENT**

STRASBOURG

17 September 2013

FINAL

20/01/2014

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*

In the case of Söyler v. Turkey,

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

Guido Raimondi, *President*,  
 Danutė Jočienė,  
 Peer Lorenzen,  
 András Sajó,  
 Işıl Karakaş,  
 Nebojša Vučinić,  
 Helen Keller, judges,

and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 27 August 2013,

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

**PROCEDURE**

1.  The case originated in an application (no. 29411/07) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national, Mr Ahmet Atahür Söyler (“the applicant”), on 12 July 2007.

2.  The applicant, who had been granted legal aid, was represented by Mr Serkan Cengiz, a lawyer practising in İzmir. The Turkish Government (“the Government”) were represented by their Agent.

**3.  The applicant alleged, in particular, that his inability to vote in the general elections while he was serving a prison sentence was in violation of Article 3 of Protocol No. 1 to the Convention (hereinafter “Article 3 of Protocol No. 1”).**

4.  On 31 March 2010 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

**THE FACTS**

**I.  THE CIRCUMSTANCES OF THE CASE**

5.  The applicant was born in 1966 and lives in İzmir.

6.  **The applicant, a businessman, was convicted for having drawn a number of cheques without having sufficient funds in his bank account**, an offence defined in the now repealed Law No. 3167 on Cheques (see “Relevant Domestic Law and Practice”). He was sentenced to a prison term of four years, eleven months and twenty-six days. He started serving his sentence on 11 April 2007.

7.  **While he was serving his prison sentence** in Buca Prison in İzmir, **the applicant wrote to the High Council for Elections on 28 June 2007 and stated that his name was on the electoral roll for the forthcoming general elections of 22 July 2007. He added that this was possibly due to an error on the part of the High Council for Elections which must have overlooked the fact that he, as a convicted prisoner, was unable to vote.** **Referring to the judgment in the case of *Hirst v. the United Kingdom*** *(no. 2)* [GC] (no. 74025/01, ECHR 2005‑IX) **the applicant requested that he should nevertheless be allowed to cast his vote in the July 2007 elections**. He added that **the right to vote was a right guaranteed in, *inter alia*, Article 3 of Protocol No.** 1. He argued that the *Hirst* judgment, when read in conjunction with section 90 of the Constitution (see “Relevant Domestic Law and Practice” below), meant that the High Council for Elections was under an obligation to make the necessary arrangements in order to enable him to vote.

8.  On 29 June 2007 **the High Council for Elections** replied to the applicant’s letter, and **informed him that** pursuant to section 7 § 3 of Law No. 298 (see “Relevant Domestic Law and Practice” below) **it was not possible for him to vote. The High Council for Elections added that it was in the process of correcting its records to reflect the applicant’s status as a convicted prisoner.**

9.  A similarly worded letter was sent to the applicant by the Chairman of the High Council for Elections on 2 July 2007.

**10.  On 22 July 2007 general elections took place and the applicant was unable to cast his vote.**

**11.  Although the applicant’s prison sentence was to end on 1 April 2012, he was released from prison on probation on 9 April 2009** pursuant to Law No. 647 for good behaviour (see “Relevant Domestic Law and Practice” below). **However, in accordance with the applicable legislation, the applicant’s inability to vote continued until 1 April 2012.**

**II.  RELEVANT DOMESTIC LAW AND PRACTICE**

12.  Relevant parts of the Turkish Constitution provide as follows:

“Section 67:

In conformity with the conditions set forth in the law, citizens have the right to vote, to be elected, and to engage in political activities independently or in a political party, and to take part in a referendum.

Elections and referenda shall be held under the direction and supervision of the judiciary, in accordance with the principles of free, equal, secret, and direct, universal suffrage, and public counting of the votes. However, the conditions under which the Turkish citizens who are abroad shall be able to exercise their right to vote, are regulated by law.

All Turkish citizens over 18 years of age shall have the right to vote in elections and to take part in referenda.

The exercise of these rights shall be regulated by law.

Privates and corporals serving in the armed services, students in military schools, and convicts in prisons excluding those convicted of negligent offences cannot vote. The High Council for Elections shall determine the measures to be taken to ensure the safety of the counting of votes when detainees in penal institutions or prisons vote; such voting is done under the on-site direction and supervision of authorized judge. The electoral laws shall be drawn up in such a way as to reconcile the principles of fair representation and consistency in administration.

The amendments made in the electoral laws shall not be applied to the elections to be held within the year from when the amendments come into force.

...

Section 90:

...

International agreements duly put into effect bear the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.”

13.  Section 7 of the Law on Basic Provisions Concerning Elections and on Registers of Voters (Law No. 298 of 1961) provides as follows:

“7. The following persons cannot vote:

(1) Privates, corporals and sergeants performing their military service (this provision is applicable also to those on leave, whatever the reason for their leave),

(2) Students in military schools,

(3) Convicts in penitentiary establishments.”

14.  Relevant provisions of section 53 of the Criminal Code (Law no. 5237 of 2004) provide as follows:

“(1) As the statutory consequence of imposition of a prison sentence for an offence committed intentionally, the person shall be deprived of the following [rights]:

a) Undertaking of permanent or temporary public duties, including membership of the Turkish National Assembly and all civil service and other duties which are offered through election or appointment by the State, city councils, town councils, village councils, or organisations controlled or supervised by them;

b) Voting, standing for election and enjoying all other political rights;

c) Exercising custodial rights as a parent; performing duties as a guardian or a trustee;

d) Chairing or auditing foundations, associations, unions, companies, cooperatives and political parties;

e) Performing a self-employed profession which is subject to regulation by public organisations or by chambers of commerce which have public status.

(2) The person cannot enjoy the [above-mentioned] rights until the completion of execution of the prison sentence to which he or she has been sentenced as a consequence of the commission of the offence.

(3) The provisions above which relate to the exercise of custodial rights as a parent, and duties as a guardian or a trustee shall not be applicable to the convicted person whose prison sentence is suspended or who is conditionally released from the prison. A decision may [also] be taken not to apply subsection 1 (e) above to a convict whose prison sentence is suspended.

(4) Sub-section 1 above shall not be applicable to persons whose short term prison sentence is suspended or to persons who were under the age of eighteen at the time of the commission of the offence.

(5) Where the person is sentenced for an offence committed by abusing one of the rights and powers mentioned in sub-section 1 above, a further prohibition of the enjoyment of the same right shall be imposed for a period equal to between a half and the whole length of the prison sentence...

...”

15.  According to section 49 § 2, a prison sentence for a period of less than one year shall be regarded as a short term prison sentence.

16.  According to section 19 of the Law on the Execution of Punishments (Law No. 647) which was in force at the time of the calculation of the length of the applicant’s prison sentence, prisoners sentenced to a term of imprisonment could be conditionally released from prison for good behaviour after having served half of their sentences. However, for the purposes of section 53 (2) of the Criminal Code, the date of completion of the prison sentence is not the date of the conditional release, but the last day of the prison sentence handed down by the criminal court.

17.  According to the Explanatory Report of the Criminal Code, the rationale behind section 53 of the Criminal Code is as follows:

“Society’s trust in the person is damaged on account of the offence committed by him or her. For that reason the convicted person is prevented from exercising certain rights which necessitate a relationship of trust...This deprivation cannot be indefinite. Since the rationale behind punishment is to ensure that the criminal comes to regret committing the offence and that he or she is reintroduced into society, deprivations imposed for the commission of the offence shall continue until the end of the execution of the punishment. Thus, the person will be behaving in accordance with the needs of the execution of his punishment and, when he has done so, he will be declaring to society that he has once again become a trustworthy person...”.

18.  According to Law on Cheques (Law No. 5941) which entered into force on 20 December 2009 and which was amended by Law No. 6273 on 3 February 2012, drawing cheques without having sufficient funds in the bank account no longer carries a prison sentence. Instead, the person is prevented from having a cheque book until he has paid his debt together with its interest.

19.  In its decision handed down in an unrelated case (decision no. 2006/11-183 E., 2006/216 K.) the Grand Chamber of the Criminal Division of the Court of Cassation held the following in relation to section 53 of the Criminal Code:

“...Although no mention was made of the restrictions mentioned in subsection 1 of section 53 of the Criminal Code in the judgment [convicting the appellant], [those] restrictions are the natural consequence of the conviction and do not have to be mentioned in the judgment for them to be applicable. Therefore, when [the judgment] is enforced, section 53 will be applied and the restrictions mentioned in subsection 1 (a-e) will come into play. Although after his conditional release from the prison the [appellant] will be able to exercise his powers [mentioned in 53 § 1 (c) of the Criminal Code], restrictions placed on his other rights will continue until his sentence has been executed fully...”.

**III.  RELEVANT INTERNATIONAL MATERIALS**

20.  A description of relevant international materials and comparative law can be found in *Scoppola v. Italy (no. 3)* [GC] (no. 126/05, §§ 40-60, 22 May 2012).

**THE LAW**

**I.  ALLEGED VIOLATIONS OF ARTICLE 3 OF PROTOCOL NO. 1**

21.  The applicant argued that his disenfranchisement breached his rights guaranteed in Article 3 of Protocol No. 1 which provides as follows:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

22.  The Government contested the applicant’s arguments.

A.  Admissibility

23.  The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B.  Merits

24.  The applicant complained that his disenfranchisement was in breach of Article 3 of Protocol No. 1. He maintained that he had not only been unable to vote in the general elections held in July 2007 while he was being detained in the prison, but also in the general elections of 2011 held after his conditional release. The reason for this was that, even though he was conditionally released from prison on 9 April 2009, the official date for the completion of the execution of his sentence was 1 April 2012 (see paragraph 11 above).

25.  The applicant submitted that he had been a businessman and owned a company at the beginning of the 2000s. He had been convicted as a result of several unpaid cheques which had been drawn by him when his business was affected by the severe economic crisis in Turkey which eventually bankrupted him. Thus, the offence committed by him did not mean that he was so morally or mentally untrustworthy as to be prevented from exercising his civic duties.

26.  The applicant considered that the national legislation on disenfranchisement did not take into account the nature of the offence or the severity of the punishment. As such, it was wholly disproportionate in its application. The only criterion taken into account when imposing the ban was the element of “intention" in the commission of the offence.

27.  Referring to the judgment in the case of *Hirst (no. 2)* [GC] (cited above, §§ 71 and 82), the applicant argued that he had been the victim of an automatic ban. Referring to the statistics issued by the Ministry of Justice, the applicant added that the blanket ban on voting did not reflect the principles of today’s democratic society, and affected a great proportion of the 80,448 convicted inmates in prisons in Turkey (November 2010 figures).

28.  The Government acknowledged that Article 3 of Protocol No. 1 guaranteed individual rights, including the right to vote and to stand for election, and that the applicant’s right to vote had been restricted in the present case.

29.  The Government referred to the Explanatory Report of the Criminal Code where the rationale behind section 53 of the Criminal Code is set out (see § 17 above in “Relevant Domestic Law and Practice”), and submitted that the legitimate aim of the restriction was the applicant’s rehabilitation. They maintained that the restriction on the right to vote in Turkey was not a ‘blanket ban’ because the applicable legislation limited the scope of the restriction in accordance with the nature of the offence. Referring to the judgment in the case of *Hirst (no. 2)* [GC] (cited above), the Government argued that, unlike the situation in the United Kingdom, the Turkish legislation restricting the right to vote was only applicable to persons who has committed offences intentionally. In the United Kingdom the legislation was applicable to all convicted prisoners detained in prisons, irrespective of the length of their sentence, the nature or gravity of the offence, and their individual circumstances.

30.  In Turkey the constitutional provisions concerning the issue of prisoners’ voting had undergone two amendments in 1995 and 2001. In 1995 the Constitution had been amended to exclude remand prisoners from the scope of the restriction because disenfranchising a person detained in prison pending the outcome of the criminal proceedings against him was considered incompatible with the principle of presumption of innocence. In the 2001 amendment, persons convicted of offences committed involuntarily had been excluded from the restrictions on voting. As it stood today, the national legislation was applicable only in respect of offences committed intentionally. In the opinion of the Government, the offences committed intentionally were “stronger” in nature as they included the element of “intention”.

**31.  The Court notes that the general principles applicable in the present case can be found in *Mathieu-Mohin and Clerfayt v. Belgium*** (2 March 1987, § 46-54, Series A no. 113); ***Hirst*** *(no. 2)* ([GC], cited above, §§ 56-71, 74-77 and 82); *Frodl v. Austria* (no. 20201/04, §§ 28 and 33-35, 8 April 2010), **and *Scoppola v. Italy*** *(no. 3)* ([GC], cited above, §§ 82-84, 96, 99 and 101-102). The Court will examine the applicant’s complaints in the light of the principles identified in those judgments.

**32.  The Court observes at the outset that the applicant, who had been sentenced to a prison term of four years, eleven months and twenty-six days, began serving his sentence on 11 April 2007** (see paragraph 6 above). In accordance with the applicable legislation, **his disenfranchisement did not end when he was conditionally released from prison on 9 April 2009, but continued until the initially foreseen date of release on 1 April 2012** (see paragraphs 11, 14 and 19 above). **Between 11 April 2007 and 1 April 2012 two general elections were held and the applicant was unable to vote in either of them. Having thus established that the applicant was directly affected by the measure foreseen in the national legislation which prevented him from voting on two occasions, the Court will proceed to examine whether the measure in question pursued a legitimate aim and did so in a proportionate manner.**

**33.  According to the Court’s established case-law referred to above, the rights enshrined in Article 3 of Protocol No. 1 are not absolute. There is room for implied limitations and the Contracting States must be afforded a wide margin of appreciation in this sphere. There are numerous ways of organising and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into its own democratic vision** (see *Scoppola* *(no. 3)* [GC], cited above, § 83 and the cases cited therein).

34**.  However, it is for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate**. In particular, **any conditions imposed must not thwart the free expression of the people in the choice of the legislature** – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage. **Any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws it promulgates. Exclusion of any groups or categories of the general population must accordingly be reconcilable with the underlying purposes of Article 3 of Protocol No. 1** (*ibid.* § 84 and the cases cited therein).

**35.  Furthermore, an indiscriminate restriction applicable automatically to prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances, must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1** (*Hirst (no. 2)* [GC], cited above, § 82).

36.  **As it appears from the relevant national provisions summarised above in the “Relevant Domestic Law and Practice”, persons convicted of having intentionally committed an offence are unable to vote. Moreover, their disenfranchisement does not come to an end on release from prison on probation, but continues until the end of the period of the original sentence handed down at the time of their conviction. In fact, pursuant to section 53 § 3 of the Criminal Code, even when a prison sentence which is longer than one year is suspended and the convicted person does not serve any time in the prison, he or she will still be unable to vote for the duration of the suspension of the sentence** (see paragraph 14 above).

37.  **Having regard to the Government’s submission** that the restrictions on the applicant’s right to vote pursued the aim of rehabilitating him, and having further regard to the rationale of section 53 of the Criminal Code set out in the Explanatory Report (see paragraph 17 above) relied on by the Government, **the Court is prepared to accept, notwithstanding whatever doubt there may be as to the efficacy of achieving these aims through a bar on voting, that the restriction on the applicant’s right to vote pursued the aim of encouraging citizen-like conduct, and considers that that aim is not untenable or incompatible *per se* with the right guaranteed under Article 3 of Protocol No. 1** (*Hirst (no. 2)* [GC], cited above, §§ 74-75).

38.  In light of the above, and in so far as they are applicable to convicts who do not even serve a prison term, **the Court considers that the restrictions placed on convicted prisoners’ voting rights in Turkey are harsher and more far-reaching than those applicable in the United Kingdom, Austria and Italy, which have been the subject matter of examination by the Court in its judgments in the above-mentioned cases of *Hirst (no. 2****)* [GC], *Frodl* and *Scoppola (no. 3)* [GC].

39**.  Furthermore, although the removal of the right to vote without any *ad hoc* judicial decision is not among the essential criteria for determining the proportionality of a disenfranchisement measure** (see *Scoppola (no. 3)* [GC], cited above, § 99) **and it does not, in itself, give rise to a violation of Article 3 of Protocol No. 1** (*ibid*, §§ 103-104), **the intervention of a judge is in principle likely to guarantee the proportionality of restrictions on prisoners’ voting rights** (*ibid.* § 99). In Turkey, disenfranchisement is an automatic consequence derived from the statute, and is therefore not left to the discretion or supervision of the judge.

40.  Indeed, according to the Grand Chamber of the Criminal Division of the Court of Cassation which examined section 53 of the Criminal Code in another case (paragraph 19 above), the judgment convicting the person does not have to make a mention of the disenfranchisement for it to be applicable.

41.  Moreover, unlike the situation in Italy which was examined by the Grand Chamber in its judgment in the case of *Scoppola (no. 3****)*, the measure restricting the right to vote in Turkey is indiscriminate in its application in that it does not take into account the nature or gravity of the offence, the length of the prison sentence ­– leaving aside the suspended sentences shorter than one year** (see paragraph 14 above) – or **the individual circumstances of the convicted persons. The Turkish legislation contains no express provisions categorising or specifying any offences for which disenfranchisement is foreseen** (see, *a contrario*, *Scoppola (no. 3)* [GC], cited above, § 105).

42.  The Court does not consider that the sole requirement of the element of “intent” in the commission of the offence is sufficient to lead it to conclude that the current legal framework adequately protects the rights in question and does not impair their very essence or deprive them of their effectiveness. **To that end, it disagrees with the Government that the legal framework takes into account the nature of the offence** (see paragraph 29 above). **Beyond submitting that the offences committed intentionally are “stronger”, the Government have not sought to explain how and why excluding all persons convicted of having intentionally committed offences was reconcilable with the underlying purposes of Article 3 of Protocol No. 1** (see *Scoppola* *(no. 3)* [GC], cited above, § 84).

43.  In any event, the Court observes that a similar legal framework, in fact one more favourable to prisoners, has already been examined by the Court in its judgment in the above-mentioned case of *Frodl*. In Austria, only prisoners who have committed with intent one or more criminal offences and been sentenced with final effect to a term of imprisonment of more than one year, forfeit the right to vote.

44.  Furthermore, the Court observes that the seriousness of the offences committed by the applicant in the case of *Scoppola (no. 3)* was one of the factors taken into account by the Grand Chamber in reaching its conclusion that the disenfranchisement in the Italian system was not applied automatically or indiscriminately (§ 107). **In the present case, the offence committed by the applicant was drawing cheques without having sufficient funds in his account. As such, the Court considers that the applicant’s case illustrates the indiscriminate application of the restriction even to persons convicted of relatively minor offences. The Court observes in this connection that drawing cheques without having sufficient funds in the bank account no longer carries a prison sentence** (see paragraph 18 in “Relevant Domestic Law and Practice” above).

45.  Furthermore, having regard to the nature of the offence committed by the applicant**, the Court is also unable to see any rational connection between the sanction and the conduct and circumstances of the applicant. It reiterates in this connection that the severe measure of disenfranchisement must not be resorted to lightly and that the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned** (see *Hirst (no. 2)* [GC], cited above, § 71).

46.  In light of the above, the Court cannot conclude that the legislature in Turkey has shown the requisite concern which, according to the Grand Chamber in the above-mentioned case of *Scoppola (no.3)*, should exist in order to adjust the application of the measure to the particular circumstances of each case by taking into account such factors as the gravity of the offence committed and the conduct of the offender (*ibid*. § 106).

47.  The Court concludes that **the automatic and indiscriminate application of the harsh measure in Turkey on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, and that there has been a breach of Article 3 of Protocol No. 1 in the present case.**

**II.  ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL NO. 1 IN CONJUNCTION WITH ARTICLE 14 OF THE CONVENTION**

48.  The applicant argued that his disenfranchisement as a convicted prisoner was discriminatory.

49.  The Court considers that this part of the application may be declared admissible. However, having regard to its conclusion above under Article 3 of Protocol No. 1, it finds that no separate issue arises under Article 14 of the Convention (see *Hirst (no.2)* [GC], cited above, § 87).

**III.  OTHER ALLEGED VIOLATIONS OF THE CONVENTION**

50.  Lastly, the applicant complained of a violation of Articles 6 and 13 of the Convention.

51.  Having regard to the documents in its possession, the Court finds that this part of the application does not disclose any appearance of a violation of the Convention provisions. It follows that this part of the application is manifestly ill-founded and should be rejected in accordance with Article 35 § 3 (a) and 4 of the Convention.

**IV.  APPLICATION OF ARTICLE 41 OF THE CONVENTION**

52.  Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A.  Damage

53.  The applicant claimed 3,000 euros (EUR) in respect of non-pecuniary damage.

54.  The Government considered that the finding of a violation would be sufficient to remedy any non-pecuniary damage.

55.  Having regard to the circumstances of the case, the Court agrees with the Government and considers that the finding of a violation constitutes sufficient just satisfaction for any non-pecuniary damage sustained by the applicant (see *Hirst (no.2)* [GC], cited above, §§ 93-94).

B.  Costs and expenses

56.  The applicant claimed EUR 912.50 for the costs and expenses incurred before the domestic courts and EUR 2,450 for those incurred before the Court. In support of his claim the applicant submitted to the Court a detailed breakdown of the costs incurred by him and his legal representative.

57.  The Government thought that the applicant claimed EUR 6,362.50, and considered that sum to be excessive and unsupported by adequate documentation. They also argued that no awards could be made for the applicant’s costs and expenses incurred at the national level.

58.  According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In response to the Government’s argument concerning the costs and expenses relating to the proceedings at the national level, the Court reiterates that, if it finds that there has been a violation of the Convention, it may award the applicant the costs and expenses incurred before the national courts for the prevention or redress of the violation (see *Société Colas Est and Others v. France*, no. 37971/97, § 56, ECHR 2002‑III, and the cases cited therein). In the present case the applicant brought the substance of his Convention rights to the attention of the national authorities (see paragraph 7 above). In the light of the foregoing, the Court considers that the applicant has a valid claim in respect of part of the costs and expenses incurred at the national level.

59.  Regard being had to the documentation in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 3,000 covering costs under all heads. From this sum should be deducted the EUR 850 granted to the applicant by way of legal aid under the Council of Europe’s legal aid scheme (see paragraph 2 above).

C.  Default interest

60.  The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

**FOR THESE REASONS, THE COURT UNANIMOUSLY**

1.  *Declares* the complaints under Article 14 of the Convention and Article 3 of Protocol No. 1 to the Convention admissible and the remainder of the application inadmissible;

2.  *Holds* that there has been a violation of Article 3 of Protocol No. 1 to the Convention;

3.  *Holds* that there is no need to examine the complaint under Article 14 of the Convention;

4.  *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;

5.  *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 3,000 (three thousand euros), less the EUR 850 (eight hundred and fifty euros) granted by way of legal aid, to be converted into the currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable to the applicant, in respect of his costs and expenses;

(b)  that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6.  *Dismisses* the remainder of the applicant’s claim for just satisfaction.

Done in English, and notified in writing on 17 September 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith Guido Raimondi  
 Registrar President

## **CASE OF MURAT VURAL v. TURKEY**

*(Application no. 9540/07)*

JUDGMENT

STRASBOURG

21 October 2014

FINAL

21/01/2015

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision*

In the case of Murat Vural v. Turkey,

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

Guido Raimondi, *President,* Işıl Karakaş, András Sajó, Nebojša Vučinić, Egidijus Kūris, Robert Spano, Jon Fridrik Kjølbro, *judges,*and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 16 September 2014,

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

**PROCEDURE**

1.  The case originated in an application (no. 9540/07) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national, Mr Murat Vural (“the applicant”), on 16 February 2007.

2.  The applicant was represented by Mr Hacı Ali Özhan, a lawyer practising in Ankara. The Turkish Government (“the Government”) were represented by their Agent.

3.  **The applicant alleged, in particular, that his imprisonment on account of having expressed his opinions, and his inability to vote as a convicted prisoner, had been in breach of his rights guaranteed by Article 10 of the Convention and Article 3 of Protocol No. 1.**

4.  On 20 September 2010 the application was communicated to the Government.

**THE FACTS**

**I.  THE CIRCUMSTANCES OF THE CASE**

5.  The applicant was born in 1975 and lives in Ankara.

6.  The facts of the case, as submitted by the parties and as they appear from the documents submitted by them, may be summarised as follows.

7.  In the early hours of 28 April 2005 the applicant went to a primary school in the town of Sincan and poured paint on a statue of Atatürk[[8]](#footnote-8) which was situated in the school’s garden. On the evening of the same day, he poured paint on a statue of Atatürk in the garden of another primary school.

8.  On 6 May 2005 he did the same thing in the same two primary schools.

9.  On 8 July 2005 the applicant poured paint on a statue of Atatürk in Sincan town centre.

10.  On 12 September 2005 the applicant went to the same statue in Sincan town centre equipped with a tin of paint, paint thinner and a ladder. As he was about to open the tin of paint he was arrested by police officers and taken to a police station where he was questioned. In a statement taken from him on the same day the applicant was reported as having told the police officers that he had carried out the above-mentioned actions because he resented Atatürk and had expressed his resentment by pouring paint on the statues.

11.  On the same day the applicant was brought before a prosecutor and then a judge, who ordered his detention on remand pending the opening of criminal proceedings against him. In his statement to the prosecutor the applicant maintained that he had carried out his actions to express his “lack of affection” for Atatürk.

12.  In his indictment of 15 September 2005, lodged with the Sincan Criminal Court of First Instance (hereinafter “the trial court”), the Sincan prosecutor charged the applicant with the offence of contravening the Law on Offences Committed Against Atatürk (Law no. 5816; see “Relevant Domestic Law and Practice” below).

13.  In the course of the trial the applicant admitted that he had poured paint on the statues. He told the trial court that he had completed his university studies and qualified as a teacher. However, he had been unemployed for a long time because his application to work as a teacher had not been accepted by the Ministry of Education. He had carried out his offences in order to protest against the Ministry’s decision.

14.  On 10 October 2005 the trial court found the applicant guilty as charged. Having regard to the fact that the offence was committed in a public place and on a number of occasions, the trial court sentenced him to three years’ imprisonment instead of the minimum term of imprisonment applicable under Law no. 5816, which is one year. The fact that the offence had been committed in a public place also led the trial court to increase the sentence by half in accordance with section 2 of Law no. 5816. The trial court also considered that the applicant had committed the offence on five separate occasions, and decided to multiply the sentence by five. The applicant was thus sentenced to a total prison term of twenty-two years and six months for his above-mentioned actions.

15.  The applicant appealed. In his appeal he argued that, according to the provisions of the Criminal Code, only one sentence should have been imposed on him because, regardless of the fact that he had poured paint on the statues on five occasions, he had in fact only committed one offence and not multiple offences. In support of his argument, he submitted that his five actions had been carried out within a short span of time.

16.  The applicant also pointed out that, instead of imposing on him the minimum one-year prison sentence provided for in Law no. 5816 in respect of each offence, the trial court had handed down a three-year sentence because it had had regard to the number of times he had poured paint on the statues. The trial court had then gone on to rely on the frequency of his actions when multiplying the sentence by five.

17.  The applicant also challenged the trial court’s reliance on section 2 of Law no. 5816 when increasing his sentence by half because the offence had been committed in a public place. He drew the Court of Cassation’s attention to the fact that, by their nature, statues are placed in public places.

18.  The applicant added that he had carried out his actions in order to express his “lack of affection” for Atatürk. As such, he had remained within the boundaries of his right to freedom of expression, which was guaranteed by Article 10 of the Convention. Thus, although it would have been reasonable to prosecute and punish him for damaging property, he had in fact been punished for expressing his opinions.

19.  On 6 April 2006 the Court of Cassation rejected the applicant’s argument that he had been expressing his opinion, but quashed the trial court’s judgment on the ground of, *inter alia*, that court’s failure to give adequate consideration to the possibility that the five separate incidents could form only one offence and not multiple offences. The Court of Cassation considered that the applicant had carried out his actions in order to protest against the Ministry of Education’s decision not to appoint him as a teacher. The case file was sent back to the trial court.

20.  In its decision of 5 July 2006 the trial court agreed with the Court of Cassation’s conclusion, and held that the applicant’s actions had amounted to a single offence and not five offences. However, having regard, *inter alia*, to the “contradictory reasons” put forward by the applicant as justification for his actions, as well as “the effects of his actions on the public”, the trial court concluded that the applicant’s actions had amounted to “insults”, and deemed it fit to sentence him to five years’ imprisonment, which is the maximum allowed under Law no. 5816. The sentence was then increased by half because the acts had been committed in a public place. Furthermore, pursuant to Article 43 of the Criminal Code (see “Relevant Domestic Law and Practice” below), the sentence was further increased by three quarters. The applicant was thus sentenced to a total of thirteen years, one month and fifteen days’ imprisonment.

21.  Furthermore, in its decision the trial court set out the restrictions under section 53 of the Criminal Code which were to be placed on the applicant on account of his conviction. Accordingly, until the execution of his sentence, the applicant was banned from, among other things, voting and taking part in elections, as well as from running associations, parties, trade unions and cooperatives (see “Relevant Domestic Law and Practice”).

22.  The applicant appealed and repeated his arguments under various provisions of the Convention. He maintained, in particular, that he had carried out his actions in order to express his “lack of affection” for Atatürk and had thus exercised his freedom of expression guaranteed in Article 10 of the Convention.

23.  The appeal was dismissed by the Court of Cassation on 5 February 2007. No mention was made in the Court of Cassation’s decision of the arguments raised by the applicant about his freedom of expression.

24.  According to a document drawn up by the prosecutor on 16 April 2007 setting out the details of the applicant’s prison sentence, the date of the applicant’s release from prison was set as 22 October 2018, with a possibility of release on 7 June 2014 for good behaviour.

25.  In the meantime, on 1 June 2005 the Law on the Execution of Prison Sentences and Other Security Measures (Law no. 5275) entered into force. This law sets out the circumstances in which prisoners can benefit from early release.

26.  On 15 May 2007 the prosecutor responsible for the prison the applicant was serving his sentence in wrote to the trial court and asked for guidance in calculating the date of the applicant’s possible early release. The prosecutor stated that, for offences committed before 1 June 2005, Law no. 647 was applicable and, for offences committed after that date, the new Law no. 5275 would be applicable. The applicant had carried out his actions both before and after that date.

27.  On 16 May 2007 the trial court considered that the critical date was the date of the commission of the final act and thus the new law was applicable.

28.  The applicant lodged an objection against that decision and argued that most of his actions had been carried out before 1 June 2005 and that therefore, when calculating his prison sentence, the old law should be taken into account. If his prison sentence were calculated in accordance with the new law, he would spend four more years in prison. That objection was rejected by the trial court on 18 June 2007 and the date of the applicant’s possible release from prison was calculated in accordance with the document drawn up by the prosecutor on 16 April 2007 (see paragraph 24 above).

29.  A request made by the applicant to the Ministry of Justice for his conviction to be quashed and another request to the Court of Cassation to rectify the judgment were rejected on 28 September 2007 and 28 December 2007 respectively.

30.  On 11 June 2013 the applicant was released conditionally.

**II.  RELEVANT DOMESTIC LAW AND PRACTICE**

31.  The Law on Offences Committed Against Atatürk (Law no. 5816, entry into force 31 July 1951) provides as follows:

“Section 1: Anyone who publicly insults the memory of Atatürk or swears at him shall be liable to imprisonment for a term of between one and three years.

Anyone who demolishes, breaks, ruins or dirties a sculpture, statue, monument or the mausoleum of Atatürk, shall be liable to imprisonment for a term of between one and five years.

Anyone who incites another to commit any of the above-mentioned offences shall be liable to the same punishment as the person committing the offence.

Section 2: In cases where the offences mentioned in section 1 of this Law are committed by two or more persons, committed in public places or committed through the media the prison term shall be increased by half.

If force is used in the commission of the offences mentioned in the second paragraph of section 1 of this Law, or an attempt is made to do so, the prison term shall be doubled.

Section 3: The offences mentioned in this Law shall be prosecuted by public prosecutors of their own motion.

Section 4: This Law shall enter into force on the date of its publication.

Section 5: The Justice Minister shall oversee the enforcement of this Law.”

32.  Section 43 of the Criminal Code (Law no. 5237 of 2004), in so far as relevant, provides as follows:

“(1)  In circumstances where, in the course of the execution of a decision to commit a particular offence, an offence is committed against a person more than once and at different times, only one punishment shall be imposed [on the offender]. However, the punishment shall then be increased by between a quarter and three quarters ...”

...”

33.  The relevant provisions of section 53 of the Criminal Code (Law no. 5237 of 2004) provide as follows:

**“(1)  As the statutory consequence of imposition of a prison sentence for an offence committed intentionally, the [convicted] person shall be deprived of the following [rights]:**

**a)  Undertaking of permanent or temporary public duties, including membership of the Turkish National Assembly and all civil service and other duties which are offered through election or appointment by the State, city councils, town councils, village councils, or organisations controlled or supervised by them;**

**b)  Voting, standing for election and enjoying all other political rights**;

c)  Exercising custodial rights as a parent; performing duties as a guardian or a trustee;

d)  Chairing or auditing foundations, associations, unions, companies, cooperatives and political parties;

e)  Carrying out a self-employed profession which is subject to regulation by public organisations or by chambers of commerce which have public status.

**(2)  The person cannot enjoy the [above-mentioned] rights until the prison term to which he or she has been sentenced as a consequence of the commission of the offence has been served.**

(3)  The provisions above which relate to the exercise of custodial rights as a parent and duties as a guardian or a trustee shall not be applicable to a convicted person whose prison sentence is suspended or who is conditionally released from prison. A decision may [also] be taken not to apply subsection 1 (e) above to a convict whose prison sentence is suspended.

(4)  Sub-section 1 above shall not be applicable a person whose short-term prison sentence is suspended or to persons who were under the age of eighteen at the time of the commission of the offence.

(5)  Where the person is sentenced for an offence committed by abusing one of the rights and powers mentioned in sub-section 1 above, a further prohibition of the enjoyment of the same right shall be imposed for a period equal to between a half and the whole length of the prison sentence ...

...”

34.  For more information concerning the legislation applicable to the issue of voting in Turkey, see *Söyler v. Turkey* (no. 29411/07, §§ 12-19, 17 September 2013).

**III.  RELEVANT INTERNATIONAL MATERIALS**

35.  A description of the relevant international materials and comparative law on the issue of voting can be found in *Scoppola v. Italy (no. 3)* [GC] (no. 126/05, §§ 40-60, 22 May 2012).

**THE LAW**

**I.  ALLEGED VIOLATION OF ARTICLES 10, 17 AND 18 OF THE CONVENTION**

36.  **Relying on Article 10 of the Convention, the applicant complained that he had been punished for having expressed his opinions**. He added that the punishment imposed on him had been **excessive, disproportionate to the offence in question, and incompatible with Articles 17 and 18 of the Convention.**

37.  The Government contested the applicant’s arguments.

38.  The Court deems it appropriate to examine the complaint solely from the standpoint of Article 10 of the Convention, which reads as follows:

“1.  Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2.  The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

A.  Admissibility

39.  The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B.  Merits

1.  Applicability of Article 10 of the Convention and the existence of an interference

40.  The applicant argued that he had carried out his actions with a view to expressing his dissatisfaction with those running the country in accordance with the Kemalist ideology[[9]](#footnote-9), and to criticising the Kemalist ideology itself.

41.  The Government considered that defiling Atatürk’s statues was considered to be an act of vandalism with the element of insulting Atatürk’s memory. By virtue of the nation’s deep sense of respect and adoration for Atatürk, his memory was protected by law.

42.  In the opinion of the Government, it was not the expression of views that was punishable under the Law on Offences Committed Against Atatürk, but, rather, insulting Atatürk’s memory or vandalising his statues. That law did not prevent individuals from criticising the personality or ideas of Atatürk or Kemalist policies. Vandalising Atatürk’s statues was not a legitimate way of expressing views under Article 10 of the Convention.

43.  Having regard to its intensity, the applicant’s aggression against the statues had been qualified as vandalism and vandalism was a violent way of expressing hatred. Although the applicant had the right to express and disseminate his thoughts and opinions through speech, writing, pictures and other media without recourse to violence, he had chosen not to do so. Instead, in order to justify his acts of vandalism the applicant had sought legal protection before the national courts by invoking his right to freedom of expression. In the opinion of the Government, the applicant’s unlawful actions had fallen outside the scope of freedom of expression guaranteed by Article 10 of the Convention.

44.  The Court reiterates that Article 10 of the Convention protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed (see *Oberschlick v. Austria (no. 1)*, 23 May 1991, § 57, Series A no. 204). Indeed, a review of the Court’s case-law shows that Article 10 of the Convention has been held to be applicable not only to the more common forms of expression such as speeches and written texts, but also to other and less obvious media through which people sometimes choose to convey their opinions, messages, ideas and criticisms.

45.  For example, Article 10 of the Convention was held to include freedom of artistic expression – notably within the scope of freedom to receive and impart information and ideas – which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds. Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence there is an obligation on the State not to encroach unduly on the author’s freedom of expression(see *Müller and Others v. Switzerland*, 24 May 1988, §§ 27 and 33, Series A no. 133). It is noteworthy that in reaching that conclusion the Court noted that Article 10 of the Convention does not specify that freedom of artistic expression comes within its ambit; but neither, on the other hand, does it distinguish between the various forms of expression (*ibid*., § 27).

46.  The wearing or displaying of symbols has also been held to fall within the spectrum of forms of “expression” within the meaning of Article 10 of the Convention. For example, in its judgment in the case of *Vajnai v. Hungary* the Court accepted that the wearing of a red star in public as a symbol of the international workers’ movement must be regarded as a way of expressing political views and that the display of such vestimentary symbols fell within the ambit of Article 10 of the Convention (no. 33629/06, §§ 6 and 47, ECHR 2008; see also *Fratanoló v. Hungary*, no. 29459/10, § 24, 3 November 2011). Similarly, the Court held that the display of a symbol associated with a political movement or entity, like that of a flag, was capable of expressing identification with ideas or representing them and fell within the ambit of expression protected by Article 10 of the Convention (see *Fáber v. Hungary*, no. 40721/08, § 36, 24 July 2012).

47.  The Court has held that opinions, as well as being capable of being expressed through the media of artistic work and the wearing or displaying of symbols as set out above, can also be expressed through conduct. For example, in its judgment in the case of *Steel and Others v. the United Kingdom* (23 September 1998, §§ 90 and 92, *Reports of Judgments and Decisions* 1998‑VII) the Court held that taking part in a protest against a grouse shoot, during which attempts were made to obstruct and distract those taking part in the shoot, and breaking into a motorway construction site and climbing trees which were to be felled and onto some of the stationary machinery which was to be used in the construction, constituted expressions of opinion within the meaning of Article 10 of the Convention even though they had taken the form of physically impeding certain activities. In doing so it rejected the respondent Government’s argument that the protest activities of the applicants had not been peaceful and that Article 10 of the Convention had thus not been applicable.

48.  Similarly, in *Hashman and Harrup v. the United Kingdom* ([GC], no. 25594/94, § 28, ECHR 1999‑VIII) holding a protest during which a fox hunt was disrupted by blowing a hunting horn and by engaging in hallooing was held to constitute an expression of opinion within the meaning of Article 10 of the Convention.

49.  Referring to the above-mentioned judgments in the cases of *Steel and Others* and *Hashman and Harrup*, the Court reaffirmed in its decision in the case of *Lucas v. the United Kingdom* ((dec). no. 39013/02, 18 March 2003) that protests can constitute expressions of opinion within the meaning of Article 10 of the Convention. This case concerned an applicant who was arrested, detained and subsequently convicted of the offence of breach of the peace for having sat in a public road leading to a naval base in order to protest against the decision of the British Government to retain nuclear submarines.

50.  In a similar vein, in its judgment in the case of *Tatár and Fáber v. Hungary* the Court considered that the public display for a short while of several items of clothing representing the “dirty laundry of the nation” amounted to a form of political expression. The Court referred to the applicants’ actions as an “expressive interaction”, and in rejecting the Government’s argument that the impugned event had in fact constituted an assembly and thereby required scrutiny under Article 11 of the Convention, it held that the event had “constituted predominantly an expression” and had thus fallen within the scope of Article 10 of the Convention (no. 26005/08 and 26160/08, §§ 29, 36 and 40, 12 June 2012).

51.  The scope of “expression” was once again the subject matter of the Court’s examination in the case of *Christian Democratic People’s Party v. Moldova (no. 2)* which concerned a political party which had been prevented from holding a protest demonstration in a square because the Municipal Council had considered that during the meeting there would be calls to a war of aggression, ethnic hatred and public violence. The applicant Party’s objection was rejected by the Court of Appeal, which held that the Municipal Council’s decision had been justified because the leaflets disseminated by the applicant political party had contained such slogans as “Down with Voronin’s totalitarian regime” and “Down with Putin’s occupation regime”. The Court of Appeal also recalled that during a previous demonstration organised by the applicant political party to protest against the presence of the Russian military in Transdniestria, the protesters had burned a picture of the President of the Russian Federation and a Russian flag. In its judgment the Court held that the applicant party’s slogans, even if they had been accompanied by the burning of flags and pictures, were a form of expressing an opinion in respect of an issue of major public interest, namely the presence of Russian troops on the territory of Moldova (no. 25196/04, §§ 9 and 27, 2 February 2010).

52.  The examples referred to above show that all means of expression are included in the ambit of Article 10 of the Convention. The Court has repeatedly stressed that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate of questions of public interest (see, *inter alia*, *Wingrove v. the United Kingdom*, 25 November 1996, § 58, *Reports* 1996‑V). In the same vein, it considers that an assessment of whether an impugned conduct falls within the scope of Article 10 of the Convention should not be restrictive, but inclusive.

53.  Moreover, the Court has held in cases concerning freedom of the press that it is neither for the Court nor for the national courts to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists because, as stated above (see paragraph 44 above), Article 10 of the Convention protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed (see, *inter alia*, *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298). The Court considers that the same can be said for any individual who may wish to convey his or her opinion by using non-verbal and symbolic means of expression, and it thus rejects the Government’s argument that “[a]lthough the applicant had the right to express and disseminate his thoughts and opinions through speech, writing, pictures and other mediums without recourse to violence, he had chosen not to do so” (see paragraph 43 above).

54.  In light of its case-law the Court considers that, in deciding whether a certain act or conduct falls within the ambit of Article 10 of the Convention, an assessment must be made of the nature of the act or conduct in question, in particular of its expressive character seen from an objective point of view, as well as of the purpose or the intention of the person performing the act or carrying out the conduct in question. The Court notes that the applicant was convicted for having poured paint on statues of Atatürk, which, from an objective point of view, may be seen as an expressive act. Furthermore, the Court notes that in the course of the criminal proceedings against him the applicant very clearly informed the national authorities that he had intended to express his “lack of affection” for Atatürk (see paragraphs 11, 18 and 22 above), and subsequently maintained before the Court that he had carried out his actions with a view to expressing his dissatisfaction with those running the country in accordance with the Kemalist ideology and the Kemalist ideology itself (see paragraph 40 above).

55.  In this connection, regard must be had to the fact that, contrary to what was submitted by the Government, the applicant was not found guilty of vandalism, but of having insulted the memory of Atatürk (see paragraph 20 above). In fact, the national courts accepted that the applicant had carried out his actions in order to protest against the Ministry of Education’s decision not to appoint him as a teacher (see paragraph 19 above).

56.  In light of the foregoing the Court concludes that through his actions the applicant exercised his right to freedom of expression within the meaning of Article 10 of the Convention and that that provision is thus applicable in the present case. It also finds that the applicant’s conviction, the imposition on him of a prison sentence and his disenfranchisement as a result of that conviction constituted an interference with his rights enshrined in Article 10 § 1 of the Convention.

2.  Compliance with Article 10 of the Convention

57.  The applicant complained that his actions had been severely and disproportionately penalised and his right to freedom of expression had thus been breached.

58.  The Government, beyond disputing the applicability of Article 10 of the Convention, did not seek to argue that the interference had been justified within the meaning of Article 10 of the Convention.

59.  Interference with an applicant’s rights enshrined in Article 10 § 1 of the Convention will be found to constitute a breach of Article 10 of the Convention unless it was “prescribed by law”, pursued one or more legitimate aim or aims as defined in paragraph 2 and was “necessary in a democratic society” to attain them.

60.  The Court observes that the restriction on the applicant’s freedom of expression was based on the Law on Offences against Atatürk. As can be seen from its relevant provisions (see paragraph 31 above), it is sufficiently clear and meets the requirements of foreseeability. The Court is therefore satisfied that the interference was prescribed by law. Moreover, it considers that it can be seen as having pursued the legitimate aim of protecting the reputation or rights of others (see *Odabaşı and Koçak v. Turkey*, no. 50959/99, § 18, 21 February 2006; see also *Dilipak and Karakaya* *v. Turkey*, nos. 7942/05 and 24838/05, §§ 117, 130-131, 4 March 2014). It therefore remains to be determined whether the interference complained of was “necessary in a democratic society”.

61.  The Court reiterates that its supervisory functions oblige it to pay the utmost attention to the principles characterizing a “democratic society”. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every individual. Subject to paragraph 2 of Article 10 of the Convention, it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society” (see *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24).

62.  This means, amongst other things, that every “formality”, “condition”, “restriction” or “penalty” imposed in this sphere must be proportionate to the legitimate aim pursued (*ibid.*). As set forth in Article 10 of the Convention, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see, *inter alia*, *Zana v. Turkey*, 25 November 1997, § 51, *Reports* 1997‑VII).

63.  The Court has frequently held that “necessary” implies the existence of a “pressing social need” and that the Contracting States have a certain margin of appreciation in assessing whether such a need exists, but that this goes hand in hand with a European supervision (*ibid.*).

64.  In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole. In particular, it must determine whether the interference in question was “proportionate to the legitimate aims pursued” and whether the reasons adduced by the national authorities to justify it are “relevant and sufficient” (see, *inter alia*, *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999‑I). In this connection, the Court reiterates that the nature and severity of the penalties imposed are also factors to be taken into account when assessing the proportionality of the interference (see, *inter alia*, *Başkaya and Okçuoğlu v. Turkey* [GC], nos. 23536/94 and 24408/94, § 66, ECHR 1999‑IV).

65.  The Court is aware that Atatürk, founder of the Republic of Turkey, is an iconic figure in modern Turkey (*Odabaşı and Koçak*, cited above, § 23), and considers that the Parliament chose to criminalise certain conduct which it must have considered would be insulting to Atatürk’s memory and damaging to the sentiments of Turkish society.

66.  Nevertheless, the Court is struck by the extreme severity of the penalty foreseen in domestic law and imposed on the applicant, that is over thirteen years of imprisonment. It also notes that as a result of that conviction the applicant has been unable to vote for over eleven years. In principle, the Court considers that peaceful and non-violent forms of expression should not be made subject to the threat of imposition of a custodial sentence (see, *mutatis mutandis*, *Akgöl and Göl v. Turkey*, nos. 28495/06 and 28516/06, § 43, 17 May 2011). While in the present case, the applicant’s acts involved a physical attack on property, the Court does not consider that the acts were of a gravity justifying a custodial sentence as provided for by the Law on Offences against Atatürk.

67.  Thus, having regard to the extreme harshness of the punishment imposed on the applicant, the Court deems it unnecessary to examine whether the reasons adduced for convicting and sentencing the applicant were sufficient to justify the interference with his right to freedom of expression (see *Başkaya and Okçuoğlu*, cited above, § 65). Nor does it deem it necessary to examine whether the applicant’s expression of his resentment towards the figure of Atatürk or his criticism of Kemalist ideology amounted to an “insult”, or whether the domestic authorities had any regard to the applicant’s freedom of expression, which he had brought to their attention on a number of occasions (see paragraphs 18 and 20 above). It considers that no reasoning can be sufficient to justify the imposition of such a severe punishment for the actions in question.

68.  In the light of the foregoing, the Court concludes that the penalties imposed on the applicant were grossly disproportionate to the legitimate aim pursued and were therefore not “necessary in a democratic society”. There has accordingly been a violation of Article 10 of the Convention.

**II.  ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL NO. 1 TO THE CONVENTION**

69.  Relying on Article 3 of Protocol No. 1 to the Convention the applicant complained about the ban which had been imposed on him by the domestic courts and which prevents him from voting. Article 3 of Protocol No. 1 to the Convention reads as follows:

**“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”**

70.  The Government contested that argument.

A.  Admissibility

71.  The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B.  Merits

**72.  The applicant complained that his conviction had not only resulted in his imprisonment, but had also prevented him from, *inter alia*, voting.**

**73.  The Government acknowledged that Article 3 of Protocol No. 1 guaranteed individual rights, including the right to vote and to stand for election, and did not contest that the applicant’s right to vote had been restricted in the present case.**

74.  **The Government referred to the Explanatory Report of the Criminal Code where the rationale behind section 53 of the Criminal Code is set out** (see *Söyler*, cited above, § 17), **and submitted that the legitimate aim of the restriction was the applicant’s rehabilitation. They maintained that the restriction on the right to vote in Turkey was not a “blanket ban” because the applicable legislation limited the scope of the restriction in accordance with the nature of the offence.** Referring to the judgment in the case of *Hirst v. the United Kingdom (no. 2)* ([GC], no. 74025/01, ECHR 2005‑IX), **the Government argued that, unlike the situation in the United Kingdom, the Turkish legislation restricting the right to vote was only applicable to persons who had committed offences intentionally. In the United Kingdom the legislation was applicable to all convicted prisoners detained in prisons, irrespective of the length of their sentence, the nature or gravity of the offence, and their individual circumstances.**

75.  In Turkey the constitutional provisions concerning the issue of prisoners’ voting rights had undergone two amendments in 1995 and 2001. In 1995 the Constitution had been amended to exclude remand prisoners from the scope of the restriction because disenfranchising a person detained in prison pending the outcome of criminal proceedings against him was considered incompatible with the principle of presumption of innocence. In the 2001 amendment, persons convicted of offences committed involuntarily had been excluded from the restrictions on voting. As it stood today, the national legislation was applicable only in respect of offences committed intentionally. In the opinion of the Government, offences committed intentionally were “stronger” in nature as they included the element of “intention”.

**76.  The Court points out that the rights guaranteed by Article 3 of Protocol No. 1 to the Convention are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law; a general, automatic and indiscriminate restriction on the right to vote applied to all convicted prisoners serving sentences is incompatible** with that Article (see *Hirst (no. 2)* [GC], cited above, §§ 58 and 82). These principles were subsequently reaffirmed by the Grand Chamber in the case of *Scoppola (no. 3)* (cited above, §§ 82-84, 96, 99 and 101-102). The Court also reiterates that Article 3 of Protocol No. 1 applies only to the election of the “legislature” (see *Paksas v. Lithuania* [GC], no. 34932/04, § 71, ECHR 2011 (extracts)).

**77.  The Court observes that the applicant’s conviction became final on 5 February 2007 and he was released from prison on licence on 11 June 2013. During that time he was not allowed to vote**. Furthermore, in accordance with the applicable legislation, **his disenfranchisement did not end when he was conditionally released from prison on 11 June 2013, but will continue until the date initially foreseen for his release, 22 October 2018** (see paragraph 24 above). **Thus, between 5 February 2007 and 22 October 2018, that is, for a period of over eleven years, the applicant has been and will be unable to vote. The Court observes that two parliamentary elections were already held** between 5 February 2007 and the date of the examination by the Court ‐ on 22 July 2007 and 12 June 2011 ‐ **and the applicant was unable to vote in either of them.**

**78.  In light of the above, the Court concludes that the applicant was directly affected by the measure foreseen in the national legislation which has already prevented him from voting on two occasions in the parliamentary elections.**

**79.  The Court has already found it established that in Turkey disenfranchisement is an automatic consequence derived from the statuteand that it is indiscriminate in its application in that it does not take into account the nature or gravity of the offence, the length of the prison sentence – leaving aside suspended sentences shorter than one year** (see paragraph 33 above) – **or the individual circumstances** of those convicted. It has noted moreover that the Turkish legislation contains no express provisions categorising or specifying offences for which disenfranchisement is foreseen and that the automatic and indiscriminate application of this harsh measure in Turkey regarding a vitally important Convention right does not fall within any acceptable margin of appreciation (see *Söyler*, cited above, §§ 36-47).

80.  Nothing in the present case allows the Court to reach a different conclusion. **In the light of the above, the Court concludes that there has been a violation of Article 3 of Protocol No. 1 to the Convention on account of the applicant’s disenfranchisement.**

**III.  OTHER ALLEGED VIOLATIONS OF THE CONVENTION**

81.  The applicant complained that, by imposing on him the maximum prison sentence applicable under domestic law and calculating his prison sentence on the basis of a new law (Law no. 5275), his rights under Articles 5, 6 and 7 of the Convention had been breached. The applicant further complained that Law no. 5816 was incompatible with Article 14 of the Convention because it gives the judge too wide a discretion to choose a prison sentence of between one year and five years. As a result, different courts handed down different sentences for the same offence. Finally, relying on Article 11 of the Convention, the applicant complained about the ban which was imposed on him by the domestic courts and which prevented him not only from voting and taking part in elections, but also from running associations, parties, trade unions and cooperatives.

82.  Having regard to its conclusions under Article 10 of the Convention and Article 3 of Protocol No. 1 (see paragraphs 68 and 80 above), the Court considers it unnecessary to examine the admissibility and merits of these complaints.

**IV.  APPLICATION OF ARTICLE 41 OF THE CONVENTION**

83.  Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A.  Damage

84.  The applicant claimed 60,000 euros (EUR) in respect of pecuniary damage and EUR 65,000 in respect of non-pecuniary damage. In calculating his claim for pecuniary damage the applicant relied on the minimum wage and multiplied it by the total number of months he was sentenced to serve in prison.

85.  The Government argued that the applicant’s claims were excessive and unsupported by evidence.

86.  Having regard to the applicant’s failure to submit to the Court any documents showing his employment status, income and loss of income, the Court rejects the applicant’s claim for pecuniary damage. On the other hand, it awards the applicant EUR 26,000 in respect of non-pecuniary damage.

B.  Costs and expenses

87.  The applicant also claimed EUR 50,000 for the costs and expenses incurred before the domestic courts and the Court.

88.  The Government considered the claim for costs and expenses to be unsupported by any documentation.

89.  According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, the applicant has not shown that he has actually incurred the costs claimed. In particular, he failed to submit documentary evidence, such as a contract, a fee agreement or a breakdown of the hours spent by his lawyer on the case. Accordingly, the Court makes no award in respect of the fees of his lawyer.

C.  Default interest

90.  The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

**FOR THESE REASONS, THE COURT**

1.  *Declares,* unanimously, admissible the complaints under Article 10 of the Convention and Article 3 of Protocol No. 1 to the Convention;

2.  *Holds*, unanimously, that there has been a violation of Article 10 of the Convention;

3.  *Holds*, unanimously, that there has been a violation of Article 3 of Protocol No. 1 to the Convention;

4.  *Holds*, unanimously, that there is no need to examine the admissibility and merits of the complaints under Articles 5, 6, 7, 11 and 14 of the Convention;

5.  *Holds*, unanimously,

(a)  that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 26,000 (twenty-six thousand euros), in respect of non-pecuniary damage, plus any tax that may be chargeable, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;

(b)  that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6.  *Dismisses*, by six votes to one, the remainder of the applicant’s claim for just satisfaction.

Done in English, and notified in writing on 21 October 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith Guido Raimondi  
 Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Sajó and joint separate opinion of Judges Nebojša Vučinić and Egidijus Kūris are annexed to this judgment.

G.R.A.  
S.H.N.

**PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE SAJÓ**

I.

The applicant Murat Vural was convicted for pouring paint on a statue of Kemal Atatürk. He was sentenced to serve the statutory maximum of five years for the insult. The punishment was increased to a total of thirteen years, one month and fifteen days’ imprisonment.

I fully agree with my colleagues that Article 10 of the European Convention of Human Rights was violated in this case. The reason given in the judgment is that, in the absence of violence, the impugned act is of insufficient gravity to justify the extreme harshness of the punishment. I agree that such punishment is *per se* unacceptable but, in my view, this limited consideration that concentrates on the extreme harshness of the punishment does not provide adequate protection for the freedom of expression. This shortcoming forces me to discuss the methodology that was applied in the case. It was the straightjacket of a “standard” proportionality analysis that hampered the full protection of free speech that is envisioned in the Convention.

A three-step “standard” proportionality analysis (the interference is prescribed by law, serves a legitimate aim, and is “proportionate to the legitimate aims pursued”) is the hallmark of this Court’s judgments in Article 8-11 cases[[10]](#footnote-10).

I have reservations as to the use of that methodology in the present case, where the matter was decided on the grounds of the disproportionality of the punishment. I also find the “standard” proportionality approach inappropriate in all cases where a freedom is unconditionally restricted by legislation.

First, it is not clear what makes the punishment disproportionate. My gut feeling indicates that the sanction is disproportionate, but in regard to what and in which sense? Would a one-year mandatory sentence be proportionate? Is it really a matter of proportionality which concerns us? Second, by grounding the finding of a violation in the severity of the punishment, the Court diverts attention from the more fundamental issue, namely the permissibility of sanctioning an “insult to memory” at all. The present case concerns the Article 10 rights of the applicant, therefore the Court should have considered the effect of the interference on the applicant’s freedom of expression.

*Proportionality of the punishment*

What are the problems with a finding of a violation based on the excessive nature of the punishment? First, this Court, of all courts, cannot rely on a crude sense of justice (though all judicial decisions rendered in disregard of the sense of justice are open to criticism). This Court is concerned with the legitimacy of restrictions on human rights under the Convention and not with the appropriateness of sanctions measured on some mysterious scale. The Convention contains no prohibition on unusual punishment and we are not called upon to evaluate sentencing.

When judges and laymen talk about disproportionate punishment, they often compare the punishment imposed for a given crime with the punishment of another crime, or with the punishment of another person for a similar, comparable crime, or even with the moral seriousness of the crime in relation to the punishment[[11]](#footnote-11).

In the present case there is no specific reason given as to *why* the punishment is grossly disproportionate. Where judicial intuition determines that a matter does not deserve further clarification, those who are not privy to the intuition remain puzzled. Would one year be acceptable, for example, because the statue had to be cleaned or repaired? The Court does not even provide a comparable reference, a *tertium comparationis*; for example, the fact that thirteen years is a sentence that is ordinarily imposed on murderers. Under that reasoning, the present conviction treats the attack on memory as if were an attack on human life, thus attributing equal weight to life and to the honouring of a deceased person’s memory (where the comparator is harm to individuals or harm to the community).

Because the dictates of the sense of justice are satisfied and the talismanic word “disproportionate” is used, the judgment of the Court looks satisfactory. It is not. I share the feelings of my colleagues as to the gross inappropriateness of the sentence, but in an Article 10 case this is not the gist of the rights protection: the Court should look into the necessity of the interference in the light of its impact on the expression concerned.

*The substantive issue: punishing specific content*

The text of the Convention requires the Government to prove that an interference was necessary in a democratic society, and it is in the context of such necessity that the question of proportionality arises.The real issue in this case is not that an excessively severe punishment was imposed for an expressive act that did not cause serious damage, but that a whole class of expression (insults to Atatürk’s memory) and related expressive acts are considered to be a crime *for their content*. The law that was applied singles out very specific content: all speech (including expressive action, as in the present case) that publicly insults the memory of Atatürk is punishable. The issue is not the protection of all public statues where harm to the statue has been caused by an expressive action. The issue, which is buried under the outrage of the excessive sentence, is the *singling out of specific speech content for punishment*. Law no. 5816 provides first and foremost that any “disrespect for Atatürk’s memory” is to be punished by a prison sentence of between one and three years, the use of paint on a monument (“dirtying of a statue”) raising the sentence to five years; the applicant was then given an *additional* eight years of punishment *for the aggravating circumstances*.

Of course, eight *additional* years for degrading a statue is excessive in view of the degree of harm caused by the act, but this Court is “only” called upon to see whether a limitation of freedom of expression is necessary in a democratic society.

I would argue that the problem can be better decided using a category-based analysis of the legislation, and even by an enhanced proportionality analysis of the means/end relationship of the legislation and the objective value of the intended aim, as is carried out, for example, in Canada and Germany. These approaches are superior to the Court’s “standard”, often narrowly case-related analysis because they are more convincing and, above all, offer a better, broader, and more equivalent protection to free speech against governmental abuse.

The legislature’s predominant concerns in Law no. 5816 are with the content of the speech as opposed to its secondary effects; it expresses the legislature’s disagreement with the message the act conveys. In the category-based approach of the United States First Amendment law, known as the “categorical approach”[[12]](#footnote-12), this is plainly unconstitutional. So what is wrong with content discrimination? It is wrong because the Government disregard content-neutrality without compelling reasons. The requirement of content neutrality follows from the assumption that content-based restrictions (“content-discrimination”) target specific messages, thus resulting in thought control, and “[such a restriction] raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace.[[13]](#footnote-13)”

*The shortcomings of the “standard” proportionality approach*

The judgment operates within the straightjacket of the proportionality analysis; it is for this reason that the Court fails to make explicit the underlying (“structural”) problem of Law no. 5816. I am aware of the advantages of the three mechanical prongs of the “standard” proportionality analysis. They offer considerable legal certainty; the approach also offers the advantages of economies of scale. This kind of manufacturing certainty is understandably attractive where a court has thousands of cases and where a court is called upon to give advice to judges reading our judgments in forty-seven different member States.

However, even within the proportionality analysis there are other methods, slightly more complex in nature than the three-pronged approach used by the Court. One may add other levels of scrutiny.

Among others, when determining a measure’s quality as a means to reach a (legitimate) end, the search must begin at the abstract level of the legislation. This search is particularly demanding (and therefore efficient) if and when a court enters into a substantive analysis of the veracity of the allegation that a regulatory measure actually serves a purported end. Moreover, the importance of the end itself may be subject to judicial analysis. Using this approach in the Articles 8-11 context, the Court would have to review how important and genuine the references are to one or another aim recognised in the Convention as a ground for restricting a Convention right. Is the end genuine? Or instead, is it a bluff couched in terms of public interest that pretends to be beyond the reach of judicial scrutiny in the name of democratic legitimation of the legislature?

Moreover, is the chosen means narrowly tailored? Is it not the case that the criminal provision is over-broad, even considering the need for sensitivity protection?

Where, as in the present case, the argument is made that the sensitivities and deep feelings of a population are to be protected, a court could and should take a long look at the relationship of this allegation to the “rights of others”. To accept that all interests “amount to rights of others” and claim that all these alleged rights are of equal weight to that of Convention human rights is extremely dangerous for human rights: not all rights are created as equal. Is there a right to have one’s feelings and deeply held convictions left undisturbed? Are feelings to be protected from potential inconvenience as a matter of right? Further, even assuming that all alleged interests constitute rights (a position that I find untenable), is this alleged right *per se* sufficient to justify certain forms of Convention-rights restriction (especially blanket bans, which used to be highly suspect even for the Court, at least until very recently, in the freedom of expression context)? This same analysis may also be appropriate when addressing the specific circumstances of the case at a later stage of the analysis; something that is often done in the form of balancing, as if Convention rights and other interests were of equal importance!

It may well be that certain measures simply do not serve the purported end or at least that they are not the least restrictive possible. One should ask the question: is mandatory imprisonment the only available means to protect political memory?

Of course, even if in the abstract the rights-restrictive means are acceptable and rationally connected to the legitimate and genuine end, their application in the specific context (the conduct of the applicant) may be disproportionate, because there are *lesser rights-restrictive means* to achieve the end in the circumstances of the case. In other instances it can be said (sometimes using the language of balancing) that the restriction on a right as a means to an end is excessive because it undermines the very right which one values more than the end. It should be added, in this logic, that Convention human rights are of a specific value (being singled out as superior values in an international convention).

Going beyond the above-mentioned, more demanding forms of scrutiny within the proportionality methodology, freedom of expression cases are sometimes (even regularly in the United States) resolved using a *categorical* approach[[14]](#footnote-14). In principle, such an approach guarantees freedom of expression unequivocally and with more certainty than a case-by-case analysis, where the metrics of proportionality and balancing are not spelled out. The uncertainty that is inherent in the case-based proportionality analysis invites authorities to attempt to impose further restrictions. More importantly, it discourages speakers.

A court of human rights must go to the heart of this matter. In Turkey it is possible to imprison someone for an offence against the memory of Atatürk. I have no doubts that the Turkish nation has strong feelings of respect towards the founder of the modern Turkish State, and it is within the constitutional powers of the Turkish nation to express such feelings. I have full respect for these sentiments, but equally strong reservations as to the legal enforcement of sensitivities in matters of speech[[15]](#footnote-15). I understand that the form of the expression is problematic here but, as the judgment demonstrates, it falls within expressive conduct; the pouring of paint is a form of expression, disputable though it may be[[16]](#footnote-16). Destruction caused to a statue or other piece of art is an ordinary crime; to destroy Michelangelo’s “Pieta” would indeed be a serious crime. But in the present case it was the expressed content that was the ground for the conviction: the object of the crime is clearly “the memory of Atatürk” and not the alleged vandalism, which of course might otherwise be subject to criminal sanctions. Moreover, I can envision the need for such a dramatic form of expression of political discontent in certain circumstances, a matter that did not have to be addressed in the present case. The Turkish courts never entered into a discussion of the appropriateness of the expressive act. In any event, all forms of expression of dislike of Atatürk and his memory, all the underlying discontent with the political system created by Atatürk and based on his political vision, are prohibited: this is the primary and fundamental issue.

I can envision situations where punishment for a similar offence is appropriate or even necessary in a democratic society, where insult to memory amounts to a call to violence or hatred against identifiable individuals, but that element is not required by the present law and no such danger is present in this case. It is the mere fact of the insult that is criminalised.

The limited analysis, resulting from the standard proportionality test, precludes the consideration of the law’s impact on all speech acts. It is for this reason that the Court did not have the opportunity to look into the real problem. However, the Convention and even our own methodology calls us to consider the impact of the restriction on freedom of expression. “It is recalled that there is little scope under Article 10 § 2 for restrictions on debates on questions of public interest.[[17]](#footnote-17)” The Court has always accepted that “there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest.[[18]](#footnote-18)” The expressive act of the applicant, being political speech, should have triggered strict scrutiny, and the Government certainly failed to provide justification based on compelling reasons why they had to criminalise insults to memory. Given that the law is content-discriminatory, we do not have to look into the effects of a content-neutral law such as the criminalisation of the destruction of statues.

Where disrespect for the memory of a political figure is punished, this has a chilling effect on all speakers. The State has not shown any compelling interest for this restriction. I cannot see the reasonable purpose of such a measure in a democratic society, given that no democratic society can exist without free expression on political matters[[19]](#footnote-19). Even assuming that the deep feelings of the Turkish people will be hurt at the sight of the paint on the statue or on hearing disrespectful words, I cannot see how this can be a sufficient justification in a democratic society, where even disturbing political opinions are to be accepted.

This fundamental consideration is grievously absent in Turkish law when the mandatory sanction is one year in prison, let alone the thirteen years imposed on applicant. A law which enables, and even mandates, such interference is incompatible with the necessities of a democratic society. This Court should not shy away from considering the impermissibility of the alleged purpose of legislation that seemingly fits into one of the (over) broad categories of permissible restriction (“rights of others”)[[20]](#footnote-20).

Given the chilling effect of the sanction in Law no. 5816, I would have used a categorical approach: the criminal law is never appropriate as a means to protect other people’s political sensitivity, where the disrespect caused to a political figure does not amount to an actual (true) threat or call to violence. Such laws are simply not necessary in a democratic society (outside emergencies), being contrary to the fundamental assumptions of such a society based on free debate and exchange of ideas. The mere existence of content-prohibiting laws endangers and sometimes kills freedom of thought. It is fundamental for a democratic society that its citizens be treated as adults who accept, or learn to tolerate, even speech that they find offensive. This is the price to be paid for a free and democratic society.

A rather similar speech-protective result could have been achieved even within an enhanced proportionality analysis: the end, namely the protection of the alleged right of others, is such that it does not necessitate a prison sentence – not just in the present circumstances of a thirteen-year term, but also in general. In a proportionality analysis that looks first at the very law that is the source of an interference, one looks at the law as a means chosen and at the end served (the protection of alleged feelings). The means are excessive here in the light of the end, among other things because the end itself is problematic; the end in itself is simply not worth the inevitable sacrifice of freedom of expression resulting from the means chosen, but also from any less radical means. Alternatively, the present end is not legitimate; or, to the extent it might be legitimate for some, the means chosen are certainly not the least restrictive possible.

Following the “standard” methodology I have signed on to many judgments where the severity of punishment was held to be an important or the decisive element of the disproportionality finding. The underlying message in those cases was clear: it is inappropriate in a democratic and free society at the level of civility and “civilisation” that Europe hopes to have achieved to use sanctions, especially criminal sanctions, for thought crime (and criminal sanctions in cases of reputational harm)[[21]](#footnote-21). But in those cases the Court did not find it appropriate to make express statements in this sense, probably as a result of its putative role related to Article 27 § 1 and Article 34 of the Convention, although pursuant to Article 19 the Court is called upon to ensure the observance of the engagements undertaken by the Parties; “engagements” that are of a general and structural nature. The Law at issue constitutes a blanket ban on the expression of specific political content for the sake of public sensitivities elevated to the status of a “right”. In view of these engagements, content discrimination for the sake of the protection of the memory of a national hero by criminal law is incompatible with the Convention. In the present circumstances of extreme harshness, which will inevitably be repeated, this has to be made clear.

II.

The present judgment provides just satisfaction for the non-pecuniary damage suffered by the applicant. This is proportionate in the sense that it falls within the range of satisfaction provided in other similarly grave freedom of expression and disenfranchisement cases. (One may have doubts that such an amount is equitable in view of the seven years of unmerited suffering in prison). I accept that the amount follows our practice. But with all due respect, I cannot agree with my colleagues as regards pecuniary (material) damage, even if denial of an award on this ground is not uncommon in comparable cases. The applicant certainly suffered material damage (loss of income) because of his incarceration: there is a causal link with a loss of income. This loss is hard to quantify, but technical difficulties of calculation cannot negate the existence of a loss: the applicant was a qualified teacher, albeit unemployed before his conviction, who would have earned a living like any average person in his situation, had he not been incarcerated in violation of the Convention. The loss is thus quantifiable, either on the basis of the average income of a teacher in his position, or at least with regard to the minimum income of an employed person (using the unfair assumption that he could not have found a position in education). Moreover, because of the conviction, he will not be able to work again as a civil servant (it is even unlikely that, having been released on licence, he will find a position as a teacher in private education). To determine the loss of future income is not rocket science and courts do use estimates in such circumstances, taking life expectancy into consideration. I have had the opportunity to express my reservations regarding the Court’s parsimonious approach in matters of pecuniary damage, concerned as it is with the risk of “speculative” awards. The “gross injustice” suffered by the applicant in the present case forces me to reach the sad conclusion that the Court has departed from those standards of remedy that national courts and international law find to be a matter of course; and a matter of reason[[22]](#footnote-22).

Finally, the Court should have applied the Gençel[[23]](#footnote-23) clause: the case should be reopened and the continuing effects of the applicant’s conviction, in particular his release on licence, must be remedied.

**JOINT CONCURRING OPINION OF JUDGES VUČINIĆ AND KŪRIS**

It is more than obvious that the situation examined in this case discloses certain fundamental issues related to the limits of freedom of expression and especially to their impact on the persons concerned. Like Judge Sajó, we also regret that these issues have been evaded in the judgment. Our approach to these issues in great part, but by no means in full, corresponds to that which is advanced in Judge Sajó’s separate opinion.

## **CASE OF MOOHAN V. UK**

DECISION

Applications nos. 22962/15 and 23345/15  
Leslie MOOHAN against the United Kingdom  
and Andrew GILLON against the United Kingdom

The European Court of Human Rights (First Section), sitting on 13 June 2017 as a Chamber composed of:

Linos-Alexandre Sicilianos, *President,* Kristina Pardalos, Aleš Pejchal, Ksenija Turković, Armen Harutyunyan, Pauliine Koskelo, Tim Eicke, *judges,*  
and Abel Campos, *Section Registrar,*

Having regard to the above applications lodged on 8 May 2015,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

**THE FACTS**

1.  The applicants are Mr Leslie Moohan and Mr Andrew Gillon, born in 1982 and 1968 respectively. Both are British nationals currently serving sentences of life imprisonment for murder. They were represented before the Court by Mr T. Kelly of Taylor & Kelly, a firm of solicitors based in Coatbridge.

2.  The British Government (“the Government”) were represented by their Agent, Ms M. Valchero of the Foreign and Commonwealth Office.

A.  The circumstances of the case

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

1.  The independence referendum

4.  On 15 October 2012 the Scottish and United Kingdom Governments signed an agreement (“the Edinburgh Agreement”) on a referendum on independence for Scotland (“the independence referendum”). Both Governments agreed that the result of the independence referendum would be respected.

5.  On 27 June 2013 the Scottish Parliament passed the Scottish Independence Referendum Franchise Bill defining the eligibility conditions for voting in the independence referendum. Convicted prisoners in detention were prohibited from voting. On 8 August 2013 the Scottish Independence Referendum Franchise Act (“the Franchise Act”) entered into force.

6.  The applicants, who would not be eligible to vote in the independence referendum on account of their incarceration, petitioned for judicial review of the Franchise Act. They argued, *inter alia*, that it was incompatible with their rights under Article 10 of the Convention and Article 3 of Protocol No. 1.

7.  The petitions were dismissed by the Outer House of the Court of Session on 19 December 2013 and an appeal was refused by the Inner House of the Court of Session on 2 July 2014. Both courts found that neither Article 10 nor Article 3 of Protocol No. 1 applied to the independence referendum.

8.  On 24 July 2014 the Supreme Court refused the applicants’ appeal by majority (five justices to two), reserving its reasons.

9.  On 18 September 2014 the independence referendum took place. Turnout was eighty-five per cent. The question was whether Scotland should be an independent country. The electorate voted “no” by fifty-five per cent to forty-five per cent.

2.  The Supreme Court’s reasons for refusing the appeal

10.  On 17 December 2014 the Supreme Court handed down its reasons for refusing the appeal. Lord Hodge delivered the leading opinion for the majority (Lords Neuberger, Clarke and Reed and Lady Hale agreeing). With regard to the applicability of Article 3 of Protocol No. 1., he explained that, in his view, the ordinary meaning of the words strongly suggested that the signatories to the Convention had undertaken to hold periodic elections to a democratically-elected legislature and that they did not have referendums in mind. That the object and purpose of the Article was so limited was, he considered, confirmed by the “unequivocal” case-law of the Convention organs which had consistently declared complaints concerning referendums inadmissible.

11.  Lord Hodge therefore found that there was no real support for the applicants’ position. In particular, he rejected their suggestion that there was a difference between an accession referendum, at stake in a number of the decided cases, and the secession referendum at issue in the present applications, since in each case a “yes” vote would result in the powers of one legislature being reduced in favour of another. The fact that the independence referendum concerned a very important political decision was immaterial, since if political importance was a criterion for inclusion in Article 3 of Protocol No. 1 the Court would not have found the election of the President of the Russian Federation to be outside its scope (*Anchugov and Gladkov* *v. Russia*, nos. 11157/04 and 15162/05, §§ 54-55 and 54-55, 4 July 2013).

12.  Finally, Lord Hodge considered the United Nations Human Rights Committee’s finding in *Gillot v. France* (Communication No. 932/2000, 15 July 2002) that Article 25 of the International Covenant on Civil and Political Rights (“ICCPR”) applied to referendums on self-determination in New Caledonia (see paragraph 32 below). He found, however, that the difference in the wording of Article 25 ICCPR and Article 3 of Protocol No. 1 explained the different interpretation of the scope of the two provisions. In this regard, he recalled that in *Anchugov and Gladkov*, cited above,the Court had referred to the United Nations Human Rights Committee’s finding in *Yevdokimov and Rezanov v. Russian Federation* (Communication No. 1410/2005, 21 March 2011) that Article 25 ICCPR applied to Presidential elections (see paragraph 32 below), while concluding that they were outside the scope of Article 3 of Protocol No. 1.

13.  Lord Neuberger agreed with Lord Hodge for four reasons, all based on the language of the Article. First, the word “elections” was not a word that naturally covered a referendum. Secondly, it would be absurd if there was an obligation on States to hold referendums “at reasonable intervals”. Thirdly, the requirement that people were entitled to vote “in the choice of the legislature” did not naturally suggest a choice as to which legislature governed. Fourthly, decisions of this Court indicated that the Article applied only to directly effective elections. He concluded:

“50.  ... There is, I accept, some initial attraction in the argument that, if a provision such as A3P1 is meant to apply to the membership of a legislature, then it ought *a fortiori* to apply to the logically anterior, and arguably more fundamental, issue of the existence or nature of the legislature itself. However, quite apart from the fact that the article does not apply to such an issue as a matter of language, I do not consider that this argument can in fact withstand scrutiny. The purpose of A3P1 is to ensure that the membership of any national legislature is the subject of elections which must be (i) reasonable in terms of frequency, and (ii) on the basis of universal (or close to universal) suffrage. There is no reason in terms of practice or principle why this should apply to a vote on the form of the legislature.”

14.  Lady Hale, who agreed with Lords Hodge and Neuberger, added:

“53.  But I also agree with Lord Kerr and Lord Wilson that the evolutive approach to the interpretation of the Convention adopted by the European Court of Human Rights strongly suggests that it might indeed encompass a referendum such as this ...

54.  However, while it is clear that A3P1 requires the holding of regular parliamentary elections, it is also clear that it does not require the holding of a referendum, even on such an important issue as Scottish independence ...”

15.  Lords Kerr and Wilson, dissenting, considered that Article 3 of Protocol No. 1 applied to the independence referendum.

16.  Lord Kerr did not accept that it was plain from the ordinary meaning of the words of that Article that it could not apply to referendums. He also derived support from the *travaux préparatoires*, which in his view suggested that the focus on legislatures was not intended to be a positive restriction of the application of Article 3 of Protocol No. 1 to legislative elections only, but rather a right of political participation that did not extend to elections of the executive.

17.  He further referred to the need to interpret the Convention as a “living instrument” in light of its object and purpose. The object and purpose of Article 3 of the Protocol must, he considered, be to contribute to the overall purpose of the Convention, as expressed in the preamble, which envisaged the guarantee of an “effective political democracy” as the foundation for all other rights. He said that it was difficult to see how that purpose would be other than frustrated by preventing the safeguards applicable to ordinary legislative elections from applying to “this most fundamental of votes”.

18.  As to the case-law of this Court, Lord Kerr drew a distinction between referendums which merely had an effect on the powers and operation of a legislature and those which necessarily determined the type of legislature that citizens of a country would have. He continued:

“71.  ... Deciding whether Scotland should be independent is inextricably bound up with the question of what sort of legislature it will have; whether it will be a sovereign Parliament or one which must act within the range of powers devolved to it. I do not consider that Strasbourg can be said to have set its face against recognising that A3P1 should cover referendums that, in effect, determine the choice of legislature for a country’s people.”

19.  He pointed out that the only decision of the Convention organs which contained any reasoning was *X. v. the United Kingdom*, no. 7096/75, Commission decision of 3 October 1975, Decisions and Reports (DR) 3, p. 165, a case concerning a referendum on the United Kingdom’s continued membership of the European Economic Community. The Commission had identified two features of that referendum which had led it to conclude that Article 3 was not applicable: the referendum was of a purely consultative character, and there was no legal obligation to organise it. Lord Kerr considered that the independence referendum differed in both respects: the Scottish and United Kingdom Governments had agreed that the result of the referendum would be binding; and the Scottish Independence Referendum Act 2013 imposed the legal obligation to organise it (see paragraph 24 below).

20.  Given this Court’s position as to the vital importance of effective political democracy, Lord Kerr concluded that to find that the choice of government by which one was to be ruled lay outside the sphere of protection that the Convention provided would be remarkable indeed.

21.  Lord Wilson agreed with Lord Kerr. He considered that the drafters of Article 3 of the Protocol did not have in mind a secession referendum but that, had they had it in mind, they would have expressly provided that a right to vote in it fell within its ambit. He explained:

“93.  ... [W]hat is intriguing is that the drafters alighted upon a phrase – ‘choice of the legislature’ – which happens, as I have explained, to be a particularly apt description of the exercise in which Scottish voters were engaged on 18 September. Yes, indirectly and generically, they might also be said to have been choosing their ‘legislators’ but on any view they were choosing their ‘legislature’ ...”

22.  As to the case-law of the Convention organs, he said:

“102.  The Lord Advocate contended that there is a clear and constant line of determinations by the ECtHR that A3P1 does not apply to referenda. This is true. But it is too glib. For the court has never had occasion to consider the application of A3P1 to a secession referendum ...

103.  The majority of the court considers that the case law of the ECtHR is ... ‘unequivocal’. I am driven to say that I totally disagree. There is no decision of the ECtHR in point ...”

23.  On the question of the applicability of Article 10, the Supreme Court unanimously found that it did not apply. Lord Hodge, with whom the other justices agreed, noted that the Convention organs had repeatedly found that Article 10 did not protect the right to vote or other rights already secured by Article 3 of Protocol No. 1 as the *lex specialis*. In any event, he considered that there was nothing in this Court’s case-law to suggest that a claim under Article 10 would confer a wider right of political participation by voting than that protected by Article 3 of Protocol No. 1.

B.  Relevant domestic law

24.  **The Scottish Independence Referendum Act 2013 imposed the legal obligation to organise the independence referendum.**

25.  The Scottish Independence Referendum Franchise Act 2013 set out the conditions for eligibility to vote in the independence referendum. Pursuant to the Act, **a convicted person was legally incapable of voting in the independence referendum if he was, on the date of the referendum, detained in a penal institution in pursuance of the sentence imposed on him.**

C.  Relevant Council of Europe materials

26.  In 2005 the Parliamentary Assembly of the Council of Europe adopted Recommendation 1704 (2005) on referendums: towards good practices in Europe. The Parliamentary Assembly explained that referendums were one of the instruments which enabled citizens to participate in the political decision-making process. It noted that in recent years, there had been an increase in the number of referendums held in Council of Europe Member States. It recommended the use of referendums as a means of reinforcing the democratic legitimacy of political decisions, enhancing the accountability of representative institutions, increasing the openness and transparency of decision-making and stimulating the direct involvement of the electorate in the political process.

27.  The Venice Commission Code of Good Practice in Referendums, adopted by the Congress of Local and Regional Authorities in Resolution 235 (2007), declares that any deprivation of the right to vote in referendums must be based on mental incapacity or a criminal conviction for a serious offence and must observe the proportionality principle.

D.  Relevant international legal materials

28.  Article 25 ICCPR provides:

“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a)  To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b)  To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c)  To have access, on general terms of equality, to public service in his country.”

29.  Article 2 involves an undertaking to respect ICCPR rights without distinction of any kind.

30.  In General Comment 25 (57), the Human Rights Committee explained that the rights in Article 25 were related to the right to self‑determination. Article 1 ICCPR guaranteed peoples the right to freely determine their political status and choose the form of their constitution or Government; Article 25 guaranteed the right of individuals to participate in those processes which constituted the conduct of public affairs. Citizens participated directly in the conduct of public affairs when they exercised power as members of legislative bodies or by holding executive office. The Committee continued:

“6.  ... Citizens also participate directly in the conduct of public affairs when they choose or change their constitution or decide public issues through a referendum or other electoral process conducted in accordance with paragraph (b).”

31.  It added that where direct participation was established, no distinction should be made as regards participation on the grounds mentioned in Article 2 and no unreasonable restrictions should be imposed.

32.  In *Gillot v. France* (Communication No. 932/2000, 15 July 2002) the Human Rights Committee accepted that a complaint concerning referendums in New Caledonia organised as part of a self-determination process fell within the scope of Article 25. In *Yevdokimov and Rezanov v. Russian Federation* (Communication No. 1410/2005, 21 March 2011) the Human Rights Committee found that Article 25 applied where the complaint concerned Presidential elections.

**COMPLAINTS**

33.  The applicants complain under Article 10 of the Convention and under Article 3 of Protocol No. 1 that they were subject to a “blanket ban” on voting in the independence referendum.

**THE LAW**

A.  Joinder

34.  Given their similar factual and legal background, the Court decides that the two applications should be joined pursuant to Rule 42 § 1 of the Rules of Court.

B.  Article 3 of Protocol No. 1

35.  **The applicants complain that the “blanket ban” preventing convicted prisoners from voting in the independence referendum breached their rights under Article 3 of Protocol No. 1 to the Convention.**

36.  Article 3 of Protocol No. 1 provides as follows:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

1.  The parties’ submissions

37.  The Government submitted that the complaint was incompatible *ratione materiae* with the provisions of the Convention and its Protocols since the independence referendum did not fall within the scope of Article 3 of Protocol No. 1. They therefore contended that this complaint should be declared inadmissible under Article 35 §§ 3 (a) and 4 of the Convention.

38.  In this regard, they relied on the reasoning of the majority in the Supreme Court: in short, that, on the ordinary meaning of its language, Article 3 of Protocol No. 1 did not apply to referendums; and that this interpretation was reflected in a consistent line of case-law, beginning with *X v. the United Kingdom* (dec.), no. 7096/75, 3 October 1975 and ending with *McLean and Cole v. the United Kingdom* (dec.), nos. 12626/13 and 2522/12, 11 June 2013 (see paragraphs 10-14 above).

39.  The applicants, on the other hand, argued that the Court should reject the Government’s submissions for the reasons given by the minority in the Supreme Court: namely, that the ordinary meaning of Article 3 of Protocol No. 1 was not clear; that the overall purpose of the Convention envisaged the guarantee of an “effective political democracy”, and this would be frustrated by preventing the safeguards applicable to ordinary legislative elections from applying to “this most fundamental of votes”; and that the reasoning in the case-law relied upon by the Government was either deficient or not applicable to the independence referendum (see paragraphs 15-22 above).

2.  The Court’s assessment

40**.  The principal question for the Court to decide is whether the independence referendum can be considered to fall within the scope of Article 3 of Protocol No. 1**. In this regard, it recalls that **the Convention organs have not, to date, considered the language of Article 3 of Protocol No. 1 to be in any way ambiguous. On the contrary, they have unequivocally held that the Article is limited to elections concerning the choice of the legislature and does not apply to referendums** (see *X. v. the United Kingdom*, cited above; *Bader v. Austria* (dec.), no. 26633/95, Commission decision of 15 May 1996, unreported; *Nurminen v. Finland* (dec.), no. 27881/95, 26 February 1997; *Castelli and Others v. Italy*, nos. 35790/97 and 38438/97, Commission decision of 14 September 1998, DR 94, p. 102; *Hilbe v. Liechtenstein* (dec.), no. 31981/96, ECHR 1999‑VI; *Borghi v. Italy* (dec.), no. 54767/00, ECHR 2002‑V (extracts)); *Z. v. Latvia* (dec.), no. 14755/03, 26 January 2006; *Niedzwiedz v. Poland* (dec.), no. 1345/06, 11 March 2008; and *McLean and Cole*, cited above, § 32). Rather than undermine their authority, the brevity of the reasoning in these decisions strongly indicates that both the Court and the former Commission considered the issue to be clear-cut.

41.  It is true that, as Lord Kerr and Lord Wilson observed, in the independence referendum the people of Scotland were effectively voting to determine *the type* *of legislature* that they would have. Consequently, at first glance it might appear anomalous for such a referendum to fall outside the sphere of protection provided by Article 3 of Protocol No. 1, while elections concerning *the choice of the legislature* fallwithin it. However, such a conclusion is consistent with both the wording of the Article – which is more narrowly drafted than Article 25 ICCPR – and its consistent interpretation by the Convention organs. While they have not, to date, considered a secession referendum, there have been a number of cases concerning referendums on Contracting States’ accession to or continued membership of the European Union (see *X. v. the United Kingdom*, *Nurminen v. Finland,* *Z. v. Latvia* and *Niedzwiedz v. Poland*, all cited above). **In each of these cases the people were also voting to determine the type of legislature they would have, but the Convention organs did not consider this factor sufficient to bring the referendums within the ambit of Article 3 of Protocol No. 1.**

42.  **Given that there are numerous ways of organising and running electoral systems and a wealth of differences in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into their own democratic vision** (see, for example, Scoppola v. Italy (no. 3) [GC], no. 126/05, § 83, 22 May 2012 and Hirst v. the United Kingdom (no. 2) [GC], no. 74025/01, § 61, ECHR 2005‑IX), **the Court has not excluded the possibility that a democratic process described as a “referendum” by a Contracting State could potentially fall within the ambit of Article 3 of Protocol No. 1** (*McLean and Cole*, cited above, § 33). However, **in order to do so the process would need to take place “at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature”.** It is true that in *X v. the United Kingdom*, cited above, the Commission referred to the fact that the referendum in issue was purely consultative and there had been no legal obligation to hold it. However, while these factors supported the Commission’s conclusion that the referendum did not fall within the scope of Article 3 of Protocol No. 1, they do not appear to have been decisive; rather, the decisive factor was that the referendum was not “an election concerning the choice of the legislature” and, having regard to the case-law of the Commission and the Court, the same must be said of the referendum at issue in the present case.

43.  **It follows that applicants’ Article 3 of Protocol No. 1 complaint is incompatible *ratione materiae* with the provisions of the Convention and its Protocols within the meaning of Article 35 § 3 (a) and must be rejected pursuant to Article 35 § 4.**

C.  Article 10

44.  **The applicants further complain that the “blanket ban” preventing convicted prisoners from voting in the independence referendum breached their rights under Article 10 of the Convention.**

45.  Article 10 provides as follows:

“1.  Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2.  The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

1.  The parties’ submissions

46.  The Government submitted that pursuant to the case-law of the Court and the former Commission, Article 10 did not protect the right to vote. Since the right to vote was expressly protected by Article 3 of Protocol No.1 (the *lex specialis*), Article 10 (the *lex generalis*) should not be interpreted as intruding into this area.

47.  The applicants, on the other hand, submitted that the Court should find that their complaints fell within the ambit of Article 10 because such a decision would put the Convention in harmony with the ICCPR; would give effect to the object and purpose of the Convention as expressed in its preamble; and would ensure that the rights protected by Article 10 were “practical and effective”.

**2.  The Court’s assessment**

**48.  The Convention organs have repeatedly found that Article 10 does not protect the right to vote, either in an election or a referendum** (see *X. v. the Netherlands* (dec.), no. 6573/74, 19 December 1974; *X. v. the United Kingdom*, cited above; *Luksch v. Italy* (dec.), no. 27614/95, 21 May 1997; and *Baskauskaite v. Lithuania* (dec.), no. 41090/98, 21 October 1998).

49.  **It follows that applicants’ Article 10 complaint is also incompatible *ratione materiae*** with the provisions of the Convention and its Protocols within the meaning of Article 35 § 3 (a) **and must be rejected pursuant to Article 35 § 4.**

**FOR THESE REASONS, THE COURT, UNANIMOUSLY,**

1. *Decides* to join the applications;

2. *Declares* the applications inadmissible.

Done in English and notified in writing on 6 July 2017.

Abel Campos Linos-Alexandre Sicilianos  
 Registrar President

## **CASE OF BRÂNDUŞE v. ROMANIA (No. 2)**

*(Application no. 39951/08)*

JUDGMENT

STRASBOURG

27 October 2015

FINAL

27/01/2016

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*

In the case of Brânduşe v. Romania (no. 2),

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

Luis López Guerra, *President,* Kristina Pardalos, Johannes Silvis, Iulia Antoanella Motoc, Branko Lubarda, Carlo Ranzoni, Armen Harutyunyan, *judges,*and Stephen Phillips, *Section Registrar,*

Having deliberated in private on 6 October 2015,

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

**PROCEDURE**

1.  The case originated in an application (no. 39951/08) against Romania lodged with the Court **under Article 34** of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Romanian national, Mr Ioan Brânduşe (“the applicant”), on 18 July 2008.

2.  The applicant was represented by Ms R. Crișan Costea, a lawyer practising in Arad. The Romanian Government (“the Government”) were represented by their Agent, Ms C. Brumar, of the Ministry of Foreign Affairs.

3.  The applicant alleged, in particular, that he was detained in conditions which do not satisfy the requirements of Article 3 of the Convention and that **he was prevented from voting in parliamentary elections because of a blanket ban on prisoners’ voting.**

4.  On 11 September 2013 these complaints were communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

**THE FACTS**

**I.  THE CIRCUMSTANCES OF THE CASE**

5.  The applicant was born in 1951 and lives in Şomoşcheş, Arad County.

6.  **At the time of the events in the present case, the applicant was serving a prison sentence for fraud**, imposed by two decisions of the Timişoara Court of Appeal on 14 August 2002 and 11 November 2004. He was held mainly in Arad and Timişoara Prisons. In 2008 he spent a few days in cell no. 309 of Jilava Prison. According to the applicant’s description, the cell was dirty and lacked access to warm water.

7.  On several occasions the applicant was kept in the court’s detention rooms where the detainees and guards were allowed to smoke. According to the applicant, he was exposed to passive smoking in the Arad County Court detention room on 15 December 2008.

8.  According to the information provided by the prison administration and forwarded to the Court by the Government, the applicant was held in cell no. 309 in Jilava Prison from 29 May to 1 June 2008 and from 16 to 18 June 2008. The personal space available to the applicant was 1.65 sq. m during the first period of detention and 1.93 sq. m during the second period of detention. Disinfection and pest control were carried out three times per year and the cell was cleaned daily by the inmates. The same rules of hygiene applied to the toilets and shower rooms. The cell benefitted from both natural and artificial light and had beds with mattresses, tables, shelves, and a television set. In an annex to the cell there was a toilet space, consisting of two partitioned toilet bowls and two wash basins. Access to warm water was possible in the common shower room, which contained eighteen showers and to which the inmates had access in privacy once a week.

9**.  On 30 November 2008 the applicant was not allowed to vote in the parliamentary elections and, despite his requests for clarifications, the prison authorities gave him no explanations as to whether he was entitled to vote or not. The next day, he informed the Court about what had happened**.

10.  On 21 December 2009 the applicant was released on probation. He was arrested again on 2 July 2010 and served the rest of his sentence until 28 March 2011.

**II.  RELEVANT LAW**

A.  Conditions of detention

11.  Excerpts from the relevant domestic legislation and international reports, specifically Law no. 275/2006 on the execution of sentences; reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (“the CPT”); and Recommendation Rec(2006)2 of the Committee of Ministers of the Council of Europe to member States on the European Prison Rules, are set out in the cases of *Bragadireanu v. Romania,* no. 22088/04, §§ 73-75, 6 December 2007; *Artimenco v. Romania,* no. 12535/04, §§ 22-23, 30 June 2009; and *Iacov Stanciu v. Romania,* no. 35972/05, §§ 116-29, 24 July 2012.

B.  Right to vote

12.  The relevant Articles of the Criminal Code providing for the automatic withdrawal of the right to vote and to be elected during the execution of a prison sentence, read as follows:

Article 64 – Additional penalties

“Disqualification from exercising one or more of the rights mentioned below may be imposed as an additional penalty:

(a) the right to vote and to be elected to public authorities or to public office ...”

Article 71 – Secondary penalty

“The secondary penalty shall consist of disqualification from exercising all the rights listed in Article 64.

(2)  A life sentence or any other prison sentence shall automatically entail disqualification from exercising the rights referred to in the preceding paragraph from the time at which the conviction becomes final until the end of the term of imprisonment or the granting of a pardon waiving the execution of the sentence ...”

13.  In its decision of 5 November 2007 (following an appeal in the interests of the law) which became mandatory on the date of its publication in the Official Gazette on 18 July 2008, **the High Court of Cassation and Justice advised the domestic courts to interpret Article 71 § 2 of the Criminal Code in the light of the Convention and thus assess in each case individually the necessity of the withdrawal of the right to vote.**

14.  The relevant international instruments concerning restrictions on the right to vote are summarised in *Anchugov and Gladkov* *v. Russia* (nos. 11157/04 and 15162/05, §§ 38-46, 4 July 2013).

**THE LAW**

**I.  ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION**

15.  The applicant complained under Article 3 of the Convention about the conditions of his detention in Jilava Prison and about the fact that he had been kept on several occasions with smokers in the court’s detention facilities. Article 3 of the Convention reads as follows:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

A.  Admissibility

16.  Firstly, the Government argued that the applicant had not raised his complaint in the application form. Moreover, the letter of 18 July 2008 in which he mentioned the complaint did not meet the criteria set forth in Rule 47 of the Rules of Court as the applicant had merely made general statements unsupported by evidence.

17.  Secondly, they contended that the applicant had abused the right of individual application. In particular, they considered that the applicant’s complaint concerning the conditions of detention in Arad Prison had already been dealt with by the Court in *Brânduşe v. Romania*, no. 6586/03, 7 April 2009. In their view, the applicant had omitted this information in his current request in order to obtain fresh compensation for the same Convention violation as in his previous application, thus abusing his right of petition.

18.  The applicant made no further comments on these points.

19.  The Court reiterates that, in accordance with its established practice and Rule 47 § 5 of the Rules of Court, as in force at the relevant time, it normally considered the date of introduction of an application to be the date of the “first communication” indicating an intention to lodge an application and giving some indication of the nature of the application (see *Avanesyan v. Russia*, no. 41152/06, § 20, 18 September 2014). In the current case, the applicant set out in his letter of 11 July 2008 a summary description of the conditions of his detention in Jilava Prison which raised a *prima facie* issue concerning the compliance by the State authorities with the criteria set forth in Article 3 of the Convention in this respect. It was therefore sufficient to warrant examination by the Court (see, in contrast, *Nicolescu v. Romania* (dec.), no. 38566/04, §§ 10-11, 14 January 2014).

20.  The Court further reiterates that the communication referred to the conditions of detention in Jilava alone and therefore did not overlap with those already examined by the Court in the applicant’s previous case before the Court in *Brânduşe*, cited above.

21.  The Government’s objections are therefore unfounded and must be dismissed.

22.  The Court notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B.  Merits

1.  The parties’ submissions

23.  The applicant submitted a statement by F.N.I., another inmate, who explained the situation of non‑smokers in prison. He also submitted court decisions in which the complaint raised by F.N.I. was dismissed as ill‑founded.

24.  The Government made reference to the information provided by the prison administration, according to which cell no. 309 and the attached washroom and toilets were cleaned daily and disinfected three times per year. They reiterated that the applicant had only spent five days in that cell.

25.  As for the exposure to passive smoking, the Government could not provide exact information on whether the room in question had been non‑smoking, but pointed out that the applicant himself had received a significant amount of cigarettes during his detention. They further averred that the decision to place the applicant in Jilava Prison had been taken in order to preserve his own interests, namely to ensure that he could easily participate in court hearings in his cases rather than having to be transported from Arad or Timişoara Prisons (which were further away) for each such hearing.

2.  The Court’s assessment

26.  The Court refers to the principles established in its case-law regarding conditions of detention (see, in particular, *Iacov Stanciu*, cited above, §§ 165-70, and *Pavalache v. Romania*, no. 38746/03, §§ 87-88, 18 October 2011). It reiterates, specifically, that ill‑treatment must attain a minimum level of severity if it is to fall within the scope of Article 3; the assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim (see *Kudła v. Poland* [GC], no. 30210/96, § 91, ECHR 2000‑XI).

27.  The Court further reiterates that it has previously found violations of Article 3 on account of severely inadequate conditions of detention, even if the period of detention is brief (notably ten and four days detention in an overcrowded and dirty cell in the case of *Koktysh v. Ukraine*, no. 43707/07, §§ 22 and 91-95, 10 December 2009, and five days in *Căşuneanu v. Romania*, no. 22018/10, §§ 61-62, 16 April 2013).

28.  The Court has also already found violations of Article 3 of the Convention on account of the material conditions of detention in Jilava Prison, especially with respect to overcrowding and lack of hygiene (see, among others, *Iacov Stanciu*, cited above, §§ 173 and 179).

29.  Turning to the facts of the present case, the Court notes that the applicant’s submissions in respect of the poor conditions of detention, all be they succinct, correspond to the general findings by the CPT in respect of Romanian prisons (see *Iacov Stanciu*, cited above, §§ 125-126). Furthermore, it appears from the Government’s submissions that the applicant was also held in overcrowded conditions. The Court considers that the material conditions that the applicant had to live in for five days (see paragraph 8 above) were sufficiently intolerable to cause him suffering (see, *mutatis mutandis*, *Căşuneanu*, cited above, § 61). The Government failed to put forward any argument that would allow the Court to reach a different conclusion.

30.  The foregoing considerations are sufficient to enable the Court to conclude that the conditions of incarceration caused the applicant harm that exceeded the unavoidable level of suffering inherent in detention and thus reached the minimum level of severity necessary to constitute degrading treatment within the meaning of Article 3 of the Convention.

31.  There has accordingly been a violation of Article 3 of the Convention in respect of the material conditions of the applicant’s detention.

32.  On account of this finding, the Court does not consider it necessary to examine the remainder of the complaint concerning the conditions of detention.

**II.  ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL No. 1 TO THE CONVENTION**

33.  Relying in substance on Article 3 of Protocol No. 1 to the Convention, the applicant complained that he had not been allowed to vote in the parliamentary elections of 30 November 2008. That provision reads as follows:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

A.  Admissibility

34.  The Government firstly argued that the applicant had failed to observe the requirements of Rule 47 of the Rules of Court, in that he had not raised his complaint in the application form. Moreover, the letter in which he had mentioned the complaint, specifically that of 1 December 2008, had not met the criteria set forth in Rule 47, as the applicant had merely made general statements unsupported by evidence.

35.  **Secondly, they pointed out that the restrictions on the applicant’s right to vote had been instituted by the decision of 11 November 2004 and argued that the six-month time-limit for lodging this complaint with the Court had started running from that date.** **Moreover, they noted that two other elections had occurred since that date –** the presidential elections of 2004 and the European parliamentary elections of November 2007 – and that the applicant could not vote on those occasions either. **In their view, the fact that he had not complained about his disenfranchisement for those elections showed that he had lacked interest and that his complaint was thus purely vexatious.**

36.  The applicant did not comment.

37.  The Court makes reference to the requirements of Rule 47 at the date when the application was lodged (see paragraph 19 above). It notes that the elections complained of took place on 30 November 2008 and the applicant brought his complaint on 1 December 2008, giving sufficient details in his letter addressed to the Court about the factual situation and the nature of his grievance. It is satisfied that Rule 47 was observed by the applicant.

38.  **The Court further notes that, although disenfranchisement was imposed by the final decision adopted in the case – therefore in 2004 at the latest – the applicant was directly affected by it when he wished to cast his vote in the parliamentary elections of 2008** (see, for instance, *Firth and Others v. the United Kingdom*, nos. 47784/09, 47806/09, 47812/09, 47818/09, 47829/09, 49001/09, 49007/09, 49018/09, 49033/09 and 49036/09, 12 August 2014 where the applicants complained about their inability to vote in specific elections – for the European Parliament – and lodged their complaint within six months of those elections, irrespective of the date when the statutory ban had been imposed). **In a similar case, the Court has concluded that such a disenfranchisement provision produced a continuing state of affairs against which no domestic remedy was in fact available to the applicant, and which could end only when the provision in question was no longer in force or when it was no longer applicable to the applicant** (see *Anchugov and Gladkov*, cited above, § 77).

39.  As for the allegations of vexatious complaint, **the Court notes that casting a vote in elections is not an obligation in the respondent State** (Article 36 of the Constitution (the right to vote), and Article 4(4) of Law no. 35/2008 on parliamentary elections). **Therefore, no negative consequences can be inferred from the applicant’s choice not to participate in the previous elections mentioned by the Government.**

40.  **The Government’s objections are therefore unfounded and should be dismissed.**

41.  The Court notes that **this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.**

B.  Merits

1.  The parties’ submissions

42.  The applicant averred that he could not vote in the elections.

43.  The Government contended that the disenfranchisement was applied according to the law. They further argued that the Court’s findings in *Cucu v. Romania* (no. 22362/06, 13 November 2012) were not applicable in this case, in so far as in *Cucu* the Court only established that the interested party had to contest the decision to disenfranchise and not a subsequent application of that decision in particular elections.

2.  The Court’s assessment

44.  **The Court reiterates that Article 3 of Protocol No. 1 guarantees subjective rights, including the right to vote and to stand for election**. It further notes that **the rights guaranteed by this Article are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law. In addition, the right to vote is not a privilege.** In the twenty-first century, the presumption in a democratic State must be in favour of inclusion and universal suffrage has become the guiding principle. As the Court has already noted, the same rights are enshrined in Article 25 of the International Covenant on Civil and Political Rights (see *Scoppola v. Italy (no. 3)* [GC], no. 126/05, §§ 81-82, 22 May 2012).

45.  The Court has established in *Hirst v. the United Kingdom (no. 2)* ([GC], no. 74025/01, § 82, ECHR 2005‑IX), that **when disenfranchisement affects a group of people generally, automatically and indiscriminately, based solely on the fact that they are serving a prison sentence, irrespective of the length of the sentence and irrespective of the nature or seriousness of their offence and their individual circumstances, it is not compatible with Article 3 of Protocol No. 1.**

46.  **In several cases against Romania, the Court has found a similar restriction to be incompatible with the requirements of Article 3 of the First Protocol in so far as, according to Romanian law as it was applied by the domestic courts at that time, all convicted prisoners serving prison sentences received a secondary penalty in the form of a general, automatic and indiscriminate restriction on the right to vote** (see, notably, *Calmanovici v. Romania*, no. 42250/02, §§ 150-151, 1 July 2008, and *Cucu*, cited above, § 109).

47.  The circumstances of the present case are identical to those examined by the Court in *Calmanovici* and *Cucu*, both cited above, as the disenfranchisement was imposed as a direct consequence of incarceration, without an individual assessment of the applicant’s concrete situation by the courts.

48.  The Court **notes the change in the interpretation of the legislation in question brought about by the decision adopted by the High Court** of Cassation and Justice on 5 November 2007 (see paragraph 13 above and *Pleş v. Romania* (dec.), no. 15275/10, 8 October 2013). **However, this new approach did not benefit the applicant who remained unable to vote in elections.**

**49.  For these reasons, the Court concludes that there has been a violation of Article 3 of Protocol No. 1 to the Convention.**

III.  APPLICATION OF ARTICLE 41 OF THE CONVENTION

50.  Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A.  Damage

51.  The applicant claimed just satisfaction in respect of damage requesting, in particular:

–  250,000 euros (EUR) for non-pecuniary damage for the alleged violation of Article 3 of Protocol No. 1 to the Convention (and other Articles); and

–  EUR 200 for pecuniary damage for each day of detention in breach of the requirements of Article 3 of the Convention; he further asked the Court to determine the amount of compensation for the non‑pecuniary damage incurred.

52.  The Government contested these claims.

53.  The Court notes that the applicant failed to justify the pecuniary damage alleged; it therefore rejects this claim. However, it awards the applicant EUR 1,500 in respect of non-pecuniary damage for the violation of Article 3 of the Convention. No additional award is made for the violation of Article 3 of Protocol No. 1 to the Convention (see *Firth and Others*, cited above, § 18).

B.  Costs and expenses

54.  The applicant also claimed EUR 1,000 for costs and expenses incurred before the domestic courts and the Court.

55.  The Government contested the claim.

56.  According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court rejects the claim for costs and expenses.

C.  Default interest

57.  The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

**FOR THESE REASONS, THE COURT, UNANIMOUSLY,**

1.  *Declares* the application admissible;

2.  *Holds* that there has been a violation of Article 3 of the Convention;

3.  *Holds* that there has been a violation of Article 3 of Protocol No. 1 to the Convention;

4.  *Holds*

(a)  that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,500 (one thousand and five hundred euros) plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;

(b)  that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5.  *Dismisses* the remainder of the applicant’s claim for just satisfaction.

Done in English, and notified in writing on 27 October 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips Luis López Guerra  
 Registrar President

## **CASE OF KULINSKI AND SABEV v. BULGARIA**

*(Application no. 63849/09)*

JUDGMENT

STRASBOURG

21 July 2016

FINAL

**21/10/2016**

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*

In the case of Kulinski and Sabev v. Bulgaria,

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

Angelika Nußberger, *President*, Khanlar Hajiyev, Erik Møse, André Potocki, Síofra O’Leary, Carlo Ranzoni, *judges*, Pavlina Panova,ad hoc *judge*,  
and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 28 June 2016,

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

**PROCEDURE**

1.  The case originated in an application (no. 63849/09) against the Republic of Bulgaria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) on 30 November 2009 by two Bulgarian nationals, Mr Krum Yordanov Kulinski and Mr Asen Todorov Sabev (“the applicants”), who were born in 1970 and 1977 respectively.

2.  The applicants were represented by Mr K. Kanev, from the Bulgarian Helsinki Committee. The Bulgarian Government (“the Government”) were represented by their Agent, Ms R. Nikolova, of the Ministry of Justice.

**3.  The applicants alleged that they were prevented from voting while serving prison sentences of different lengths.**

4.  On 4 June 2015 the complaints concerning the applicants’ inability to vote while serving their prison sentences were communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

5.  Mr Yonko Grozev, the judge elected in respect of Bulgaria, withdrew from sitting in the case (Rule 28 § 3 of the Rules of Court). Accordingly, the President of the Fifth Section appointed Ms Pavlina Panova to sit as an *ad hoc* judge (Article 26 § 4 of the Convention and Rule 29 § 1 of the Rules of Court).

**THE FACTS**

**I.  THE CIRCUMSTANCES OF THE CASE**

6.  The first applicant, Mr Kulinski, was convicted of hooliganism on 16 May 2008 in a final judgment of the Sofia City Court. He served his sentence in Sofia Prison between 6 November 2008 and 30 December 2009. Having served the entirety of his sentence, he was released on the latter date.

7.  The second applicant, Mr Sabev, was convicted of robbery and murder and sentenced to whole-life imprisonment on 17 December 2003 in a final judgment of the Supreme Court of Cassation. The applicant is serving his sentence in Sofia Prison. On 3 September 2014 the Vice‑President of Bulgaria, exercising the constitutional prerogative to grant clemency, commuted the applicant’s whole-life sentence to a “simple-life” sentence (see paragraph 16 below).

8.  In 2009, while both applicants were serving their sentences, the following elections took place: elections to the European Parliament on 7 June 2009 and to the Bulgarian Parliament on 5 July 2009. No polling station was set up in the prison where the applicants were detained, as the relevant legislation excluded sentenced individuals from voting.

9.  Subsequently, the second applicant was not allowed to vote in the elections to the Bulgarian Parliament on 12 May 2013 and 5 October 2014, nor in the European Parliament election on 25 May 2014.

**II.  RELEVANT DOMESTIC AND INTERNATIONAL LAW**

A.  Domestic law

1.  Constitution 1991

10.  Article 42 § 1 provides that citizens of legal age (18 years), except those deprived of legal capacity and those serving prison sentences, have the right to elect State and municipal bodies and to take part in referenda.

11.  According to Article 149 § 1 (1)(2) the Constitutional Court provides binding interpretations of the Constitution and rules on the constitutionality of the laws and other acts passed by Parliament or acts passed by the President. Decisions of the Constitutional Court have effect only for the future (*ex nunc*).

2.  Election of Members of the Bulgarian Parliament Act 2001 (repealed in 2011)

12.  Section 3(1) of the Act reproduced the essential content of Article 42 of the Constitution as regards the election of Members of Parliament.

3.  Election of Members of the European Parliament Act 2007 (repealed in 2011, the relevant provisions incorporated in the Election Code 2011)

13.  Bulgarian citizens who are of legal age, have continuously resided in Bulgaria or another EU State during at least the last three months, and have neither been deprived of legal capacity nor are serving a prison sentence, can vote in elections to the European Parliament (Section 4(1)). Other European Union nationals can also elect members of the European Parliament if the former are of legal age, have resided in Bulgaria or another EU member State for at least three months prior to the election, have not been deprived of their right to elect in the State whose citizens they are and have requested in writing participation in the election (Section 4(2)). Those eligible can only vote once in every election to the European Parliament.

4.  Election Code 2011 (repealed in March 2014)

14.  Article 3 §§ 1 and 2 of this Code stipulated that Bulgarian citizens who have not been deprived of legal capacity and are not serving a prison sentence could elect members of Parliament, the President and the Vice‑President of the Republic of Bulgaria.

5.  Election Code 2014 (in force from March 2014)

15.  Article 243 provides that Bulgarian citizens who meet the requirements of Article 42 § 1 of the Constitution 1991 (see paragraph 10 above) can vote in elections to the Bulgarian Parliament. Article 29 § 1 of this Code provides that, in the context of elections to the Bulgarian or European Parliaments, the prison authorities make arrangements for voting in the prisons and manage electoral lists concerning individuals who have been detained but who have not been convicted.

6.  Post death penalty abolition

16.  Since the abolition of the death penalty with effect from 27 December 1998, the Code has provided for three types of custodial penalty: imprisonment for a fixed period of up to thirty years, simple-life imprisonment with the possibility of commutation, and whole-life imprisonment without the possibility of commutation.

7.  Release on parole

17.  Under Article 70 § 1 of the Criminal Code, release on parole is only applicable to fixed-term prison sentences. Offenders sentenced to whole-life or simple-life imprisonment are not eligible for release on parole.

8.  Reduction of sentences

18.  Prisoners can have their sentences reduced under Article 41 § 3 of the Criminal Code, which provides that two days of work effectively carried out counts as three days of imprisonment. When prisoners systematically avoid working or breach prison rules, the court can wholly or partially cancel the reduction of the sentence accrued during the previous two years (Article 41 § 4 of the Criminal Code).

9.  Amnesty

19.  Article 84 (13) of the Constitution provides that amnesty is granted by Parliament.

10.  Presidential pardon

20.  Under Article 98 (11) of the Constitution, granting a pardon is a presidential prerogative. It is a discretionary power which the President of the Republic has delegated to the Vice-President, who may decide to exercise it in any form and at any time while the sentence is being served. His or her decision is unconditional and irrevocable and is not subject to judicial or administrative review (for more detail, see *Harakchiev and Tolumov* *v. Bulgaria*, nos. 15018/11 and 61199/12, §§ 72-107, ECHR 2014 (extracts).

11.  Ombudsman’s prerogatives

21.  Since 1 January 2004 the Ombudsman can ask the bodies enumerated in Article 150 of the Constitution, namely the President of the Republic, the Council of Ministers, the Supreme Court of Cassation, the Supreme Administrative Court, the Prosecutor General or at least one-fifth of the members of parliament, to apply to the Constitutional Court with a request for interpretation of the Constitution. From 2006, the Ombudsman can himself or herself ask the Constitutional Court to rule on the compatibility of ordinary laws with the Constitution (Article 150 § 3 of the Constitution).

12.  Commutation of the sentence by judicial decision

22.  The Criminal Code of 1968 (Article 38a § 3) provides that a simple‑life sentence can be commuted to a fixed-term prison sentence of thirty years, provided that the prisoner has served a minimum of twenty years. This is done by the regional court at the request of the regional public prosecutor (Articles 449 and 450 of the Code of Criminal Procedure of 2005). The regional court rules by means of a reasoned decision; a negative decision may be challenged before the higher courts. If the public prosecutor’s proposal is rejected, no further commutation request may be submitted for two years. The legislation makes no provision for the public prosecutor to seek an adjustment of the sentence of offenders sentenced to whole life imprisonment.

B.  International and comparative law

23.  The relevant provisions on prisoners’ voting rights, found in international legal instruments and laws of other member States of the Convention, have been summarised in the case of *Anchugov and Gladkov* *v. Russia*, nos. 11157/04 and 15162/05, §§ 36-46, 4 July 2013.

24.  To the extent that the present case concerns not only Bulgarian parliamentary elections but also the right to vote in elections to the European Parliament, the following is of relevance. The Court of Justice of the European Union has examined, in the case of *Thierry Delvigne v. Commune de Lesparre-Médoc and Préfet de la Gironde* (C-650/13, EU:C:2015:648) the compatibility with Article 39 (2) of the Charter of Fundamental Rights of the European Union of the exclusion, by operation of French law, from those entitled to vote in elections to the European Parliament persons who were convicted of a serious crime. In *Delvigne*, the Court of Justice held that the French limitation of prisoners’ voting rights did not call into question the essence of those rights since it had the effect of excluding certain persons, under specific conditions and on account of their conduct, from those entitled to vote in elections to the Parliament, as long as those conditions are fulfilled. In addition, it considered the French limitation was proportionate in so far as it takes into account the nature and the gravity of the criminal offence committed and the duration of the penalty (see *Delvigne*, cited above, paragraphs 48-49).

25.  A comparative law study was carried out in the context of the proceedings before the Grand Chamber of the Court in another case concerning prisoners’ voting rights (see *Scoppola v. Italy* (no. 3) [GC], no. [126/05](http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"appno":["126/05"]}), §§ 45-48, 22 May 2012). It showed that, at that time, seven Convention States – Armenia, Bulgaria, Estonia, Georgia, Hungary, Russia and the United Kingdom – automatically deprived all convicted prisoners serving prison sentences of the right to vote, while nineteen of the forty‑three States examined placed no restrictions on that right and seventeen followed an intermediate approach whereby disenfranchisement of prisoners depended on the type of offence and/or the length of the custodial sentence.

**THE LAW**

**I.  ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL NO. 1 TO THE CONVENTION**

26.  Both applicants complained under Article 3 of Protocol No. 1 to the Convention that their disenfranchisement on the ground that they were convicted prisoners violated their right to vote and, in particular, that they had been unable to vote in two elections held on different dates in 2009 (see paragraph 8 above). The second applicant complained separately that he had not been able to vote in three other elections which took place in 2013 and 2014 (see paragraph 9 above). The relevant part of Article 3 of Protocol No. 1 reads as follows:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

27.  The Government contested the applicants’ assertions.

A.  Admissibility

28.  The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B.  Merits

1.  The Government’s submissions

29.  The Government considered that Article 3 of Protocol No. 1 did not provide an individual right to participation in elections which was absolute and unlimited. Contracting States had a wide margin of appreciation in respect of people’s voting rights. The restrictions on the exercise of voting rights found in Article 42 (1) of the Bulgarian Constitution was a sovereign right of every State to impose certain restrictions on the voting rights of citizens under its jurisdiction. Article 3 of Protocol No. 1 of the Convention did not imply any other conditions relating to electoral rights, apart from the State having to guarantee the free expression of the people and not to impose arbitrary restrictions on voting. In this connection, this Convention provision did not suggest that States had to guarantee to absolutely all of their citizens the right to vote, as long as their electoral systems provided conditions for the holding of free elections in which people could freely express their will when electing the legislature. The Convention member States were therefore entitled to provide criminal conviction as a ground for disenfranchisement.

30.  The loss of voting rights was not arbitrary but connected to the commission of crimes in connection with which individuals were effectively serving a sentence of imprisonment. The disenfranchisement pursued the legitimate purpose of promoting high civic responsibility and respect for the rule of law. In Bulgaria disenfranchisement applied only in respect of individuals effectively serving sentences of imprisonment on the basis of a final judgment. This restriction did not apply in cases of suspended prison sentences, or in respect of detained suspects or those accused. The number of prisoners who could not exercise their right to vote was relatively low when compared with the general population, respectively 8,614 in January 2009 and 6,996 in July 2015; as such, it did not represent a threat to the democratic foundations of the State. Finally, the Bulgarian legal system contained a mechanism for the automatic restoration of prisoners’ rights after their release from prison.

2.  The applicants’ submissions

31.  The applicants considered that their situation was very similar to that of the applicants in *Anchugov and Gladkov*, cited above, as the constitutional ban on voting applied to everyone who was serving a sentence. Their situation differed from that described in *Scoppola (no. 3),* cited above, where the voting ban only applied to those sentenced to more than three years of imprisonment and to those convicted of certain crimes against the State.

3.  The Court’s assessment

(a)  General principles

32.  **The Court observes that the relevant general principles governing the right to vote in parliamentary elections have been summarised in the cases of *Hirst v. the United Kingdom (no. 2)*** [GC], no. 74025/01, §§ 63-71, ECHR 2005-IX; *Scoppola (no. 3)* [GC], cited above, §§ 81-87; and *Anchugov and Gladkov*, cited above, §§ 93-100. **The essence of these principles**, reiterated in all of these three key cases, **is that when disenfranchisement affects a group of people generally, automatically and indiscriminately, solely on the basis that they are serving a prison sentence, irrespective of the length of the sentence and irrespective of the nature or gravity of their offences and their individual circumstances, it is not compatible with Article 3 of Protocol No. 1** (see to this effect *Hirst* *(no. 2)* [GC], cited above, § 82; *Scoppola (no. 3)* [GC], cited above, § 96; and *Anchugov and Gladkov*, cited above, § 100, first two sentences).

(b)  Application of these principles to the present case

**33.  The Court notes that the present application concerns the inability of two Bulgarian citizens to vote in legislative elections while serving prison sentences. The Court must therefore ascertain whether this was compatible with Article 3 of Protocol No. 1.**

(i)  Interference

34.  **As regards, in the first place, whether there was an interference with the applicants’ rights under this Convention provision, the Court observes that the applicants were deprived of the right to vote by virtue of Article 42 § 1 of the Bulgarian Constitution and by the relevant provisions of legislation on elections to the Bulgarian and European Parliaments** (see paragraphs 12 and 15 above). **The deprivation therefore constituted an interference with their right to vote enshrined in Article 3 of Protocol No. 1.**

(ii)  Legitimate aim

35.  Secondly, the Court has to consider whether the interference pursued one or more legitimate aims. The Court points out in this connection that, unlike other provisions of the Convention, Article 3 of Protocol No. 1 does not specify or limit the aims which a restriction may pursue. A wide range of purposes may therefore be compatible with this provision (see, for example, *Podkolzina v. Latvia*, no. 46726/99, § 34, ECHR 2002-II, § 34). The Court accepts the Government’s argument that the ban on voting for convicted prisoners behind bars was aimed at promoting the rule of law and enhancing civic responsibility, both of which are legitimate aims for the purposes of Article 3 of Protocol No. 1 (see *Hirst no. 2* (GC), cited above, §§ 74 and 75; *Scoppola (no. 3)* (GC), cited above, § 90, and *Anchugov and Gladkov*, cited above, § 102).

(iii)  Proportionality

36.  Finally, the Court has to establish whether the restrictions in question were proportionate to the aims pursued.

**37.  The Court observes that the applicants were deprived of the right to vote for Parliament as a result of a blanket ban on voting** which **applied to all convicted persons who were in detention**. **This prohibition was unambiguous and categorical, stemmed directly from the Constitution** (see paragraph 10 above) **and was reproduced in several ordinary laws applicable at different points in time during the period in question** (see paragraphs 12‑15 above). The situation in the present case is therefore comparable to that examined in the case of *Anchugov and Gladkov*, cited above, § 101, second sentence, and § 105, last sentence, where the Constitution imposed a blanket ban on voting on all convicted prisoners serving prison sentences and which the Court found to be in breach of the Convention requirements. The Court reiterates in this connection **that removal of the right to vote without any *ad hoc* judicial decision does not, in itself, give rise to a violation of Article 3 of Protocol** No. 1 (see *Scoppola* (no. 3) [GC], cited above, § 104). With a view to securing the rights guaranteed by Article 3 of Protocol No. 1, the **Contracting States may decide either to leave it to the courts to determine the proportionality of a measure restricting convicted prisoners’ voting rights, or to incorporate provisions into their laws defining the circumstances in which such a measure should be applied. In this latter case, it will be for the legislature itself to balance the competing interests in order to avoid any general, automatic and indiscriminate restriction** (ibid., § 102; and also *Anchugov and Gladkov*, cited above, § 107**). The Court finds that in the present case, unlike the situation examined in *Scoppola (no. 3)*, cited above, where the law provided for a prohibition on voting only in respect of individuals sentenced to a prison term of three years or more, the constitutional and legislative provisions at issue do not adjust the voting ban to the circumstances of the particular case, the gravity of the offence or the conduct of the offender.**

38.  In respect of the Government’s argument that States enjoy a wide margin of appreciation in respect of people’s voting rights, the Court has repeatedly recognised that this margin exists but that it is not all-embracing (see *Hirst (no. 2)*, cited above, § 82). **A general, automatic and indiscriminate restriction of the right protected under Article 3 of Protocol No. 1 must be seen as falling outside any acceptable margin of appreciation, however wide that margin may be in this field** (see *Hirst (no. 2)*, cited above, § 82).

39.  As regards the extent of the obligation of States under Article 3 of Protocol No. 1, the Court considers it vital to emphasise the following. The formulation **used in this Article to the effect that “The High Contracting Parties undertake”, as opposed to the wording whereby “Everyone has the right” or “No one shall” which is found in nearly all the other substantive clauses of the Convention, does not reflect any difference of substance between this Article and the other provisions of the Convention and its Protocols** (see *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, §§ 48-50, Series A no. 113). The Court has repeatedly read into this Article the existence of individual subjective rights of participation – **the “right to vote” and the “right to stand for election to the legislature”, as protected by the positive obligation of the State to effectively ensure those rights to individuals under its jurisdiction** (see *Scoppola (no. 3),* cited above, § 81; *Anchugov and Gladkov*, cited above, § 93; and *Brânduşe v. Romania (no. 2)*, no. 39951/08, § 44, 27 October 2015).

**40.  The respondent Government argued that the number of prisoners who could not exercise their right to vote was low** (see paragraph 30 above, last sentence) with **the result that the restriction did not lead to a disproportionate interference with the applicants’ voting rights.** **The Court finds that, to the extent that such statistical data could be considered relevant, these figures are above all indicative of the numbers of individuals who have been deprived of the exercise of their right to vote while serving prison sentences.**

41.  Finally, **in respect of the argument that prisoners regained their right to vote upon their release from prison, the Court observes that this feature of the system does not in any way change the fact that, as the law and practice stood at the time of the elections in question, all convicted prisoners, regardless of their individual circumstances, their conduct and the gravity of the offences committed, were deprived of the right to vote.**

42.  The foregoing considerations are sufficient to enable the Court to **conclude that there has been a violation of Article 3 of Protocol No. 1 to the Convention in respect of both applicants** as regards the election for European Parliament on 7 June 2009 and the election to the Bulgarian Parliament on 5 July 2009. The Court also finds that there has been a violation of this provision in respect of the second applicant as regards the elections to the Bulgarian Parliament on 12 May 2013 and 5 October 2014, and the European Parliament elections on 25 May 2014.

**II.  ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION IN CONJUNCTION WITH ARTICLE 3 OF PROTOCOL NO. 1**

43.  Both applicants complained that they did not have effective domestic remedies in respect of their grievance under Article 3 of Protocol No. 1 to the Convention in relation to their inability to vote while serving their prison sentences. They relied on Article 13 of the Convention, which provides as follows:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

A.  The parties’ submissions

44.  According to the Government, the applicants had several remedies at their disposal in respect of their complaint. In the first place, they could complain to the Ombudsman, who could in turn make representation to the Constitutional Court (see paragraph 21 above). Secondly, having served at least half of their sentence, they could apply for and obtain early release on parole if they showed by exemplary behaviour and an honest attitude towards labour that they had corrected themselves (see paragraph 17 above). Thirdly, the applicants could obtain a reduction of their sentence by working in prison, given that under the applicable legislation two days worked equalled three days served (see paragraph 18 above). The termination of the effective sentences in case of early release and reduction of sentence, albeit conditional, would have the legal effect of permitting the individuals in question to exercise their right to vote, as they would not then be serving sentences of imprisonment. Finally, release could also result from amnesty or full or partial pardon (see paragraphs 19-20 above).

45.  In the Government’s view, the above-listed legal mechanisms for reducing a sentence constituted effective remedies which allowed for early recovery of the right to vote; this in turn demonstrated that the Bulgarian criminal justice system had a certain degree of flexibility, as required by the Convention.

46.  As regards the second applicant, the Government pointed out that simple-life imprisonment may be replaced by a sentence of imprisonment for a term of thirty years (see paragraph 22 above).

47.  The applicants contested the above arguments.

B.  The Court’s assessment

48.  The Court first notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

49.  The Court next reiterates that it has already held that Article 13 does not go so far as to guarantee a remedy allowing a Contracting State’s laws as such to be challenged before a national authority on the ground of being contrary to the Convention or to equivalent domestic legal norms (see *Greens and M.T. v. the United Kingdom*, nos. 60041/08 and 60054/08, §§ 90-92, ECHR 2010 (extracts), and *Szabó and Vissy v. Hungary*, no. 37138/14, § 93, 12 January 2016, and the authorities cited therein).

50.  In the present case the Court has found a violation of Article 3 of Protocol No. 1 as a result of the applicants’ being deprived of the right to vote by virtue of Article 42 § 1 of the Bulgarian Constitution and the relevant provisions of legislation on elections to the Bulgarian and European Parliaments (see paragraphs 12 and 15 above).

51.  The Court accordingly concludes that there has been no violation of Article 13.

**III.  APPLICATION OF ARTICLE 41 OF THE CONVENTION**

52.  Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A.  Damage

53.  Mr Kulinski claimed 2,000 euros (EUR) in respect of non-pecuniary damage, and Mr Sabev claimed EUR 5,000 in respect of non-pecuniary damage.

54.  The Government considered that both of these claims were unjustified and excessive.

55.  Having regard to the circumstances of the present case, the Court considers that the finding of a violation constitutes sufficient just satisfaction in the present case for any non-pecuniary damage sustained by the applicants (see *Hirst (no. 2)* [GC], cited above, §§ 93-94; *Greens and M.T. v. the United Kingdom*, nos. 60041/08 and 60054/08, § 98, ECHR 2010 (extracts); and *Anchugov and Gladkov*, cited above, § 122).

B.  Costs and expenses

56.  The applicants also claimed EUR 2,727 for the costs and expenses incurred before the Court. They asked for this amount to be paid directly into the account of the Bulgarian Helsinki Committee.

57.  The Government considered that these claims were exaggerated and unjustified.

58.  According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum.

59.  As regards the costs and expenses incurred before the Court, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,727.

C.  Default interest

60.  The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

**FOR THESE REASONS, THE COURT, UNANIMOUSLY,**

1.  *Declares* the application admissible;

2.  *Holds* that there has been a violation of Article 3 of Protocol No. 1 to the Convention;

3.  *Holds* that there has been no violation of Article 13 of the Convention;

4.  *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicants;

5.  *Holds*

(a)  that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts,to be converted intoBulgarian levs at the rate applicable at the date of settlement:

(i)  EUR 2,727 (two thousand seven hundred and twenty seven euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses, to be paid directly into the bank account of the Bulgarian Helsinki Committee;

(b)  that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6.  *Dismisses* the remainder of the applicants’ claim for just satisfaction.

Done in English, and notified in writing on 21 July 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek Angelika Nußberger  
 Registrar President

## **CASE OF NENCIU v. ROMANIA**

*(Application no. 65980/13)*

JUDGMENT

*This version was rectified on 21 February 2017 under Rule 81 of the Rules of Court*

STRASBOURG

17 January 2017

*This judgment is final but it may be subject to editorial revision.*

**In the case of Nenciu v. Romania,**

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

Paulo Pinto de Albuquerque, *President,*

Iulia Motoc,

Marko Bošnjak, *judges,*

and Andrea Tamietti, *Deputy Section Registrar,*

Having deliberated in private on 6 December 2016,

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

**PROCEDURE**

1. The case originated in an application (no. 65980/13) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Romanian national, Mr Laurențiu Eduard Nenciu (“the applicant”), on 4 October 2013.
2. The applicant was represented by Ms N.T. Popescu, a lawyer practising in Bucharest. The Romanian Government (“the Government”) were represented by their Agent, Mrs C. Brumar, from the Ministry of Foreign Affairs.
3. On 24 June 2014 the application was communicated to the Government.

**THE FACTS**

1. The applicant was born in 1966 and is currently detained in Giurgiu Prison.
2. On 24 June 1999 the Călăraşi County Court convicted the applicant of burglary, rape and murder and sentenced him to twenty five years’ imprisonment. In application of Article 71 of the Criminal Code, his right to vote and to be elected was withdrawn during detention.
3. The decision became final on 25 February 2000 when the Supreme Court of Justice dismissed the appeal on points of law lodged by the applicant.
4. The applicant is currently serving his prison sentence in Giurgiu Prison where he has been held since 21 January 2009.

A. The applicant’s account of the conditions of detention

1. The applicant described the conditions of his detention as follows:

* there was no water during summer days;
* he was placed with smokers (in the court-room and for few days during detention) although he did not smoke;
* the windows were covered with bars and thick galvanised wire which rendered the ventilation of the cell impossible;
* he was transported to court hearings in small dirty vans, with no ventilation or natural light;
* from 2009 until the date of the last information received (22 July 2014) he had been held with five other inmates in a 17.65 sq. m cell infested with bugs.

B. The Government’s account of the conditions of detention

1. Based on the documents presented by the Prison Administration, the Government explained that during his stay in Giurgiu Prison the applicant had occupied the following cells, all non-smoking: - cells nos. A305, A306, A328, B232, C109, C116, C126, C127, C215, C216, C225, E1.22, E3.7, E3.12, E3.24, E3.26, E3.32, E4.5, E4.14, E4.25, E4.27, E5.32, E10.8, E10.11 which each measured 17,65 sq. m and which he shared with a maximum of five other detainees, between 26 January 2009 and 5 August 2010, between 12 August and 6 September 2010, between 7 March and 28 April 2011, between 20 May and 22 August 2011, between 29 August 2011 and 3 February 2012, between 9 February and 2 April 2012, between 7 May and 23 July 2012, between 2 August and 13 September 2012, between 4 October 2012 and 4 March 2013, between 11 March and 11 April 2013, between 18 and 29 April 2013, between 7 May 2013 and 7 February 2014 and between 21 February and 22 July 2014. cells nos. C317, C333, C336 and E3.19 which each measured 9.66 sq. m and which he shared with another person, between 21 and 26 January 2009, between 6 September and 10 October 2010, between 12 and 20 May 2011 and between 7 and 21 February 2014. The sanitary annexe measured 2.7 sq. m and was provided with a sink, a shower cabin, shelves, mirror and a toilet. All rooms had windows and ventilation. The detainees collected the trash and cleaned the cells twice every day.
2. The inmates received the hygiene products from the prison administration and had access to warm water twice every week. Access to drinking water was unlimited.
3. The information submitted by the Prison Administration concerned conditions of detention only until 22 July 2014.
4. According to the Government, from 21 February 2014 onwards the applicant had been sharing the cells with a maximum of four other persons, in compliance with the decision adopted on 31 January 2014 by the Giurgiu District Court (see paragraph [15](#_bookmark2) below).

C. The applicant’s complaints to the post-sentencing judge

1. The applicant complained repeatedly to the post-sentencing judge (Law no. 275/2006 on the execution of sentences; hereinafter “Law no. 275/2006”) about the conditions of his detention.
2. By two decisions of 29 August and 21 November 2013 the post-sentencing judge for Giurgiu Prison noted that the applicant was no longer held with smokers. The judge also considered that because of the large number of inmates held in that Prison, it was impossible to ensure more personal space for the applicant. He also concluded that in so far as the inmates were responsible for cleaning their cells, the presence of bugs was not the authorities’ fault, but that of the prisoners. The applicant appealed against these two decisions. On 31 January 2014 the Giurgiu District Court ordered the Giurgiu Prison administration to ensure the applicant 4 sq. m of personal space, as provided by law.
3. The applicant also complained before the post-sentencing judge for Slobozia Prison, that while he was held in there, from March to May 2013, he was again placed in cells with smokers. On 7 October 2013 the post-sentencing judge dismissed the request as having been lodged after the expiry of the ten-day time-limit provided for by Law no. 275/2006. The decision was upheld by the Slobozia District Court on 10 March 2014.
4. Ruling on a similar complaint lodged by the applicant about his stay in a cell with smokers from 8 to 11 March 2013 in Rahova Prison, the post-sentencing judge for this prison decided, on 19 March 2013, that no measure could be imposed on Rahova Prison as the applicant was no longer there. He also noted that the applicant could bring a separate claim for compensation before the civil courts.

**THE LAW**

1. **ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION**
2. The applicant complained of the inadequate conditions of his detention. He relied on Article 3 of the Convention, which reads as follows:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

A. Admissibility

1. The Government argued that the applicant’s conditions of detention had improved in compliance with the decision of 31 January 2014 (see paragraph [15](#_bookmark2) above) and that therefore he could no longer claim to be a victim of a violation of Article 3 after 7 February 2014.
2. The applicant contended that the decisions rendered by the post-sentencing judge remained practically ineffective given the structural problems in the Romanian prison system. He made reference to reports by the Association for the Defence of Human Rights – the Helsinki Committee (APADOR-CH) and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).
3. The Court considers that the argument raised by the Government is closely linked to the merits of the complaint. It therefore joins it to the merits of the case.
4. Furthermore, the Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The Court refers to the principles established in its case-law regarding inadequate conditions of detention (see, for instance, *Kudła v. Poland* [GC], no. 30210/96, §§ 90-94, ECHR 2000-XI, and *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, §§ 139-165, 10 January 2012). It reiterates in particular that a serious lack of space in a prison cell weighs heavily as a factor to be taken into account for the purpose of establishing whether the detention conditions are “degrading” from the point of view of Article 3 and may disclose a violation, both alone or taken together with other shortcomings (see, amongst many authorities, *Karalevičius v. Lithuania*, no. 53254/99, §§ 37-39, 7 April 2005, and *Ananyev and Others*, cited above, §§ 145-147).
2. In the leading case of *Iacov Stanciu v. Romania* (no. 35972/05, §§ 171-187, 24 July 2012), the Court already found a violation in respect of issues similar to those in the present case. Moreover, the Court already held in a number of cases that the detention conditions in Giurgiu Prison, where the applicant has been and is currently detained, breached the safeguards of Article 3 of the Convention (see, notably, *Serce v. Romania*, no. 35049/08, § 45, 30 June 2015, and *Cucu v. Romania*, no. 22362/06, §§ 79 and 82, 13 November 2012, with further references).
3. Having examined all the material submitted to it, the Court has not found any fact or argument capable of persuading it to reach a different conclusion on the merits of these complaints. Having regard to its case-law on the subject, the Court considers that in the instant case the applicant’s conditions of detention were inadequate for most of his stay, both before and after the decision of 31 January 2014.
4. Accordingly, the Court dismisses the Government’s preliminary objection and finds that there has been a violation of Article 3 of the Convention.

**II. ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL NO. 1 TO THE CONVENTION**

1. The applicant complained about his automatic disqualification from exercising his right to vote. He relied on Article 3 of Protocol No. 1 to the Convention which reads as follows:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

A. Admissibility

1. The Government pointed out firstly that the restrictions on the applicant’s right to vote had been instituted by the decision of 25 February 2000 (see paragraphs [5](#_bookmark0) and [6](#_bookmark1) above) and argued that the six-month time-limit for lodging this complaint with the Court had started running from that date. Moreover, they noted that several elections had occurred since that date – parliamentary elections of 2000, 2004, 2008 and 2012, and the European parliamentary elections of 2007 and 2009 – and that the applicant could not vote on those occasions either. In their view, the fact that he had not complained about his disenfranchisement for those elections showed that he had lacked interest and that his complaint was thus purely vexatious.
2. Secondly, the Government argued that the applicant should have complained before the domestic courts about the ban on his voting rights. He could have done so by relying directly on the Court’s case-law, notably the judgment adopted in *Sabou and Pîrcălab v. Romania* (no. 46572/99, 28 September 2004), which also concerned a blanket restriction of rights during detention and which brought a change in the manner in which the domestic courts imposed such restrictions.
3. The applicant contested these arguments.
4. The Court reiterates that in a recent case it has rejected a similar objection related to the six-month rule and the alleged vexatious nature of the complaint, on the ground that the disenfranchisement provision produced a continuing state of affairs against which no domestic remedy was in fact available to the applicant, and which could end only when the provision in question was no longer in force or when it was no longer applicable to the applicant (see *Brânduşe v. Romania (no. 2)*, no. 39951/08, § 38, 27 October 2015; see also *Anchugov and Gladkov v. Russia*, nos. 11157/04 and 15162/05, § 77, 4 July 2013). Moreover, casting a vote being a right and not an obligation in the respondent State, no negative consequences can be inferred from the applicant’s choice not to participate in certain elections (see *Brânduşe*, cited above, § 39).
5. Moreover, given the circumstances, the Court considers that it would be excessive to require the applicant to lodge an application with the domestic courts. It notes in this respect that there is no evidence brought by the Government that such a complaint would be effectively heard by those courts. The case *Sabou and Pîrcălab*, cited above, concerned an absolute ban on the parental rights not on the voting rights. The domestic case-law in that particular field had only changed after the adoption of that judgment, on 28 September 2004 (see *Iordache v. Romania*, no. 6817/02, § 60, 14 October 2008). There is no information available about how that judgment might have affected other restrictions, such as the one examined in the present case. Therefore, its impact for the applicant, who had been sentenced before September 2004 to a different type of restriction, remains unproven.
6. Lastly, it was not until 5 November 2007 that the High Court of Cassation and Justice advised the domestic courts to assess in each case individually the necessity of the withdrawal of the right to vote (see *Brânduşe*, cited above, § 13). This recommendation, which became mandatory on 18 July 2008, does not apply to past decisions and the Government failed to show how the applicant could have benefited from it.
7. For these reasons, the Court dismisses the Government’s objections.
8. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It is also not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The applicant complained about his automatic and complete disenfranchisement and argued that his case was identical to that of *Cucu* (judgment cited above).
2. The Government contested these arguments, averring, principally, that this disenfranchisement had been applied according to the law.
3. The Court reiterates that Article 3 of Protocol No. 1 guarantees subjective rights, including the right to vote and to stand for election. It further notes that the rights guaranteed by this Article are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law (see *Scoppola v. Italy (no. 3)* [GC], no. 126/05, §§ 81-82, 22 May 2012).
4. The Court has established in *Hirst v. the United Kingdom (no. 2)* ([GC], no. 74025/01, § 82, ECHR 2005-IX), that when disenfranchisement affects a group of people generally, automatically, and indiscriminately, based solely on the fact that they are serving a prison sentence, irrespective of the length of the sentence and irrespective of the nature or seriousness of their offence and their individual circumstances, it is not compatible with Article 3 of Protocol No. 1.
5. These principles were reaffirmed by the Grand Chamber in the case of *Scoppola*, in particular the incompatibility with Article 3 of Protocol No. 1 of such a general and automatic restriction, irrespective of the length of the sentence and irrespective of the nature or gravity of the offence and the individual circumstances of the convicted prisoners (*Scoppola*, cited above, §§ 96, 108 and 109).
6. In several cases against Romania, the Court has found a similar restriction to be incompatible with the requirements of Article 3 of the First Protocol in so far as, according to Romanian law as it was applied by the domestic courts at that time (which is also relevant for the present case), all convicted prisoners serving prison sentences received a secondary penalty in the form of a general, automatic and indiscriminate restriction on the right to vote (see, notably, *Calmanovici v. Romania*, no. 42250/02, §§ 152-154, 1 July 2008, and *Cucu*, cited above, § 110-112).
7. The circumstances of the present case are identical to those examined by the Court in *Calmanovici*, *Cucu*, and *Brânduşe* cited above, as the disenfranchisement was imposed as a direct consequence of incarceration, without an individual assessment by the courts of the applicant’s individual situation.
8. The Court notes the change in the interpretation of the legislation in question brought about by the decision adopted by the High Court of Cassation and Justice on 5 November 2007 (see paragraph [33](#_bookmark3) above and *Pleş v. Romania* (dec.), no. 15275/10, § 14, 8 October 2013). However, this new approach did not benefit the applicant who remained unable to vote in elections.
9. For these reasons, the Court concludes that there has been a violation of Article 3 of Protocol No. 1 to the Convention.

**III. APPLICATION OF ARTICLE 41 OF THE CONVENTION**

1. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

1. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage.
2. The Government considered that the finding of a violation should constitute sufficient compensation for the alleged non-pecuniary damage. If the Court wished to make an award, the Government asked it to take into account the sums awarded in similar cases.
3. Having regard to all the circumstances of the present case, the Court accepts that the applicant must have suffered non-pecuniary damage because of the conditions of his detention, which cannot be compensated solely by the finding of a violation. Making its assessment on an equitable basis, the Court awards the applicant EUR 14,400 in respect of non-pecuniary damage, plus any tax that may be chargeable thereon. No additional award is made for the violation of Article 3 of Protocol No. 1 to the Convention (see *Brânduşe*, cited above, § 53).

B. Costs and expenses

1. Court. More specifically, EUR 2,585 in lawyer’s fees, to be paid directly to the lawyer’s account, and EUR 300 for technical support and various correspondence costs incurred by the APADOR-CH, to be paid directly to that organisation’s account. The applicant submitted a contract signed by his representative and a detailed document indicating the number of hours worked in preparing the case. He also submitted an agreement signed with the APADOR-CH whereby the latter committed to offer technical support and to pay the correspondence fees incurred before the Court.
2. The Government argued that the applicant had failed to demonstrate that the alleged costs had been necessary and actually incurred.
3. The Court reiterates that in order for costs and expenses to be reimbursed under Article 41, it must be established that they were actually and necessarily incurred and were reasonable as to quantum (see, for example, *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 62, ECHR 1999-VIII, and *Cobzaru v. Romania*, no. 48254/99, § 110, 26 July 2007). In accordance with Rule 60 § 2 of the Rules of Court, itemised particulars of all claims must be submitted, failing which the Court may reject the claim in whole or in part.
4. In the present case, having regard to the above criteria and to the itemised list submitted by the applicant, the Court considers it reasonable to award the applicant the sum of EUR 2,585 in respect of lawyer’s fees, to be paid directly into the bank account indicated by the applicant’s representative.

C. Default interest

1. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

**FOR THOSE REASONS, THE COURT, UNANIMOUSLY,**

1. *Joins* to the merits and *dismisses* the Government’s objection concerning the lack of victim status;
2. *Declares* the application admissible;
3. *Holds* that there has been a violation of Article 3 of the Convention on account of the applicant’s conditions of detention;
4. *Holds* that there has been a violation of Article 3 of Protocol No. 1 to the Convention;
5. *Holds*
   1. that the respondent State is to pay the applicant, within three months the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      1. EUR 14,400 (fourteen thousand and four hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      2. EUR 2,585 (two thousand five hundred and eighty five euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be paid into the bank account of the applicant’s representative;[[24]](#footnote-24)
   2. that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses* the remainder of the applicant’s claim for just satisfaction.

Done in English, and notified in writing on 17 January 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti Paulo Pinto de Albuquerque Deputy Registrar President

## **CASE OF MILLER AND OTHERS v. THE UNITED KINGDOM**

*(Application no. 70571/14 and 6 others - see appended list*)

JUDGMENT

STRASBOURG

11 April 2019

*This judgment is final but it may be subject to editorial revision.*

In the case of Miller and Others v. the United Kingdom,

The European Court of Human Rights (First Section), sitting as a Committee composed of:

Aleš Pejchal, *President,* Jovan Ilievski, Gilberto Felici, *judges,*  
and Liv Tigerstedt, *Acting Deputy Section Registrar,*

Having deliberated in private on 21 March 2019,

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

**PROCEDURE**

1.  The case originated in applications against the United Kingdom lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) on the various dates indicated in the appended table.

2.  Notice of the applications was given to the United Kingdom Government (“the Government”) on 21 September 2018.

**THE FACTS**

3.  A list of the applicants is set out in the appendix.

**I.  THE CIRCUMSTANCES OF THE CASE**

4.  **The applicants were all incarcerated at the relevant time following criminal convictions for a variety of offences**. They were **automatically prevented from voting**, pursuant to primary legislation, in one or more of the following elections: the elections to the European Parliament on 22 May 2014; the elections to the Scottish Parliament on 5 May 2016; and the parliamentary election on 8 June 2017 (for further details see the appended table).

II.  RELEVANT DOMESTIC LAW AND PRACTICE

5.  The relevant domestic law and practice is set out in the Court’s judgments in *Hirst v. the United Kingdom* *(no. 2)* [GC], no. 74025/01, ECHR 2005‑IX; and *Greens and M.T. v. the United Kingdom*, nos. 60041/08 and 60054/08, ECHR 2010 (extracts).

6.  Further developments since the *Greens and M.T.* judgment are set out in the Court’s decision in *McLean and Cole v. the United Kingdom* (dec.), nos. 12626/13 and 2522/12, 11 June 2013; in *Firth and Others v. the United Kingdom*, nos. 47784/09 and 9 others, 12 August 2014; in *McHugh v. the United Kingdom*, no. 51987/08 and 1,014 others, 10 February 2015; and in the Court’s decision in *Millbank and Others v. the United Kingdom*, nos. 44473/14 and 21 others, 30 June 2016).

7.  In 2018 the respondent Government adopted a number of administrative measures, including a change in policy and guidance in relation to prisoners released on temporary licence and on home detention curfew. On 6 December 2018 the Committee of Ministers at its 1331st meeting adopted Resolution CM/ResDH(2018)467 declaring that it was satisfied with the measures adopted by the respondent Government and deciding to close the examination of the *Hirst (No.2)* group of cases.

**COMPLAINTS**

8.  **The applicants complain under Article 3 of Protocol No. 1 to the Convention that as convicted prisoners in detention they had been subject to a blanket ban on voting in elections and had accordingly been prevented from voting in elections** (see paragraph 4 above).

**THE LAW**

**I.  JOINDER OF THE APPLICATIONS**

9.  Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

**II.  ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL No. 1**

10.  **The applicants complained about their ineligibility to vote in elections. They relied on Article 3 of Protocol No. 1, which reads as follows:**

**“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”**

11.  The Court refers to the principles established in its case‑law regarding ineligibility to vote in elections (see paragraphs 5 and 6 above).

12.  In the leading cases of *Hirst (no. 2),* cited above, and *Greens and M.T.,* cited above*,* the Court already found a violation in respect of issues similar to those in the present case.

13.  Having examined all the material submitted to it, the Court has not found any fact or argument capable of persuading it to reach a different conclusion on the admissibility and merits of these complaints. Having regard to its case-law on the subject, **the Court considers that that at the date of the index elections (all of which preceded the package of measures adopted by the respondent Government in 2018) the statutory ban on prisoners voting in elections was, by reason of its blanket character, incompatible with Article 3 of Protocol No. 1.**

**14.  These complaints are therefore admissible and disclose a breach of Article 3 of Protocol No. 1.**

**III.  APPLICATION OF ARTICLE 41 OF THE CONVENTION**

15.  Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

16.  Regard being had to the documents in its possession and to its case‑law (see, in particular, *Firth and Others,* cited above), the Court concludes that the finding of a violation constitutes sufficient just satisfaction for any non-pecuniary damage sustained by the applicants.

**FOR THESE REASONS, THE COURT, UNANIMOUSLY,**

1.  *Decides* to join the applications;

2.  *Declares* the applications admissible;

3.  *Holds* that these applications disclose a breach of Article 3 of Protocol No. 1 concerning the ineligibility to vote in elections;

4.  *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicants.

Done in English, and notified in writing on 11 April 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Liv Tigerstedt Aleš Pejchal  
 Acting Deputy Registrar President

## **CASE OF RAMISHVILI v. GEORGIA**

(Application no. 48099/08)

JUDGMENT

STRASBOURG

31 May 2018

This judgment is final but it may be subject to editorial revision.

In the case of Ramishvili v. Georgia,

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

Yonko Grozev, President,

Gabriele Kucsko-Stadlmayer,

Lado Chanturia, judges,

and Milan Blaško, Deputy Section Registrar,

Having deliberated in private on 7 May 2018,

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

**PROCEDURE**

1. The case originated in an application (no. 48099/08) against Georgia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Georgian national, Mr Shalva Ramishvili (“the applicant”), on 30 September 2008.

2. The applicant was represented by Ms S. Japaridze, Ms T. Khidasheli, Ms T. Abazadze, Ms N. Jomarjidze, and Ms T. Dekanosidze of the Georgian Young Lawyers Association (GYLA). The Georgian Government (“the Government”) were represented by their Agent, Mr B. Dzamashvili, of the Ministry of Justice.

3. On 14 September 2016 the application was communicated to the Government.

**THE FACTS**

**I.  THE CIRCUMSTANCES OF THE CASE**

4.  The applicant was born in 1971 and lives in Tbilisi.

5.  On 29 March 2006 the applicant was convicted of conspiracy to commit extortion and sentenced to four years’ imprisonment. The sentence was upheld on appeal on 30 June 2006. Pursuant to Article 5 § 2 of the Electoral Code and Article 28 § 2 of the Constitution, the applicant was debarred, as a convicted prisoner, from participating in any elections.

6.  On 25 July 2007 the applicant challenged the constitutionality of the ban under Article 5 § 2 of the Electoral Code in relation to Article 28 of the Constitution. **He referred to the case-law of the European Court of Human Rights on prisoners’ voting rights and submitted, among other things, that he would be unable to participate in the parliamentary elections in 2008.**

7.  On 31 March 2008 the Constitutional Court declared the application inadmissible in view of an identical restriction contained in the Constitution. It noted the following:

“It would be absolutely futile for the Constitutional Court to abolish the impugned provision [Article 5 § 2 of the Electoral Code] as this will not relieve the complainant of the restriction placed upon him by Article 28 § 2 of the Constitution. To achieve [this latter result] it would be necessary to introduce amendments with respect to the relevant provision of the Constitution, which is beyond the Constitutional Court’s competence. ...

... the Parliament of Georgia has directly copied the prohibition contained in Article 28 § 2 of the Constitution into Article 5 § 2 of the Electoral Code. The impugned provision is [thus] analogous to the rule contained in Article 28 § 2 of the Constitution and its constitutionality ‒ which implies the assessment of a constitutional norm’s constitutionality ‒ is not within the Constitutional Court’s jurisdiction.”

8.  As a result, the applicant was unable to vote in the parliamentary elections held on 21 May 2008.

**II.  RELEVANT DOMESTIC LAW**

A.  Prisoners’ voting rights

**9.  Article 28 § 2 of the Constitution (1995), as it stood at the material time, provided that “citizens ...who are convicted by a court and detained in a penal institution shall have no right to participate in elections and referenda.”**

10.  Article 5 § 2 of the Electoral Code (2001), as it stood at the material time, contained an identically formulated provision.

11.  Article 28 § 2 of the Constitution was amended on 27 December 2011 in the following manner: “citizens ...who are convicted by a court and detained in a penal institution, except those convicted of less grave crimes, shall have no right to participate in elections and referenda.” On the same date, the Parliament adopted the new Electoral Code (2011) which contained an identical formulation.

B.  Jurisdiction of the Constitutional Court of Georgia

12.  According to Article 89 § 1 (a) and (f) of the Constitution, the Constitutional Court adjudicates “the constitutionality of a Constitutional Agreement, laws, normative acts of the President and the Government, the normative acts of the higher state bodies of the Autonomous Republic of Abkhazia and the Autonomous Republic of Adjara” and “on the basis of an application from an individual, reviews the constitutionality of normative acts adopted in relation to the fundamental human rights and freedoms enshrined in Chapter Two of the Constitution.”

**THE LAW**

**I.  ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL No. 1 TO THE CONVENTION**

13.  Relying on Article 3 of Protocol No. 1 to the Convention, the applicant complained about his inability to vote, as a convicted prisoner, in the parliamentary elections held on 21 May 2008. The provision reads as follows:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

14.  The Government contested that argument.

**A.  Admissibility**

1.  The parties’ submissions

15.  The Government submitted that the application was inadmissible for failure to comply with the six-month rule laid down in Article 35 § 1 of the Convention. In particular, the applicant’s complaint to the Constitutional Court was not an effective remedy considering that the application for a constitutional review of Article 5 § 2 of the Electoral Code had in effect amounted to a request to amend the ban on prisoner’s voting rights contained in Article 28 § 2 of the Constitution, and clearly fell outside the Constitutional Court’s competence. Accordingly, the six-month time-limit started to run from the date on which the applicant became aware of his inability to take part in the elections, the latest date being when the applicant’s constitutional complaint was lodged on 25 July 2007.

16.  The applicant stated that the declaration of Article 5 § 2 of the Electoral Code as unconstitutional would have enabled him to participate in the elections.

2.  The Court’s assessment

17.  **The Court notes that even assuming that the Constitutional Court had jurisdiction to invalidate the disputed provision of the Electoral Code, the applicant would still have been unable to participate in the parliamentary elections due to the explicit constitutional ban of identical character contained in Article 28 § 2 of the Constitution**, **the repeal of which was neither requested by the applicant, nor was it within the Constitutional Court’s competence** (see paragraphs 7 and 12 above). **Consequently, the remedy attempted cannot be considered as either capable of providing redress or offering reasonable prospects of success with respect to the applicant’s complaint under Article 3 of Protocol No. 1 and, therefore, was not an effective remedy for the purposes of Article 35 § 1 of the Convention**.

18.  The Court further reiterates that, **as a rule, the six-month period starts to run from the date of the final decision in the process of exhaustion of domestic remedies. Where it is clear from the outset, however, that no effective remedy is available to the applicant, the period starts to run from the date of the acts or measures complained of, or from the date of cognisance of that act or of its effect on or prejudice to the applicant** (see *Varnava and Others v. Turkey* [GC], nos. 16064/90 and 8 others, § 157, ECHR 2009, and *Dennis and Others v. the United Kingdom* (dec.), no. 76573/01, 2 July 2002). **In cases featuring a continuing situation, the six-month period does not apply and runs only from the cessation of that situation** (see *Sabri Güneş v. Turkey* [GC], no. 27396/06, § 54, 29 June 2012, and *Anchugov and Gladkov* *v. Russia*, nos. 11157/04 and 15162/05, § 73, 4 July 2013).

19.  Against this background, the Court observes that the applicant complained about his inability to take part in specific parliamentary elections that were held on 21 May 2008. **Accordingly, in view of the Court’s finding that no effective remedy was available to the applicant with respect to his complaint** (see paragraph 17 above), **the six-month period started to run from the date of the elections concerned**: an act occurring at a given point in time (see *Anchugov and Gladkov*, cited above, § 75).

20.  **In the light of the foregoing and having regard to the date of introduction of the present application – 30 September 2008 – the Court cannot conclude that the application is lodged out of time.**

21.  The Court further notes that the application is not manifestly ill‑founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds. It must therefore be declared admissible.

B.  Merits

22.  The applicant submitted that his disenfranchisement resulted in a breach of Article 3 of Protocol No. 1 as he was unable to take part in the parliamentary elections of 21 May 2008. He maintained that his case was similar to that of *Hirst v. the United Kingdom (no. 2)* ([GC], no. 74025/01, ECHR 2005‑IX) as the ban on the prisoners’ voting rights that was applied to him was of an absolute nature and applied to all prisoners serving their sentences in detention, without regard to the gravity of their offenses or the length of their sentence.

23.  The Government did not submit their position on the merits of the application.

24.  The Court refers to the general principles established in its case‑law regarding the disenfranchisement of convicted prisoners (see, among other authorities, *Hirst (no. 2)* [GC], cited above, § 82; *Scoppola v. Italy (no. 3)* [GC], no. 126/05, §§ 81‑87, 22 May 2012; and *Anchugov and Gladkov*, cited above, §§ 93-100).

25.  Turning to the circumstances of the present case, **the Court observes that the ban on the prisoners’ voting rights contained in Article 28 § 2 of the Constitution was of a general, automatic, and indiscriminate character, affecting all persons convicted of a crime irrespective of the length of the sentence and the nature or gravity of their offence** (see paragraph 9 above). As a result, **the applicant was unable to participate in the parliamentary elections** held on 21 May 2008. **While the Constitution and the Electoral Code were subsequently amended in 2011 to allow prisoners convicted of less grave crimes to vote** (see paragraph 11 above), **those amendments did not affect the applicant’s situation in relation to the elections of 21 May 2008**.

26.  The foregoing considerations are sufficient to enable the Court to **conclude that there has been a violation of Article 3 of Protocol No. 1 to the Convention**.

**II.  APPLICATION OF ARTICLE 41 OF THE CONVENTION**

27.  Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A.  Damage

28.  The applicant claimed 1,500 euros (EUR) in respect of non‑pecuniary damage.

29.  The Government submitted that should any violation of the applicant’s rights be found in the present case, the mere finding of a violation would suffice.

30.  The Court considers that the finding of a violation constitutes sufficient just satisfaction in the present case for any non-pecuniary damage sustained by the applicant (see *Firth and Others v. the United Kingdom*, nos. 47784/09 and 9 others, § 18, 12 August 2014, with further references).

B.  Costs and expenses

31.  The applicant did not submit a claim for the costs and expenses incurred before the domestic courts and the Court. Accordingly, the Court will not award him any sum on that account.

**FOR THESE REASONS, THE COURT, UNANIMOUSLY,**

1.  *Declares* the application admissible;

2.  *Holds* that there has been a violation of Article 3 of Protocol No. 1 to the Convention;

3.  *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant.

Done in English, and notified in writing on 31 May 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško Yonko Grozev   
Deputy Registrar President

## **CASE OF DIMOV AND OTHERS v. BULGARIA**

(Applications nos. 45660/17 and 13 others – see appended list)

JUDGMENT  
STRASBOURG

8 June 2021

*This judgment is final but it may be subject to editorial revision.*

In the case of Dimov and Others v. Bulgaria,

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

Iulia Antoanella Motoc, *President,* Gabriele Kucsko-Stadlmayer, Pere Pastor Vilanova, *judges,*  
and Ilse Freiwirth, *Deputy Section Registrar,*

Having regard to:

the applications against the Republic of Bulgaria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by nineteen Bulgarian nationals (“the applicants”) on different dates (see the appended table for a list of the applicants, the introduction dates of their applications and the names of their representatives);

the decision to give notice to the Bulgarian Government (“the Government”) of the complaint concerning the applicants’ inability to vote while serving their prison sentences and to declare inadmissible the remainder of the second, third, fourth, fifth, sixth, seventh, eighth, ninth and tenth applications;

the parties’ observations;

Having deliberated in private on 11 May 2021,

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

**INTRODUCTION**

1.  The case concerns complaints under Article 3 of Protocol No. 1 to the Convention that the applicants had been unable to vote while effectively serving prison sentences.

1. **THE FACTS**

2.  The applicants were born on different dates between 1958 and 1990. The applicants in the first and fourteenth applications were represented by Mr K. Kanev, acting in his capacity as head of the Bulgarian Helsinki Committee. The applicants in the remaining applications were represented by Ms S. Ivanova, a lawyer practising in Sofia.

3.  The Government were represented by their Agent, Ms R. Nikolova, from the Ministry of Justice.

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

5.  **The applicants in the first to tenth applications were all effectively serving different prison sentences when elections for the Bulgarian Parliament were held on 26 March 2017.** As the relevant legislation excluded individuals serving prison sentences from voting, the applicants could not vote in those elections.

6.  **The applicants in the first application, with the exception of Mr T.P. Stamenov, as well as the applicants in the eleventh, twelfth, thirteenth and fourteenth applications, were effectively serving different prison sentences on 26 May 2019 when elections of Members of the European Parliament were held**. **As a result, in application of the relevant legislation, they could not vote in those elections**. As regards in **particular Mr T.P. Stamenov** (who is one of the six applicants in the first application), **the Government pointed out**, and his representative accepted, **that he had not been serving a prison sentence at the time of the elections for Members of the European Parliament on 26 May 2019.**

1. **RELEVANT LEGAL FRAMEWORK**

7.  The relevant legal provisions concerning prisoners’ right to vote have been set out in the Court’s judgment in the case of *Kulinski and Sabev v. Bulgaria*, no. [63849/09](https://hudoc.echr.coe.int/eng#{"appno":["63849/09"]}), §§ 10 and 15-22, 21 July 2016.

1. **THE LAW**
   1. **JOINDER OF THE APPLICATIONS**

8.  Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

* 1. **PRELIMINARY ISSUE**

9.  The Government stated that under Rule 36(4)(a) of the Rules of Court the representative acting on behalf of the applicants had to be an advocate authorised to practice in any of the Contracting Parties and resident in the territory of one of them, or any other person approved by the President of the Chamber. They pointed out that they were not aware that those conditions were fulfilled in respect of the applicants in a number of applications and invited the Court to clarify that question.

10.  The Court finds that no issue arises under Rule 36(4)(a) of the Rules of Court in respect of the representatives of any of the applicants. In particular, according to the official register maintained by the Supreme Bar Council, the representative of the applicants in the second to thirteenth applications, Ms S. Ivanova, is a lawyer authorised to practise in Bulgaria and residing on its territory. Furthermore, while Mr K. Kanev, the representative of the applicants in the first and fourteenth applications, is not an advocate authorised to practise in any of the Contracting Parties by the terms of Rule 36 § 4 (a), in view of the circumstances of the cases and in the interests of the proper administration of justice, the President of the Section granted him leave to represent the applicants in the proceedings before the Court in those two applications.

* 1. **ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL NO.1 TO THE CONVENTION**

11.  **All applicants complained under Article 3 of Protocol No. 1 to the Convention about the impossibility to vote because they were convicted prisoners,** effectively serving their sentences at the time when two parliamentary elections were held. In particular, the applicants in the first to tenth applications complained in relation to the elections to the Bulgarian Parliament on 26 March 2017, and the applicants in the first and eleventh to fourteenth applications, complained in relation to the elections of Members of the European Parliament on 26 May 2019. The relevant part of Article 3 of Protocol No. 1 reads as follows:

**“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”**

* + 1. Admissibility

12.  The Court observes that, following the communication of the applications, the Government pointed out and the representative accepted that one of the applicants in the first application, Mr T.P. Stamenov, was not serving a prison sentence at the time of the elections for Members of the European Parliament on 26 May 2019 (see paragraph 6 above). Consequently, the Court finds that he cannot claim to have been a victim of a violation of Article 3 of Protocol No. 1 in respect of those elections. His complaint related to those elections is therefore incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected as inadmissible under Article 35 §§ 1 and 4 of the Convention.

13.  The Court further notes that the complaint, made by the rest of the applicants (see paragraph 11 above), is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. The Court further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

* + 1. Merits
       1. The parties’ position

14.  The applicants in the first and fourteenth applications emphasised that, just like in the case *Kulinski and Sabev* *v. Bulgaria*, (no. 63849/09, 21 July 2016), they had been deprived of the right to vote, in particular in relation to the elections indicated in their complaints. The prohibition on their voting rights stemmed from the Constitution and the Election Code, was of a blanket nature and did not allow for an assessment of proportionality through the establishment of a discernible and sufficient link between the sanction and the conduct of the individuals concerned.

15.  The applicants in the second to the thirteenth applications stated that the Court had repeatedly found a violation of the Convention in situations such as that of the applicants. The disenfranchisement of persons effectively serving a prison sentence represented a dehumanising penal policy, impeding prisoners in their work toward resocialisation.

16.  The Government stated that Article 3 of Protocol No. 1 to the Convention did not provide for an absolute right. Likewise, that Convention provision contained no exhaustive list of restrictions which might accompany the right to free elections. A violation of Article 3 of Protocol No. 1 could not be justified only because prisoners serving custodial sentences could not exercise their voting right, since that restriction was not arbitrary and pursued a legitimate aim related to ensuring the rule of law. That restriction did not prejudice the requirement of the Convention to ensure the free expression of the opinion of the people. Disenfranchisement had a further re-education effect on the convicted person and, in this sense, it was introduced as a punitive measure in order to achieve a legitimate aim.

17.  The Government pointed out that the Bulgarian legal system provided for several mechanisms allowing early termination of the effective implementation of a prison sentence. Those were the release on parole and a reduction of sentence, as well as a possibility for release, as a result of presidential clemency or amnesty. Those mechanisms allowed for an early recovery of the right to vote and demonstrated that the Bulgarian criminal justice system had a certain degree of flexibility as it provided a legal opportunity for a differentiated approach. In view of the above, they stated, it could not be said that the Bulgarian legislation, presupposing disenfranchisement for the period of serving a prison sentence, had a common and undifferentiated application with regard to prisoners.

* + - 1. The Court’s assessment

18.  The Court observes that the facts underlying the present complaints and the arguments advanced by the Government are similar to those that have already given rise to the finding of a violation of Article 3 of Protocol No. 1 to the Convention in the case of *Kulinski and Sabev* (cited above, §§ 8-9 and 29-30). Having examined all the material submitted to it, the Court has not found any fact or argument capable of persuading it to reach a different conclusion. **The Court notes in this connection that the Government have not shown or argued, that the relevant domestic legal provisions, or related practice**, which had been at the origin of the Court’s finding of a violation in *Kulinski and Sabev* (cited above, §§ 37 and 41), **have been amended in any way, or that the Constitutional Court has interpreted the relevant Constitutional provision in compliance with the Convention requirement that there be no general, automatic and indiscriminate restriction to the right to vote of prisoners effectively serving their sentences** (see, *mutatis mutandis*, *Anchugov and Gladkov* *v. Russia*, nos. 11157/04 and 15162/05, § 111, 4 July 2013).

19.  The foregoing considerations are sufficient to enable the Court to **conclude that there has been a violation of Article 3 of Protocol No. 1 to the Convention in respect of the applicants** in the first to the tenth applications as regards the election to the Bulgarian Parliament on 26 March 2017. The Court also finds that there has been a violation of this provision in respect of the applicants in the first and eleventh to fourteenth applications as regards the election to the European Parliament on 26 May 2019, save for Mr T.P. Stamenov in the first application whose related complaint was declared inadmissible (see paragraph 12 above).

* 1. **APPLICATION OF ARTICLE 41 OF THE CONVENTION**

20.  Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

* + 1. Damage

21.  The applicants claimed different amounts in respect of non‑pecuniary damage.

22.  The Government stated that in case the Court found a violation of the applicants’ right to free elections, the ruling in this regard and the publication of the judgment would constitute just satisfaction.

23.  Having regard to the circumstances of the present case, the Court considers that the finding of a violation constitutes sufficient just satisfaction for any non-pecuniary damage sustained by the applicants (see *Kulinski and Sabev*, cited above, § 55 with further reference).

* + 1. Costs and expenses

24.  The applicants in the first and fourteenth applications claimed 2,173 euros (EUR) for the costs and expenses incurred before the Court, of which EUR 2,160 was in respect of the legal fee of their representative. They asked for this amount to be paid directly into the account of the Bulgarian Helsinki Committee.

25.  The applicants in the second to thirteenth applications claimed EUR 1,920 each in respect of the legal fees of their representative.

26.  The Government considered that these claims were exaggerated and unjustified.

27.  According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum.

28.  As regards the costs and expenses incurred before the Court, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award EUR 2,000 to each of the two representatives and that this amount should be paid directly into the respective bank accounts of the Bulgarian Helsinki Committee and of Ms S. Ivanova.

* + 1. Default interest

29.  The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

**FOR THESE REASONS, THE COURT, UNANIMOUSLY,**

1. *Decides* to join the applications;
2. *Declares* the complaint by one of the applicants in the first application, namely Mr T.P. Stamenov, inadmissible in respect of the elections to the European Parliament of 26 May 2019 and the remainder of the applications admissible;
3. *Holds* that there has been a violation of Article 3 of Protocol No. 1 to the Convention;
4. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicants;
5. *Holds*
   1. that the respondent State is to pay the applicants, within three months, the following amounts**,** to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 2,000 (two thousand euros) jointly, plus any tax that may be chargeable to the applicants in the first and fourteenth applications in respect of costs and expenses, to be paid directly into the bank account of the Bulgarian Helsinki Committee;

(ii) EUR 2,000 (two thousand euros) jointly, plus any tax that may be chargeable to the applicants in the second to thirteenth applications in respect of costs and expenses, to be paid directly into the bank account of their representative;

* 1. that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

1. *Dismisses* the remainder of the applicants’ claim for just satisfaction.

Done in English, and notified in writing on 8 June 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth Iulia Antoanella Motoc  
 Deputy Registrar President

# **FRAUD AND INVALIDATION OF ELECTION RESULTS**

## **CASE OF MAMMADOV v. AZERBAIJAN (No. 2)**

*(Application no. 4641/06)*

JUDGMENT

STRASBOURG

10 January 2012

**FINAL**

*10/04/2012*

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*

**In the case of** Mammadov v. Azerbaijan (no. 2),

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

Nina Vajić, *President,* Elisabeth Steiner, Khanlar Hajiyev, Mirjana Lazarova Trajkovska, Julia Laffranque, Linos-Alexandre Sicilianos, Erik Møse, *judges,*  
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 6 December 2011,

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

**PROCEDURE**

1.  The case originated in an application (no. 4641/06) against the Republic of Azerbaijan lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Azerbaijani national, Mr Sardar Jalal oglu Mammadov (*Sərdar Cəlal oğlu Məmmədov* – “the applicant”), on 19 January 2006.

2.  The applicant was represented by Mr F.A. Agayev, a lawyer practising in Azerbaijan. The Azerbaijani Government (“the Government”) were represented by their Agent, Mr Ç. Asgarov.

**3.  The applicant alleged, in particular, that the invalidation of the parliamentary elections in his electoral constituency had infringed his electoral rights under Article 3 of Protocol No. 1 to the Convention.**

4.  On 3 September 2008 the President of the First Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

**THE FACTS**

**I.  THE CIRCUMSTANCES OF THE CASE**

5.  The applicant was born in 1957 and lives in Baku. He stood for the elections to the National Assembly (Milli Majlis) of 6 November 2005 as a candidate of the opposition bloc Azadliq.

**6.  The applicant was registered as a candidate by the Constituency Electoral Commission (“the ConEC”) for the single-mandate Binagadi Second Electoral Constituency no. 9.**

**7.  There were a total of thirty polling stations in the constituency. At the end of election day, the applicant was only able to obtain copies of official records of election results (*səsvermənin nəticələrinə dair protokol*) drawn up by twenty-one Polling Station Electoral Commissions (“ PECs”).**

**8.  According to the applicant, he received the majority of votes in the constituency. Specifically, he received a total of 3,665 votes. His closest contender received 3,197 votes. All unofficial exit-polls indicated that the applicant had won the election.**

**9.  An official tabulation of results was carried out by the ConEC after election day, but the applicant was not provided with a copy of the ConEC record of election results. It appears that the ConEC did not officially declare a winner in the applicant’s constituency following the tabulation of results.**

**10.  On 8 November 2005 a representative of the Azadliq bloc applied to the Central Electoral Commission (“the CEC”) with a request for the invalidation of the election results in Polling Stations nos. 1, 3, 11, 14, 19, 20, 23 and 25 (eight polling stations in total, for which the applicant did not receive PEC records of results) and to declare the applicant the winner of the election as, according to copies of those PEC results records which were in the applicant’s possession, he had obtained the highest number of votes in the constituency.**

**11.  It appears that, at a later unspecified date, the applicant obtained copies of all the PEC results records, except those for Polling Stations nos. 1 and 19.**

12.  On 8 November 2005 **the CEC acknowledged receipt of the Azadliq bloc’s request and notified it that it had issued a decision to invalidate the election results for the entire Binagadi Second Electoral Constituency no. 9.** The decision, in its entirety, stated as follows:

“Pursuant to Articles 19.4, 19.14, 25.2.22, 28.4, 100.12 and 170.2.2 of the Electoral Code and sections 3.5 and 3.6 of the Law of 27 May 2003 on Approval and Entry into Force of the Electoral Code, the Central Electoral Commission decides:

1.  To invalidate the election results in Polling Stations nos. 2, 3, 4, 6, 7, 8, 9, 10, 23, 25, 26, 27 and 29 of Binagadi Second Electoral Constituency no. 9 due to impermissible alterations [“*yolverilməz düzəlişlər*”] made to the PEC records of election results [*“protokollar”*] of those polling stations as well as infringements of the law [“*qanun pozuntuları*”] which made it impossible to determine the will of the voters.

2.  To invalidate the election results in Binagadi Second Electoral Constituency no. 9 due to the fact that the number of polling stations in which the election results have been invalidated constitutes more than two-fifths of the total number of polling stations in the constituency and that the number of voters registered in those polling stations constitutes more than one-quarter of the total number of voters in the constituency.

3.  To forward the relevant materials concerning this electoral constituency to the Prosecutor General’s Office for investigation.”

13.  On 10 November 2005 **the applicant lodged an appeal against that decision with the Court of Appeal, arguing that the findings in the CEC decision were wrong**. **He argued that, while the CEC decision noted that “impermissible alterations” had been made to the PEC records of results for Polling Stations nos. 2, 6, 8, 9, 10, 26, 27 and 29, the photocopies of the same PEC records which were in his possession did not contain any such alterations or changes. According to those PEC records, he had obtained the highest number of votes in each of those polling stations. As to Polling Stations nos. 23 and 25, he noted that the PECs in those polling stations had refused to provide him with copies of their records of results. Nevertheless, according to the information provided by observers and PEC members, the applicant had obtained the highest number of votes in those polling stations as well.**

14.**The applicant argued that the invalidation of the election results had been arbitrary and that the only reason for the invalidation had been to prevent him, as an opposition candidate, from winning the election. He asked the court to examine all the relevant records of election results, quash the CEC decision and declare him the winner of the election in the constituency.**

15.  During the hearing held on 11 November 2005, **the judges of the Court of Appeal refused to independently examine the originals of the PEC and ConEC records of results which had allegedly contained “impermissible alterations”. The Court of Appeal upheld the CEC decision by reiterating the findings made in that decision and concluding that the invalidation of the election results based on those findings had been lawful.**

16.**The applicant lodged a cassation appeal.** Apart from the arguments advanced in his appeal before the Court of Appeal, **he also complained, *inter alia*, that the Court of Appeal had refused to independently examine the primary evidence (the originals of the relevant official records of election results) and had simply taken the CEC’s findings as fact.**

17.  On 25 November 2005 **the Supreme Court rejected the applicant’s appeal and upheld the Court of Appeal’s judgment as lawful.**

18.**On 1 December 2005 the Constitutional Court ordered repeat elections to be held on 13 May 2006 for all electoral constituencies in which the results had been invalidated, including the applicant’s constituency.**

19.**In the meantime, criminal proceedings were instituted against the ConEC chairman and the chairman of the PEC of Polling Station no. 20, for tampering with official electoral documents and abuse of official authority.**

20.  On 19 January 2006 **the Binagadi District Court convicted both defendants under Articles 161.1** (falsification of election documents) and 308.1 (abuse of official power) **of the Criminal Code. Both defendants were fined and sentenced to five months’ imprisonment.**

**21.  The factual findings in the Binagadi District Court’s judgment revealed that the majority of falsifications in the PEC results records had been made at the ConEC level by its chairman, after the submission of those records to the ConEC. These falsifications affected a total of thirteen polling stations and were all made in favour of one of the applicant’s opponents, but not the applicant.**

**II.  RELEVANT DOMESTIC LAW AND INTERNATIONAL REPORTS**

A.  Electoral Code

22.  After the votes in a polling station have been counted at the end of election day, the PEC draws up an official record of election results (in three original copies) documenting the results of the vote in the polling station (Articles 106.1-106.6). One copy of the PEC record, together with other relevant documents, is then submitted to the relevant ConEC within twenty‑four hours (Article 106.7). The ConEC verifies whether the PEC record complies with the law and whether it contains any inconsistencies (Article 107.1). After submission of all PEC records, the ConEC tabulates, within two days of election day, the results from the different polling stations and draws up a record reflecting the aggregate results of the vote in the constituency (Article 107.2). One copy of the ConEC record of results, together with other relevant documents, is then submitted to the CEC within two days of election day (Article 107.4). The CEC checks whether the ConEC records comply with the law and whether they contain any inconsistencies (Article 108.1) and draws up its own final record reflecting the results of voting in all constituencies (Article 108.2).

23.  If within four days of election day the CEC discovers mistakes, impermissible alterations or inconsistencies in the records of results (including the accompanying documents) submitted by ConECs, the CEC may order a recount of the votes in the relevant electoral constituency (Article 108.4).

24.  Upon review of a request to declare invalid the election of a registered candidate, an electoral commission has a right to hear submissions from citizens and officials and to obtain necessary documents and materials (Article 112.8).

25.  In the event of the discovery of irregularities aimed at assisting candidates who were not ultimately elected, such irregularities cannot be a basis for the invalidation of the election results (Article 114.5).

26.  The ConEC or CEC may invalidate the election results for an entire single-mandate constituency if election results in two-fifths of polling stations, representing more than one-quarter of the constituency electorate, have been invalidated (Article 170.2.2).

27.  According to former Article 106.3.6 of the Electoral Code, in force at the material time, during the initial vote-counting at a polling station at the end of election day, if a voting ballot which had not been properly placed in the corresponding envelope was found in the ballot box, the vote on that ballot was considered to be invalid. Article 106.3.6 was subsequently repealed on 2 June 2008.

B.  The Organisation for Security and Cooperation in Europe, Office for Democratic Institutions and Human Rights (OSCE/ODIHR) Election Observation Mission Final Report on the Parliamentary Elections of 6 November 2005 (Warsaw, 1 February 2006)

28.  The relevant excerpts from the report read as follows:

“Although constituency aggregate results were made available within the legal deadline, detailed results by polling station were only released on 10 November, four days after the election, despite the computer networking of all ConECs with the CEC. This made it difficult for candidates and observers to check that results had been reported accurately. Protocols from two constituencies, 9 and 42, were never posted publicly. ...

The CEC invalidated the results of four constituencies [including Binagadi Second Electoral Constituency no. 9] under Article 170.2 of the Election Code, which states that if a ConEC or the CEC cancels more than 2/5 of PECs representing more than 1/4 of the total electorate in a constituency, then the entire constituency result is considered invalid. ...

At least ... two ConEC chairpersons [ConECs 9 and 42] were dismissed after election day for involvement in electoral malfeasance. The two ConEC chairpersons were arrested and charged with forging election documents. ... The CEC forwarded materials on possible criminal violations to the Prosecutor General’s Office regarding 29 PECs. ...

The process of invalidation of aggregated results in four constituencies by the CEC did not have sufficient legal grounds or an evidentiary basis, nor was the process transparent. The CEC decisions on the invalidation of the election results in the four constituencies concluded that there were “unacceptable modifications performed on the protocols and law infringements which made it impossible to determine the will of the voters” but did not provide any factual basis to support this conclusion. ...

Furthermore, when it invalidated results, the CEC did not make the required initial factual inquiry [as required by Article 170.2 of the Election Code], and ignored Article 108.4 of the Election Code, which authorizes the CEC to order a recount of votes in a constituency if the protocols and documents submitted by the ConEC reveal “mistakes, inadmissible corrections and inconsistencies.” Protocols of ConECs and PECs were not examined or reviewed at CEC sessions. Invalidation of results in a polling station was premised solely on the conclusion of an individual CEC member as to whether a protocol should be invalidated. The judgment of a single CEC member that there were deficiencies in the protocol was accepted as established fact without any explanation of the alleged defect or identification of the number of votes involved. Accordingly, there was no factual basis presented publicly for invalidating results in any of the four constituencies, which is particularly troubling since the CEC registered few complaints that alleged violations in these constituencies. ...

The adjudication of post-election disputes in the courts largely disregarded the legal framework, and fell short of internationally accepted norms. ... In most cases, complaints and appeals were either dismissed without consideration of the merits or rejected as groundless by both the Court of Appeal and the Supreme Court.

Opposition candidates appealed the CEC’s invalidation of results in constituencies 9, 42 and 110. The Court of Appeal upheld the three CEC decisions without any investigation or review of the primary documents and evidence, such as the PEC protocols. In constituency 9, the appellant petitioned the Court of Appeal to examine the protocols, which had been forwarded to the Prosecutor General’s office by the CEC. This petition was denied. In constituency 42, the appellant made an identical request and the court again denied the petition, ruling that it was impossible to obtain the protocols from the Prosecutor General within the legal deadline. The CEC was not able to explain or give any information as to any specific defect in an invalidated protocol or offer any explanation as to what change to a protocol was sufficient for invalidation. ...

Proceedings in the Supreme Court did not correct the shortcomings noted above. The Supreme Court upheld each CEC decision.”

**THE LAW**

**I.  ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL NO. 1 TO THE CONVENTION**

29.  Relying on Article 3 of Protocol No. 1 to the Convention and Article 13 of the Convention, the applicant complained that the invalidation of election results in his electoral constituency had been arbitrary and unlawful and had infringed his electoral rights as the rightful winner of the election. He argued that the process of invalidation had lacked transparency and sufficient safeguards against arbitrariness, and that the decisions of the electoral commissions and domestic courts lacked any factual basis and were contrary to a number of requirements of the domestic electoral law.

30.  The Court considers that this complaint falls to be examined only under Article 3 of Protocol No. 1 to the Convention and that no separate examination is necessary under Article 13. Article 3 of Protocol No. 1 reads as follows:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

A.  Admissibility

1.  The applicant’s “victim” status

31.**The Government argued that the applicant had lost his “victim” status because the authorities had acknowledged the breaches of electoral law that had infringed the electoral rights of voters and candidates (including the applicant) and afforded redress for those breaches, by means of invalidating the election results and ordering repeat elections in the constituency.** Moreover, the Government argued that the institution of the criminal proceedings against the officials responsible for those breaches and their conviction had also formed part of that “redress”.

32.  The applicant contested this objection.

33.**The Court considers that the Government’s objection is misplaced as it appears to be based on an assumption that the applicant’s Convention rights had been breached by the fact of the alleged irregularities that included “falsification of electoral documents” at the PEC and ConEC level.** However, **the Court notes that in the present case, the applicant complained not about the alleged irregularities at the lower levels or the alleged perpetrators of those irregularities, but about the allegedly arbitrary annulment by the CEC of the results of the election in his constituency. Accordingly, the Court notes that in the present case the annulment of the election results could not possibly deprive the applicant of his victim status in respect of the present complaint, given that this annulment in itself is the matter complained of. Moreover, the mere fact that repeat elections were held does not constitute a redress for any breaches of electoral rights that had taken place during the original elections.**

**34.  For these reasons, the Court rejects the Government’s objection.**

2.  Exhaustion of domestic remedies

35. **The Government further submitted that the applicant had not exhausted domestic remedies.** Firstly, he had failed to make an application to be recognised as a “victim of a crime” in the framework of the criminal proceedings against the election officials responsible for the breaches of electoral law at the PEC and ConEC levels, which would have enabled him to effectively take part in those proceedings and exercise his procedural rights. Secondly, the Government argued that it was open to the applicant under the domestic law to lodge an action for damages with the domestic courts against the election officials who had infringed his electoral rights.

36. **The applicant disagreed and noted that he had lodged all the appeals available to him under electoral law against the CEC’s decision. As to the other remedies suggested by the Government, the applicant noted that an application to be recognised as a “victim of a crime” in the criminal proceedings did not constitute a remedy that could redress the breach of his electoral rights to stand effectively as a candidate and win the election. Moreover, the possibility for him to bring a civil action for damages against the ConEC and PEC officials was irrelevant in the context of his present complaint concerning the annulment of the election results by the CEC and the upholding of that decision by the courts.**

37.**The Court notes that the applicant has exhausted the relevant remedies in respect of the annulment of the election results, as provided by the domestic electoral law.** Specifically, he lodged an appeal against the CEC decision with the Court of Appeal, and subsequently lodged a further appeal with the Supreme Court, which was the final instance**. As to the remedies suggested by the Government (criminal or civil proceedings against the ConEC and PEC officials), the Court notes that neither of those remedies could have led to the quashing of the CEC decision or involved the assessment of the substance of the CEC decision and review of its compliance with the electoral law and the Convention. The Court does not see how either of those remedies could have otherwise provided redress for the applicant’s complaint concerning the alleged arbitrariness of the annulment of the election results.**

38. **For these reasons, the Court rejects the Government’s objection.**

3.  Conclusion

39.  The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and is not inadmissible on any other grounds. It must therefore be declared admissible.

B.  Merits

1.  The parties’ submissions

40.  The Government submitted that the CEC’s decision to invalidate the election results in the applicant’s electoral constituency had followed a complaint by the representative of the applicant’s electoral bloc and had been based on sound factual findings. These findings were subsequently proved to have been correct by the outcome of the criminal proceedings against the two officials of the ConEC for Binagadi Second Electoral Constituency no. 9 and the PEC for Polling Station no. 20 of that constituency. Both of these officials were found to have tampered with the official records of election results.

41.  As to the applicant’s argument that the CEC had failed to order a recount, the Government argued that Article 108.4 of the Electoral Code did not require the CEC to recount the votes in all cases, but simply vested it with the discretion to decide whether a recount of votes should be ordered in each particular case. The Government further argued that a recount of votes had not been possible in the present case, because in accordance with Article 106.3.6 of the Electoral Code in force at the material time (this provision was subsequently repealed in 2008), ballots which were not in envelopes were considered invalid. As all the ballots submitted to the CEC had already been pulled out of their envelopes during the original count in the relevant polling stations and had not been put back into them, the recount of these ballots was impossible.

42.  The Government argued that the established incidents of tampering with official records of election results had made it impossible for the CEC to determine the true will of the voters on the basis of those records. Such interference with the procedure of the vote-count documentation interfered with the free expression of the opinion of the people and, therefore, the CEC had correctly invalidated the election results in the applicant’s constituency, as it was guided by the legitimate aim of ensuring that only the candidates elected in accordance with the will expressed by voters represented those voters in parliament.

43.  The applicant submitted that he had won the election convincingly by a considerable margin of votes. The applicant claimed that, according to the relevant PEC results records which he had been able to obtain, he had received the highest amount of votes in the constituency. Moreover, the applicant noted that exit polls conducted by two different organisations indicated that he had won. Even the pro-Government official newspaper *Azərbaycan* named him as the winning candidate in his constituency in its unofficial list of “provisional” election results published on 7 November 2005, the day after election day.

44.  The applicant argued that the CEC decision had lacked any relevant reasons and that he, as a candidate and affected party, had been deprived of the opportunity to exercise his basic procedural rights during the CEC proceedings. The examination by the domestic courts of his appeals against the CEC decision had been ineffective.

45.  The applicant further noted that all the alleged impermissible changes made to the official records of the election results had been made in favour of his opponents, and not in his favour. Despite this, the CEC had failed to comply with Article 114.5 of the Electoral Code, which did not allow invalidation of election results if it was established that any irregularities discovered during the election process had been made to assist the candidates who had not ultimately been elected, and not the winning candidate. In any event, the majority of the alleged unlawful alterations were of a “technical nature” which did not affect the figures on the total number of votes cast, and therefore could not impede the determination of the true will of the voters.

46.  As for the Government’s argument concerning the alleged impossibility of a recount of the votes, the applicant noted that the Government’s reference to former Article 106.3.6 of the Electoral Code was wrong, because that provision concerned only the original count of the votes in polling stations at the end of election day, when the envelopes containing the ballots were first taken out of the ballot boxes, and did not concern any subsequent recount of votes in the presence of the CEC members. In any event, the applicant considered that on the facts of the cases there was no need for a recount, for the simple reason that his victory in the election could be established beyond any doubt from the documentary material available.

47.  The applicant submitted that there were no legitimate grounds for an outright invalidation of the election results for the entire electoral constituency. Such a decision in the present case meant in essence that the domestic electoral system allowed one or a few random individuals to frustrate the opinion of tens of thousands of voters simply by making minor alterations to official records of election results. This in turn gave the current Government the opportunity to prevent opposition candidates from becoming members of parliament by simply having an electoral official tamper with a results record in order to render the results of the election null and void, and subsequently escape with a very lenient penalty for doing this. In this connection, the applicant noted in particular that the ConEC chairman who had been found guilty of ruining the election results in his constituency had received a very mild punishment and, despite his criminal conviction, was reinstated to work in the public education field as deputy director of a secondary school.

**2.  The Court’s assessment**

48.  **Article 3 of Protocol No. 1** appears at first sight to differ from the other rights guaranteed in the Convention and Protocols, as it is phrased in terms of the obligation of the High Contracting Party to hold elections which ensure the free expression of the opinion of the people rather than in terms of a particular right or freedom. However, the Court has established that **it guarantees individual rights, including the right to vote and to stand for election** (see *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, §§ 46-51, Series A no. 113). The Court has consistently highlighted **the importance of the democratic principles underlying the interpretation and application of the Convention and has emphasised that the rights guaranteed under Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law** (ibid., § 47; see also *Hirst v. the United Kingdom* (no. 2) [GC], no. 74025/01, § 58, ECHR 2005-IX).

**49.  The rights bestowed by Article 3 of Protocol No. 1 are not absolute. There is room for “implied limitations” and Contracting States** **have a wide margin of appreciation in the sphere of elections** (see *Mathieu-Mohin and Clerfayt*, cited above, § 52; *Matthews v. the United Kingdom* [GC], no. 24833/94, § 63, ECHR 1999-I; and *Labita v. Italy* [GC], no. 26772/95, § 201, ECHR 2000-IV). **It is, however, for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with.** In particular, it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate (see *Mathieu-Mohin and Clerfayt*, cited above, § 52, and *Gitonas and Others v. Greece*, 1 July 1997, § 39, *Reports of Judgments and Decisions* 1997-IV). Such conditions must not thwart the free expression of the people in the choice of the legislature – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage (see *Hirst (no. 2)*, cited above, § 62).

**50.  Furthermore, the object and purpose of the Convention, which is an instrument for the protection of human rights, requires its provisions to be interpreted and applied in such a way as to make their stipulations not theoretical or illusory but practical and effective** (see, among many other authorities, *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 33, *Reports* 1998-I; *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, § 100, ECHR 1999-III; and *Lykourezos v. Greece*, no. 33554/03, § 56, ECHR 2006-VIII). The right to stand as a candidate in an election, which is guaranteed by Article 3 of Protocol No. 1 and is inherent in the concept of a truly democratic regime, would only be illusory if one could be arbitrarily deprived of it at any moment. **Consequently, while it is true that States have a wide margin of appreciation when establishing eligibility conditions in the abstract, the principle that rights must be effective requires that the eligibility procedure contain sufficient safeguards to prevent arbitrary decisions** (see *Podkolzina v. Latvia*, no. 46726/99, § 35, ECHR 2002-II). Although originally stated in connection with the conditions on eligibility to stand for election**, the principle requiring prevention of arbitrariness is equally relevant in other situations where the effectiveness of individual electoral rights is at stake** (see *Namat Aliyev*, cited above, § 72), **including the manner of review of the outcome of elections and invalidation of election results** (see *Kovach v. Ukraine*, no. 39424/02, § 55 et seq., ECHR 2008-...).

51.  The Court has emphasised that **it is important for the authorities in charge of electoral administration to function in a transparent manner and to maintain impartiality and independence from political manipulation** (see *The Georgian Labour Party v. Georgia*, no. 9103/04, § 101, 8 July 2008), **that the proceedings conducted by them be accompanied by minimum safeguards against arbitrariness and that their decisions are sufficiently reasoned** (see, *mutatis mutandis*, *Namat Aliyev*, cited above, §§ 81-90, and *Kovach*, cited above, §§ 59-60).

52.  The Court notes that it has previously examined a complaint based on very similar facts, in the *Kerimova* judgment (see *Kerimova v. Azerbaijan*, no. 20799/06, 30 September 2010). However, it observes that, unlike the *Kerimova* judgment, where it was apparent from the established facts that the applicant would have won the election had the election results not been invalidated arbitrarily (ibid., §§ 9 and 47), **in the present case it is not possible to establish with certainty that the applicant would have won the election in his electoral constituency. Specifically, while the applicant claimed that he had received the highest number of votes based on the copies of PEC results records in his possession, no similar aggregated vote count showing him as the winner has ever been officially produced by the relevant ConECs or CEC (unlike in the *Kerimova* case). In this respect, the Court notes that, unless it is rendered unavoidable by the circumstances of the case, it is not the Court’s task to substitute itself for domestic electoral authorities or to take on the function of a first-instance tribunal of fact by attempting to determine the exact vote counts on the basis of records of election results issued by electoral commissions of the lowest level or to determine who should have won the elections in the applicant’s constituency** (see, *mutatis mutandis*, *Namat Aliyev*, cited above, § 77). **Nevertheless, it is sufficiently clear from the facts of the case that the applicant was one of the frontrunners among other candidates in his electoral constituency and that the authorities’ decision to annul the election results affected the applicant’s chances of being elected to the National Assembly. In this connection, the Court also reiterates that Article 3 of Protocol No. 1 guarantees not a right to win the election *per se*, but a right to stand for election in fair and democratic conditions** (ibid., § 75).

53.**Moreover, it is true that in the present case, prior to the CEC decision on the annulment of the election results, a representative of Azadliq, apparently acting in the applicant’s interests, had requested the CEC to invalidate the election results in some of the polling stations in the constituency owing to alleged irregularities perpetrated against him in those specific polling stations. It could therefore be argued that the CEC decision followed a relevant request by the applicant. However, the CEC decision went manifestly beyond what had been requested of it by the applicant and invalidated the election results in a greater number of polling stations of the constituency, resulting in an invalidation of the election results in the constituency as a whole.**

54.  Having regard to the above considerations**, the Court considers that the CEC decision to annul the election results constituted an interference with the applicant’s effective exercise of his right to stand for election. It remains to be determined whether this interference was compatible with the requirements of Article 3 of Protocol No. 1 to the Convention.**

55.  The Government contended that the impugned decision on the invalidation of election results had been aimed at protecting the free expression of the voters’ opinion from illegal interference and ensuring that only the rightfully elected candidates represented the voters in parliament. However, the Court has doubts as to whether a practice of discounting all votes cast in an entire electoral constituency owing merely to the fact that irregularities have taken place in some polling stations, without an attempt to establish in a diligent manner the extent of the irregularities and their impact on the outcome of the overall election results in the constituency, can necessarily be seen as pursuing a legitimate aim for the purposes of Article 3 of Protocol No. 1 (compare, *mutatis mutandis*, *Kovach*, cited above, § 52, and *Kerimova*, cited above, § 46). However, the Court is not required to take a final view on this issue in the light of its findings below.

56.**Having regard to the decisions of the CEC and domestic courts in the present case, the Court considers that they were not in compliance with the requirements of Article 3 of Protocol No. 1, for essentially the same reasons as those in the *Kerimova* judgment. In particular, the Court notes the following.**

57.  As to the CEC decision of 8 November 2005 invalidating the election results in the applicant’s constituency (see paragraph 12 above), **the Court notes that it contained no specific description of the alleged “impermissible alterations” made to the PEC results records or other “infringements of law”, no elaboration as to the nature of these “alterations” and “infringements”, and no reasons explaining why the alleged breaches obscured the outcome of the vote in the relevant polling stations and made it impossible to determine the true opinion of the voters. In such circumstances the Court cannot but note that the CEC decision was unsubstantiated.**

58.  Furthermore, the Court notes that, like in the *Kerimova* case, **the CEC and the domestic courts failed, in an unexplained manner, to follow a number of procedural safeguards provided by the domestic electoral law.** Firstly, the CEC failed to consider the possibility of a recount of votes before invalidating the election results for the entire constituency. Even accepting the Government’s argument that under Azerbaijani law an election recount was optional (at the CEC’s discretion) and not mandatory, the Court considers that in the present case the CEC could have considered the possibility of a recount or explained the reasons for passing up this opportunity before deciding on an invalidation of the election results. Secondly, the Court notes that the domestic authorities ignored the requirements of Article 114.5 of the Electoral Code, which prohibited invalidation of election results at any level on the basis of a finding of irregularities committed for the benefit of candidates who lost the election. Accordingly, it appears that according to this provision, prior to considering a decision to annul the results of an election, the authorities first had to specify the total vote counts and determine in whose favour the alleged irregularities had been committed. However, this was not done in the present case. In the Court’s view, the authorities’ failure to order a recount of votes or to take into account the requirements of Article 114.5 of the Electoral Code, and the lack of any explanation for that failure, contributed to the appearance of arbitrariness of the decision to annul the election results (compare *Kerimova*, cited above, §§ 49-51).

59**.  Lastly, the Court notes that, despite the fact that the applicant repeatedly raised all of the above points in his appeals to the domestic courts, those courts failed to adequately address those issues and simply reiterated the CEC’s findings.** They refused to examine any primary evidence, which mostly consisted of the illegally altered originals of the PEC records of election results, and failed to review the compliance of the CEC decision with the requirements of the electoral law. **As such, the manner of examination of the applicant’s election-related appeals was ineffective.**

60.  For the above reasons, **the Court concludes that the decision on the annulment of the election results in the applicant’s electoral constituency was arbitrary, as it lacked any relevant and sufficient reasons and was in breach of the procedures established by the domestic electoral law** (see paragraph 58 above). **This decision arbitrarily prevented the applicant from effectively exercising his right to stand for election and as such ran counter to the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage.**

**61.  There has accordingly been a violation of Article 3 of Protocol No. 1 to the Convention.**

**II.  ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION**

62.  In conjunction with the above complaint, the applicant complained that he had been arbitrarily deprived of his seat in the National Assembly owing to his affiliation with the political opposition. He relied on Article 14, which provides as follows:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

**63.  The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.**

**64.  However, having regard to its above finding in relation to Article 3 of Protocol No. 1, the Court considers that it is not necessary to examine whether in this case there has been a violation of Article 14.**

**III.  APPLICATION OF ARTICLE 41 OF THE CONVENTION**

65.  Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A.  Damage

1.  Pecuniary damage

66.  The applicant claimed 101,305.83 euros (EUR) in respect of pecuniary damage, including damage caused by loss of the earnings he would have received in the form of a parliamentary member’s salary if elected to the National Assembly had the results of elections in his constituency not been invalidated, as well as loss of the useful effect of the funds spent on his election campaign.

67.  The Government contested the applicant’s claims.

68.  As to the claim in respect of loss of a parliamentary member’s salary, the Court reiterates that, as discussed in paragraph 52 above, it cannot be established with sufficient certainty in this case (unlike in the similar *Kerimova* case) that the applicant would necessarily have won the election in his constituency and become a member of parliament, had the election not been annulled in an arbitrary manner. It is therefore impossible for the Court to speculate as to whether the applicant would have received a member of parliament’s salary.

69.  As to the claim in respect of expenses borne during the election campaign, the Court does not discern any causal link between the violation found and the pecuniary damage alleged.

70.  For the above reasons, the Court rejects the claim in respect of pecuniary damage.

2.  Non-pecuniary damage

71.  The applicant claimed EUR 100,000 in respect of non-pecuniary damage.

72.  The Government argued that the amount claimed was excessive and considered that a finding of a violation of the Convention would constitute sufficient just satisfaction in itself.

73.  The Court considers that the applicant suffered non-pecuniary damage which cannot be compensated solely by the finding of the violation of Article 3 of Protocol No. 1. Ruling on an equitable basis, the Court awards him the sum of EUR 7,500 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B.  Costs and expenses

74.  The applicant claimed EUR 4,800 for the costs and expenses incurred before the Court, including legal fees and postal expenses.

75.  The Government contested this claim.

76.  According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,600 covering costs under all heads, plus any tax that may be chargeable to the applicant on that sum.

C.  Default interest

77.  The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

**FOR THESE REASONS, THE COURT UNANIMOUSLY**

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

**2.  *Holds* that there has been a violation of Article 3 of Protocol No. 1 to the Convention;**

**3.  *Holds* that there is no need to examine separately the complaint under Article 14 of the Convention;**

**4.  *Holds***

**(a)  that the respondent State is to pay the applicant**, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Azerbaijani manats at the rate applicable at the date of settlement:

(i)  EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii)  EUR 1,600 (one thousand six hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b)  that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5.  *Dismisses* the remainder of the applicant’s claim for just satisfaction.

Done in English, and notified in writing on 10 January 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen Nina Vajić  
 Registrar President

## 

## **CASE OF GAHRAMANLI AND OTHERS v. AZERBAIJAN**

*(Application no. 36503/11)*

JUDGMENT

STRASBOURG

October 2015

FINAL

08/01/2016

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*

In the case of Gahramanli and Others v. Azerbaijan,

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

András Sajó, *President,* Elisabeth Steiner, Khanlar Hajiyev, Paulo Pinto de Albuquerque, Linos-Alexandre Sicilianos, Erik Møse, Dmitry Dedov, *judges,*  
and André Wampach, *Deputy Section Registrar,*

Having deliberated in private on 15 September 2015,

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

**PROCEDURE**

1.  The case originated in an application (no. 36503/11) against the Republic of Azerbaijan lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by three Azerbaijani nationals, Mr Fuad Ali oglu Gahramanli (*Fuad Əli oğlu Qəhrəmanlı*), Mr Zalimkhan Adil oglu Mammadli (*Zəlimxan Adil oğlu Məmmədli*) and Mr Namizad Heydar oglu Safarov (*Namizəd Heydər oğlu Səfərov*) (“the applicants”), on 1 June 2011.

2.  The applicants were represented by Mr H. Hasanov, a lawyer practising in Azerbaijan. The Azerbaijani Government (“the Government”) were represented by their Agent, Mr Ç. Asgarov.

3.  The applicants alleged, in particular, that the election in their electoral constituency had not been free and fair owing to numerous instances of electoral fraud and that their right to stand for election had been infringed due to the relevant authorities’ failure to effectively address their complaints concerning election irregularities.

4.  On 9 December 2013 the application was communicated to the Government.

**THE FACTS**

**I.  THE CIRCUMSTANCES OF THE CASE**

5.  The applicants were born in 1975, 1957 and 1955 respectively and live in Baku.

6.  **The applicants stood as candidates for the opposition parties in the parliamentary elections of 7 November 2010** in the single-mandate Khatai First Electoral Constituency No. 33. Mr Fuad Gahramanli was nominated by the coalition of the Popular Front and Musavat parties, Mr Zalimkhan Mammadli by the Classic Popular Front Party and Mr Namizad Safarov by the Karabakh electoral bloc.

7.  **The constituency was divided into thirty-five electoral precincts, with one polling station in each precinct. It is apparent that there were a total of eight candidates running for election in the constituency**.

8.  According to the official election results, **Mr H.M., the candidate nominated by the ruling Yeni Azerbaijan Party, won the election** with 9,805 votes. **Mr Zalimkhan Mammadli finished second** with 1,893 votes, **Mr Fuad Gahramanli third** with 1,571 votes and **Mr Namizad Safarov last** with 157 votes.

A.  The applicants’ complaints concerning alleged irregularities on election day

9.  **On 10 November 2010 the applicants, together with one other candidate, jointly lodged nearly identical complaints with the Constituency Electoral Commission (the “ConEC”) and the Central Electoral Commission (the “CEC”).** **They complained that the election results had not reflected the true opinion of the voters** because there had been **numerous instances of electoral fraud and irregularities on election day, and they requested the annulment of the election results in their constituency**. They alleged that:

(a)  **In all the constituency polling stations, employees of the Khatai District Executive Authority and people affiliated with Mr H.M. had, in an organised manner, brought a number of persons not registered as voters into constituency polling stations to cast voting ballots**;

(b)  There had been instances of **ballot-stuffing** in numerous polling stations;

(c)  **The number of ballots cast in all the polling stations had been more than three times higher than the number of voters who had come to cast votes in all the polling stations;**

(d)  In one polling station, **observers and consultative members of precinct electoral commissions (“PECs”) (commission members with no voting rights) had been prevented from participating in the vote-counting process.**

10.  The applicants also requested that their presence be ensured at the commission hearings concerning their complaints.

11.  In support of their allegations, the applicants submitted to the electoral commissions more than a hundred statements (*akt*) made by election observers documenting specific instances of the irregularities complained of.

12.  The applicants submitted copies of approximately fifty of the above‑mentioned statements to the Court concerning alleged irregularities in Polling Stations nos. 4, 5, 6, 9, 10, 11, 13, 14, 16, 18, 19, 20, 21, 23, 24, 25, 28, 29, 30, 33, 34 and 35. Some examples of those statements are summarised below.

13.  Two observers in Polling Station no. 34 claimed to have witnessed an incident of ballot-box stuffing by two PEC members. They noted that, although fewer than 240 voters had been counted throughout the day, a total of 534 ballots had been found in the ballot box and officially counted.

14.  Three observers in Polling Station no. 9 witnessed an incident where the PEC chairman had given a stack of several pre-marked ballots to a voter, who then accidentally dropped them on the floor near the ballot box. Despite this, the ballots were gathered up and put into the ballot box in plain view of all those present. In a separate statement, the same three observers noted two other incidents of similar ballot-box stuffing allegedly initiated by the PEC chairman.

15.  Three observers in Polling Station no. 19 noted that, although a total of only 259 voters had been counted throughout the day, the number of ballots found inside the ballot box at the end of the day had exceeded 400.

16.  One consultative member of the PEC and two observers in Polling Station no. 18 noted that they had been prevented from standing at a place where they could observe, in an unobstructed manner, the checking of voters’ forefingers for election ink. This had presumably been done by persons in charge in the precinct,

17.  Three observers in Polling Station no. 25 noted that, although a total of only 235 voters had been counted throughout the day, 496 ballots had been found in the ballot box. The ballot box contained clumps of ballots, suggesting that ballot-box stuffing had taken place.

18.  Observers in a number of other polling stations had also noted similarly significant differences between the numbers of ballots in the ballot boxes and the numbers of voters who had been observed casting votes throughout the day.

B.  Examination of the complaint by the CEC

19.  **According to the applicants, they did not receive any reply from the ConEC and their complaint had been examined by the CEC only**.

20.  **On 13 November 2010 the CEC extended the statutory three-day period for examining the complaint for an indefinite period of time, noting that “additional enquiries” were required**.

21.  On 21 November 2010, R.I., the member of **the CEC’s expert** group who had been charged with dealing with the complaint delivered his opinion, **stating that the complaint should be dismissed as unsubstantiated**.

22.  By a decision of 21 November 2010, the text of which was essentially a repetition of the opinion delivered by the expert R.I., the CEC dismissed the applicants’ complaint as unsubstantiated. It appears that the **applicants were not present at the CEC hearing**.

23.  **In its decision, the CEC noted that the applicants should first have taken their complaints to the relevant PECs**. **They could then have appealed against the decisions of the various PECs to the ConEC, and only then should they have complained to the CEC, whereas ‒ in breach of the above procedure ‒ they had applied directly to the CEC. The CEC nevertheless decided to examine the complaint on the merits**.

24.  As to the merits of the complaint, **the CEC found, in particular, that “the majority of the observers’ statements** [as submitted by the applicants] **were of a general character and did not reflect the principle that an observation must be based on fact”.** It furthermore found that a number of the statements contained an assessment of the alleged irregularity based solely on observers’ **“subjective opinions**”. As an example of this, the CEC mentioned the statement of three observers from Polling Station no. 25 (see paragraph 17 above).

25.  Furthermore, **the CEC noted that the information in the observers’ statements which the applicants submitted** ‒ of which there were more than hundred ‒ **was refuted by the statements of over one hundred other observers from “all thirty-five polling stations” who had not registered any breaches of electoral law that could affect the election results**. According to the CEC, some of those observers represented the opposition. In particular, the CEC mentioned the names of a number of observers from Polling Stations nos. 3, 4, 6, 8, 9 and 15 who, according to the CEC, “had confirmed that no breaches of the electoral legislation had been observed”. Moreover, the CEC noted that PEC members in all the polling stations had stated that, on election day, they had not received any statements or complaints by any observer or candidate concerning any election irregularities and that the election process in their respective polling stations had been lawful and conducted under adequate conditions.

26.  **In conclusion, the CEC found that the examination of the written evidence refuted the allegations made by the applicants and that no grounds for invalidating the election results could be established.**

C.  Court proceedings

27.  On 25 November 2010 the applicants, together with one other candidate, lodged an appeal against the CEC decision with the Baku Court of Appeal. In the appeal, they reiterated the complaints made to the CEC about the alleged irregularities on election day. They also complained that ‒ contrary to the requirements of Article 112-1.7 of the Electoral Code ‒ their presence at the CEC hearing had not been ensured and that the CEC had deliberately not investigated the serious allegations of electoral fraud and irregularities.

28.  By a judgment of 26 November 2010 the Baku Court of Appeal dismissed the applicants’ appeal, mostly reiterating the CEC’s reasoning. In particular, it noted that the applicants and their observers had not immediately complained of the alleged irregularities directly to the relevant PECs on election day. It furthermore found that the CEC had properly investigated the allegations and had found that they had been refuted by a number of other observers representing various political parties, including opposition parties, who had stated that no serious irregularities had taken place in any polling station.

29.  A copy of the Baku Court of Appeal’s judgment was made available to the applicants on 30 November 2010.

30.  In the meantime, on 22 November 2010 the CEC had sent its final election results record and other relevant documents for review and final approval by the Constitutional Court. On 29 November 2010 the Constitutional Court confirmed the country-wide election results, including the election results in the applicants’ constituency, as final.

31.  On 1 December 2010 the applicants lodged an appeal with the Supreme Court against the Baku Court of Appeal’s judgment. They reiterated the complaints and arguments raised before the CEC and the Baku Court of Appeal. They also complained of the following:

(a)  as to the CEC’s and the appellate court’s remark that the irregularities allegedly observed on election day had not been communicated to the PECs immediately on that same day, the applicants noted that it had been precisely the conduct of the PECs ‒ which had created a hostile environment for opposition observers and had themselves been largely responsible for those irregularities ‒ that had made it impossible or difficult for the applicants and their observers to attempt to deal with the irregularities at the PEC level;

(b)  both the CEC and the Baku Court of Appeal had given more weight to the statements of pro-Government observers, which had assessed the election process positively, than to those of the applicants’ observers. The CEC and the Baku Court of Appeal did not explain the reasons for doing so. Moreover, while the CEC noted that positive statements about the conduct of the election had been made even by some observers from opposition parties, the applicants claimed the CEC had simply fabricated the existence of such statements by purported pro-opposition observers.

32.  On 6 December 2010 the Supreme Court dismissed the applicant’s appeal, agreeing with the lower court’s reasoning. It also added that the applicants’ appeal and the Baku Court of Appeal’s judgment had to be assessed in the light of Article 63.4 of the Law on the Constitutional Court, which stated that the Constitutional Court’s decisions were final and could not be subject to quashing, amendment or official interpretation by any authority or person. In this regard, the Supreme Court reasoned as follows:

“The results of the [parliamentary] elections of 7 November 2010 were recognised as valid by [the CEC’s] election results record of 22 November 2010 and the candidates elected as members of parliament from all 125 electoral constituencies were determined.

The aforementioned results record was approved by the CEC decision of 22 November 2010, and [on the same date] the final election results record, together with the [ConEC] results records and additional documents, were submitted to the Constitutional Court for verification and approval of the election results.

By a decision of the Plenum of the Constitutional Court on the results of the [parliamentary] elections of 7 November 2010 ..., dated 29 November 2010, the CEC’s final results record of 22 November 2010 was deemed compliant with the requirements of Articles 100.2, 100.12, 108.2 and 171.2 of the Electoral Code of the Republic of Azerbaijan, and the election results concerning 125 electoral constituencies, including Khatai First Electoral Constituency no. 33, were approved, that decision becoming final at the moment of its delivery.

It follows from that decision that the Constitutional Court did not establish any circumstances that may have taken place during the voting or the determination of the election results that could have prevented the establishing of the will of the voters in Khatai First Electoral Constituency no. 33.

Taking into account the fact that the aforementioned decision [of the Constitutional Court] is final and not subject to quashing, amendment or official interpretation by any authority or person, the court considers that the judgment of the appellate court [dismissing the applicants’ complaints] must be upheld.”

**II.  RELEVANT DOMESTIC LAW**

A.  Electoral Code

1.  Electoral commissions: system, composition and decision-making procedure

33.  Elections and referenda are organised and carried out by electoral commissions which are competent to deal with a wide range of issues relating to the electoral process (Article 17). There are three levels of electoral commissions: (a) the Central Electoral Commission (CEC); (b) constituency electoral commissions (ConECs); and (c) precinct (polling station) electoral commissions (PECs) (Article 18.1).

34.  Each electoral commission at every level has a chairperson and two secretaries who are elected by open voting by members of the relevant electoral commission. The chairperson of each electoral commission at every level must be a representative of the political party holding the majority of parliamentary seats in the National Assembly. One of the secretaries must be a representative of the political parties holding the minority of parliamentary seats, and the other one a representative of “independent” members of parliament who are not formally affiliated with any political party (Article 19.3).

35.  Meetings of the electoral commissions at every level may be convened either by the chairperson or by at least one third of the relevant commission’s members (Article 19.5). The quorum for meetings of any electoral commission is at least two-thirds of the members who have voting rights (Article 19.10). The qualified majority vote of at least two-thirds of the members who are in attendance is required for the adoption of decisions of any commission at any level (Articles 28.2, 34.3 and 39.3).

36.  The CEC consists of eighteen members who are elected by the National Assembly. Six members of the CEC are directly nominated by and represent the political party holding a majority of seats in the National Assembly, six members are nominated by and represent members of parliament who are not affiliated with any political party (independents), and six members are nominated by and represent all the remaining political parties holding a minority of parliamentary seats. Out of the six nominees representing the independent members of parliament, two candidates are nominated “in agreement” with the “interested parties”: one of the nominees is agreed by the representatives of the majority party and the other is agreed by the representatives of the minority parties (Article 24).

37.  Each ConEC consists of nine members who are appointed by the CEC. Three members of the ConEC are nominated by the CEC members representing the parliamentary majority party, three members are nominated by the CEC members representing the parliamentary minority parties, and three members are nominated by the CEC members representing the members of parliament who are not affiliated with any political party. Local branches of the relevant political parties may suggest candidates to ConEC membership for nomination by the CEC members representing the relevant parties. Out of the three candidates nominated by the CEC members representing the members of parliament who are not affiliated with any political party, two candidates are nominated “in agreement” with the “interested parties”: one of the nominees is agreed with the CEC members representing the parliamentary majority party and the other is agreed with the CEC members representing the parliamentary minority parties (Article 30).

38.  Each PEC consists of six members appointed by the relevant ConEC. Two members of the PEC are nominated by the ConEC members representing the parliamentary majority party, two members are nominated by the ConEC members representing the parliamentary minority parties, and two members are nominated by the ConEC members representing the members of parliament who are not affiliated with any political party. Local branches of the relevant political parties may suggest candidates for PEC membership for nomination by the ConEC members representing the relevant parties. As to candidates for PEC membership nominated by the ConEC members representing the members of parliament who are not affiliated with any political party, these candidates may also be suggested to the relevant ConEC members by voters or voters’ initiative groups. These candidates must be citizens of the Republic of Azerbaijan who permanently reside within the territory of the relevant electoral constituency (Article 36).

2.  Examination of electoral disputes

39.  Candidates and other interested parties may complain about decisions or actions (or omissions to act) violating the electoral rights of candidates or other interested parties within three days of the publication or receipt of such decisions or the occurrence of such actions (or omissions) or within three days of an interested party having become aware of such decisions or actions (or omissions) (Article 112.1).

40.  Such complaints may be submitted directly to a higher electoral commission (Article 112.2). If a complaint is first decided by a lower electoral commission, a higher electoral commission may quash its decision or adopt a new decision on the merits of the complaint or remit the complaint for a fresh examination (Article 112.9). Decisions or actions (or omissions to act) of a ConEC may be appealed against to the CEC, and decisions or actions (or omissions to act) of the CEC may be appealed against to the appellate court (Article 112.3).

41.  If the examination of the complaint reveals a suspicion that a criminal offence has been committed, the relevant prosecuting authority can be informed thereof. The CEC must adopt a reasoned decision in this regard. The relevant prosecution authority must examine this information within a three-day period (Article 112.4).

42.  While examining requests for annullment of the election of a specific candidate, the relevant electoral commission has the right to hear submissions from citizens and officials as well as to obtain the requisite documents and evidential material (Article 112.8).

43.  The relevant electoral commission shall adopt a decision on any complaint submitted during the election period and deliver it to the complainant within three days of the receipt of such complaint, except for complaints submitted on election day or the day after election day, which shall be examined immediately (Article 112.10).

44.  For the purposes of investigating complaints concerning breaches of electoral rights, the CEC shall create an expert group consisting of nine members (Article 112-1.1).

45.  If a complainant expresses a wish to participate in the hearing of an electoral commission examining his complaint, he or she must be informed of the time and place of the hearing one day in advance (Article 112-1.7).

46.  Complaints concerning decisions of electoral commissions shall be examined by courts within three days (unless the Electoral Code provides for a shorter period). The period for lodging an appeal against a court decision is also three days (Article 112.11).

47.  Persons illegally interfering with the election process and otherwise violating electoral rights of voters and candidates may bear criminal, civil or administrative responsibility under the Criminal Code, the Civil Code or the Code of Administrative Offences (Article 115).

3.  Vote-counting, tabulation and approval of election results

48.  After the counting of votes in a polling station at the end of election day, the PEC draws up an election results record (*protokol*), in three original copies, documenting the results of the voting in the polling station (Articles 106.1‑106.6). One copy of the PEC results record, together with other relevant documents, is then submitted to the relevant ConEC within twenty‑four hours (Article 106.7). The ConEC verifies whether each PEC results record and documents attached to it comply with the law and whether there are any inconsistencies (Article 107.1). After submission of all the PEC results records, the ConEC tabulates, within two days of election day, the results from the different polling stations and draws up a results record, in three original copies, reflecting the aggregated results of the vote in the constituency (Articles 107.2 -107.7). One copy of the ConEC results record, together with other relevant documents, is then submitted to the CEC within two days of election day (Article 107.4). The CEC verifies whether the ConEC results records comply with the law and whether they contain any inconsistencies (Article 108.1) and draws up its own final results record reflecting the results of the elections in all constituencies (Article 108.2).

49.  The Constitutional Court reviews and approves the results of the elections (Article 171.1). For this purpose, the CEC conducts a review of the ConEC results records, together with other relevant documents over a period of no more than twenty days following election day, and then submits them to the Constitutional Court within forty-eight hours (Article 171.2).

50.  Within ten days of receipt of the above documents the Constitutional Court determines, with the assistance of experts, whether they are in accordance with the requirements of the Electoral Code. If necessary, this ten-day period may be extended (Article 171.3).

B.  Law on the Constitutional Court

51.  Article 63.4 of the Law on the Constitutional Court states:

“A decision of the Plenum of the Constitutional Court shall be final and cannot be cancelled, changed or officially interpreted by any organ or official.”

**III.  RELEVANT INTERNATIONAL DOCUMENTS**

A.  Code of Good Practice in Electoral Matters

52.  The relevant excerpts from the Code of Good Practice in Electoral Matters (Guidelines and Explanatory Report) (CDL-AD (2002) 23 rev), adopted by the European Commission for Democracy Through Law (“the Venice Commission”) at its 51st and 52nd sessions (5-6 July and 18‑19 October 2002), read:

“GUIDELINES ON ELECTIONS

...

3. Procedural guarantees

3.1. Organisation of elections by an impartial body

a.  An impartial body must be in charge of applying electoral law.

b.  Where there is no longstanding tradition of administrative authorities’ independence from those holding political power, independent, impartial electoral commissions must be set up at all levels, from the national level to polling station level.

c.  The central electoral commission must be permanent in nature.

d.  It should include:

i.  at least one member of the judiciary;

ii.  representatives of parties already in parliament or having scored at least a given percentage of the vote; these persons must be qualified in electoral matters.

It may include:

iii.  a representative of the Ministry of the Interior;

iv.  representatives of national minorities.

e.  Political parties must be equally represented on electoral commissions or must be able to observe the work of the impartial body. Equality may be construed strictly or on a proportional basis...

...

h.  It is desirable that electoral commissions take decisions by a qualified majority or by consensus.

...

3.3. An effective system of appeal

a.  The appeal body in electoral matters should be either an electoral commission or a court. For elections to Parliament, an appeal to Parliament may be provided for in first instance. In any case, final appeal to a court must be possible.

b.  The procedure must be simple and devoid of formalism, in particular concerning the admissibility of appeals.

...

d.  The appeal body must have authority in particular over such matters as the right to vote – including electoral registers – and eligibility, the validity of candidatures, proper observance of election campaign rules and the outcome of the elections.

e.  The appeal body must have authority to annul elections where irregularities may have affected the outcome. It must be possible to annul the entire election or merely the results for one constituency or one polling station. In the event of annulment, a new election must be called in the area concerned.

f.  All candidates and all voters registered in the constituency concerned must be entitled to appeal. ...

g.  Time-limits for lodging and deciding appeals must be short (three to five days for each at first instance).

h.  The applicant’s right to a hearing involving both parties must be protected.

i.  Where the appeal body is a higher electoral commission, it must be able ex officio to rectify or set aside decisions taken by lower electoral commissions.

...

EXPLANATORY REPORT

...

3.1. Organisation of elections by an impartial body

68.  Only transparency, impartiality and independence from politically motivated manipulation will ensure proper administration of the election process, from the pre‑election period to the end of the processing of results.

69.  In states where the administrative authorities have a long-standing tradition of independence from the political authorities, the civil service applies electoral law without being subjected to political pressures. It is therefore both normal and acceptable for elections to be organised by administrative authorities, and supervised by the Ministry of the Interior.

70.  However, in states with little experience of organising pluralist elections, there is too great a risk of government’s pushing the administrative authorities to do what it wants. This applies both to central and local government - even when the latter is controlled by the national opposition.

71.  This is why independent, impartial electoral commissions must be set up from the national level to polling station level to ensure that elections are properly conducted, or at least remove serious suspicions of irregularity.

...

3.3. An effective system of appeal

92.  If the electoral law provisions are to be more than just words on a page, failure to comply with the electoral law must be open to challenge before an appeal body. This applies in particular to the election results: individual citizens may challenge them on the grounds of irregularities in the voting procedures. It also applies to decisions taken before the elections, especially in connection with the right to vote, electoral registers and standing for election, the validity of candidatures, compliance with the rules governing the electoral campaign and access to the media or to party funding.

93.  There are two possible solutions:

- appeals may be heard by the ordinary courts, a special court or the constitutional court;

- appeals may be heard by an electoral commission. There is much to be said for this latter system in that the commissions are highly specialised whereas the courts tend to be less experienced with regard to electoral issues. As a precautionary measure, however, it is desirable that there should be some form of judicial supervision in place, making the higher commission the first appeal level and the competent court the second.

...

95.  Appeal proceedings should be as brief as possible, in any case concerning decisions to be taken before the election. On this point, two pitfalls must be avoided: first, that appeal proceedings retard the electoral process, and second, that, due to their lack of suspensive effect, decisions on appeals which could have been taken before, are taken after the elections. In addition, decisions on the results of elections must also not take too long, especially where the political climate is tense. This means both that the time limits for appeals must be very short and that the appeal body must make its ruling as quickly as possible. Time limits must, however, be long enough to make an appeal possible, to guarantee the exercise of rights of defence and a reflected decision. A time limit of three to five days at first instance (both for lodging appeals and making rulings) seems reasonable for decisions to be taken before the elections. It is, however, permissible to grant a little more time to Supreme and Constitutional Courts for their rulings.

96.  The procedure must also be simple, and providing voters with special appeal forms helps to make it so. It is necessary to eliminate formalism, and so avoid decisions of inadmissibility, especially in politically sensitive cases.

...

99.  Standing in such appeals must be granted as widely as possible. It must be open to every elector in the constituency and to every candidate standing for election there to lodge an appeal. A reasonable quorum may, however, be imposed for appeals by voters on the results of elections.

100.  The appeal procedure should be of a judicial nature, in the sense that the right of the appellants to proceedings in which both parties are heard should be safeguarded.

101.  The powers of appeal bodies are important too. They should have authority to annul elections, if irregularities may have influenced the outcome, i.e. affected the distribution of seats. This is the general principle, but it should be open to adjustment, i.e. annulment should not necessarily affect the whole country or constituency – indeed, it should be possible to annul the results of just one polling station. This makes it possible to avoid the two extremes – annulling an entire election, although irregularities affect a small area only, and refusing to annul, because the area affected is too small. In zones where the results have been annulled, the elections must be repeated.

102.  Where higher-level commissions are appeal bodies, they should be able to rectify or annul ex officio the decisions of lower electoral commissions.”

B.  The Organisation for Security and Cooperation in Europe, Office for Democratic Institutions and Human Rights (OSCE/ODIHR) Election Observation Mission Final Report on the Parliamentary Elections of 7 November 2010 (Warsaw, 25 January 2011) (“the OSCE Report”)

53.  The relevant excerpts from the OSCE Report read as follows:

“IV.  ELECTION SYSTEM AND THE LEGAL FRAMEWORK

A.  ELECTION SYSTEM

Parliamentary elections are conducted under a majoritarian system. Members of parliament are elected in 125 single-mandate constituencies for a five-year term, in one round of voting. The candidate who obtains the highest number of votes is considered elected. ...

...

V.  THE ELECTION ADMINISTRATION

The 7 November parliamentary elections were administered by a three-tiered system of election administration, headed by the 18-member CEC. There are 125 ConECs and 5,175 PECs. These election commissions are permanent bodies appointed for a five-year term. Members of the CEC are elected by parliament, ConECs are appointed by the CEC, and PECs by the relevant ConECs.

...

According to the Election Code, the composition of all election commissions reflects the representation of political forces in the parliament: three equal quotas are reserved for members nominated by the parliamentary majority (i.e. YAP), parliamentarians elected as independent candidates, and the parliamentary minority (defined as the remaining political parties represented in the parliament).

This formula remains highly contentious, since in practice it establishes the domination of the election administration by pro-government forces, which have a decisive majority in all commissions. Moreover, the chairpersons of all election commissions are by law nominees of the parliamentary majority. This domination undermines confidence in the independence and impartiality of election administration bodies and does not ensure that they enjoy public confidence. The OSCE/ODIHR and the Venice Commission have repeatedly recommended that the formula be revised in a manner which would ensure that election commissions are not dominated by pro-government forces and enjoy public confidence, in particular the confidence of political parties contesting the elections. This recommendation has not been addressed.

...

OSCE/ODIHR EOM LTOs assessed the performance of ConECs as generally efficient and professional as far as the technical preparations of the election process were concerned. However, they expressed serious concerns regarding the impartiality of ConECs, which generally appeared to favor YAP candidates or incumbent independent candidates. The lack of impartiality of ConECs became particularly apparent during the candidate registration process and in the handling of electoral disputes by ConECs.

...

XIV. ELECTION DAY

While election day was generally calm and peaceful, international observers reported a high occurrence of serious irregularities and procedural violations, including ballot box stuffing. ...

A. OPENING AND VOTING

...

Overall, international observers assessed voting positively in 89 per cent of polling stations visited, while voting was assessed negatively in a considerable 11 per cent of the 1,247 polling stations visited (127 polling stations), indicating systemic irregularities. The most widely observed procedural violations during voting concerned inking, an important safeguard against multiple voting. In 12 per cent of polling stations visited, not all voters were checked for traces of invisible ink; in 8 per cent, not all voters were marked with ink. Twenty-three PECs where voting was observed did not check voters for ink at all, and 12 PECs did not ink any voters. International observers reported from seven polling stations that voters who had already been inked were nonetheless allowed to vote. ...

International observers noted a series of identical signatures on the voter list in 100 of the polling stations visited, and ballot box stuffing in a significant 63 cases. Group voting was observed in 7 per cent of polling stations visited, proxy voting in 2 per cent, and multiple voting in 1 per cent. In 25 polling stations visited, voters were allowed to vote although they were not able to produce any of the prescribed identity documents. ...

In 7 per cent of polling stations visited, not all voters marked their ballots in secret. International observers also noted 12 cases where one person was “assisting” numerous voters, potentially undermining the secrecy of the vote. ...

International observers reported 65 instances of tension in and outside polling stations, 20 attempts to influence for whom voters should cast their ballots, and 9 cases of intimidation of voters. They also noted instances of campaigning or the presence of campaign material in the vicinity of and inside polling stations. Unauthorized persons were identified in 79 polling stations and interfered in or directed the process in 19 instances.

Proxies of candidates, parties and electoral blocs were present in 91 per cent of polling stations visited, and domestic non-party observers, in 56 per cent. ... International observers noted some cases where observers and proxies were expelled from polling stations and received reports of them being pressured, detained or physically assaulted. Regrettably, international observers were restricted in their observation in 114 polling stations.

B. COUNTING

While 105 of the 152 counts observed were evaluated positively, observers assessed the vote count negatively in a 47 instances (32 per cent), a significantly high number. In 14 cases, the number of ballots in the mobile or stationary ballot box was higher than the number of signatures on the voter list or the written requests for mobile voting, and 31 ballot boxes contained clumps or stacks of ballots, suggesting that ballot box stuffing had occurred earlier. In a few cases, the PEC counted the ballots in a different room. Election results were tampered with in 13 polling stations.

Significant procedural errors and omissions were reported from over one quarter of counts observed. A considerable number of PECs did not perform basic reconciliation procedures required by law, such as counting and entering into the protocols the number of voters’ signatures on the voter lists (61 cases), of DVCs [de-registration voting card] retained (25 cases), or of requests for mobile voting (25 cases). Twenty‑eight PECs did not cancel unused ballots after the end of voting, and 33 did not place spoiled ballots in a separate envelope. Fifty-one PECs did not enter all figures from the reconciliation procedures in the draft protocol before opening the ballot boxes, and 41 did not crosscheck them for mathematical consistency. In five polling stations where the count was observed, ballot box seals were not intact when the boxes were opened, and in 13 cases, their serial numbers did not match those entered in the draft protocol during the opening of the polling station.

Ballot validity was not always determined in a reasonable and consistent manner (16 and 14 cases, respectively), with PECs not voting on the validity of disputed ballots in 42 of the counts observed. In 31 counts observed, not everybody present was able to see clearly how ballots had been marked, and in 12 instances, PEC members or observers were not allowed to examine ballots upon request. In 48 counts observed, the data established was not announced before being entered into the draft protocol. In ten polling stations, unauthorized persons were present during the count, and in six, such persons interfered in or directed the process. Persons other than PEC members were seen participating in the count in 12 polling stations. ...

...

XVI. POST-ELECTION COMPLAINTS AND APPEALS

A. ADJUDICATION OF POST-ELECTION COMPLAINTS BY THE CEC

The CEC reviewed, up to 22 November, over 120 complaints, 73 of which requested the invalidation of results in 50 constituencies. Plaintiffs cited grave irregularities such as ballot stuffing, multiple voting and proxy voting, in particular in military polling stations, voting by unauthorized persons, interference and pressure by executive officials, obstruction of observers, breaches of the law during the vote count and the tabulation of results, and discrepancies between PEC and ConEC protocols. They also requested the prosecution of officials and individuals who allegedly committed electoral offences.

The CEC review of complaints lacked due process and transparency; the investigation was conducted solely by one member of the expert group to whom the case was assigned and whose opinion was presented only briefly and was always adopted unquestioningly by the majority of CEC members. The substance of the complaints was not discussed during the CEC sessions. Instead of attempting to ascertain the authenticity of the dispute, it invoked formalistic reasons to deny a thorough examination of the complaints. On one occasion, the CEC debated whether a complaint should be discussed on its merits, because there was a difference between the plaintiff’s signature on the complaint and the signature on his ID, while no effort was made to contact the plaintiff. Some complaints were dismissed on the grounds that there were differences in the signatures of observers who signed several statements on violations and because the CEC estimated that observers could not have visited a certain number of polling stations within the time indicated in the statements.

Documents which had been submitted as evidence, such as PEC protocols, were not examined or discussed during the sessions, under the pretext that they were not the originals. In response to complaints alleging that groups of people were carried around by buses and voted multiple times, the CEC chairperson stated during a session that the CEC only investigates events inside polling stations and that all else does not concern the CEC. Plaintiffs attended the sessions where their complaints were being reviewed only on very few occasions and complained that they were given very short notice before the session. They also claimed that PECs and ConECs in several instances refused to accept their complaints. Even though ConECs at times sent their decisions by mail, with delivery to the plaintiffs taking several days, the CEC dismissed the subsequent appeal on the grounds that they were submitted past the three-day legal deadline.

...

B. ADJUDICATION OF APPEALS BY THE COURTS

Over 60 appeals against CEC decisions were lodged with the Baku Court of Appeal, all of which were dismissed. The court upheld all CEC decisions without proper investigation of the appellants’ arguments. The court in all but a few cases did not call and did not examine testimonies of witnesses suggested by the appellants. The reasons why the court did not call witnesses and hear testimonies were not indicated in the decisions, even though the Code of Civil Procedures clearly states that the section of a court decision which is motivating the decision should mention the reasons for refusal to accept any evidence referred to by the persons participating in a case.

Requests by appellants to have original documents which they had previously submitted to the CEC returned to them were routinely refused. In one case, the appellant requested the court to oblige the CEC to provide the footage from the video camera installed in a polling station as evidence. The CEC lawyer claimed that the video recordings were in the archive and could not be submitted. The Court did not address the request either during the hearing or in its decision. Results protocols certified by PECs which were different from those posted on the CEC website were presented during hearings but were not taken into account by the court, which accepted the CEC’s explanation that after recounts no discrepancies were found.

The OSCE/ODIHR EOM is aware of approximately 30 cases that were reviewed by the Supreme Court. Requests to the court by the OSCE/ODIHR EOM for information regarding election-related cases went unanswered. The court did not address the shortcomings and deficiencies in the adjudication of complaints by the CEC and the Baku Court of Appeal and dismissed all appeals. Attorneys of the appellants claimed they were given notice of only an hour or two before the hearings. Overall, the courts failed to provide effective remedy and on occasions even failed to comply with domestic legislation.

C. COMPILATION AND ADOPTION OF THE FINAL RESULTS PROTOCOL

The CEC compiled and sent to the Constitutional Court the final protocol of the election results on 22 November, even before the deadlines for challenging CEC decisions in the courts had expired. The protocol was signed by 17 out of 18 CEC members. The Constitutional Court validated the election results by a final decision on 29 November, when cases were still pending before the Baku Court of Appeal and deadlines for challenging Court of Appeal’s decisions to the Supreme Court had not expired. This effectively deprived stakeholders of the opportunity to exercise their constitutional right to seek legal redress.”

C.  Explanatory memorandum by Mr Pedro Agramunt and Mr Tadeusz Iwiński, co-rapporteurs, to Resolution 2062 (2015) of the Parliamentary Assembly of the Council of Europe, “The functioning of democratic institutions in Azerbaijan”

54.  The following are extracts from the explanatory memorandum:

“**4.  Elections**

...

27.  Concerning the Electoral Code, in March 2008, the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe (OSCE/ODIHR) and the Venice Commission prepared a joint interim opinion on the draft amendments to the Code. The [National Assembly] adopted the amendments on 2 June 2008. Another Venice Commission and OSCE/ODIHR joint opinion was adopted in June 2008 on the adopted amendments to the Electoral Code. Since then, the Electoral Code was further amended in June 2010, April 2012 and April 2013, but key issues were not tackled, in particular the reform of the composition of the electoral administration, which lacks independence.

28.  In their previous report on “The honouring of obligations and commitments by Azerbaijan” of 20 December 2012 the then co-rapporteurs expressed concern over the fact that previous Venice Commission recommendations had not been addressed. The biggest concerns were about the composition of the Central Electoral Commission and territorial electoral commissions, candidate registration, observers, the electoral roll and its accuracy, as well as the complaints and appeals procedure. Since then, the electoral code has not been amended to improve the composition of the electoral administration and candidates’ and voters’ registration, despite the Venice Commission recommendations:

29.  The Central Electoral Commission is appointed by parliament: one third of its members are proposed by the majority, one third by the minority and the last third by independent members of parliament. Although this could be seen as an appropriate system in theory, in practice, this formula provides pro-government forces with a decisive majority and results in a lack of commission members from the opposition. [Footnote: “... See also former election reports and joint Venice Commission and OSCE/ODIHR opinions issued in 2008, 2005, 2004 and 2003, in which it has been repeatedly stated, departing from the experience in past elections, commission members appointed by theoretically “independent” sections of the parliament or small parties tend, in reality, to vote in line with the governing party – see, among others, CDL-AD(2003)015, CDL-AD(2004)016rev, CDL-AD(2005)029 and CDL‑AD(2008)011.”] By law, all chairpersons of all electoral commissions are nominated by the parliamentary majority. Constituency electoral commissions are appointed by the Central Electoral Commission, and precinct electoral commissions are appointed by the relevant constituency electoral commissions. In view of the above, the composition of the commissions is detrimental to the independence of the electoral administration and thus undermines confidence in the electoral process.

...

32.  ... The importance of independence in the composition of electoral commissions has ... repeatedly been highlighted by the Venice Commission, which recommends that central electoral commissions include at least one member of the judiciary. These conclusions were subsequently reflected in the opinion of the Venice Commission on the draft amendments to the Electoral Code of the Republic of Azerbaijan.”

**THE LAW**

I.  **ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL No. 1 TO THE CONVENTION**

55.  **Relying on Article 3 of Protocol No. 1 to the Convention and Article 13 of the Convention, the applicants complained that, in the electoral constituency where they had run for the parliamentary election, there had been a number of serious irregularities and breaches of electoral law which had made it impossible to determine the true opinion of voters and had thus infringed their right to stand as candidates in free elections. The domestic authorities, including the electoral commissions and courts, had failed to properly examine their complaints and to investigate their allegations concerning the aforementioned irregularities and breaches of electoral law. In particular, the examination of their appeal by the Supreme Court had been deprived of all effectiveness because the election results had already been approved by the Constitutional Court. They also argued that the structural composition of the electoral commissions at all levels ‒ dominated by pro-government political forces as they were ‒ had allowed electoral fraud to be committed by commission members to the detriment of opposition candidates and had been one of the reasons for the failure to effectively investigate it.**

56.  Having regard to the special features of the present case, **the Court considers that this complaint falls to be examined only under Article 3 of Protocol No. 1 to the Convention and that no separate examination is necessary under Article 13**. Article 3 of Protocol No. 1 reads:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

A.  Admissibility

57.  The Court notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B.  Merits

1.  The parties’ submissions

58.  The Government submitted that the domestic legislation provided for an effective mechanism for the examination by the ConECs, the CEC, an appellate court and the Supreme Court of election-related complaints.

59.  As to the structural composition of the electoral commissions, the Government noted that at all three levels the commission members represented the three categories of political forces represented in the parliament: the majority party, the independents and the remaining (minority) parties. As each of these forces is represented equally by one‑third of commission members, the existing system ensured that no political force was in a dominant position compared to the other two.

60.  **The Government argued that the applicants’ electoral complaint had been comprehensively and thoroughly examined by the electoral commissions and the courts in accordance with the requirements of the Electoral Code and other applicable legislation.** The complaint had first been examined by a member of the CEC expert group who had produced an opinion before the CEC hearing. The CEC decision had been substantiated. The CEC had received statements from “a great number of observers ... representing various political parties, including the applicants’ [own] political parties”, which did not support the applicants’ allegations. On the basis of those statements, **the CEC had decided that the applicants’ allegations were groundless.**

61.  Lastly, **the Government noted that applicants had been duly informed of the Baku Court of Appeal hearing and that two of them had attended it and had been heard by the court. Two of the applicants were also present at the Supreme Court hearing**. As to the effectiveness of the examination of the appeal by the Supreme Court, the Government noted that the Supreme Court had not merely “mechanically referred” to the Constitutional Court’s decision approving the election results, but had also comprehensively examined all the relevant legal points of the appeal.

62.  **The applicants argued that the electoral commissions had not been independent but had operated under the influence and control of the Government, with the aim of creating various unfair advantages for the pro‑Government candidates.** While at first sight it might appear that representatives of the ruling party formally held only one-third of the seats in each electoral commission, in reality the remaining commission members ‒ representing both the independents and the parliamentary‑minority parties ‒ were also pro-ruling-party and had followed the instructions of the authorities. Moreover, by law, the chairperson of every electoral commission at each level was nominated by the parliamentary-majority party. Thus, in practice, the system allowed the pro-government forces to effectively dominate in each electoral commission.

63.  The applicants claimed that the relevant PECs had not only failed to address on the spot the irregularities that had allegedly taken place, but that the “majority of the violations of the law” had been actively encouraged by them. Despite this, the CEC had referred to statements by chairpersons and members of the relevant PECs ‒ in which the existence of irregularities was denied ‒ as a basis for rejecting the applicants’ complaints. It had also relied chiefly on the statements of observers representing pro-government political parties and “governmental NGOs”. The CEC had not explained why those statements were considered to constitute more reliable evidence than the applicants’ observers’ statements documenting the alleged irregularities. It had not questioned any of the applicants’ observers.

64.  According to the applicants, the Baku Court of Appeal’s judgment had lacked reasoning because it had failed to address the applicants’ arguments concerning the alleged irregularities and the unfairness of the CEC’s examination of those arguments.

65.  They also claimed that the Supreme Court had examined the applicants’ appeal in a superficial manner and had, moreover, dismissed it partly on the basis of an extraneous reason, namely the fact that the Constitutional Court had already approved the election results. Moreover, the premature approval of the election results by the Constitutional Court, which had taken place before the period for the applicants’ appeal to the Supreme Court had expired, reduced the overall effectiveness of the appeal to the Supreme Court as a remedy.

2.  The Court’s assessment

(a)  General principles

66.  **Article 3 of Protocol No. 1 enshrines a principle that is characteristic of an effective political democracy and is accordingly of prime importance in the Convention system** (see *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, § 47, Series A no. 113). This Article would appear at first to differ from the other provisions of the Convention and its Protocols, as it is phrased in terms of the obligation of the High Contracting Parties to hold elections under conditions which ensure the free expression of the opinion of the people, rather than in terms of a particular right or freedom. However, the Court has established that **it guarantees individual rights, including the right to vote and to stand for election** (ibid., §§ 46-51).

67.  The Court has consistently highlighted **the importance of the democratic principles underlying the interpretation and application of the Convention and has emphasised that the rights guaranteed under Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law** (see *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, § 58, ECHR 2005‑IX). **Nonetheless, those rights are not absolute. There is room for “implied limitations”, and Contracting States are given a margin of appreciation in this sphere** (see *Matthews v. the United Kingdom* [GC], no. 24833/94, § 63, ECHR 1999‑I; *Labita v. Italy* [GC], no. 26772/95, § 201, ECHR 2000‑IV; and *Podkolzina v. Latvia*, no. 46726/99, § 33, ECHR 2002‑II). **However, in the last resort it is for the Court to determine whether or not the requirements of Article 3 of Protocol No. 1 have been complied with. It must satisfy itself that the conditions imposed on the rights to vote and to stand for election do not curtail those rights to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate** (see *Mathieu-Mohin and Clerfayt*, cited above, § 52). **In particular, any conditions imposed must not thwart the free expression of the people in the choice of the legislature – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage** (see *Hirst (no. 2)*, cited above, § 62).

68.  Furthermore, the object and purpose of the Convention, which is an instrument for the protection of human rights, **requires its provisions to be interpreted and applied in such a way as to make their stipulations not theoretical or illusory but practical and effective** (see, among many other authorities, *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 33, *Reports of Judgments and Decisions* 1998‑I; *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, § 100, ECHR 1999‑III; and *Lykourezos v. Greece*, no. 33554/03, § 56, ECHR 2006‑VIII). **The right to stand as a candidate in an election, which is guaranteed by Article 3 of Protocol No. 1 and is inherent in the concept of a truly democratic regime, would be merely illusory if one could be arbitrarily deprived of it at any moment. Consequently, while it is true that States have a wide margin of appreciation when establishing eligibility conditions in the abstract, the principle that rights must be effective requires that the eligibility procedure contain sufficient safeguards to prevent arbitrary decisions** (see *Podkolzina*, cited above, § 35). **This principle requiring prevention of arbitrariness is equally relevant in other situations where the effectiveness of individual electoral rights is at stake** (see, *mutatis mutandis*, *Kovach v. Ukraine*, no. 39424/02, § 55, ECHR 2008).

69.  The Court has established that **the existence of a domestic system for the effective examination of individual complaints and appeals in matters concerning electoral rights is one of the essential guarantees of free and fair elections**. Such a system ensures an effective exercise of individual rights to vote and to stand for election, maintains general confidence in the State’s administration of the electoral process and constitutes an important device at the State’s disposal in achieving the fulfilment of its positive duty under Article 3 of Protocol No. 1 to hold democratic elections. Indeed, the State’s solemn undertaking under Article 3 of Protocol No. 1 and the individual rights guaranteed by that provision would be illusory if, throughout the electoral process, specific instances indicative of failure to ensure democratic elections are not open to challenge by individuals before a competent domestic body capable of effectively dealing with the matter (see *Namat Aliyev v. Azerbaijan*, no. 18705/06, § 81, 8 April 2010).

70.  The Court has also emphasized that **it is important for the authorities in charge of electoral administration to function in a transparent manner and to maintain impartiality and independence from political manipulation** (see *Georgian Labour Party v. Georgia*, no. 9103/04, § 101, ECHR 2008) **and for their decisions to be sufficiently well reasoned** (see *Namat Aliyev*, cited above, §§ 81-90).

(b)  Application of those principles to the present case

71.  **In the present case, the Court notes that the applicants complained of numerous instances of irregularities and breaches of electoral law** which had allegedly taken place during election day in various polling stations in their electoral constituency. They maintained that, due to the irregularities themselves as well as the domestic authorities’ failure to address them adequately, the election in their constituency had not been free and democratic and the official election results had not reflected the real opinion of the voters.

72.  **As for the applicants’ claims concerning the specific instances of alleged irregularities, the Court is not in a position to assume a fact-finding role by attempting to determine whether all or some of these alleged irregularities had taken place and, if so, whether they had amounted to irregularities capable of thwarting the free expression of the people’s opinion**. Owing to the subsidiary nature of its role, **the Court needs to be wary in assuming the function of a first-instance tribunal of fact where this is not rendered unavoidable by the circumstances of a particular case.** The Court’s task under Article 3 of Protocol No. 1 is rather to satisfy itself, from a more general standpoint, that the respondent State has complied with its obligation to hold elections under free and fair conditions and has ensured that individual electoral rights were exercised effectively (see *Namat Aliyev*, cited above, § 77).

73.  That said, **the Court considers that the applicants have put forward a very serious and “arguable” claim disclosing an apparent failure to hold free and fair elections in their constituency. In particular, they complained, *inter alia*, of unlawful interference in the election process by electoral commission members, undue influence on voter choice, obstruction of observers, and numerous instances of ballot-box stuffing. The Court considers that these types of irregularities, if duly confirmed as having taken place, were indeed potentially capable of thwarting the democratic nature of the elections. The Court further notes that the applicants’ allegations were based on relevant evidence**, consisting mainly of statements written and signed by observers who gave first-hand accounts of the alleged irregularities witnessed by them. **The Court is also cognisant of the OSCE Report** (see paragraph 53 above), **which indirectly corroborates the applicants’ claims. While this report did not contain any details relating specifically to the applicants’ constituency, it gave a general account of the most frequent problems identified during the election process, which were similar to those alleged by the applicants.**

74.  Since such a serious and arguable claim has been lodged by the applicants, **the respondent State is under an obligation to provide a system for undertaking an effective examination of the applicants’ complaints. Azerbaijani law did indeed provide for a system consisting of electoral commissions at different levels, whose decisions could subsequently be appealed against to the Court of Appeal and then further to the Supreme Court. The applicants duly made use of this system and it remains to be seen whether, in practice, the examination of the applicants’ claims was effective and devoid of arbitrariness.**

75.  **As for the examination of the applicants’ complaint by the CEC**, **the Court takes due note**, at the outset, **of the applicants’ argument that the electoral commissions, in general, lacked impartiality owing to their structural composition. In particular, one-third of the members of each commission at all levels, including the CEC, were nominated by or on behalf of the parliamentary-majority party**. In addition, another member, nominally representing independent members of parliament formally unaffiliated with any political party, was appointed “in agreement” with the majority party. Thus, seven out of eighteen CEC members, four out of nine members of each ConEC, and three out of six members of each PEC were either directly or indirectly appointed by the ruling party. In addition, chairmen of all commissions at all levels were appointed from among the members nominated by the ruling party. Pro-ruling-party forces thus had a relative majority *vis-à-vis* the representatives of any other political force in electoral commissions at every level, including the CEC which examined the applicants’ complaint in the present case. **While, at least at CEC level, this majority was not sufficient to automatically secure the qualified majority of at least two-thirds of the attendant members’ votes required for a decision (see paragraph 35 above), the Court takes note of the reports that commission members appointed by theoretically “independent” sections of the parliament or some small parties tended, in reality, to vote in line with the governing party** (see paragraph 54 above).

76.  Both the OSCE/ODIHR and the Venice Commission have opined that the above-mentioned structural composition of electoral commissions gave rise, in practice, to the domination of the election administration by pro-government forces and gave them a decisive majority in all commissions. Both the OSCE/ODIHR and the Venice Commission repeatedly recommended that the existing formula be revised in a manner which would eliminate such domination by pro-government forces; however, this recommendation has not so far been addressed.

77.  The above assessment and recommendations must be taken seriously in the context of elections in Azerbaijan, which have previously been assessed by reputable international observers as falling short of a number of democratic standards. In this connection, it should be noted that the Court itself has examined various election-related issues in a number of cases against Azerbaijan that have involved arbitrary decisions by electoral commissions in relation to opposition-oriented candidates (see, among others, *Namat Aliyev*, cited above; *Kerimova v. Azerbaijan*, no. 20799/06, 30 September 2010; *Mammadov v. Azerbaijan (no. 2)*, no. 4641/06, 10 January 2012; *Hajili v. Azerbaijan*, no. 6984/06, 10 January 2012; *Khanhuseyn Aliyev v. Azerbaijan*, no. 19554/06, 21 February 2012; and *Karimov v. Azerbaijan*, no. 12535/06, 25 September 2014).

78.  Although there can be no ideal or uniform system guaranteeing checks and balances between the different State powers or political forces within a body of electoral administration, **the Court shares the view that the proportion of pro-ruling-party members in all electoral commissions in Azerbaijan, including the CEC, is currently particularly high** (compare, *mutatis mutandis*, *Georgian Labour Party*, cited above, § 106). **The Court reiterates that, ultimately, the *raison d’être* of an electoral commission is to ensure the effective administration of free and fair voting in an impartial manner, which is achievable by virtue of a structural composition that guarantees its independence and impartiality but which would become impossible to achieve if the commission were to become another forum for political struggle between various political forces** (ibid., § 108).

79.  However, the Court considers that the present case, in isolation, does not require it to determine whether or not the method actually implemented for the structuring of the Azerbaijani electoral commissions ‒ and in particular the CEC ‒ was in itself compatible with the respondent State’s undertaking under Article 3 of Protocol No. 1. Nevertheless, having regard to the above considerations in the context of electoral complaints lodged by opposition candidates in general, **the Court finds that the method in question was one of the systemic factors contributing to the ineffectiveness of the examination by the CEC of the applicants’ election-related complaint in the present case. It falls to the Committee of Ministers to supervise, in the light of the information provided by the respondent State, the execution of the Court’s judgment and to follow up on the implementation of general measures and evolution of the system of electoral administration in line with the Convention requirements. In this connection, the Court considers that an effort by the respondent State envisioning a reform of the structural composition of the electoral commissions should be encouraged with the aim of improving the effectiveness of examination of individual election‑related complaints.**

80.  Turning to the manner in which the applicants’ particular case was examined**, the Court finds, for the following reasons, that the material in the case file and the Government’s submissions do not demonstrate that an adequate and comprehensive assessment of evidence was carried out by the CEC or that any genuine effort was made to determine the validity of the applicants’ claims.**

81.  In particular, the Court observes that, **despite the requirement of Article 112-1.7 of the Electoral Code (see paragraph 45 above) and the applicants’ express request to this effect, the applicants’ presence at the CEC hearing was not ensured**, thus depriving them of the possibility of arguing their position and challenging the opinion of the CEC expert group member, R.I. **In fact, it appears that the CEC may not even have held a genuine hearing, as in practice it routinely adopted an expert group member’s opinion unquestioningly, without discussing the substance of the complaints** (see, in this respect, the OSCE Report at paragraph 53 above).

82.  It does not appear that the CEC gave adequate consideration to the observers’ statements concerning the alleged irregularities that were submitted by the applicants as evidence in support of their complaint. **None of those observers was called to be questioned and no further investigation was carried out in respect of their allegations. In particular, many of the observers claimed that there had been serious discrepancies between the numbers of voters attending various polling stations and the numbers of ballots found inside the ballot boxes.** However, it has not been shown that the CEC expert group took any steps to actually investigate this matter. One obvious step would have been to review the attendance lists in the affected polling stations and examine whether the relevant numbers were consistent. Instead, the CEC presented somewhat dubious reasons for discrediting those statements. For example, the Court notes that the CEC described the statement made by three observers in Polling Station no. 25 as their “subjective opinions” (see paragraph 24 above), when it was clear that the statement in question did not contain any opinions but was rather a first‑hand observation including specific factual information requiring further investigation as to its veracity (see paragraph 17 above).

83.  The CEC referred, in general terms, to statements collected from some other observers denying any irregularities and argued that those statements refuted the applicants’ allegations. However, these purported statements were described by the CEC in a very vague manner and none was made available to the applicants or produced by the Government before the Court. No reasonable or convincing explanation was given by the CEC as to why the statements by those “other observers” were given more weight or considered more reliable than the evidence of a similar type presented by the applicants, which also consisted of observers’ statements.

84.  Moreover, the CEC referred to some explanations by unnamed PEC members denying any irregularities (see paragraph 25 above). Given that confirmation of the applicants’ allegations could potentially entail responsibility on the part of the PEC officials in question for election irregularities, it is not surprising that they would deny any wrongdoing. For this reason, the Court is not convinced that in the present case those explanations could be particularly helpful in determining the factual accuracy of the applicants’ claims (compare *Namat Aliyev*, cited above, § 83).

85.  The above shortcomings were not remedied by the domestic courts either. The Baku Court of Appeal merely reiterated and upheld the CEC’s findings, and copied its reasoning, without conducting an independent examination of the arguments raised or addressing the applicants’ complaints about the shortcomings in the CEC procedure.

86.  **As for the appeal before the Supreme Court, it was deprived of all effectiveness by the action of the Constitutional Court in approving the country-wide election results while the period afforded by law to the applicants for lodging an appeal with the Supreme Court was still pending. By the Supreme Court’s own admission, it was no longer able to take any decision affecting the election results in the applicant’s constituency because they had already been approved as final by the Constitutional Court.** The upshot of this situation was that **the domestic legal system allowed the Constitutional Court to finalise the entire election process, including the election results, while the applicants were still in the process of seeking redress for alleged breaches of their electoral rights in their constituency through the existing appeal system ‒ which was specifically designed for dealing with electoral disputes. The Constitutional Court’s decision deprived the remedy available to the applicants of all prospect of success and rendered the entire system for examining individual election‑related complaints futile and illusory in the applicants’ case**. Moreover, despite knowing of a number of pending individual complaints challenging the fairness of the election procedure and the lawfulness of the election results in particular constituencies, the Constitutional Court prematurely confirmed the country-wide election results as lawful, as if the outcomes of the pending proceedings were not important for the comprehensive assessment of the parliamentary elections as a whole.

87.  Based on the above, **the Court finds that the conduct of the electoral commissions and courts ‒ including the Constitutional Court ‒ in the present case, and their respective decisions, reveal an apparent lack of any genuine concern for combatting the alleged instances of electoral fraud and protecting the applicants’ right to stand for election. The applicants’ serious and arguable complaints concerning election irregularities were not effectively addressed at domestic level. The avenue of redress available to and pursued by the applicants was rendered futile by the Constitutional Court’s premature confirmation of the election results as final while the applicants’ appeal was still pending.**

**88.  There has accordingly been a violation of Article 3 of Protocol No. 1 to the Convention.**

**II.  ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION**

89.  In conjunction with the above complaint, **the applicants complained that candidates nominated by opposition parties, like themselves, had been discriminated against ‒ by various means ‒ by all the State executive authorities, electoral commissions, courts and Government-controlled media throughout the entire electoral process.**

They relied on Article 14, which provides:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

90.  The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

91.  However, having regard to its above finding in relation to Article 3 of Protocol No. 1, the Court considers that it is not necessary to examine whether in this case there has been a violation of Article 14.

**III.  APPLICATION OF ARTICLE 41 OF THE CONVENTION**

92.  Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A.  Damage

1.  Pecuniary damage

93.  The applicants claimed 30,000 euros (EUR) each in respect of various expenses related to their electoral campaign.

94.  The Government argued that there was no causal link between the alleged violation and the damage claimed.

95.  The Court notes that the applicants’ claims are not itemised and are not supported by any evidence. In any event, it does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim.

2.  Non-pecuniary damage

96.  The applicants claimed EUR 100,000 each in respect of non‑pecuniary damage caused by the infringement of their electoral rights.

97.  The Government argued that the amounts claimed were excessive and pointed out that in earlier comparable cases against Azerbaijan, awards in respect of non-pecuniary damage had not exceeded EUR 7,500.

98.  Ruling on an equitable basis, the Court awards each applicant the sum of EUR 10,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B.  Costs and expenses

99.  The applicants also claimed, jointly, EUR 2,000 for legal fees incurred in the domestic proceedings and the proceedings before the Court. In support of this claim, they submitted their contract with Mr H. Hasanov, their lawyer.

100.  The Government noted that, even though the above-mentioned contract stipulated legal fees for representation in the domestic proceedings, Mr H. Hasanov had not in fact represented the applicants in the domestic proceedings but only before the Court. The Government therefore asked the Court to reject that part of the claim relating to the legal fees incurred in the domestic proceedings.

101.  According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, the Court notes that it has not been demonstrated that Mr H. Hasanov represented the applicants in the domestic proceedings. Having regard to the documents in its possession, the Court rejects the part of the claim relating to costs and expenses in the domestic proceedings and considers it reasonable to award the sum of EUR 850 to all three applicants jointly for the proceedings before the Court.

C.  Default interest

102.  The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

**FOR THESE REASONS, THE COURT, UNANIMOUSLY,**

1.  *Declares* the application admissible;

2.  *Holds* that there has been a violation of Article 3 of Protocol No. 1 to the Convention;

3.  *Holds* that there is no need to examine the complaint under Article 14 of the Convention;

4.  *Holds*

(a)  that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts,to be converted into Azerbaijani new manats at the rate applicable at the date of settlement:

(i)  EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, to each applicant, in respect of non-pecuniary damage;

(ii)  EUR 850 (eight hundred and fifty euros), plus any tax that may be chargeable to the applicants, to all three applicants jointly, in respect of costs and expenses;

(b)  that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5.  *Dismisses* the remainder of the applicants’ claim for just satisfaction.

Done in English, and notified in writing on 8 October 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach András Sajó  
 Deputy Registrar President

## 

## **CASE OF SHUKUROV v. AZERBAIJAN**

*(Application no. 37614/11)*

JUDGMENT

STRASBOURG

27 October 2016

FINAL

27/01/2017

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*

**In the case of Shukurov v. Azerbaijan,**

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

Angelika Nußberger, *President*, Khanlar Hajiyev, André Potocki, Faris Vehabović, Yonko Grozev, Síofra O’Leary, Mārtiņš Mits, *judges,*  
and Milan Blaško, *Deputy Section Registrar*,

Having deliberated in private on 4 October 2016,

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

**PROCEDURE**

1.  The case originated in an application (no. 37614/11) against the Republic of Azerbaijan lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Azerbaijani national, Mr Aydin Oktay oglu Shukurov (*Aydın Oktay oğlu Şükürov* – “the applicant”), on 1 June 2011.

2.  The applicant was represented by Mr I. Aliyev, a lawyer practising in Azerbaijan. The Azerbaijani Government (“the Government”) were represented by their Agent, Mr Ç. Asgarov.

3.  The applicant alleged, in particular, that the election in his electoral constituency had not been free and fair owing to numerous instances of electoral fraud. His right to stand for election had been infringed on account of the relevant authorities’ failure to deal effectively with his complaints concerning election irregularities.

4.  On 9 December 2013 the application was communicated to the Government. The applicant and the Government each submitted written observations on the admissibility and merits of the case. Observations were also received from the International Commission of Jurists (the ICJ), to whom the President had given leave to intervene as a third party in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court).

**THE FACTS**

**I.  THE CIRCUMSTANCES OF THE CASE**

5.  The applicant was born in 1959 and lives in Baku.

A.  Domestic proceedings concerning the applicant’s election-related complaints

6.  The circumstances of the case are similar to those in *Gahramanli and Others v. Azerbaijan* (no. 36503/11, §§ 6-32, 8 October 2015).

7**.  The applicant was nominated by the Classic wing of the Popular Front party to stand as a candidate in the parliamentary elections of 7 November 2010** in the single-mandate Zangilan-Gubadly Electoral Constituency No. 125. The applicant lost the election in his constituency.

**8.  After election day, the applicant lodged a complaint with the Central Electoral Commission (the “CEC”) concerning a number of irregularities in his constituency that had allegedly taken place during election day. He complained of various types of irregularity, including interference by public officials, illegal campaigning, obstruction and intimidation of election observers, ballot-box stuffing, repeated voting by the same individuals, incorrect vote-counting procedures, and a falsely inflated voter turnout.** In support of his allegations, the applicant submitted various types of evidence documenting specific instances of the irregularities complained of, including statements made by election observers, and video and audio recordings.

**9.  On 20 November 2010 the CEC issued a decision rejecting the applicant’s claims.** Its reasoning was similar to that in the CEC decision in *Gahramanli and Others* (cited above, §§ 21-26).

**10.  The applicant lodged further complaints with the Baku Court of Appeal and the Supreme Court which, on 24 November and 1 December 2010 respectively, dismissed the applicant’s appeals.** Their reasoning was similar to that in their respective decisions in the *Gahramanli and Others* case (cited above, §§ 27-32).

**11.  In the meantime, before the Supreme Court delivered its final decision in the applicant’s case, on 29 November 2010 the Constitutional Court had confirmed the country-wide election results, including the election results in the applicant’s constituency, as final** (ibid., § 30).

B. Court proceedings and seizure of the applicant’s case file

12.  At the material time Mr Intigam Aliyev was representing not only the applicant in the present case, but also a total of twenty‑seven other applicants in cases concerning the 2010 parliamentary elections and a number of applicants in other cases before the Court.

13.  On 8 August 2014 criminal proceedings were instituted against Mr I. Aliyev, which are the subject of a separate application brought by him before the Court (application no. 68762/14). On 8 and 9 August 2014 the investigation authorities seized a large number of documents from Mr I. Aliyev’s office, including all the case files relating to the proceedings pending before the Court, which were in Mr Aliyev’s possession and which concerned over 100 applications in total. The file relating to the present application was also seized in its entirety. The facts relating to the seizure and the relevant proceedings are described in more detail in *Annagi Hajibeyli* *v. Azerbaijan* (no. 2204/11, §§ 21-28, 22 October 2015).

14.  On 25 October 2014 the investigation authorities returned a number of the case files concerning the applications lodged before the Court, including the file relating to the present application, to Mr Aliyev’s lawyer.

**II.  RELEVANT DOMESTIC LAW AND INTERNATIONAL DOCUMENTS**

15.  The relevant domestic law and international documents concerning, *inter alia,* the system of electoral commissions and procedures for examination of electoral disputes, as well as observations made during the 2010 parliamentary elections in Azerbaijan, are summarised in *Gahramanli and Others* (cited above, §§ 33-51).

**THE LAW**

**I.  ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL No. 1 TO THE CONVENTION**

16.  Relying on Article 3 of Protocol No. 1 to the Convention and Article 13 of the Convention, the applicant complained that, in the electoral constituency where he had run for parliamentary election, there had been a number of serious irregularities and breaches of electoral law which had made it impossible to determine the true opinion of voters and had thus infringed his right to stand as a candidate in free elections. The domestic authorities, including the electoral commissions and courts, had failed to properly examine his complaints and to investigate his allegations concerning the aforementioned irregularities and breaches of electoral law. In particular, the examination of his appeal by the Supreme Court had been deprived of all effectiveness because the election results had already been approved by the Constitutional Court.

17.  Having regard to the special features of the present case, the Court considers that this complaint falls to be examined only under Article 3 of Protocol No. 1 to the Convention and that no separate examination is necessary under Article 13. Article 3 of Protocol No. 1 reads:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

A.  Admissibility

18.  The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared **admissible**.

B.  Merits

1.  The parties’ submissions

19.  The submissions made by the applicant and the Government were similar to those made by the relevant parties in respect of the similar complaint raised in the case of *Gahramanli and Others v. Azerbaijan* (no. 36503/11, §§ 58-65, 8 October 2015).

2.  The Court’s assessment

20.  Having regard to the facts of the present case and their clear **similarity to those of the *Gahramanli and Others* case on all relevant and crucial points, the Court sees no particular circumstances that could compel it to deviate from its findings in that judgment, and finds that in the present case the applicant’s right to stand as a candidate was breached for the same reasons as provided in that judgment, namely that the applicant’s complaints concerning election irregularities were not effectively addressed at domestic level** (see *Gahramanli and Others*, cited above, §§ 66-88).

**21.  There has accordingly been a violation of Article 3 of Protocol No. 1 to the Convention.**

**II.  ALLEGED VIOLATION OF ARTICLE 34 OF THE CONVENTION**

22.  By means of a fax of 9 September 2014 Mr I. Aliyev, the applicant’s representative, introduced a new complaint on behalf of the applicant. **He claimed that the seizure from his office of the entire case file relating to the applicant’s pending case before the Court, together with all the other case files, had amounted to a hindrance to the exercise of the applicant’s right of individual application under Article 34 of the Convention, the relevant parts of which read as follows:**

**“The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”**

A.  The parties’ submissions

23.  The submissions made by the applicant, the Government and the third party, the International Commission of Jurists (ICJ), were identical to those made by the relevant parties in respect of the same complaint raised in *Annagi Hajibeyli v. Azerbaijan* (no. 2204/11, §§ 57-63, 22 October 2015).

B.  The Court’s assessment

24.  In *Annagi Hajibeyli*, having examined an identical complaint based on the same facts, **the Court found that the respondent State had failed to comply with its obligations under Article 34 of the Convention** (ibid., §§ 64‑79). The Court considers that the analysis and finding it made in the *Annagi Hajibeyli* judgment also apply to the present case and sees no reason to deviate from **the finding that the deprivation of access for the applicant and his lawyer to their copy of the case file constituted in itself an undue interference and a serious hindrance to the effective exercise of the applicant’s right of individual application.**

**25.  The Court therefore finds that the respondent State has failed to comply with its obligations under Article 34 of the Convention.**

**III.  APPLICATION OF ARTICLE 41 OF THE CONVENTION**

26.  Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A.  Damage

27.  The applicant claimed 20,000 Azerbaijani manats (AZN) in respect of non-pecuniary damage. The claim was submitted on 29 May 2014.

28.  The Government submitted their comments on the claim on 11 July 2014. They submitted that, as of 10 July 2014, according to the exchange rate of the Central Bank of the Republic of Azerbaijan, one euro (EUR) equalled AZN 1.0703. The Government further submitted that the claim was excessive and considered that EUR 7,500 would be a reasonable award in respect of non-pecuniary damage.

29.  On 28 June 2016, in a letter unrelated to the present case, the Government informed the Court that, in 2015, the rate of the national currency in relation to the euro had fallen significantly and requested the Court to take this circumstance into consideration when dealing with just satisfaction claims expressed in the national currency.

30.  The Court considers that the applicant sustained non-pecuniary damage which cannot be compensated for by the mere finding of a breach of the Convention and Protocol No. 1.

31.  The Court notes that the national currency has significantly depreciated since the time the applicant submitted the claim. When the present judgment was adopted, one euro was worth approximately AZN 1.85. The question therefore arises as to what exchange rate should be taken into account when assessing the applicant’s claim.

32.  In principle, claims in respect of pecuniary damage and costs and expenses are made on the basis of a precise calculation and, therefore, require conversion into euros before an award can be made. On the other hand, an award in respect of non-pecuniary damage can only be “equitable”, since such damage does not lend itself to calculation. Even so, inasmuch as the Court bases its decision on the applicant’s actual claims because it cannot make an award *ultra petitum*, claims in respect of non-pecuniary damage expressed in a currency other than the euro should be converted into euros before the Court decides on an equitable basis.

33.  The Court reiterates that the applicant should be placed, as far as possible, in the same situation he or she would have been in had the violation not occurred (see, *mutatis mutandis*, *Prodan v. Moldova*, no. 49806/99, § 70, ECHR 2004‑III (extracts)). As a general practice, in cases where just satisfaction claims (under various heads) were made in the national currency, the Court has converted them into euros as of the date of submission of the claims (see, for example, *Soner and Others v. Turkey*, no. 40986/98, § 58, 27 April 2006; *Dilek and Others v. Turkey*, nos. 74611/01, 26876/02 and 27628/02, § 76, 17 July 2007; *Altındağ and İpek v. Turkey*, no. 42921/02, § 25, 20 October 2009; *Petrenco v. Moldova*, no. 20928/05, § 73, 30 March 2010; *Güveç v. Turkey*, no. 70337/01, § 141, ECHR 2009 (extracts); and *Ciechońska v. Poland*, no. 19776/04, §§ 85 and 88, 14 June 2011).

34.  The Court finds that, as a general rule, it is appropriate to followthe above-mentioned approach both in cases where a claim has lost considerable value when the Court reaches its decision and where it has remained stable while the case has been pending. Accordingly, in the present case, in respect of the applicant’s claims under all heads, the conversion rate to be used should be the rate applicable on the date on which the claim was submitted.

35.  Therefore, as per the exchange rate of the date on which the claim was submitted, the applicant claimed approximately EUR 18,700 in respect of non-pecuniary damage.

36.  Ruling on an equitable basis, the Court awards the applicant EUR 10,000 under that head, plus any tax that may be chargeable.

B.  Costs and expenses

37.  The applicant also claimed AZN 2,500 (approximately EUR 2,340 at the time of submission of the claim) for legal fees incurred before the Court, AZN 300 (approximately EUR 280) for translation expenses and AZN 70 (approximately EUR 65) for postal expenses.

38.  The Government submitted that the claims were excessive and were not fully itemised and supported by relevant documents. Moreover, given that the applicant had been represented by the same lawyer, who had also represented other applicants in similar cases involving similar submissions, the Government argued that he should be awarded a reduced amount.

39.  According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, the Court notes that the applicant was represented by Mr I. Aliyev in the proceedings before the Court and that substantial parts of the lawyer’s submissions were similar to those he had made in a number of other similar applications. Having regard to that circumstance, as well as to the documents in its possession and to its case‑law (including the principles reiterated in paragraphs 33 and 34 above which apply to costs and expenses in the same way), the Court considers it reasonable to award the applicant EUR 1,000, covering costs under all heads, plus any tax that may be chargeable to the applicant.

C.  Default interest

40.  The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

**FOR THESE REASONS, THE COURT, UNANIMOUSLY,**

1.  *Declares* the application admissible;

**2.  *Holds* that there has been a violation of Article 3 of Protocol No. 1 to the Convention;**

**3.  *Holds* that the respondent State has failed to comply with its obligation under Article 34 of the Convention;**

4.  *Holds*,

(a)  that **the respondent State is to pay the applicant**, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts,to be converted intoAzerbaijani manats at the rate applicable at the date of settlement:

(i)  EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii)  EUR 1,000 (one thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b)  that from the expiry of the above-mentioned three months until settlement, simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses*, unanimously, the remainder of the applicant’s claim for just satisfaction.

Done in English, and notified in writing on 27 October 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško Angelika Nußberger  
 Deputy Registrar President

## 

## **CASE OF SAMADBAYLI AND OTHERS v. AZERBAIJAN**

*(Applications nos. 36821/11 and 9 others – see appended list)*

JUDGMENT

STRASBOURG

13 April 2017

*This judgment is final. It may be subject to editorial revision.*

In the case of Samadbayli and Others v. Azerbaijan,

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

Erik Møse, *President,* Yonko Grozev, Lәtif Hüseynov, *judges,*  
and Anne-Marie Dougin, *Acting Deputy Section Registrar,*

Having deliberated in private on 21 March 2017,

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

**PROCEDURE**

1.  The case originated in ten applications (nos. 36821/11, 37656/11, 37661/11, 37740/11, 37866/11, 38636/11, 38885/11, 41066/11, 42345/11 and 42360/11) against the Republic of Azerbaijan lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by ten Azerbaijani nationals, Mr Arzu Habib oglu Samadbayli, Mr Yagub Mahammad oglu Babali, Ms Leyla Ilgar qizi Mustafayeva, Mr Soltanhamid Hilal oglu Malikov, Mr Ali Amirhuseyn oglu Kerimli, Mr Giyas Boyukaga oglu Sadigov, Ms Sitara Mehdi qizi Zeynalova, Mr Panah Chodar oglu Huseyn, Mr Adil Abulfat oglu Geybulla, and Mr Isa Yunis oglu Gambar (“the applicants”), on various dates in 2011.

2.  The applicants were represented by Mr I. Aliyev, a lawyer practising in Azerbaijan. The Azerbaijani Government (“the Government”) were represented by their Agent, Mr Ç. Asgarov.

3.  On 15 October 2013 (application no. 36821/11), on 18 November 2013 (applications nos. 37656/11, 37661/11, 37740/11, 37866/11, 38636/11 and 38885/11) and on 9 December 2013 (applications nos. 41066/11, 42345/11 and 42360/11) the applications were communicated to the Government. The applicants and the Government each submitted written observations on the admissibility and merits of the case. Observations were also received from the International Commission of Jurists (the ICJ), to whom the President had given leave to intervene as a third party in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court).

**THE FACTS**

**I.  THE CIRCUMSTANCES OF THE CASE**

4.  The applicants’ years of birth and places of residence are listed in the Appendix.

A.  Domestic proceedings concerning the applicants’ election-related complaints

5.  The circumstances of the case are similar to those in *Gahramanli and Others v. Azerbaijan* (no. 36503/11, §§ 6-32, 8 October 2015).

6.  **The applicants were independent self-nominated or opposition candidates in the parliamentary elections of 7 November 2010 (see Appendix). All the applicants lost the elections in their respective constituencies.**

7.  **After election day, the applicants lodged complaints with the Central Electoral Commission (“the CEC”) concerning a number of irregularities in their respective constituencies that had allegedly taken place during and/or before election day.** Some of them also lodged identical complaints with the respective Constituency Electoral Commissions (“the ConECs”). They complained about various types of irregularities, **including interference by public officials, illegal campaigning, obstruction and intimidation of election observers, ballot-box stuffing, repeated voting by the same individuals, irregularities in applying election ink, incorrect vote-counting procedures, inconsistencies in precinct election results records indicating a falsely inflated voter turnout, and so on**. In support of their allegations, the applicants submitted various types of evidence documenting specific instances of the irregularities complained of, including statements made by election observers, video recordings and photographs.

8.  The applicants who lodged a complaint with the respective ConECs did not receive any reply from them (except in applications nos. 36821/11, 37656/11, 37740/11, 41066/11 and 42360/11). All of the applicants’ complaints were examined by the CEC which, on various dates (see Appendix), issued decisions rejecting the applicants’ claims, providing reasoning similar to that in the CEC decision in *Gahramanli and Others* (cited above, §§ 21-26).

9.  The applicants lodged further complaints with the Baku Court of Appeal and the Supreme Court which, on various dates (see Appendix), dismissed the applicants’ appeals, providing reasoning similar to that in their respective decisions in *Gahramanli and Others* (cited above, §§ 27‑32).

10**.  In the meantime, however ‒ and before the Supreme Court delivered its final decision concerning each complaint** (except in application no. 42345/11) ‒ on 29 November 2010 **the Constitutional Court confirmed the countrywide election results, including the election results in the applicants’ constituencies, as final** (ibid., § 30).

B.  Court proceedings and seizure of the applicants’ case files

11.  At the material time Mr Intigam Aliyev was representing not only the applicants in the present cases, but a total of twenty‑seven other applicants in cases concerning the 2010 parliamentary elections and a number of applicants in other cases before the Court.

12.  On 8 August 2014 criminal proceedings were instituted against Mr I. Aliyev, these being the subject of a separate application brought by him before the Court (application no. 68762/14). On 8 and 9 August 2014 the investigation authorities seized a large number of documents from Mr I. Aliyev’s office, including all the case files relating to the proceedings pending before the Court which were in Mr Aliyev’s possession, comprising over 100 applications in total. The files relating to the present applications were also seized in their entirety. The facts relating to the seizure and the relevant proceedings are described in more detail in *Annagi Hajibeyli* *v. Azerbaijan* (no. 2204/11, §§ 21-28, 22 October 2015).

13.  On 25 October 2014 the investigation authorities returned a number of the case files concerning the applications lodged before the Court, including the files relating to the present applications, to Mr Aliyev’s lawyer.

**II.  RELEVANT DOMESTIC LAW AND INTERNATIONAL DOCUMENTS**

14.  The relevant domestic law and international documents concerning *inter alia* the system of electoral commissions and procedures for examination of electoral disputes, as well as observations made during the 2010 parliamentary elections in Azerbaijan, are summarised in *Gahramanli and Others* (cited above, §§ 33-50).

**THE LAW**

**I.  JOINDER OF THE APPLICATIONS**

15.  The Court considers that, in accordance with Rule 42 § 1 of the Rules of Court, the applications should be joined, given their similar factual and legal background.

**II.  THE GOVERNMENT’S REQUEST FOR APPLICATIONS Nos. 36821/11, 37656/11, 37661/11, 37740/11, 37866/11, 38636/11 AND 38885/11 TO BE STRUCK OUT UNDER ARTICLE 37 OF THE CONVENTION**

16.  The Government submitted unilateral declarations with a view to resolving the issues raised by the above-mentioned applications. They further requested that the Court strike these applications out of the list of cases, in accordance with Article 37 of the Convention.

17.  The applicants disagreed with the terms of the unilateral declarations and asked the Court to continue its examination of the applications.

18.  Having studied the terms of the Government’s unilateral declarations, the Court considers – for the reasons stated in *Tahirov v. Azerbaijan* (no. 31953/11, §§ 32-42, 11 June 2015) and *Annagi Hajibeyli v. Azerbaijan* (no. 2204/11, §§ 30-40, 22 October 2015), which are equally applicable to the present cases and from which the Court sees no reason to deviate – that the proposed declarations do not provide a sufficient basis for concluding that respect for human rights as defined in the Convention and its Protocols does not require it to continue its examination of the present applications.

19.  The Court therefore refuses the Government’s request for it to strike the applications out of its list of cases under Article 37 of the Convention, and will accordingly pursue its examination of the admissibility and merits of the cases.

**III.  ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL No. 1 TO THE CONVENTION**

20.  Relying on Article 3 of Protocol No. 1 to the Convention and Article 13 of the Convention, the applicants complained that in the electoral constituencies where they had run for parliamentary election there had been a number of serious irregularities and breaches of electoral law which had made it impossible to determine the true opinion of the voters and had thus infringed their right to stand as candidates in free elections. **The domestic authorities, including the electoral commissions and courts, had failed to properly examine their complaints and to investigate their allegations concerning the aforementioned irregularities and breaches of electoral law. Several of the applicants complained, in particular, that the examination of their appeal by the Supreme Court had been deprived of all effectiveness because the election results had already been confirmed by the Constitutional Court.**

21.  Having examined the special features of the present case, the Court considers that this complaint falls to be examined only under Article 3 of Protocol No. 1 to the Convention and that no separate examination is necessary under Article 13. Article 3 of Protocol No. 1 reads:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

A.  Admissibility

22.  The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B.  Merits

1.  The parties’ submissions

23.  The submissions made by the applicants and the Government were similar to those made by the relevant parties in respect of the similar complaint raised in the case of *Gahramanli and Others* (cited above, §§ 58‑65).

2.  The Court’s assessment

24.  Having considered the facts of the present case and in view of their clear similarity to the facts in the *Gahramanli and Others* on all relevant and crucial points, the Court sees no particular circumstances that could persuade it to deviate from its findings in that judgment, and finds that in the present case each applicant’s right to stand as a candidate was breached for the same reasons as those provided in that judgment, namely that the applicants’ complaints concerning election irregularities were not effectively addressed at domestic level (see *Gahramanli and Others*, cited above, §§ 71-88).

25.  There has accordingly been a violation of Article 3 of Protocol No. 1 to the Convention.

**IV.  ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION**

26.  In conjunction with the above complaint, the applicants in applications nos. 37866/11 and 42360/11 also complained that opposition‑oriented candidates, like themselves, had been discriminated against by various means by all the State executive authorities, electoral commissions, courts and Government-controlled media throughout the entire electoral process. They relied on Article 14 of the Convention, which provides:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

27.  The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

28.  However, in the light of its above finding concerning Article 3 of Protocol No. 1, the Court considers that it is not necessary to examine whether in this case there has been a violation of Article 14 (compare *Gahramanli and Others*, cited above, §§ 89-91).

**V.  ALLEGED VIOLATION OF ARTICLE 34 OF THE CONVENTION**

29.  In a fax dated 9 September 2014 Mr I. Aliyev, the applicants’ representative, introduced a new complaint on behalf of the applicants. He claimed that the seizure from his office of all case files relating to the applicants’ pending cases before the Court, together with all his other case files, had amounted to a hindrance to the exercise of the applicants’ right of individual application under Article 34 of the Convention, the relevant parts of which read as follows:

“The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”

A.  The parties’ submissions

30.  The submissions made by the applicants, the Government and the third party, the International Commission of Jurists (ICJ), were identical to those made by the relevant parties in respect of the same complaint raised in *Annagi Hajibeyli v. Azerbaijan* (cited above, §§ 57-63).

B.  The Court’s assessment

31.  **In *Annagi Hajibeyli*, having examined an identical complaint based on the same facts, the Court found that the respondent State had failed to comply with its obligations under Article 34 of the Convention** (ibid., §§ 64‑79). The Court considers that **the analysis and the finding made in the *Annagi Hajibeyli* judgment also apply to the present case** and sees no reason to deviate from the finding that the deprivation of access for the applicants and their lawyer to their copies of the case files constituted in itself an undue interference and a serious hindrance to the effective exercise of the applicants’ right of individual petition.

32.  **The Court therefore finds that the respondent State has failed to comply with its obligations under Article 34 of the Convention**.

**VI.  APPLICATION OF ARTICLE 41 OF THE CONVENTION**

33.  Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A.  Damage

34.  Each applicant in applications nos. 36821/11, 37656/11, 37661/11, 37740/11, 38636/11, 38885/11 and 42345/11 claimed 20,000 Azerbaijani manats (AZN) (approximately 18,600 euros (EUR) at the time of submission of the claims) in respect of non‑pecuniary damage. Each applicant in applications nos. 37866/11 and 42360/11 claimed AZN 50,000 (approximately EUR 46,500 at the time of submission of the claims) in respect of non-pecuniary damage. The applicant in application no. 41066/11 claimed AZN 40,000 (approximately EUR 37,200 at the time of submission of the claim) in respect of non-pecuniary damage. All claims were submitted between 5 April and 2 June 2014.

35.  The Government considered that the claims were excessive and that EUR 7,500 to each applicant would represent a reasonable award in respect of non-pecuniary damage.

36.  Ruling on an equitable basis, the Court awards each applicant the sum of EUR 10,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B.  Costs and expenses

37.  Each applicant also claimed AZN 2,500 (approximately EUR 2,325 at the time of submission of the claims) for legal fees incurred before the Court, AZN 300 (approximately EUR 280 at the time of submission of the claims) for translation expenses and AZN 70 (approximately EUR 65 at the time of submission of the claims) for postal expenses. All claims were submitted between 5 April and 2 June 2014.

38.  The Government submitted that the claims were excessive and were not fully supported by relevant documents. Moreover, given the fact that the applicants were represented by the same lawyer as had represented other applicants in similar cases involving similar and/or repetitive submissions, the Government argued they should be awarded a reduced amount.

39.  The Court notes that all the applicants were represented by Mr I. Aliyev in the proceedings before the Court and that substantial parts of the lawyer’s submissions were similar to those made in a number of other similar applications. Taking into account that circumstance, as well as the documents in its possession and to its case-law, the Court considers it reasonable to award a total sum of EUR 10,000 to all the applicants jointly, to be paid directly into the representative’s bank account, covering costs under all heads, plus any tax that may be chargeable to the applicants.

C.  Default interest

40.  The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

**FOR THESE REASONS, THE COURT, UNANIMOUSLY,**

1.  *Decides* to join the applications;

2.  *Rejects* the Government’s request to strike applications nos. 36821/11, 37656/11, 37661/11, 37740/11, 37866/11, 38636/11 and 38885/11 out of the Court’s list of cases;

**3.  *Declares* the applications admissible;**

**4**.  ***Holds* that there has been a violation of Article 3 of Protocol No. 1 to the Convention;**

**5**.  ***Holds* that there is no need to examine the complaint under Article 14 of the Convention in applications nos. 37866/11 and 42360/11;**

**6.  *Holds* that the respondent State has failed to comply with its obligation under Article 34 of the Convention;**

7.  *Holds*

(a)  that **the respondent State is to pay the applicants** within three months the following amounts,to be converted intoAzerbaijani manats at the rate applicable at the date of settlement:

(i)  EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, to each applicant, in respect of non-pecuniary damage;

(iii)  EUR 10,000 (ten thousand euros), plus any tax that may be chargeable to the applicants, to all the applicants jointly, in respect of costs and expenses, to be paid directly into their representative’s bank account;

(b)  that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

8.  *Dismisses* the remainder of the applicants’ claim for just satisfaction.

Done in English, and notified in writing on 13 April 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Anne-Marie Dougin Erik Møse  
 Acting Deputy Registrar President

## 

## **CASE OF BERLUSCONI V. ITALY**

GRAND CHAMBER

DECISION

Application no. 58428/13  
Silvio BERLUSCONI  
against Italy

The European Court of Human Rights, sitting on 30 August 2018 as a Grand Chamber composed of:

Angelika Nußberger, *President*, Linos-Alexandre Sicilianos, Ganna Yudkivska, Helena Jäderblom, Robert Spano, Ledi Bianku, Nebojša Vučinić, Paulo Pinto de Albuquerque, Helen Keller, Faris Vehabović, Iulia Antoanella Motoc, Yonko Grozev, Mārtiņš Mits, Gabriele Kucsko-Stadlmayer, Pauliine Koskelo, Jovan Ilievski, *judges*, Ida Caracciolo,ad hoc *judge*,and Françoise Elens-Passos, *Deputy Registrar*,

Having regard to the above application lodged on 10 September 2013,

Having deliberated on 22 November 2017 and 30 August 2018, delivers the following decision:

**PROCEDURE AND FACTS**

1.  The applicant, Mr S. Berlusconi, is an Italian national who was born in 1936 and lives in Rome. He was represented before the Court by Mr A. Saccucci, Mr B. Nascimbene, Mr E. Fitzgerald and Mr S. Powles, lawyers practising in Rome, Milan and London respectively.

2.  The Italian Government (“the Government”) were represented by their co-Agents, Ms P. Accardo and Ms M.G. Civinini.

**3.****The applicant alleged, in particular, that the application of Legislative Decree no. 235/2012, resulting in the invalidation of his election to the Senate after he had been disqualified from standing for election on account of his conviction for tax fraud, had breached Article 7 of the Convention, Article 3 of Protocol No. 1 and Article 13 of the Convention.**

4.  The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court).

**5.****On 5 July 2016 the Government were given notice of the application, together with questions about the above complaints.**

6.  On 6 April 2017, after Guido Raimondi, the judge elected in respect of Italy, had withdrawn from sitting in the case (Rule 28), the President of the First Section appointed Ida Caracciolo to sit as an *ad hoc* judge (Rule 29).

7.  On 6 June 2017 a Chamber of the First Section, composed of Linos-Alexandre Sicilianos, President, Kristina Pardalos, Ledi Bianku, Robert Spano, Pauliine Koskelo, Jovan Ilievski and Ida Caracciolo, judges, and Abel Campos, Registrar, relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to such relinquishment (Article 30 of the Convention and Rule 72). The composition of the Grand Chamber was determined in accordance with the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

8.  The applicant and the Government each filed observations on the admissibility and merits of the application. In addition, third-party comments were received from the European Commission for Democracy through Law (“the Venice Commission”), which had been given leave by the President of the Grand Chamber to intervene in the written procedure (Rule 44 § 3 (a)). The parties replied to those comments in writing (Rule 44 § 6).

9.  On 31 August 2017 the President gave leave to the *Associazione Politica Nazionale Lista Marco Pannella* to intervene as a third party and to submit written comments (Rule 44 § 3 (a)). On 11 October 2017 the President decided that the comments received at the Registry on 21 September 2017 should not be included in the case file as they did not comply with the formal and substantive requirements (Rule 44 § 5).

10.  A hearing took place in public in the Human Rights Building, Strasbourg, on 22 November 2017 (Rule 59 § 3).

There appeared before the Court:

(a)  *for the Government*  
Ms M.G. Civinini,  
Ms P. Accardo, *Co-Agents*,  
Ms S. Feriozzi,  
Ms V. De Martin,  
Mr G. Veggi, *Assistants*;

(b)  *for the applicant*  
Mr A. Saccucci,  
Mr B. Nascimbene,  
Mr E. Fitzgerald,  
Mr S. Powles, *Counsel*,  
Mr F. Coppi,  
Mr N. Ghedini, *Advisers*,  
Ms G. Borgna,  
Mr F. Ciancio, *Assistants*.

The Court heard addresses by Ms Civinini, Mr Fitzgerald, Mr Nascimbene and Mr Saccucci, and also their replies to questions from judges.

A.  The circumstances of the case

1.  The Anti-Corruption Law

**11.****On 28 November 2012 Law no. 190/2012 came into force** (see paragraphs 42-44 below). Section 1(1) of the Law provided in particular, in accordance with Article 6 of the United Nations Convention **against Corruption** (see paragraph 50 below), adopted in New York on 31 October 2003 (and ratified by Italy in October 2009), and Articles 20 and 21 of the Council of Europe Criminal Law Convention on Corruption (see paragraph 51 below), adopted in Strasbourg on 27 January 1999 (and ratified by Italy in June 2013), that a National Anti-Corruption Authority was to be established and a national action plan drawn up to “monitor, prevent and combat corruption and unlawful activity within the public authorities”. As was noted in the report introducing in Parliament the Bill that was to become Law no. 190/2012, the establishment of a national anti-corruption plan had become essential, firstly in view of the conclusions of the evaluation conducted in 2008 and 2009 by the Group of States against Corruption (GRECO – see paragraph 52 below), and secondly because of the finding that most European States already had such a plan.

12.  Bill no. 2156 had been put before the Senate in May 2010 by the Minister of Justice of the “Berlusconi IV Government” and, on completion of the parliamentary procedure, had then been put before the Chamber of Deputies by the Minister of Justice of the “Monti Government” in October 2012.

**13.****Subsection 63 of section 1 of Law no. 190/2012 delegated powers to the government to adopt, within one year, a legislative decree consolidating in a single instrument the provisions on disqualification from standing for election (*incandidabilità*) to bodies including the European Parliament, the Chamber of Deputies and the Senate, and disqualification from holding elected and government office (*divieto di ricoprire cariche elettive e di Governo*).** Subsection 64 laid down the strict framework for the criteria to be applied.

2.  Legislative Decree no. 235 of 31 December 2012

**14.  On 6 December 2012, acting within its delegated powers, the “Monti Government”, on a proposal by its Minister for the Interior, adopted Legislative Decree no. 235** (“Legislative Decree no. 235/2012” – see paragraphs 46-49 below).

**15.****Article 1 of Legislative Decree no. 235/2012 provides, *inter alia*, that anyone who has been sentenced in a final judgment to more than two years’ imprisonment for an offence committed with malicious intent carrying a maximum sentence of at least four years’ imprisonment is disqualified from standing for election or serving as a member of the Senate or the Chamber of Deputies.** **Pursuant to Article 3, where the ground for such disqualification arises or is established during the senator’s or deputy’s term of office, the house of Parliament to which he or she belongs must deliberate on the matter in accordance with Article 66 of the Constitution** (see paragraph 41 below). The disqualification from standing for election provided for in Legislative Decree no. 235/2012 is valid for a duration equivalent to double the length of the ancillary penalty of temporary disqualification from public office that may be imposed by the criminal courts, and in any event not less than six years; it is applicable even if no such ancillary penalty is imposed (Article 13) and is effective from the date on which the judgment becomes final.

3.  The applicant’s conviction

**16.****On 26 October 2012, in the context of the “Mediaset trial”, the Milan District Court found the applicant guilty (**with three other individuals) **of tax fraud for the years 2002 and 2003 and sentenced him to four years’ imprisonment** (reduced to one year as a result of a remission of sentence), **together with an ancillary penalty of disqualification from public office for five years** (entailing, among other things, a prohibition on voting and standing for election). The judgment was then upheld on 8 May 2013 by the Milan Court of Appeal, and subsequently on 1 August 2013 by the Court of Cassation in respect of the main sentence.

17.  The Court of Cassation remitted the question of the determination of the ancillary penalty to the Milan Court of Appeal.

18.  On 19 October 2013 the Court of Appeal set the duration of the ancillary penalty at two years. It refused a request by the applicant for a ruling to be sought from the Constitutional Court on the alleged incompatibility of Article 13 of Legislative Decree no. 235/2012 with Article 25 § 2 of the Constitution, by which the retroactive application of criminal legislation was prohibited. The Court of Appeal found that this matter fell outside the scope of the case, which was limited to determining the duration of the ancillary penalty.

**19.****On 25 November 2013 the applicant appealed on points of law.** In a judgment of 18 March 2014 (no. 16206/2014) the Court of Cassation upheld the judgment of the Court of Appeal.

20.  On 2 August 2013 the public prosecutor had notified the applicant of the order to execute the sentence and, at the same time, the suspension of its execution pending a possible request for an alternative measure to detention.

21.  On 10 April 2014 the Milan Sentence Supervision Court granted the applicant an alternative measure to detention.

22.  On 9 April 2015, on completion of the alternative measure, the Sentence Supervision Court declared that the main sentence and the ancillary penalty of temporary disqualification from public office had expired. The decision was deposited with the registry on 14 April 2015. In the absence of an appeal on points of law by the public prosecutor within fifteen days, the decision became final.

4.  Procedure for removal from office as a senator

**23.  On 24 February 2013 elections to the Senate had been held**, with the deadline for submitting the lists of election candidates to the competent bodies set at 21 January 2013. **The applicant stood as a candidate and was elected to the Senate. The official proclamation took place the following month.**

**24.****Pursuant to Article 13 of Legislative Decree no. 235/2012, the applicant was disqualified from standing for election for six years with effect from 1 August 2013, the date on which his conviction became final** (see paragraph 16 above).

25.  On 2 August 2013, in accordance with Articles 1 and 3 of Legislative Decree no. 235/2012, **the public prosecutor transmitted an extract from the Milan District Court’s judgment to the President of the Senate, who forwarded it on the same day to the Senate’s Committee on Elections and Parliamentary Immunity.** **Under Rule 19, paragraph 4, of the Rules of the Senate, this body is responsible for verifying senators’ credentials and any grounds for ineligibility or disqualification that may arise after their election.**

26.  On 8 August 2013 the chair of the Committee initiated a procedure for a possible challenge to the applicant’s election, informing the latter that following the referral of the matter to the Committee, he was entitled to file observations within twenty days and to consult the relevant documents.

27.  On 28 August 2013 the applicant submitted his observations to the Committee, appending six *pro veritate* opinions arguing, in particular, that Legislative Decree no. 235/2012 was unconstitutional.

28.  On 7 September 2013 he submitted a copy of the application he had just lodged with the European Court of Human Rights and asked for the procedure to be suspended pending the Court’s decision.

29.  On 10 September 2013 the Committee’s rapporteur submitted a report in which he proposed that: (1) the validity of the applicant’s election be confirmed; (2) several questions of constitutionality be referred to the Constitutional Court; and (3) a question be referred to the Court of Justice of the European Union (CJEU) for a preliminary ruling.

30.  On 18 September 2013 the Committee rejected the three proposals, by a majority, and declared that there was a challenge to the applicant’s election. As Rule 11 of the Committee’s Rules on Verification of Credentials (*Regolamento per la verifica dei poteri della Giunta*) provides that the rapporteur is to be replaced in such circumstances, the chair of the Committee decided to take over the role himself. He then set 4 October 2013 as the date of the public sitting at which the debate on the challenge to the applicant’s election was to take place (in accordance with Rule 14).

31.  On 28 September 2013, in advance of the sitting, the applicant filed submissions in which he reiterated his arguments.

32.  On 4 October 2013, following the public sitting (broadcast live on the Senate’s satellite channel and online), at which neither the applicant nor his representative had been present, the Committee deliberated in private and decided, by a majority, to propose that the Senate invalidate the applicant’s election.

33.  In a report submitted to the Senate on 15 October 2013, the Committee outlined the procedure that had been followed and the points raised and discussed, namely: (1) the nature of the Committee and of its functions; (2) the alleged retroactive application of Legislative Decree no. 235/2012 and the problems as to its constitutionality; (3) the content of the discussions and the different views of its members; (4) Law no. 190/2012; (5) the ground for disqualification from standing for election; (6) relevant precedents; (7) the application to the European Court of Human Rights; and (8) the possibility of referring a question to the CJEU.

**34.  The report noted, in particular, that since the Committee was not a judicial body, the procedure before it was not judicial in nature and was “not guided by the individual’s electoral rights, but by the interest of Parliament in ensuring that its members satisfy the requirements of lawfulness, including that of not having been convicted in a final judgment”. Accordingly, the nature of the Committee did not empower it to seek a ruling from the Constitutional Court on the alleged retroactive application of the Legislative Decree in question.**

35.  As to how removal from office should be classified, the Committee pointed out that in *Paksas v. Lithuania* ([GC], no. 34932/04, ECHR 2011 (extracts)) the Court had ruled that a measure of this kind that had been applied to a country’s president was not criminal in nature, on the grounds that, as it had found in other decisions concerning the loss of electoral rights, restrictions of this kind pursued the entirely legitimate aim of protecting democratic institutions.

36.  Furthermore, the Committee observed: “[Law no. 190/2012] refers to the grounds for disqualification from standing for election, taking as its starting-point the establishment of the offence and not the time when it was committed. In short, it is the conviction which, within the law, creates the dividing line between before and after, marking the emergence of an ethical and moral incompatibility and a finding of unsuitability arising from the new development which the conviction represents.”

**37.****On 27 November 2013 the Senate, by open ballot, rejected nine motions opposing the proposal by the Committee on Elections and Parliamentary Immunity, invalidated the applicant’s election and declared that he had forfeited his seat.**

38.  On the same day, the Senate declared that Mr U.D.G. had been elected as a senator in place of the applicant.

5.  Recent developments

39.  On 11 May 2018 the Milan Sentence Supervision Court granted an application for rehabilitation lodged by the applicant on 8 March 2018. In its decision the court observed, in particular, that the applicant had served his sentence and that, during the period that had elapsed since the decision of 9 April 2015 (see paragraph 22 above) had become final, he had not had any further convictions and had thus displayed good behaviour. The court pointed out that, in accordance with the Court of Cassation’s case-law, the fact that three sets of criminal proceedings had been brought against the applicant for acts committed after those forming the subject of his trial for tax fraud did not “in itself constitute an obstacle to granting the application for rehabilitation, on account of the presumption of innocence”. The decision became final on 29 May 2018.

40.  Subsequently, the applicant asked the Court for leave to submit documents relating to the rehabilitation procedure, as well as written observations on the effects of the measure on the admissibility and merits of the application. He argued that his rehabilitation demonstrated the purely criminal nature of disqualification from standing for election and was likely to have an impact on his status as a victim. The President of the Grand Chamber granted the applicant leave to file the documents. However, she refused him leave (on two occasions: 14 June and 19 July 2018) to submit observations (Rule 38 § 1 and Rule 71 of the Rules of Court).

On 27 July 2018 the applicant informed the Court that he no longer intended to pursue his application.

B.  Relevant domestic law

1.  Provisions of the Italian Constitution

41.  The relevant provisions of the Constitution read as follows:

Article 25

“...

2.  No one may be punished except by virtue of a law that came into force before the offence was committed.

...”

Article 65

“1.  The law shall determine the cases of ineligibility for and disqualification from the office of deputy or senator.

...”

Article 66

“Each of the two houses shall verify the credentials of its members and any grounds for ineligibility or disqualification that may subsequently arise.”

2.  Law no. 190 of 6 November 2012

42.  Law no. 190/2012 was passed by the Senate on 17 October 2012 and by the Chamber of Deputies on 31 October 2012, signed by the President of the Republic on 6 November 2012 and came into force on 28 November 2012, fifteen days after its publication in the Official Gazette.

43.  Section 1, subsection 64, of this Law laid down the key principles and criteria for the legislative decree to be adopted by the government (under subsection 63) with a view to consolidating within a single instrument the provisions on disqualification from standing for election to bodies including the European Parliament, the Chamber of Deputies and the Senate, and from holding elected and government office. The decree was to:

“(a)  ... provide for temporary disqualification from standing for election to the Chamber of Deputies and the Senate in the case of anyone who has been sentenced in a final judgment to more than two years’ imprisonment for offences referred to in Article 51, paragraphs 3 *bis* and *quater*, of the Code of Criminal Procedure [in particular, those relating to mafia-type criminal organisations and terrorism];

(b)  in addition, provide for a similar disqualification for anyone who has been sentenced in a final judgment to more than two years’ imprisonment for offences [against the public authorities] or for any other offences for which the law has prescribed a maximum sentence of more than three years’ imprisonment;

(c)  specify the duration of the disqualification;

(d)  specify that it also covers situations where the sentence is imposed following an agreement between the accused and the prosecution, under Article 444 of the Code of Criminal Procedure;

(e)  coordinate the provisions on disqualification from standing for election with the existing provisions on disqualification from holding public office and on rehabilitation, and with restrictions on the exercise of electoral rights;

(f)  specify that the criteria for disqualification from standing for election to the Chamber of Deputies and the Senate also apply in relation to positions in the executive;

...

(m)  determine the cases of automatic suspension and removal from office referred to in subsection 63 where a final conviction for an offence committed with malicious intent occurs after the person has been nominated as a candidate or has assumed office.”

44.  According to the explanatory report, the purpose of the Law was to prevent and punish the phenomenon of corruption by means of a multidisciplinary approach whereby penalties would be only one of the ways of fighting corruption and unlawful activity within the public authorities. The Law was underpinned by the requirements of transparency and public scrutiny and aimed to bring the Italian legal system into line with international standards. The report also stated that corruption was undermining the country’s credibility and discouraging investment, including from abroad, thereby slowing down economic development.

3.  Legislative Decree no. 235 of 31 December 2012

45.  Legislative Decree no. 235 was adopted on 6 December 2012, signed by the President of the Republic on 31 December 2012 and came into force on 5 January 2013, the day after its publication in the Official Gazette.

46.  Article 1 of the Legislative Decree provides:

“1.  The following shall be disqualified from standing for election as a member of the Chamber of Deputies and the Senate and from holding such office:

(a)  anyone who has been sentenced in a final judgment to more than two years’ imprisonment for an offence ... referred to in Article 51, paragraphs 3 *bis* and *quater*, of the Code of Criminal Procedure;

(b)  anyone who has been sentenced in a final judgment to more than two years’ imprisonment for an offence [against the public authorities];

(c)  anyone who been sentenced in a final judgment to more than two years’ imprisonment for an offence ... committed with malicious intent for which the law prescribes a maximum sentence of at least four years ...”

47.  Article 3 is worded as follows:

“Where a ground for disqualification arises or is established during the convicted senator’s or deputy’s term of elected office, the house of Parliament to which he or she belongs shall deliberate on the matter in accordance with Article 66 of the Constitution. Accordingly, any final judgments referred to in Article 1 above entailing the conviction of serving deputies or senators shall be transmitted immediately by the [competent] public prosecutor’s office to the house to which [the convicted person] belongs ...”

48.  As to the duration of the measure, Article 13 provides:

“... disqualification from standing for election to the Chamber of Deputies, the Senate, and the European Parliament in respect of Italy, shall apply from the date on which the conviction becomes final and shall be effective for a period equivalent to double the court-imposed ancillary penalty of temporary disqualification from public office. In any event, the duration of the disqualification shall not be less than six years, even if no ancillary penalty is imposed.”

49.  As regards the choice of the type of conviction giving rise to disqualification from standing for election, the explanatory report states:

“... the existence of a conviction for clearly determined offences covering a wide range of legal interests that must be specifically identified and categorised in order to avoid any uncertainty or contradictory approach that could undermine the sphere protected by Article 51 of the Constitution has been chosen on the basis of an abstract assessment as a precondition for disqualification from holding an elected public position or office; such disqualification from access is automatic, no provision being made for weighing up individual situations or using discretion. In this connection, the Court of Cassation (judgment no. 3904/2005) has held that convictions for offences entailing disqualification from holding public office render the person concerned entirely and irrevocably unfit to discharge the relevant functions, in order to preserve ‘the proper functioning and transparency of the public authorities, order and security, and the free decision-making process of elected bodies’ (see also Constitutional Court, judgments nos.407/1992, 197/1993 and 118/1994).”

C.  Relevant international law

1.  Combating corruption

50.  Article 6 of the United Nations Convention against Corruption, adopted on 31 October 2003, provides:

“1.  Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate, that prevent corruption by such means as:

*(a)* Implementing the policies referred to in article 5 of this Convention and, where appropriate, overseeing and coordinating the implementation of those policies;

*(b)* Increasing and disseminating knowledge about the prevention of corruption.

...”

51.  Articles 20 and 21 of the Council of Europe Criminal Law Convention on Corruption, adopted on 27 January 1999, read as follows:

Article 20 – Specialised authorities

“Each Party shall adopt such measures as may be necessary to ensure that persons or entities are specialised in the fight against corruption. They shall have the necessary independence in accordance with the fundamental principles of the legal system of the Party, in order for them to be able to carry out their functions effectively and free from any undue pressure. The Party shall ensure that the staff of such entities has adequate training and financial resources for their tasks.”

Article 21 – Co-operation with and between national authorities

“Each Party shall adopt such measures as may be necessary to ensure that public authorities, as well as any public official, co-operate, in accordance with national law, with those of its authorities responsible for investigating and prosecuting criminal offences ...”

52.  In the Addendum to the Compliance Report on Italy for the Joint First and Second Evaluation Rounds (2008 and 2009 respectively), published on 1 July 2013 (Greco RC-I/II (2011)1E), the Group of States against Corruption (GRECO) issued conclusions including the following on anti-corruption measures:

“...

76.  Italy deserves recognition for the steps taken to further articulate its corruption policy; the adoption, in November 2012, of a new anticorruption framework law is a clear sign in this direction. Moreover, Italy has now ratified the Criminal Law Convention on Corruption (ETS 173) and the Civil Law Convention on Corruption (ETS 174). Several measures have been introduced to improve transparency and accountability in public administration and to better target areas of public concern including, *inter alia*, the regulation of public tenders and contracts, conflicts of interest, integrity and ethics in public administration, managerial responsibility and whistleblower protection. Likewise, an institutional framework has been established to adopt, implement, monitor and evaluate anticorruption policies. The Commission for the Evaluation, Transparency and Integrity of Public Administration [which later became the ANAC] has been designated as the national anticorruption authority with a view to implement[ing] Article 6 of the United Nations Convention against Corruption (UNCAC), as well as Articles 20 and 21 of ETS 173; administrations at national and subnational level are entrusted with key responsibilities in the development of anticorruption and integrity programmes for their respective sector of activity. Time and experience will show whether the new system efficiently serves its purpose to prevent and deter corruption. It will be crucial to ensure that all new legislative measures are coupled with effective implementation mechanisms, including guidance for those who are to abide by the law and appropriate sanctions when malpractice occurs. This calls for sustained political commitment. ...”

2.  Restrictions on electoral rights (passive aspect)

53.  The relevant European and international instruments concerning removal of a member of parliament all provide for the possibility of restricting the right to be elected and to hold elected office, as long as such restrictions satisfy certain requirements, at the very least in terms of lawfulness, necessity and proportionality.

54.  In particular, in its report on exclusion of offenders from Parliament (Opinion no. 807/2015, CDL-AD(2015)036cor) the Venice Commission noted that restrictive measures such as removal from office pursued the legitimate aim of preserving democracy. Ineligibility to stand for election and removal from office were closely linked as they had to satisfy the same requirements: being based on precise legal rules, pursuing a legitimate aim and observing the proportionality principle.

55.  The relevant passages of the report read as follows:

“...

139.  Legality is the first element of the *Rule of Law* and implies that the law must be followed, by individuals and by the authorities. The exercise of political power by people who seriously infringed the law puts at risk the implementation of this principle, which is on its turn a prerequisite of democracy, and may therefore endanger the democratic nature of the state: a person who is not eager to recognise the standards of conduct in democratic society, may be unwilling to obey the constitutional or international standards on democracy and the Rule of Law. The basis for the restriction on such a person’s right to be elected or to sit in Parliament is *inter alia* the occurred violation of democratically adopted criminal law, *i.e.* of generally recognised standards of conduct.

140.  According to the case-law of the European Court of Human Rights on Article 3 of [Protocol No. 1], restrictions on the right to be elected should be limited to what is necessary to ensure the proper functioning and preservation of the democratic regime. This functioning would be more seriously endangered by an elected officer than by a simple voter exercising his active electoral rights. The restrictions under consideration should not be considered as limiting democracy, but as a means of preserving it.

141.  The vast majority of if not all the states addressed in this report recognise the public interest in excluding offenders from Parliament and most of them have adopted legislative measures in order to achieve this result.

...

164.  The Venice Commission considers that the termination of the mandate of an MP who has been sentenced and whose conviction entered into force after elections is justified if this was a cause of ineligibility to be elected. ...

...

174.  The Venice Commission considers that, if the exclusion of offenders from elected bodies does not happen by the simple functioning of the electoral mechanisms, legislative intervention becomes necessary.

...

179.  Finally, the Commission finds it suitable for the Constitution to regulate at least the most important aspects of the restrictions to the right to be elected and of loss of parliamentary mandate, and indeed many states provide for such provisions.”

**COMPLAINTS**

**56.****Relying on Article 7 of the Convention, the applicant complained that the application of Legislative Decree no. 235/2012, which had had the effect of disqualifying him from standing for election and removing him from office as a senator after he had been convicted of tax fraud in a final judgment, had breached the principles of lawfulness, foreseeability, proportionality and non-retroactive application of criminal penalties.**

57.  Relying on Article 3 of Protocol No. 1**, he** **also submitted that the disqualification provided for by the aforementioned Legislative Decree did not comply with the principles of lawfulness and proportionality to the aim pursued, thus breaching both his right to fulfil his electoral mandate and the electorate’s legitimate expectation that he would serve his term as senator.**

58.  Furthermore, the applicant argued that the **lack of an accessible and effective remedy in domestic law by which to contest the compatibility of Legislative Decree no. 235/2012 with the Convention and to challenge the Senate’s decision of 27 November 2013 breached** **Article 13 of the Convention.**

**59.  The applicant also alleged a violation of Article 3 of Protocol No. 1 in conjunction with Article 14, without providing an explanation in his initial application.** Subsequently, in his memorial of 31 July 2017, the **applicant stated that he had been disqualified from standing for election for six years, on an equal footing to an individual who had been given a more severe penalty of disqualification from public office than he had, for example permanently or for three years.** He contended on that account that the Legislative Decree in question breached Article 3 of Protocol No. 1, in conjunction with Article 14 of the Convention.

60.  In a letter of 7 May 2014, after the Court of Cassation’s judgment upholding the ancillary penalty of temporary disqualification from public office had been deposited on 18 March 2014, the applicant raised two further complaints, under Article 4 of Protocol No. 7 and Article 6 § 1 of the Convention.

**THE LAW**

Request for the application to be struck out of the list

**61.  On 27 July 2018 the applicant informed the Court that he no longer intended to pursue his application and asked for it to be struck out of the list of cases. He argued in particular that as a result of his rehabilitation** (see paragraph 40 above), **the Court’s decision on his application would serve no useful purpose, given that his disqualification from standing for election had been lifted and that no adequate redress could be afforded either for the disqualification or for the loss of his seat in the Senate. He asked the Court to strike the case out in accordance with Article 37 § 1 (a) and (b) of the Convention.**

62.  On 10 August 2018 the Government stated that they would leave the matter to the Court’s discretion.

63.  Article 37 § 1 of the Convention provides:

“The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that

(a)  the applicant does not intend to pursue his application; or

(b)  the matter has been resolved; or

(c)  for any other reason established by the Court, it is no longer justified to continue the examination of the application.

However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires.”

64.  The Court notes that the applicant has explicitly stated that he does not wish to pursue his application within the meaning of Article 37 § 1 (a) of the Convention.

65.  It considers that the applicant’s intention to withdraw from the proceedings instituted before the Court has been unequivocally established (see *Association SOS Attentats and de Boëry v. France* [GC], (dec.), no. 76642/01, § 30, ECHR 2006‑XIV). In accordance with Article 37 § 1 (a) of the Convention, the Court concludes that the applicant does not intend to pursue his application.

66.  Accordingly, there is no need to ascertain whether the matter has been resolved within the meaning of Article 37 § 1 (b) of the Convention.

67.  It remains to be determined whether there are special circumstances relating to respect for human rights as defined in the Convention and the Protocols thereto which require the continued examination of the application (Article 37 § 1 *in fine*).

68.  To determine whether it is necessary to continue the examination of an application in accordance with Article 37 § 1 *in fine*, the Court has, *inter alia*, had regard to whether the case raises important issues providing it with an opportunity to elucidate, safeguard and develop the standards of protection under the Convention (see *Konstantin Markin v. Russia* [GC], no. 30078/06, §§ 89-90, ECHR 2012 (extracts)), or whether the impact of the case goes beyond the particular situation of the applicant (see *F.G. v. Sweden* [GC], no. 43611/11, §§ 81-82, 23 March 2016, and, conversely, *Khan v. Germany* [GC] (striking out), no. 38030/12, § 40, 21 September 2016).

**69.  Taking account of the facts of the case as a whole, in particular the applicant’s rehabilitation on 11 May 2018 (see paragraph 39 above) and his unequivocal wish to withdraw his application, the Court concludes that no special circumstances relating to respect for human rights require it to continue the examination of the application in accordance with Article 37 § 1 *in fine*.**

**70.  Accordingly, the application should be struck out of the list.**

For these reasons, the Court, by a majority,

***Decides* to strike the application out of its list of cases.**

Done in English and French, and notified in writing on 27 November 2018.

Françoise Elens-Passos Angelika Nußberger  
 Deputy Registrar President

## **CASE OF RUSSIAN UNITED DEMOCRATIC PARTY YABLOKO AND OTHERS v. RUSSIA**

(Applications nos. 41982/12 and 6599/14)

JUDGMENT  
STRASBOURG

28 September 2021

*This judgment is final but it may be subject to editorial revision*In the case of Russian United Democratic Party Yabloko and Others v. Russia,

The European Court of Human Rights (Third Section), sitting as a Committee composed of:

Georgios A. Serghides, *President,* María Elósegui, Andreas Zünd, *judges,*  
and Olga Chernishova, *Deputy Section Registrar,*

Having regard to:

the applications (nos. 41982/12 and 6599/14) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a political party registered in the Russian Federation, Russian United Democratic Party Yabloko (*Rossiyskaya Obyedinennaya Demokraticheskaya Partiya Yabloko*) (“Yabloko” or “the first applicant party”), its regional branch, the Voronezh Branch of Russian United Democratic Party Yabloko (“the Voronezh branch of Yabloko” or “the second applicant party”), and two Russian nationals, Vasiliy Alekseyevich Timoshenko and Vyacheslav Semenovich Krapivkin (“the third applicant” and “the fourth applicant”), on the dates indicated in the Appendix;

the decision to give notice to the Russian Government (“the Government”) of the applications;

the parties’ observations;

the decision to reject the Government’s objections to examination of the applications by the Committee;

Having deliberated in private on 7 September 2021,

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

**INTRODUCTION**

**1.  The case concerns the alleged failure of the domestic authorities to adequately investigate complaints of serious irregularities during the elections to the State Duma of the Russian Federation (the lower chamber of the Russian Parliament) (“the Duma”) held on 4 December 2011**.

1. **THE FACTS**

2.  The applicants’ details are set out in the appended table. They were represented by Mr I. Sivoldayev, a lawyer practising in Voronezh.

3.  The Government were initially represented by Ms V. Milinchuk, the Representative of the Russian Federation to the European Court of Human Rights, then by her subsequent successors in that office, Mr M. Galperin, and Mr M. Vinogradov.

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

* 1. **elections to the duma**

5.  On 4 December 2011 elections to the Duma were held.

6.  General information about the organisation of elections, the parties and the system of vote counting is outlined in the case of *Davydov and Others v. Russia* (no. 75947/11, §§ 10-16 and 20, 30 May 2017). While the latter case refers to elections in St Petersburg, the system operated similarly in each constituency of the Russian Federation.

7.  The parties that took part in the elections were as follows: Yedinaya Rossiya (“ER”); Spraverdlivaya Rossiya (“SR”); Patrioty Rossiyi (“PR”); Pravoye Delo (“PD”); Kommunisticheskaya Partiya Rossiyskoy Federatsii (“the KPRF”); Liberalno-Demokraticheskaya Partiya Rossii (“the LDPR”); and Yabloko.

* 1. **Alleged irregularities**

8.  According to the applicants, **in the course of the elections numerous irregularities were detected as regards the vote counting, tabulation and reporting of the results obtained during the Duma elections in the Voronezh Region. The precinct election commissions (“PECs”) allegedly altered the results of the elections by systematically assigning more votes to the ruling party (“ER”) and its candidates, and sometimes by stripping the opposition parties (including Yabloko) of their votes.**

* + 1. Application no. 41982/12

9.  The applicants challenged the results in respect of eighteen polling stations of the Kalacheyevskiy District in the Voronezh Region: nos. 16/01, 16/02, 16/06, 16/07, 16/08, 16/11, 16/12, 16/13, 16/14, 16/20, 16/21, 16/29, 16/33, 16/34, 16/39, 16/42, 16/43 and 16/44.

* + - 1. Proceedings brought by the first applicant party

10.  On 11 March 2012 the first applicant party and SR lodged a complaint challenging the results of the elections to the Duma. They claimed that (1) the PECs had falsified the results of the elections in respect of the eighteen above-mentioned polling stations, and (2) such actions had been in breach of Article 3 of Protocol No. 1 to the Convention. They submitted a list of the allegedly incorrect data in the election results and asked the court for the data to be corrected. The allegedly incorrect data concerned: (1) the number of ballots contained in the ballot boxes; (2) the number of unused ballots; (3) the number of valid or invalid ballots; and (4) the number of votes cast in favour of the participating parties, including ER, Yabloko and SR.

**11.  In the claimants’ opinion, the breaches had resulted in the following: (1) the number of valid ballots had been inflated by 1,967; (2) the number of invalid ballots had decreased by 191; (3) the number of unused ballots had decreased by 2,057; (4) the votes cast in favour of the ruling party (ER) had been inflated by 4,295, (5) the LDPR had lost 1,736 votes; (6) PR had lost 118 votes; (7) the first applicant party had lost 205 votes; and (8) PD had lost 51 votes.**

12.  The claimants submitted that **the observers who had been present at the eighteen polling stations during the vote counts had been provided with copies of the records containing the results of the elections in respect of each of the eighteen polling stations. However, the records transmitted later by the PECs to the Territorial Election Commission (TEC) contained different data from those documented in the “original” records. In support of their allegations, the claimants submitted copies of the records containing the election results received by the observers.**

13.  In particular, the alleged discrepancies for polling station no. 16/01 are summarised in the table below. The third column indicates the figures as recorded in the “original” copy of the records. This document was attested by the signature of the commission’s chairperson and a stamp and indicated that it was issued at 12.30 a.m. on 5 December 2011. The fourth column of figures comes from the official results for the constituency as entered in the “*Vybory*” database and made public.

|  |  |  |  |
| --- | --- | --- | --- |
| **Line №** | **Line description** | **“Original” record** | **Official result** |
| 4 | Number of ballots issued at the polling station | 1,455 | 1,755 |
| 6 | Number of unused ballots invalidated after the end of the voting | 807 | 507 |
| 8 | Number of used ballots in the stationary ballot boxes | 1,455 | 1,755 |
| 9 | Number of invalid ballots | 32 | 12 |
| 10 | Total number of valid ballots | 1,625 | 1,946 |
| 19 | Votes cast for SR | 262 | 262 |
| 20 | Votes cast for the LDPR | 170 | 5 |
| 21 | Votes cast for PR | 17 | 5 |
| 22 | Votes cast for the KPRF | 375 | 375 |
| 23 | Votes cast for Yabloko | 46 | 6 |
| 24 | Votes cast for ER | 747 | 1,291 |
| 25 | Votes cast for PD | 9 | 2 |

14.  According to the claimants’ calculations, 4,495 votes for ER were added across the eighteen polling stations, amounting to about 12% of the total number of votes cast on that day in the Kalacheyevskiy District. Conversely, the number of votes cast for the first applicant party was reduced by 205.

1. Judicial review at the first level of jurisdiction

15.  **On an unspecified date the Kalacheyevskiy District Court of the Voronezh Region started the hearing of the case**. The first applicant party and SR maintained their position. The KPRF was admitted as a third party to the proceedings. Its representative supported the claim. The prosecutor taking part in the proceedings called for the claim to be dismissed.

16.  The court heard evidence from the PECs’ chairpersons and secretaries, who denied the claimants’ allegations. They further submitted that all of them had conducted the vote counts in the presence of the observers, in strict compliance with the applicable laws. The observers had interfered with, and slowed down, the process. As to the potential errors in the records, some of the persons questioned attributed them to fatigue on the part of the PEC members who had performed the actual counting.

17.  The court also heard evidence from the observers assigned to the eighteen polling stations by the KPRF and from one observer representing SR. They explained that they had received the records of the election results after the vote count had been completed. The data in the records had corresponded to those published on the noticeboard. The election results announced officially on the following day had differed from the results recorded in the “original” records they had received.

18.  Witness P.S., a member of the PEC at polling station no. 16/43, submitted that, according to the vote count, only 42% of the votes had been cast in favour of ER. The chairperson and another member of the commission had been concerned that they would be fired for such a result. The PEC had decreased the number of votes cast in favour of the LDPR, the first applicant party and PD, and assigned them to ER. The witness also claimed that one of the signatures in the “official” record against his name had not been his.

19.  Witness N.S., the TEC deputy chairperson, submitted that on 5 December 2011 from 3 to 5 a.m. the computer system had stopped responding and they had been unable to enter the data regarding the election results. At the time of the system shutdown, the TEC had not received the records from the eighteen PECs in question. In his opinion, the system had been manipulated in order to rig the election results.

20.  Witness Ch., a member of the TEC, submitted that the figures in the records submitted to the TEC in respect of the eighteen polling stations had differed from those recorded in the records issued to the observers. He had seen the persons who had brought the ballot boxes amend the records during the two hours when the computer system had been shut down.

21.  **On 23 July 2012 the District Court dismissed the claims, noting as follows:**

“The claimants failed to submit evidence showing consistently that on election day [the eighteen PECs] had counted the votes and determined the election results in violation of the laws on elections or that the election results did not reflect the true expression of the voters’ will. Nor did [the claimants] submit any evidence to prove that their right to take part in the elections had been infringed ...

[The court] established that the process of voting, vote counting, determination of the election results, completion of the records by the PECs and issuance of the copies of the records was in compliance with the applicable laws on elections ... The claimants’ arguments are based on an incorrect interpretation of substantive laws, and on speculation and emotions that cannot be taken into consideration by the court. They are of no relevance for the correct consideration of the case.

On 2 July 2012 [the investigator] refused to institute criminal proceedings ... as regards the alleged election fraud at polling station no. 16/01 ...

[The claimants and the third party] justify their allegations by relying on the copies of the records issued to the observers on behalf of the KPRF and SR.

Admittedly, the [content] of the copies of the records submitted by the claimants and the third party differs from [the data contained in] those received by the TEC.

...

[The claimants and the third party] refused categorically to submit the original copies of the records which [had been issued to the observers]. In such circumstances the court is unable to verify the documents’ authenticity and admit them in evidence.

The court explained to SR’s representative that it was necessary to question the observers on [their] behalf who had obtained the copies of the records. However, no information concerning those persons was provided and it was impossible to obtain their attendance.

Regard being had to the above, the court considers the copies of the records containing the election results [submitted in respect of the eighteen polling stations] to be inadmissible in evidence.

...

... **No evidence has been submitted to show that any of the PECs’ members have been found administratively liable for [failure to act in compliance with law]. Accordingly, the allegation that there were errors in the content of the record [issued by PEC no. 16/21] has not been substantiated.**

...

No criminal investigation has been opened in respect of members of the PECs on charges of [election fraud]. Accordingly, the allegations of election fraud have not been substantiated.”

22.  The court dismissed the statement made by P.S., relying on the forensic expert’s findings that it could not be established whether the signature attributed to P.S. had been authentic or forged.

23.  **The first applicant party, SR and the KPRF appealed against the judgment of 23 July 2012**.

1. Appeal proceedings

24.  On 1 November 2012 the Voronezh Regional Court upheld the judgment of 23 July 2012 on appeal, noting as follows:

“... the court at the first level of jurisdiction has correctly determined the circumstances of the case. Its findings are based on the fact that the copies of the records submitted by the claimants cannot be admitted in evidence. They do not correspond to the requirements set out in [the applicable legislation]. No other evidence in support of the argument that the election results were based on false data has been submitted. [The District Court] has found correctly that there were no grounds to satisfy the claims.

The statements made by the observers and PEC members cannot be considered in evidence given that the election results should be determined exclusively on the basis of the vote count. Such data can be obtained on the basis of the records of election results or duly certified copies of them. Accordingly, the statements made by the observers and by PEC members and secretaries are of no significance.

[The appellate court] affirms the District Court’s finding that there have been no significant violations in the course of the vote count and preparation of the records.

...

The argument set out in the statement of appeal to the effect that the validity and authenticity of the copy of the records which is duly certified by the officer in charge should be presumed cannot be accepted. The copies of the records submitted by the claimants do not comply with the legal requirements for such copies. The required information is missing. The time of the preparation of the record is not indicated. The copy number is missing. In some [of the records] the figures are not reproduced in words, and so on.

The information contained in the copies of the records submitted is refuted by other objective evidence contained in the case file. The claimants have failed to provide any other evidence in compliance with [the applicable laws].”

* + - 1. Proceedings initiated by individual voters, observers and members of PECs

25.  Several voters, observers and PEC members challenged the election results as reported by PECs nos. 16/02, 16/06, 16/11, 16/12, 16/21, 16/29, 16/33, 16/34, 16/39, and 16/43. The third applicant was a PEC member with an advisory vote appointed by the KPRF. The fourth applicant was an observer on behalf of the KPRF who had taken part in the vote count. The claimants alleged that the vote count conducted by the PEC had differed from the results submitted to, and published by, the TEC. The courts discontinued the proceedings, noting that the claimants did not have standing to challenge the election results. The claimants appealed against those decisions. The second applicant party took part in the appeal proceedings as a third party. On various dates between 20 March and 11 December 2012 the court of appeal upheld the findings of the lower courts.

* + - 1. Proceedings brought by SR

26.  The regional branch of SR challenged the election results as reported by PECs nos. 16/01, 16/07, 16/11, 16/12, 16/13, 16/14, 16/20, 16/29, 16/33, 16/34, 16/39, 16/42, 16/43, and 16/44. In each case the courts discontinued the proceedings, noting that the claimant did not have standing to challenge the election results. The claimants appealed against those decisions. The second applicant party took part in the appeal proceedings as a third party. On various dates between 5 April and 26 June 2012 the court of appeal upheld the findings of the lower courts.

* + - 1. Proceedings before the Constitutional Court

27.  On 22 April 2013 the Constitutional Court allowed a complaint lodged by ten persons, including the third applicant, challenging the compliance of legislation on elections with the Constitution of the Russian Federation. It confirmed the right of individual voters to challenge election results. The Constitutional Court’s findings on the issue are set out in detail in *Davydov and Others* (cited above, §§ 80-88).

* + - 1. Administrative proceedings

28.  On 21 September 2012 the first and second applicant parties, jointly with KPRF and SR, asked the Kalacheyevskiy District Prosecutor’s Office to open administrative proceedings in respect of irregularities as regards the vote count. On 24 October 2012 the District Prosecutor’s Office discerned no grounds to open such proceedings. The parties appealed, and on 7 December 2012 the District Court found that the prosecutor had failed to carry out a proper investigation into the complaint and quashed the decision of 24 October 2012. On 29 January 2013 the Regional Court upheld the refusal by the prosecutor’s office to institute the proceedings.

* + 1. Application no. 6599/14

29.  **On 3 December 2012 the first applicant party and SR applied to the Semilukskiy District Court of the Voronezh Region, challenging the decision ordering a recount of the votes** in respect of PECs: nos. 35/13, 35/16, 35/18, 35/21, 35/22, 35/24, 35/25, 35/27, 35/28, 35/29, 35/33, 35/35, 35/36 and 35/50. They submitted that SR’s representatives had been present during the initial vote count. At the time the PECs had established and recorded the election results. The party’s representatives had received the relevant records. However, the official election results published by the TEC had been different from those recorded in the records received by SR’s representatives. **According to the official version, the fourteen PECs had decided to recount the votes. The recount had been conducted in the absence of any legal basis or legal ground. None of the interested parties, including observers, journalists, and so on, had been informed of the decision to recount the votes. As a result of the recount, the number of votes cast in favour of the ruling party increased by 1,493.**

**30.  On 14 December 2012 materials relating to the elections of December 2011, including the ballot papers, were destroyed.**

**31.  On 3 April 2013 the District Court dismissed the complaint.** It established that **the PEC members with an advisory vote had not been informed of the decision ordering the recount of the votes and that the recount had taken place in their absence**. The court also **accepted that the election results had been based on the records reissued by the fourteen PECs.** In that connection it noted that the copies of the records presented by the claimants, containing results which differed from the official ones, had been issued prematurely and that the data contained therein had not been verified. **The court conceded that the fact that the PEC members had received the records containing incorrect data had amounted to a breach of the applicable legislation but had not led to a distortion of the voters’ intent. Nor did the court accept that the difference between the information contained in the records presented by the claimants and the official election results proved that the data in the records had been correct. It noted that the records submitted by the claimants had not been in conformity with the applicable legal requirements as to their form and dismissed them as inadmissible in evidence.**

32.  On 16 July 2013 the Regional Court upheld the judgment of 3 April 2013 on appeal.

33.  On the same day, the Regional Court issued a separate ruling (*частное определение*) directed at the Semilukskiy District TEC. It reminded it of the duty to fully comply with the requirements of the applicable legislation concerning, *inter alia*, the copies of the records of the voting results, and the recount procedure. **The Regional Court found that the PECs and the TEC concerned had not informed all members of the commissions of the recounts and the drawing up of new records, in breach of the relevant legislation. The TEC was asked to report to the Regional Court within one month on the measures taken to comply with such requirements in the future.**

1. **RELEVANT LEGAL FRAMEWORK AND PRACTICE**

34.  An overview of the relevant domestic legal framework and practice and international documents is provided in *Davydov and Others v. Russia* (no. 75947/11, §§ 173-98, 30 May 2017).

1. **THE LAW**
   1. **JOINDER OF THE APPLICATIONS**

35.  Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly.

* 1. **locus standi**

36.  On 4 May 2021 the applicants’ representative informed the Court that fourth applicant (Mr S. Krapivkin) died on 4 November 2020 and that his widow, Ms Nina Timofeevna Krapivkina, wished to pursue the application before the Court in his stead.

37.  The Government claimed that Ms N. Krapivkina should not be allowed to pursue the application in stead of her late husband, because the rights under Article 3 of Protocol No. 1 of the Convention to which he referred to are eminently personal and non-transferrable.

.  The Court notes that the decisive point in the present case is not whether the rights in question are or are not transferable to the heirs wishing to pursue the procedure, but whether the heirs can in principle claim a legitimate interest in asking the Court to deal with the case on the basis of the applicant’s wish to exercise his or her individual and personal right to lodge an application with the Court (see *Singh and Others v. Greece*, no. 60041/13, § 26, 19 January 2017; *Burlya and Others v. Ukraine*, no. 3289/10, § 68, 6 November 2018; and *Garbuz v. Ukraine*, no. 72681/10, § 28, 19 February 2019).

39.  Taking into account the materials before it, the Court considers that Ms N. Krapivkina has a legitimate interest in pursuing the application. It therefore holds that she has standing to continue the present proceedings in her late husband’s stead (see, among recent examples, *Mifsud v. Malta*, no. 62257/15, §§ 38-40, 29 January 2019, and *Radzevil v. Ukraine*, no. 36600/09, § 47, 10 December 2019).

* 1. **ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL No. 1 TO THE CONVENTION**

40.  The applicants complained under Article 3 of Protocol No. 1 to the Convention **in conjunction with Article 13 of the Convention that the official results of the elections to the Duma had not been based on the vote counts conducted by the PECs** in the Kalacheyevskiy and Semilukskiy Districts **and that the national judicial authorities had failed to ensure a proper judicial review of their complaints**. The Court will examine those allegations under Article 3 of Protocol No. 1, which reads as follows:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

* + 1. Admissibility

41**.  The Government submitted that the applicants had failed to bring their grievances to the attention of the election commissions. They also pointed out that none of the applicants had asked the competent national authorities to open a criminal or administrative investigation** **into their allegations of election fraud or any other violations in the course of the elections**. **Neither the third nor the fourth applicant had applied for the reopening of their cases after the review of the applicable legislation by the Constitutional Court of the Russian Federation.**

**42.  The applicants contended that they had exhausted the domestic remedies in respect of their grievances. As to the possibility for the third and fourth applicants to apply for a review of the decisions in their cases following the decision of the Constitutional Court of the Russian Federation, the relevant documents had been already destroyed by the PECs and any application for a review of the cases would have been devoid of purpose.**

43.  **The Court observes that the applicants applied for a judicial review of their complaints at the domestic level.** The national courts were competent, as a matter of law, to perform an independent and effective evaluation of the allegations at stake (compare *Davydov and Others*, cited above, §§ 333-34). **Accordingly, the applicants complied with the requirements set out in Article 35 of the Convention by bringing their grievances to the attention of the national courts**. The Court also accepts **the applicants’ position that it was not incumbent on them to apply for the reopening of the proceedings in their respective cases following the Constitutional Court’s decision of 22 April 2013** (ibid., § 323).

44.  The Court notes that the applicants’ complaints are neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. They must therefore be declared **admissible**.

* + 1. Merits
       1. The parties’ submissions

45.  The applicants maintained their complaints. They argued that they had submitted arguable claims concerning serious violations in the course of the vote counting and reporting by the electoral commissions and that the domestic courts had failed to ensure an effective examination of those claims. The courts had ignored the obvious violations committed by the PECs and had refused to recount the votes. The complaints lodged by the third and fourth applicants had not been examined on the merits.

46.  The Government submitted that the applicants’ grievances had been duly considered by the national judicial authorities at two levels of jurisdiction; that the applicants’ rights had not been infringed; and that the elections had been conducted in strict compliance with the law.

47.  As regards the proceedings which ended with the judgment of the Voronezh Regional Court on 1 November 2012, the Government relied on the domestic courts’ findings that the first applicant party had failed to substantiate its allegations. The claimants had refused to submit duly authenticated copies of the records, to provide the names of the parties’ observers who had been present during the vote count, or to ensure their attendance at the hearing. The Government further reiterated the domestic courts’ findings that there had been no administrative or criminal proceedings instituted against members of the PECs and reasoned that, in such circumstances, the courts had rightfully dismissed as unsubstantiated the claimants’ allegations of fraud committed in the course of the vote-count reporting.

48.  As regards the proceedings which ended with the judgment of the Regional Court on 16 July 2013, the Government reiterated the findings of the national judicial authorities. They conceded that the PECs had failed to comply with the procedure for the issuance of the records to the observers. That fact alone, however, had not had any impact on the expression of the voters’ will and the election results. Having examined the first applicant party’s allegations, the national domestic authorities had not discerned any serious violations of law that would have invalidated the elections. Nor had the claimants submitted copies of the relevant records to substantiate their allegations. The copies of the records submitted by the claimants had not been admitted in evidence by the courts. Accordingly, the national judicial authorities’ decision to dismiss the claimants’ allegations as unsubstantiated did not appear unreasonable or arbitrary. Lastly, the Government argued that the first applicant party had applied for a judicial review of the alleged violations one year after the elections. At the time, the PECs had already been dissolved and it had been impossible to obtain the relevant evidence. The original documents had been destroyed as the time-limit for their storage had expired.

* + - 1. The Court’s assessment

49.  According to the principles developed in *Mugemangango v. Belgium* [GC], no. 310/15, §§ 67-73, 10 July 2020, and *Davydov and Others,* cited above, §§ 271-88, the Court’s task in the present case is to ascertain whether the applicants’ allegations were sufficiently serious and arguable and whether they received an effective examination, i.e. that that the findings of the domestic authorities were not arbitrary or manifestly unreasonable.

1. The first applicant party’s complaints
2. Kalacheyevskiy District (application no. 41982/12)

50.  The Court observes that the first applicant party challenged the election results in respect of eighteen polling stations in the Kalacheyevskiy District, alleging manipulation of the vote count leading to an increase in the vote share of the ruling party and to a decrease in the vote share of its rival candidates. In doing so, it relied on the documents submitted by the observers and on eyewitness statements (see paragraphs 10-24 above). The first applicant party claimed that the free expression of the will of the people had been thwarted as a result of the misreporting of the vote count by the relevant PECs.

51.  In the Court’s view the first applicant party put forward a serious and arguable claim that the fairness of the elections had been seriously compromised. The alleged irregularities, if duly confirmed to have taken place, were indeed capable of thwarting the democratic nature of the elections. The first applicant party’s allegations were supported by relevant evidence, which included statements made by the observers and the members of the electoral commissions who gave fact-specific accounts of the violations witnessed by them. The Court also has regard to its finding in the above-mentioned *Davydov and Others* judgment, and observes that the problems identified in that case were similar to the first applicant party’s specific allegations. It remains, accordingly, to ascertain whether the first applicant party’s complaint received an effective examination at the national level.

52.  **The Court accepts and the parties have not argued otherwise, that Russian law provided, at the relevant time, for a system of examination of individual election-related complaints, consisting of electoral commissions at different levels, whose decisions could be challenged subsequently before the courts of general jurisdiction. Under such circumstances, the Court’s examination should be limited to verifying whether any arbitrariness could be detected in the domestic procedure and decisions** (see *Namat Aliyev v. Azerbaijan*, no. 18705/06, § 80, 8 April 2010).

53.  **While the first applicant party’s claims were accepted for examination on the merits, the national judicial authorities refrained from examining the substance of the complaints.** **They routinely dismissed the documents submitted by the first applicant party and its co-claimants as inadmissible in evidence, noting that the form of those documents had not been in compliance with the statutory requirements. The Court does not deny the importance of adherence to rules of procedure in matters of election administration and the recording of the results. Nevertheless, in its opinion and regard being had to the seriousness of the accusations, it was incumbent on the national courts to employ other means available to dispel the doubts as to the validity of the election results rather than dismissing the documentary evidence on purely formal grounds. The Court discerns no indication in the judgments delivered by the national courts or in the Government’s submissions as to the efforts made by the national authorities in that regard.** While several witnesses who had been members of the electoral commissions testified to the repeated violations of the vote count and reporting and those allegations were also supported by the written statements provided by the observers assigned to the polling stations, the national courts refused to assess that evidence and found it, without going into any detail, of no probative value. **The fact that the election results management system malfunctioned was ignored. Nor did the courts explain why a judicial recount of the votes was impossible or unfeasible. It appears that the national courts gave such predominant weight to the fact that no criminal or administrative proceedings had been opened in connection with the first applicant party’s complaint that they virtually dispensed with examining the evidence presented by the claimants.**

54.  Regard being had to the above, **the Court concludes that the national judicial authorities refrained from going into the substance of the complaint lodged by the first applicant party about the misreporting of the election results by the eighteen PECs, instead limiting its judicial review to trivial questions of formalities and ignoring evidence pointing to serious and widespread breaches of procedure and transparency requirements. Accordingly, the Court is unable to conclude that the national courts ensured a procedure complying with the requirement to provide sufficient guarantees against arbitrariness in the review of an arguable claim of serious violations of electoral rights. There has been accordingly a violation of Article 3 of Protocol No. 1 to the Convention.**

1. Semiluksiy District (application no. 6599/14)

.  As to the first applicant party’s complaint concerning the recount of the votes at the fourteen polling stations in the Semilukskiy District (see paragraphs 29-33 above), the Court takes into account the national courts’ finding that (1) the decisions to recount the votes were taken in the absence of the observers from the opposition and (2) the observers from the opposition were not present during the actual recount or advised in good time about the results of the recount. It further notes that, as a result of the recount, the number of votes in favour of the ruling party increased. Accordingly, the Court considers that the recount of the votes on such scale, in the absence of any transparency, pointed to a serious dysfunction in the electoral system and was capable of casting serious doubts on the fairness of the entire process. It therefore accepts that the first applicant party put forward a serious and arguable claim that the fairness of the elections had been seriously compromised. It remains to ascertain whether there was an effective examination of the first applicant party’s complaint at the national level.

56.  The Court further notes that, similarly to the situation in the Kalacheyevskiy District, the judicial authorities refrained from going into the substance of the first applicant party’s allegations, instead limiting their analysis to trivial questions of formalities and completely ignoring evidence pointing to serious and widespread breaches of procedure and transparency requirements.

57.  **Lastly, the Court does not lose sight of the fact that, as submitted by the Government, the actual ballots were destroyed almost immediately after the District Court accepted the first applicant party’s complaint for consideration, thus rendering it impossible for the judicial authorities to verify the vote count if necessary. The Government did not explain why the District Court chose not to take measures ensuring the preservation of the ballots while this was still feasible. Nor did they elaborate as to the legislative requirements, if indeed there were any, concerning the storage of relevant electoral materials until the last opportunity to challenge election results had passed. Similarly, the Court does not accept the Government’s argument that the first applicant party instituted the judicial proceedings belatedly.**

**58.  In the circumstances of the case, the Court considers that the failure on the part of the authorities to ensure a proper, transparent review of the first applicant party’s grievances amounts to a violation of Article 3 of Protocol No. 1. It finds it difficult to reconcile such a breach with the Russian courts’ and the Government’s argument that it did not lead to a distortion of the voters’ intent. Accordingly, the Court finds that the Government’s argument that such an omission did not lead to a violation of the relevant Convention provisions is of no significance and concludes that there has been a violation of Article 3 of Protocol No. 1 to the Convention**.

1. The second applicant party and the third and fourth applicants

59.  The Court observes that the national courts refused to consider the complaints lodged by the second applicant party and the third and fourth applicants on the merits, noting that they did not have standing to challenge the election results (see paragraphs 25 and 26 above26). The Government did not argue that the applicants’ complaints had received an effective examination by the national judicial authorities.

60.  In this connection, the Court reiterates that such a failure would constitute a violation of the individual’s right to free election guaranteed under Article 3 of Protocol No. 1 to the Convention (see, for example, *Davydov and Others*, cited above, § 335). It further notes that the Government have not made any submissions on the matter that would allow it to reach a different finding in the present case.

**61.  The Court concludes that the national judicial authorities have not ensured an effective examination of the applicants’ grievances. The Court does not lose sight of the fact that it was open to the applicants to apply for the reopening of the proceedings after the Constitutional Court’s finding. However, such an application for reopening would have been devoid of purpose after a significant lapse of time, when all the relevant documents had been destroyed. There has accordingly been a violation of Article 3 of Protocol No. 1 to the Convention.**

* 1. **APPLICATION OF ARTICLE 41 OF THE CONVENTION**

62.  Article 41 of the Convention provides: “If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

* + 1. Damage

63.  The applicants’ claims in respect of non-pecuniary damage are summarised in the appended table.

64.  The Government considered those claims excessive and unreasonable.

**65.  The Court considers that there is a clear link between the violations found and the non-pecuniary damage alleged by the applicants.** Making its assessment on an equitable basis, the Court awards the first, second and third applicant, as well as Ms N. Krapivkina 5,000 euros (EUR) each in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

* + 1. Costs and expenses

66.  The applicants also claimed EUR 8,000 jointly for the costs and expenses incurred before the domestic courts and the Court, and asked the award to be payed directly to their representative. They submitted that their representative had represented them *pro bono*. Nevertheless, he had incurred travel, accommodation and other expenses which had to be reimbursed. The third and fourth applicants each claimed 200 Russian roubles (RUB) in respect of the court fees they had paid. Lastly, the applicants claimed RUB 2,000 in connection with the court fee paid by their representative when lodging an appeal and RUB 11,415.49 in respect of the fee paid by him for commissioning an expert report. The third and fourth applicants submitted copies of the relevant receipts. The remainder of the documents submitted were illegible. The applicants asked the Court to indicate that the aforementioned amounts of fees should be paid into the bank account of their representative.

67.  The Government submitted that no compensation should be awarded to the applicants under this head. As regards the costs of Mr Sivoldayev’s services, the applicants had failed to substantiate their claims in respect of the sum of EUR 8,000, regard being had to the *pro bono* service provided by Mr Sivoldayev. They further noted that the court fees paid by the applicants when lodging an appeal were obligatory and should be not reimbursed. Lastly, they submitted that the fee paid by Mr Sivoldayev for the expert report had not been substantiated by any document.

68.  According to the Court’s case-law, the applicants are entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the third applicant and Ms N. Krapivkina the sum of EUR 5 each covering court fees incurred by them in the domestic proceedings, for which evidence confirming the payment has been submitted.

Default interest

69.  The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

**FOR THESE REASONS, THE COURT, UNANIMOUSLY,**

1. *Decides* to join the applications;
2. *Holds* that Ms N. Krapivkina has *locus standi* under Article 34 of the Convention to continue the proceedings in her late husband’s stead;
3. *Declares* the applications admissible;
4. *Holds* that there has been a violation of Article 3 of Protocol No. 1 to the Convention in respect of each of the applicants;
5. *Holds*
   1. **that the respondent State is to pay** the applicants and Ms N. Krapivkina, within three months, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      1. EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to the first, second, and third applicant and to Ms N. Krapivkina each;
      2. EUR 5 (five euros), plus any tax that may be chargeable, in respect of costs and expenses to the third applicant and Ms N. Krapivkina each;
   2. that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses* the remainder of the applicants’ claim for just satisfaction.

Done in English, and notified in writing on 28 September 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Olga Chernishova Georgios A. Serghides  
 Deputy Registrar President

1. Bosnia and Herzegovina consists of two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska, and the Brčko District. [↑](#footnote-ref-1)
2. Bosniacs were known as Muslims until the 1992-95 war. The term “Bosniacs” (*Bošnjaci*) should not be confused with the term “Bosnians” (*Bosanci*) which is commonly used to denote citizens of Bosnia and Herzegovina irrespective of their ethnic origin. [↑](#footnote-ref-2)
3. The Croats are an ethnic group whose members may be natives of Croatia or of other former component republics of the SFRY including Bosnia and Herzegovina. The expression “Croat” is normally used (both as a noun and as an adjective) to refer to members of the ethnic group, regardless of their nationality; it is not to be confused with “Croatian”, which normally refers to nationals of Croatia. [↑](#footnote-ref-3)
4. The Serbs are an ethnic group whose members may be natives of Serbia or of other former component republics of the SFRY including Bosnia and Herzegovina. The expression “Serb” is normally used (both as a noun and as an adjective) to refer to members of the ethnic group, regardless of their nationality; it is not to be confused with “Serbian”, which normally refers to nationals of Serbia. [↑](#footnote-ref-4)
5. I will not discuss the recent case of Strøbye and Rosenlind v. Denmark (nos. 25802/18 and 27338/18, 2 February 2021), as the judgment in that case is not yet final at the moment of writing of this opinion. [↑](#footnote-ref-5)
6. This same agreement is also reflected in Recommendation CM/Rec(2011)14 of the Committee of Ministers of the Council of Europe on the participation of persons with disabilities in political and public life, adopted on 16 November 2011. One of the principles which should guide the Member States in adopting the appropriate legislative measures is that “all persons with disabilities, whether they have physical, sensory, or intellectual impairments, mental health problems or chronic illnesses, have the right to vote on the same basis as other citizens, and should not be deprived of this right by any law limiting their legal capacity, by any judicial or other decision or by any other measure based on their disability, cognitive functioning or perceived capacity” (Appendix to the recommendation, point 3, on “non-discrimination in the exercise of legal capacity”). [↑](#footnote-ref-6)
7. Rectified on 26 June 2013: The following text has been added: “…, the European Parliament and the United Kingdom Parliament…”. [↑](#footnote-ref-7)
8. .  Mustafa Kemal Atatürk is the founder and the first President of the Republic of Turkey. [↑](#footnote-ref-8)
9. 2.  Kemalist ideology is the political ideology of Mustafa Kemal Atatürk, and is based on six main pillars of ideology; republicanism, nationalism, populism, secularism, statism and revolutionism. [↑](#footnote-ref-9)
10. 1.  In other contexts the Court uses a category-based approach. This is the approach in Article 3 cases, and to some extent even in the context of freedom of expression under Article 17, as certain categories of expression are deemed not worthy of protection because they are abusive, therefore belonging to a category that is impermissible and not protected. [↑](#footnote-ref-10)
11. .  In *Buitoni v Fonds d’Orientation* [1979] ECR 677, the European Court of Justice found a penalty for failing to report the use of a licence disproportionate because the penalty was the same as for the actual use of the licence. In *Buitoni* it was intuitively accepted that not reporting a crime and committing that crime could not be the same and did not deserve the same treatment. This is so obvious that it needs no further explanation.

    I follow here Bernhard Schlink, *Proportionality (1)* and Aharon Barak, *Proportionality (2)* in M. Rosenfeld and A. Sajó: *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press 2012. [↑](#footnote-ref-11)
12. .  See *Texas v. Johnson,* 491 U.S. 397 (1989). For the advantages of the categorical approach see below. [↑](#footnote-ref-12)
13. .  *Simon and Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.,* 502 U.S. 105, 116 (1991). [↑](#footnote-ref-13)
14. .  A categorical approach is used against applicants, but not against States, in the Article 17 context (see *Garaudy v. France* (dec.), no. 65831/01, ECHR 2003‑IX). [↑](#footnote-ref-14)
15. .  The Court accepted in *Otto-Preminger-Institut v. Austria* (20 September 1994, Series A no. 295‑A) that protection against indignation caused by “offensive” speech was a legitimate aim within the concept of the rights of others, at least where the right was freedom of religion. *A, B and C v. Ireland* ([GC], no. 25579/05, § 232, ECHR 2010) goes beyond a Convention-right-related concern. Here it was not popular religious sensitivity that was to be protected and considered by the Court in a balancing exercise. The Court said that where the case raised sensitive moral or ethical issues, the margin of appreciation would be wider (but compared to what?), so the Court was technically not even compelled to go into genuine balancing (which it did anyway, in an Article 8 context). The Court concluded that “profound moral values” of the majority entered into the realm of legitimate aims of rights limitation, namely “protection of morals”, hence the matter was to be treated under the necessity test. Both judgments resulted in strong dissents and criticism. Under this logic, if applied to freedom of expression, the argument might go like this: the “deep sense of respect and adoration” amounts to a profound moral value; therefore – as is common in the context of disparagement of national symbols – national unity or respect for the nation as such are foundational for public morals. History shows the speech-restrictive consequences of such authority-respecting (if not outright authoritarian) approaches. [↑](#footnote-ref-15)
16. .  I am not denying that the use of such a form of expression, although it clearly falls within the ambit of Article 10, may not be necessary in a democratic society in given circumstances. Furthermore, there are other legitimate aims that could make such a restriction proportionate. But the present law simply precludes such analysis. (For a similar problem see *Vajnai v. Hungary*, no. 33629/06, ECHR 2008.) [↑](#footnote-ref-16)
17. .  See *Wingrove v. the United Kingdom*, 25 November 1996, § 58, *Reports of Judgments and Decisions* 1996-V. [↑](#footnote-ref-17)
18. .  See *Sürek v. Turkey* (no. 1) [GC], no. 26682/95, § 61, ECHR 1999-IV. [↑](#footnote-ref-18)
19. .  The best part of this Court’s Article 10 jurisprudence requires that a demanding scrutiny be applied to political speech, precisely because of the crucial importance of such expression for a democratic society. (See *Ceylan v. Turkey* [GC], no. 23556/94, § 34, ECHR 1999‑IV, *Öztürk v. Turkey* [GC], no. 22479/93, § 66, ECHR 1999‑V, *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, § 92, ECHR 2009; citing: *Lingens v. Austria*, 8 July 1986, § 42, Series A no. 103; *Castells v. Spain*, 23 April 1992, § 43, Series A no. 236; *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, § 63, Series A no. 239; *Wingrove*, cited above, § 58; and *Monnat v. Switzerland*, no. 73604/01, § 58, ECHR 2006‑X). The present case is about political speech. Under this traditional approach of proportionality the measure is disproportionate not for the severity of the conviction but because of the insufficiency of the reasons justifying the interference. [↑](#footnote-ref-19)
20. .  To consider legislation as being compatible *in abstracto* with the grounds for restriction enumerated in paragraph 2 of Article 10 has in principle been recognised by the Court. This is how Sir Nicolas Bratza summarised the Court’s position: “Where, however, as here, the interference springs directly from a statutory provision which prohibits or restricts the exercise of the Convention right, the Court’s approach has tended to be different. In such a case, the Court’s focus is not on the circumstances of the individual applicant, although he must be affected by the legislation in order to claim to be a victim of its application; it is, instead, primarily on the question whether the legislature itself acted within its margin of appreciation and satisfied the requirements of necessity and proportionality when imposing the prohibition or restriction in question.” (Concurring opinion of Judge Bratza in *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, ECHR 2013). [↑](#footnote-ref-20)
21. .  After all, this is the unequivocal message of those judgments which state that even a sanction of one euro (i.e. any sanction) might be disproportionate (see *Eon v. France*, no. 26118/10, 14 March 2013, and *Colombani and Others v. France*, no. 51279/99, ECHR 2002‑V). For the *per se* inappropriateness of criminal sanctions for certain categories of expression, see, for example, *Lehideux and Isorni v. France*, 23 September 1998, § 57, *Reports* 1998‑VII. [↑](#footnote-ref-21)
22. .  For a criticism of departure from international law in the property context see *Guiso‑Gallisay v. Italy* (just satisfaction) [GC], no. 58858/00, 22 December 2009, dissenting opinion of Judge Spielmann: “Through its judgment in this case the Court has departed from its settled case-law, a case-law that, moreover, is in conformity with the principles of international law on reparation, ... I refer to the principle of *restitutio in integrum*. This principle enshrines the obligation on a State that is guilty of a violation to make reparation for the consequences of the violation found.” I voiced my discontent as regards a similarly parsimonious denial of just satisfaction in *Kayasu v. Turkey*, nos. 64119/00 and 76292/01, 13 November 2008 (dissenting opinion of Judge Sajó). [↑](#footnote-ref-22)
23. .  *Gençel v. Turkey*, no. 53431/99, § 27, 23 October 2003. [↑](#footnote-ref-23)
24. Rectified on 21 February 2017: the text was “EUR 2,585 (two thousand five hundred and eighty five euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;” [↑](#footnote-ref-24)