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

FIFTH SECTION

CASE OF KOVACH v. UKRAINE

(Application no. 39424/02)

JUDGMENT

STRASBOURG

7 February 2008

FINAL

07/05/2008

In the case of Kovach v. Ukraine,

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

Peer Lorenzen, *President*,
Karel Jungwiert,
Volodymyr Butkevych,
Margarita Tsatsa-Nikolovska,
Javier Borrego Borrego,
Renate Jaeger,
Mark Villiger, *judges*,
and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 15 January 2008,

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

PROCEDURE

1. The case originated in an application (no. 39424/02) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Mr Mykola Mykolayovych Kovach ("the applicant"), on 17 October 2002.

2. The applicant was represented by Ms N. Petrova, a lawyer practising in Kyiv. The Ukrainian Government ("the Government") were represented by their Agent, Mr Y. Zaytsev.

3. On 14 February 2006 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Events giving rise to the applicant's subsequent complaints

4. The applicant stood as a candidate in the parliamentary elections of 31 March 2002 in the single-seat electoral constituency no. 72 in the

Zakarpattya (Transcarpathia) region (*Одномандатний виборчий округ № 72*).

5. Among the candidates registered in that constituency was Mr G., who, at the material time, occupied the post of Head of the Beregovo District State Administration (Zakarpattya *Oblast*) (*Берегівська державна адміністрація Закарпатської області*).

6. On 13 and 28 March 2002 the local Hungarian-language newspapers *Bereginfo* and *Karpati Igaz Szo* published the following appeal to voters:

> "We firmly believe that anyone who honours [Mr G.] with their support on Sunday can do so with a clear conscience, placing their faith and trust in him to ensure the best possible future for our country. He is the only candidate who respects all our interests and is capable of representing and defending those interests at the highest level. He is a man of action who will never abuse your trust in him and who will do his utmost to retain the full support of voters in the future."

7. The appeal was followed by a large number of signatures, including those of Mrs D., secretary of the Electoral Commission of constituency no. 72 (*Окружна виборча комісія*), and Mr O., the Chairman of the same electoral commission.

8. On 31 March 2002 the parliamentary elections were held. During the elections an observer, acting on behalf of Mr G. in electoral division no. 14 of constituency no. 72, drew up a report (*акт*) stating that she had witnessed an unknown person depositing several (she believed there were seven) ballots in the ballot box. The report was signed by two voters. The observers sent by Mr G. to electoral divisions nos. 45 and 58 drew up similar reports of such breaches of electoral law, stating that they had seen respectively five and ten ballots being cast in the ballot box unlawfully.

9. According to the first results generated by the computerised system, the applicant had obtained 33,567 votes, compared with 33,524 for his main opponent, Mr G. In electoral division no. 14 the applicant had obtained 537 and Mr G. 291 votes out of 1,570 votes cast. In division no. 45, out of 1,244 voters 711 had voted for the applicant and 372 for his opponent. In division no. 58 there had been 830 votes, of which 475 had been cast for the applicant and 219 for Mr G. In division no. 67, of 1,480 voters 765 cast their ballots for the applicant and 387 for his opponent. In total, in the four above-mentioned electoral divisions the applicant had obtained 2,488 votes, against 1,269 for Mr G.

10. By decision no. 36 of 2 April 2002, the Electoral Commission of constituency no. 72, on the basis of the above-mentioned observers' reports, declared the results in electoral divisions nos. 14, 45 and 58 invalid on the grounds of serious breaches of electoral law. It was also established that on the night of 1 April 2002, after the close of polls and the count, the members of the Electoral Commission of division no. 67 had unlawfully opened the sealed polling station and retrieved the original voting records and several invalid ballots. The next day the Chairman of that division's Electoral

Commission had brought those voting records and ballots to the Electoral Commission of constituency no. 72. No reason had been given for these actions. Therefore, the results of the elections in division no. 67 were also declared invalid. On the same date the applicant appealed against this decision to the Central Electoral Commission (*Центральна виборча комісія* – “the CEC”).

11. By decision no. 37, the Electoral Commission of constituency no. 72 announced the final results of the ballot, according to which the applicant had obtained 31,079 votes compared with 32,255 for Mr G. This result corresponded to that set out in the first voting record, referred to above, after deduction of the votes in divisions nos. 14, 45, 58 and 67. Mr G., therefore, was declared elected as a member of parliament for the constituency.

B. Proceedings concerning the annulment of the vote in the four electoral divisions

12. On 3 April 2002 the chairmen and members of the Electoral Commissions of divisions nos. 14, 45, 58 and 67 sent statements to the Chairman of the CEC to the effect that none of the official observers had drawn their attention to any breach of electoral law during the voting or the count, and that the documents submitted by the observers complaining of irregularities had been drawn up after the count, “the results of which did not suit one of the candidates”.

13. By decision no. 750 of 5 April 2002, the CEC, following the applicant’s complaint of 2 April 2002, set aside decision no. 36 and instructed the Electoral Commission of constituency no. 72 to give a reasoned decision on the results of the vote in the four divisions in question. Referring to the first paragraph of section 70 of the Parliamentary Elections Act, the CEC observed that the impugned decision had not been duly reasoned and that there was no conclusive evidence of the alleged irregularities or the allegation that the number of ballots deposited unlawfully had exceeded 10% of the votes cast in each electoral division.

14. At a meeting of 6 April 2002, the Electoral Commission of constituency no. 72, by a majority of nine votes to two with three abstaining, adopted decisions nos. 40 and 41, whereby the vote in electoral divisions nos. 14, 45, 58 and 67 was declared invalid for the same reasons as before. In these decisions the Commission noted that the twelfth paragraph of section 72 of the Parliamentary Elections Act allowed a vote to be declared invalid on account of “other circumstances making it impossible to establish the results of the expression of the electorate’s wishes”, in addition to those enumerated in section 70 of the Act. The Commission further noted that since section 72 did not list these “other circumstances”, the matter fell within its exclusive competence. Lastly, the Electoral

Commission of constituency no. 72 concluded that the irregularities which it had established and those noted by the observers could be considered as "other circumstances", making it impossible to establish the electorate's wishes.

15. On 9 April 2002 the applicant lodged a complaint challenging decisions nos. 40 and 41 of 6 April 2002. He submitted that the Electoral Commission of constituency no. 72 had not followed the instructions given by the CEC in its decision of 5 April 2002 concerning the need to give sufficient reasons.

16. By decision no. 858 of 12 April 2002, the CEC rejected the applicant's complaint of 9 April 2002 on the ground that, in accordance with section 72 of the Parliamentary Elections Act, the task of establishing the existence of "other circumstances" causing the vote to be declared invalid fell to the constituency electoral commission.

17. The applicant appealed against this decision to the Supreme Court, which, in a judgment of 24 April 2002, upheld the findings of the CEC, including that concerning the exclusive competence of the constituency Electoral Commissions to establish the "other circumstances" provided for in section 72 of the 2001 Parliamentary Elections Act.

C. Proceedings concerning the remainder of the alleged breaches of electoral law

18. On 3 April 2002 Mr V., the applicant's observer, in the presence of the observers of other candidates and the Chairman and two members of the Electoral Commission of constituency no. 72, drew up a report alleging a breach of electoral law. According to the authors, the conditions in the office of the electoral commission located in the basement of the State Administration building in Beregovo were not adequate to ensure that the ballots were kept secure and intact; in particular, they alleged that the doors and filing cabinets had not been sealed, and that one of the doors did not even have a lock on it.

19. On 5 April 2002 the applicant lodged a complaint with the CEC, challenging decision no. 37 of 2 April 2002 whereby Mr G. had been announced the winner of the elections in constituency no. 72

20. On 7 April 2002, after the CEC's decision no. 750 (see paragraph 13 above), a recount of the votes in the electoral divisions nos. 14, 45, 58 and 67 was held. After the recount, the Electoral Commission of constituency no. 72 issued a detailed voting record dated 7 April 2002 setting out the results of the ballot in the constituency, which were the same as those stated in its decision no. 37.

21. On the same day a member of the constituency Electoral Commission, together with two observers of two of the unsuccessful candidates, prepared a memorandum, addressed to the CEC, alleging that

the packages containing the ballot papers had not been sealed by the Electoral Commission of division no. 67, that some of the ballot papers had been damaged and that, in view of these factors, access to the ballots by third parties before the recount could not be ruled out.

22. On 14 April 2002 the Electoral Commission of constituency no. 72 drew up the corrected voting record (see paragraph 27 below) setting out the results of the vote.

23. On the same date the deputy chairman and three members of the Electoral Commission of division no. 67 drew up a memorandum, addressed to the CEC, in which they stated that, in breach of the law, the deputy chairman and secretary of the constituency Electoral Commission, accompanied by four officials of the municipal council and the State Administration acting as observers appointed by Mr G., had come to their homes asking them to sign the corrected voting record. The signatories of the document expressed doubts as to the accuracy of the figures given in the record of 14 April 2002.

24. On 15 April 2002 the corrected voting records were sent to the CEC.

25. On 16 April 2002 the applicant lodged a complaint with the CEC seeking to have the record of 14 April 2002 declared invalid. Referring to the appeal to voters published on 13 and 28 March 2002 in the newspapers *Bereginfo* and *Karpati Igaz Szo*, he criticised the fact that the chairman and the secretary of the commission had engaged in election campaigning for his opponent. He also noted that the conditions in which the ballot materials had been kept and the new voting record produced cast doubt on the accuracy of the results of the vote obtained after the recount on 7 April 2002.

26. In a letter of 18 April 2002, the Electoral Commission of constituency no. 72 informed the CEC that, in accordance with the instructions of the Zakarpattya *Oblast* Police Department (*ГУ МВС України в Закарпатський області*), the commission's office had been properly protected and that no illegal entry had been found to have occurred.

27. By a decision of 18 April 2002, the CEC examined and rejected the applicant's complaints of 5 and 16 April 2002. It noted that the voting record drawn up after the recount of 7 April 2002 did not contain certain data, namely the number of invalid ballots, and that the amended record of 14 April 2002 had corrected that error. The CEC further noted that decision no. 37 of 2 April 2002 had been lawful and valid given that, according to the corrected voting record, Mr G. had obtained the highest number of votes. Moreover, no indication was found that the way in which the recount had been organised had affected the accuracy of the results of the vote. The CEC referred in this regard to the letter of 18 April 2002 of the Electoral Commission of constituency no. 72 concerning the security of its office. Lastly, the CEC found that the applicant had failed to indicate any ground

provided by the Parliamentary Elections Act for the dismissal of the Chairman and the secretary of the Electoral Commission of constituency no. 72.

28. The applicant challenged this decision before the Supreme Court, which, in a judgment given on 22 April 2002, rejected his complaint. It held that the decision of 18 April 2002 had been taken within the CEC's competence and in a manner prescribed by the applicable domestic law.

II. RELEVANT DOMESTIC LAW

A. Constitution of Ukraine

29. The relevant Article of the Constitution provides:

Article 76

> "... A citizen of Ukraine who has reached the age of 21 on the date of the elections has the right to vote and, if that citizen has resided on the territory of Ukraine for the past five years, is eligible to be elected a member of parliament ..."

B. The Parliamentary Elections Act of 18 October 2001 (in force at the material time)

30. At the material time the Ukrainian electoral system was governed by section 1 of this Act. It was based on a mixed-member proportional system, where 225 of the 450 members of the *Verkhovna Rada* (the Ukrainian unicameral parliament) were elected from the single-seat constituencies by simple plurality ("first past the post") (see *Sukhovetskyy v. Ukraine*, no. 13716/02, ECHR 2006-VI) and another 225 seats were reserved for candidates from party lists (see *Melnychenko v. Ukraine*, no. 17707/02, ECHR 2004-X).

31. In accordance with section 18 of the Act, the system of electoral commissions included the CEC, commissions of electoral constituencies and electoral divisions. Each electoral constituency consisted of several divisions.

32. Section 29 of the Act provided that the candidates for election were entitled to challenge the decisions, actions and omissions of the electoral commissions before the higher electoral commissions or the courts. The higher electoral commission, following such an application, the decision of the court or of its own motion, could set aside the decision of the lower commission and either take a new decision or oblige the commission

concerned to reconsider the matter. Decisions, actions and omissions of the CEC could be challenged before the Supreme Court.

33. Section 70 of the Act determined the procedure for having the vote in an electoral division declared invalid by the electoral commission of that division.

Paragraph 1 of this section stipulated:

> "An electoral commission of a division may declare the vote in the division invalid in the event of a breach of this Act making it impossible to establish the results of the expression of the electorate's wishes. The electoral commission of a division may declare the vote invalid only in the following circumstances:
>
> 1. if actual unlawful voting has been established (depositing of a ballot in the ballot box by a person other than the one to whom it has been issued; voting by persons who have no right to vote; voting by persons who are not included in the electoral lists of the relevant electoral division or by persons who have been wrongly included in the lists; multiple voting by one voter) if the number of fraudulent votes exceeds 10% of the total votes cast;
>
> 2. if a ballot box has been damaged or destroyed so that it is impossible to establish the content of the ballots deposited, and if the number of damaged ballots exceeds 10% of the total votes cast;
>
> 3. if the number of ballots deposited exceeds the number of voters who voted by 10% or more."

34. Section 72 of the Act regulated the procedure for examination by the constituency commissions of voting records issued by the division commissions.

Paragraph 12 of this section provided:

> "If the electoral commission of a constituency establishes the existence of the circumstances enumerated in paragraph 1 of section 70 or of other circumstances which make it impossible to establish the wishes of the voters in the division, it may declare the vote in the division concerned invalid."

35. The 2004 Parliamentary Elections Act (as amended on 7 July 2005) provides for proportional representation in elections. Section 90 of the 2004 Act retains the power for commissions of electoral divisions to declare a ballot inadmissible if the number of fraudulent votes exceeds 10% of the total votes cast. Section 92 provides that, after a recount, commissions of electoral constituencies are entitled to annul the vote in an electoral division if the circumstances set out in section 90 have been established, or if intentional acts have wrongfully interfered with the work of the members of the electoral commissions or the candidates' observers.

THE LAW

I. SCOPE OF THE CASE

36. The Court observes that after communication of the application to the respondent Government and in response to the Government's objections as to the admissibility and merits of the application, the applicant submitted further complaints, alleging that during the election campaign the applicant and his supporters had been constantly oppressed by the authorities. The applicant also complained that his main opponent, Mr G., had used his post of Head of the Beregovo District State Administration to influence the campaign and the outcome of the elections.

37. The Government made no comments.

38. In the Court's view, the new complaints are related in a general sense to the present case, but do not constitute an elaboration of the applicant's original complaint to the Court, which is limited to the alleged unfairness of the count procedure at constituency no. 72 during the 2002 parliamentary elections. The Court considers, therefore, that it is not appropriate now to take these matters up separately in the context of the present application (see, *inter alia*, *Piryanik v. Ukraine*, no. 75788/01, § 20, 19 April 2005, and *Lyashko v. Ukraine*, no. 21040/02, § 29, 10 August 2006).

II. ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL No. 1

39. The applicant complained that the conditions in which the elections had been conducted in constituency no. 72 had not ensured the free expression of the opinion of the people in the choice of the legislature. In particular, he complained about the invalidation of the votes cast in electoral divisions nos. 14, 45, 58 and 67, and the alleged unfairness of the subsequent recount. He also complained that the chairman and secretary of the constituency had made an appeal to voters in a local newspaper, thereby indicating their lack of impartiality. He 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."

A. Admissibility

40. The Government argued that the applicant had generally failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention.

Although the Convention and its Protocols constituted a part of the law of Ukraine, the applicant never raised either before the CEC or the Supreme Court any complaints of a violation of the Convention provisions.

41. The applicant disagreed.

42. The rule of exhaustion of domestic remedies normally requires that the complaints intended to be made subsequently at the international level should have been aired before the domestic courts, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law (see *Azinas v. Cyprus* [GC], no. 56679/00, § 38, ECHR 2004-III). It is undisputed that the applicant raised his complaints about the invalidation of the vote cast in electoral divisions nos. 14, 45, 58 and 67 and the alleged unfairness of the recount of 7 April 2002 before the CEC and, subsequently, before the Supreme Court. Those issues were therefore fully before the national authorities. The Government have not suggested that any domestic rules required reference to the Convention, nor have they claimed that additional reference to Article 3 of Protocol No. 1 would have affected the examination or outcome of the case before the CEC or the Supreme Court. The Court therefore finds that the applicant adequately raised these complaints before the domestic authorities, and rejects the objection.

43. The Court finds that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that these complaints are not inadmissible on any other grounds. They must therefore be declared admissible.

44. As to the applicant's complaint about the publication in a local newspaper of the appeal to voters signed by the Chairman and the secretary of the Electoral Commission of constituency no. 72, the Government claimed that the applicant had failed to exhaust domestic remedies in that he had failed to raise this complaint before the CEC and the Supreme Court. The applicant submitted that this issue had been addressed in his application to the CEC of 16 April 2002. If the application concerned solely this issue, the Court has doubts as to whether an application to the CEC without a subsequent appeal to the Supreme Court could be regarded as sufficient for the exhaustion of domestic remedies. However, on the facts of the present case, in which the allegation of bias on the part of the chair and secretary of an Electoral Commission is closely linked to the other aspects of the applicant's complaint about a violation of his right to free elections, the Court considers it appropriate to join the Government's objection to the merits of the application. The complaint is not inadmissible on any other ground, and it must therefore be declared admissible.

B. Merits

1. The parties' submissions

45. The applicant claimed that he had received more votes than his rival candidate, but was denied the seat in parliament owing to the unfair counting procedure, on the basis of the unfettered discretion of the constituency Electoral Commission.

46. The Government maintained that there had been no serious violations of electoral law during the elections in constituency no. 72 and the irregularities which did occur had been duly and promptly reported and remedied by the CEC.

47. The Government maintained that the margin between the two main candidates, the applicant and Mr G., was slim and even a handful of votes could tip the balance. They argued that the fact that so-called "wasted votes", a phenomenon which is not unique to Ukraine and pertains to other electoral systems, influenced the outcome of the elections in constituency no. 72 could not be attributed to the State's failure to "ensure the free expression of the opinion of the people in the choice of the legislature". The Government next stated that the Electoral Commission of constituency no. 72 had come to the reasonable conclusion that the breaches of the electoral law which had occurred during the vote in the four divisions in issue constituted an impediment to the establishment of the voters' wishes. This conclusion had been reviewed by the CEC and the Supreme Court and had been found to be lawful and reasonable.

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 the Protocols thereto, 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 the Protocol and the interpretation of the provision in the context of the Convention as a whole, the Court has established that it guarantees individual rights, including the right to vote and to stand for election (see, among many other authorities, *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, §§ 46-51, Series A no. 113; *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, § 56-57, ECHR 2005-IX; and, more recently, *Ždanoka v. Latvia* [GC], no. 58278/00, § 102, ECHR 2006-IV). Furthermore, the Court has considered that this Article guarantees the individual's right to stand for election and, once elected, to sit as a member of parliament (see *Lykourezos v. Greece*, no. 33554/03, § 50, ECHR 2006-VIII).

49. 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, those rights are not absolute. There is room for "implied limitations", and Contracting States must be given a margin of appreciation in this sphere. In this field, Contracting States enjoy a wide margin of appreciation, provided that they ensure equality of treatment for all citizens. 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).

50. 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 *Labita v. Italy* [GC], no. 26772/95, § 201, ECHR 2000-IV). Any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws which 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 *Sukhovetskyy v. Ukraine*, no. 13716/02, § 52, ECHR 2006-VI).

51. The applicant's complaints in the present case were focused on the way the count was carried out in the electoral constituency where he was registered as a candidate. In particular he contended that the decisions to declare the vote in electoral divisions nos. 14, 45, 58 and 67 invalid were unfair and unreasonable.

52. The Government, referring to the impossibility of avoiding "wasted votes", contended that the impugned decisions of the Electoral Commission of constituency no. 72 were aimed at eliminating the detrimental impact of breaches of electoral law on the free choice of voters. The Court has doubts as to whether a practice discounting all votes at a polling station at which irregularities have taken place, regardless of the extent of the irregularity and the impact on the outcome of the result in the constituency, can at all be seen as pursing a legitimate aim for the purposes of Article 3 of Protocol No. 1. However, the Court is not required to take a final view on this issue in the light of its findings below.

53. 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, for example, *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, *Reports of Judgments and Decisions* 1998-I, § 33, and *Chassagnou and Others v.*

France [GC], nos. 25088/94, 28331/95 and 28443/95, § 100, ECHR 1999-III).

54. In *Podkolzina v. Latvia* (no. 46726/99, ECHR 2002-II), the Court reiterated that 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 the finding that this or that candidate has failed to satisfy them to comply with a number of 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 (ibid., § 35).

55. The present case concerns not eligibility conditions as such but the way in which the outcome of elections was reviewed by the responsible domestic authorities. The State's latitude remains broad in this field, too, but cannot oust the Court's review of whether a given decision was arbitrary.

56. By way of example, in two previous cases, *I.Z. v. Greece* (no. 18997/91, Commission decision of 28 February 1994, Decisions and Reports 76-A) and *Babenko v. Ukraine* ((dec.), no. 43476/98, 4 May 1999), the Convention bodies examined the complaints of unsuccessful candidates of the unfairness of the electoral procedures. Those complaints were rejected because, in the absence of genuine prejudice to the outcome of the elections in issue, the situation complained of did not amount to an interference with the free expression of the people. This approach, however, cannot be applied in the present case as, and the Government accepted this in their observations, the annulment of the vote in the four divisions concerned led directly to the declaration of Mr G., and not the applicant, as the successful candidate.

57. The 2001 Parliamentary Elections Act provided that the vote in the electoral divisions could be declared invalid on the basis of the grounds laid down in section 70 or, alternately, on the basis of "other circumstances" which made the establishment of the voters' wishes impossible, provided for in section 72 (see paragraphs 33 and 34 above).

58. Section 70 of this Act addressed specifically the situation of multiple voting by one person, stipulating that the vote in the division may be declared invalid only if the number of spoilt ballots reached the threshold of 10% of the total votes cast. As regards section 72, it is to be noted that there

was no legal provision or domestic practice capable of giving an explanation as to which factors may be regarded as "other circumstances". In particular, it was unclear whether the "other circumstances" had to be circumstances which were not foreseen by section 70, or whether they opened the possibility for the Electoral Commissions and, on appeal, the courts to circumvent the wording of section 70 by interpreting "other circumstances" as including those matters covered by that provision. Further, whilst section 70 enumerated events during elections which could result in a vote being declared invalid, section 72 was intended to regulate the procedure for examination of voting records, rather than dealing directly with the events.

59. This lack of clarity of section 72 of the 2001 Parliamentary Elections Act and the potential risks to the enjoyment of electoral rights inherent in its interpretation by the domestic authorities called for particular caution on their part. The constituency Electoral Commission, however, in its decisions nos. 40 and 41 simply referred back to the previous decisions, and claimed that the irregularities established and noted by observers constituted "other circumstances" which made it impossible to establish the will of the electorate. The previous decision no. 36 to which reference was made stated that the deposition of several invalid ballots, as witnessed by Mr G.'s observers to electoral divisions nos. 14, 45 and 58, and the fact that members of the Electoral Commission of division no. 67 had opened the sealed polling station and retrieved voting records and several invalid ballots (see paragraph 10 above) were sufficient to declare all of the votes cast in these divisions invalid.

60. In none of these decisions, nor in the subsequent decisions of the CEC or the Supreme Court, was there a discussion of the conflict between sections 70 and 72 of the 2001 Parliamentary Elections Act; nor was there a discussion of the credibility of the various actors in the elections. In addition, none of the decisions contained any explanation as to why (particularly in the light of section 70) the perceived breaches obscured the outcome of the vote in divisions nos. 14, 45, 58 and 67 to such an extent that it became impossible to establish the wishes of voters.

61. Having regard to all the foregoing considerations, the Court concludes that the decision to annul the vote in the four electoral divisions must be considered as arbitrary, and not proportionate to any legitimate aim pleaded by the Government. It follows that in this case there has been a violation of Article 3 of Protocol No. 1.

62. That being so, the Court considers that it is not necessary to rule on the applicant's complaints that the members of the Electoral Commission of constituency no. 72 lacked the required impartiality as they had published an appeal to voters, that the recount of 7 April 2002 had been tainted with breaches of domestic electoral law and that the security of the ballot boxes had been compromised. It is further not necessary to examine the

Government's non-exhaustion plea in respect of the complaints of bias on the part of the officers of that Electoral Commission.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

63. 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. Pecuniary damage

64. The applicant submitted that his claim in respect of pecuniary damage related to the loss of salary due to him as a member of the *Verkhovna Rada*. He claimed 144,000 United States dollars (USD) (107,250 euros (EUR)) in compensation, which was based on the approximate salary of a member of parliament, and which he would have received had he been elected.

65. The Government noted that there was no causal link between the applicant's compensation claims and the violation found.

66. As noted at paragraph 56 above, the annulment of the vote in the four divisions led directly to the declaration of Mr G., and not the applicant, as a member of parliament. It is true that, if elected, the applicant would have received a salary as a member of parliament. That is not, however, sufficient to award the sums claimed, because the sums claimed would have to be set off against other income which he may have been receiving and which he would have had to forego if elected, as in *Lykourezos v. Greece* (no. 33554/03, § 64, ECHR 2006-VIII), in which the applicant was prevented from continuing to exercise his mandate. The applicant has given details of the salary he would have received as a member of parliament, but has not specified what his net loss would have been. The Court accordingly dismisses the applicant's claims under this head.

B. Non-pecuniary damage

67. The applicant claimed USD 56,000 (EUR 41,715) in compensation for the anguish and distress which he had allegedly suffered on account of the violation of his electoral rights.

68. The Government considered the sum claimed by the applicant unsubstantiated and excessive.

69. The Court acknowledges that the applicant suffered non-pecuniary damage as a result of the violation found. Consequently, ruling on an equitable basis and having regard to all the circumstances of the case, it awards him EUR 8,000 under this head.

C. Costs and expenses

70. The applicant did not submit any claim under this head within the set time-limit; the Court therefore makes no award in this respect.

D. Default interest

71. 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. *Joins to the merits* the Government's contention concerning the exhaustion of domestic remedies in respect of the applicant's complaint of bias on the part of officers of an Electoral Commission, and finds that it is not necessary to examine it;

2. *Declares* the remainder of the application admissible;

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

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 8,000 (eight thousand euros) in respect of non-pecuniary damage, to be converted into Ukrainian hryvnias at the rate applicable on the date of settlement, plus any tax that may be chargeable;
   (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 7 February 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek	Peer Lorenzen
Registrar	President