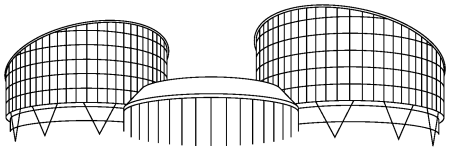

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF ORAN v. TURKEY

(Application nos. 28881/07 and 37920/07)

JUDGMENT
(Extracts)

STRASBOURG

15 April 2014

FINAL

08/09/2014

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Oran 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,
Helen Keller,
Paul Lemmens,
Robert Spano, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 4 March 2014,

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

PROCEDURE

1. The case originated in an application (no. 28881/07) 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 Baskin Oran ("the applicant"), on 7 July 2007.

2. The applicant was represented by Mr M.S. Gemalmaz, a lawyer practising in Istanbul. The Turkish Government ("the Government") were represented by their Agent.

3. The applicant alleged a violation des Articles 10 and 14 of the Convention respectively, in conjunction with Article 3 of Protocol No. 1, and a violation of Article 13 of the Convention.

4. On 14 March 2011 the applications were communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1945 and lives in Ankara.

6. The applicant, who was a professor of political science at the University of Ankara, had stood for the parliamentary elections of 22 July 2007, in the second electoral district of Istanbul, as an independent candidate. He had not been a member of any political party at the material time.

A. The legislative background to the present applications

7. With a view to a deeper understanding of the background to the present applications, the Court considers it useful to outline the circumstances under which the parliamentary elections of 22 July 2007 took place. Accordingly it will refer to the relevant passages of *Yumak and Sadak v. Turkey* ([GC], no. 10226/03, §§ 22-26, ECHR 2008), which read as follows:

> "22. In early May 2007 the Turkish Parliament decided to hold early parliamentary elections, choosing 22 July 2007 as the date. The decision followed a political crisis resulting from Parliament's inability to elect a new President of the Republic to follow on from Ahmet Necdet Sezer before the expiry of his single seven-year term of office, on 16 May 2007. In the normal course of events, these elections should have been held on 4 November 2007.
>
> 23. Fourteen political parties took part in the elections, which were marked by two characteristics. Firstly, a strong mobilisation of the electorate was observed following the presidential crisis, since the participation rate rose to 84%. Secondly, political parties used two pre-electoral strategies to circumvent the national 10% threshold. The Party of the Democratic Left (DSP) took part in the poll under the banner of the CHP, a rival party, and by that means managed to win thirteen seats. The Party for a Democratic Society (DTP, pro-Kurdish, left-leaning) presented its candidates as independents using the slogan 'A thousand hopes'; it also supported certain left-wing Turkish candidates. This movement was backed by other small left-wing groups such as the EMEP, the SDP and the ÖDP (the Liberty and Solidarity Party, socialist). More than sixty independent candidates stood for election in about forty provincial constituencies.
>
> 24. In the elections the AKP, the CHP and the MHP managed to get over the 10% threshold. With 46.58% of the votes cast, the AKP won 341 seats, 62% of the total. The CHP, with 20.88% of the votes, won 112 seats, 20.36% of the total; however, the thirteen MPs mentioned in paragraph 23 above subsequently resigned from the CHP and went back to the DSP, their original party. The MHP, which polled 14.27% of the votes, won seventy-one seats, or 12.9% of the total.
>
> 25. The strong showing by independent candidates was one of the main features of the elections of 22 July 2007. There were none in the National Assembly in 1980 but 1999 saw them return, when there were three. In 2002 nine independent MPs were elected from a national total of 260 independent candidates. In the elections of 22 July 2007, twenty-seven independent MPs were elected. In particular, more than twenty 'thousand hopes' candidates were elected, after obtaining approximately 2.23% of the votes cast, and joined the DTP after the elections. The DTP, which had twenty MPs, the minimum number to be able to form a parliamentary group, was thus able to do so. The independents also included a socialist MP (the former president of the ÖDP), a nationalist MP (the former president of the Great Union Party – BBP, nationalist) and a centrist MP (the former president of ANAP).
>
> 26. A government was formed by the AKP, which again secured an absolute majority in Parliament."

B. Application no. 28881/07

8. In accordance with Article 94 II a) of Law no. 298 as amended under section 24 of Law no. 3270 of 28 March 1986, electors were able to vote in polling stations set up at customs posts for political parties but not for independent candidates, who included the applicant.

9. In a Decree of 27 May 2007 the Higher Electoral Council (*Yüksek Seçim Kurulu*) stated that it had chosen 25 June 2007 and 22 July 2007 respectively as the dates for the beginning and end of the parliamentary elections in the polling stations set up at customs posts for nationals who had been resident abroad for over six months. In the Decree the Higher Electoral Council explained that the nationals in question could only vote in those polling stations for political parties.

10. On 3 July 2007, with reference to Articles 67 and 90 § 6 of the Constitution and Article 3 of Protocol No. 1 to the Convention, the applicant lodged with the Higher Electoral Council a request for the annulment of the Decree du 27 May 2007.

11. On 4 July 2007 the Higher Electoral Council dismissed the applicant's request, on the basis of Article 94 II a) of Law no. 298. It pointed out that this provision could only be modified by a fresh legislative amendment.

C. Application no. 37920/07

12. Section 52 (1) of Law no. 298 on Elections allowed political parties participating in elections to transmit election broadcasts on national radio and television (TRT), subject to certain restrictions, particularly in terms of airtime.

13. The Higher Electoral Council oversaw the implementation of the Law, which laid down sanctions for infringements of the provisions on election broadcasts.

14. Election broadcasts were authorised from 15 to 21 July 2007, that is to say during the week before the elections.

15. According to the applicant, the Law did not allow independent candidates like himself who did not, as a matter of principle, belong to any political party, to electioneer on the national radio and television, or, for that matter, on the private channels.

16. The applicant stressed that one peculiarity of the 22 July 2007 elections had been the large number of independent candidates standing. He considered that this unprecedented phenomenon had stemmed, firstly, from the 10% electoral threshold imposed during the parliamentary elections, and secondly, from the dissatisfaction felt by most people at the material time with the performance of the political parties, whether in power or in opposition.

...

THE LAW

I. THE JOINDER OF THE APPLICATIONS

177. The Court decides, in pursuance of Rule 42 § 1 of the Rules of Court, to join the applications in view of their similarity in terms of the facts and the legal issues which they raise, and decides to examine them jointly under one judgment.

...

III. ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL No. 1 IN CONJUNCTION WITH ARTICLES 10 AND 14 OF THE CONVENTION

38. In the two applications examined by the Court, the allegations put forward by the applicant in his capacity as an independent candidate who, as a matter of principle, does not belong to any political party are of two different types: firstly, pursuant to section 94 II a) of Law no. 298, Turkish citizens who have been living outside Turkey for over six months can vote in the polling stations set up at customs posts only for the lists presented by the political parties, not for the independent candidates; secondly, in accordance with section 52 (1) of Law no. 298, in his capacity as an independent candidate, the applicant could not transmit election broadcasts on the TRT on the same basis as the political parties taking part in the 2007 parliamentary elections. The applicant relies on Article 3 of Protocol No. 1 in conjunction with Articles 10 and 14 of the Convention.

39. The Court reiterates that it has already held in an electoral context that it is necessary to consider the right to freedom of expression under Article 10 in the light of the right to free elections protected by Article 3 of Protocol No. 1 (see *Bowman v. the United Kingdom*, 19 February 1998, § 41, *Report of Judgments and Decisions* 1998-I, and *TV Vest AS and Rogaland Pensjonistparti v. Norway*, no. 21132/05, § 61, ECHR 2008). That being so, it decides to examine the applicant's complaints solely from the angle of Article 3 of Protocol No. 1 taken on its own or in conjunction with Article 14 of the Convention.

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."

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."

A. The parties' submissions

1. The applicant

40. The applicant considered that the difference in treatment between the political parties and, on the one hand, the candidates included in the party lists and, on the other, independent candidates such as himself did not pursue any legitimate aim. He was of the view that such treatment had excluded him from the political debate and had constituted unjustified interference in the citizens' right to receive information during the parliamentary elections in question.

41. The applicant pointed out that competition between individual candidates affiliated to a political party and the other unaffiliated independent candidates was distorted. He contested the technical necessity argument put forward by the Government to justify the impugned difference in treatment. He submitted that that did not release the respondent State from the obligation to assiduously take the requisite action to overcome this difficulty, particularly as the Law had been enacted over 27 years previously. Referring to the case-law of the Court, the applicant submitted that in the context of the right to free elections the respondent State had the positive obligation to take all the necessary action, and not only the obligation to refrain from interfering. He took the view that this was not a restriction but a prohibition, inasmuch as the Law made it impossible for electors to vote for unaffiliated independent candidates in the polling stations set up at customs posts or for such candidates to engage in electioneering on TRT. The applicant added that the Court's case-law suggested that electioneering had a more immediate impact when broadcast on television and radio than when published in the press. Moreover, election broadcasts on the State radio and television were free for political parties. Nor could unaffiliated independent candidates, in fact, engage in any advertising of a political nature. Giving the political parties the opportunity to do so would be incompatible with the respondent State's duty to remain neutral and its positive obligation to keep the electorate informed about candidates standing in elections.

42. The applicant submitted that facilities for electioneering on the Internet had been introduced under an amendment of 8 April 2010 incorporated into Law no. 298. Consequently, such facilities were unavailable to the applicant for the 22 July 2007 parliamentary elections.

43. The applicant pointed out that section 94 II a) of Law no. 298 was germane to the subject of application no. 28881/07. He repeated that as an independent candidate he had been excluded from the voting organised in the polling stations set up at customs posts to the extent that voters living abroad could only have voted for the political parties. He argues in this context that there was a difference between electors living in Turkey and those living abroad. The latter could only have voted for the political parties, while those living in Turkey could have voted for the political parties and the independent candidates. Furthermore, votes cast in the polling stations set up at customs posts could only be tallied for the political parties taking part in the elections. A distinction had therefore been drawn between unaffiliated independent candidates and independent candidates affiliated to a political party.

44. The applicant reiterated that section 52 of Law no. 298 related to the subject-matter of application no. 37920/07. He pointed out that independent candidates affiliated to a political party hardly needed to electioneer on TRT at all as compared with unaffiliated independent candidates because the former benefited from the electioneering efforts of the particular political party to which they were affiliated. With reference to Article 31 § 2 of the Constitution, he submitted that an exhaustive list of restrictions, that is to say national security, public order and the protection of public morals, prevented the public from obtaining information. Furthermore, he had not been allowed to transmit election broadcasts on private radio or television channels.

2. The Government

45. The Government submitted that the applicant had stood during the 22 July 2007 parliamentary elections as one of 44 independent candidates in the second electoral district of Istanbul. These 44 independent candidates had obtained 101,704 votes out of the total of 2,146,486 electors registered. No independent candidate had been elected in this district during the election. The Government did not consider that the applicant's right to stand in free elections had been flouted.

46. As regards section 94 II a) of Law no. 298, the Government explained first of all that voters living in Turkey were registered in one of the country's electoral regions and that the names of the candidates standing in this region were printed on their ballot papers. On the other hand, voters living abroad were not registered on the national electoral rolls and were only permitted to vote in the polling stations set up at customs posts. Those polling stations did not constitute an electoral district for the purposes of electing members of parliament. Considering that there had been 700 independent candidates standing in the 2007 parliamentary elections, it would have been technically impossible to print the names of all the independent candidates on the ballot papers and to make those papers

available in the polling stations. This was why only the ballot papers made out in the names of candidates representing political parties had been printed on the ballot papers and used in the said polling stations. This restriction, which resulted from a technical necessity, had applied not only to the les independent candidates but also to the other independent candidates designated by a political party, where they were acting on their own behalf.

47. As regards section 52 (1) of Law no. 298, the Government explained that this provision only applied to State radio and television, not to private radio stations and TV channels, and applied in the same way to all candidates designated by political parties where they were standing on their own behalf rather than on behalf of the parties having designated them. No distinction had therefore been made between the independent candidates and they had not suffered any discrimination. This restriction was, according to the Government, a technical necessity. During the 22 July 2007 parliamentary elections there had been several hundred independent candidates, including unaffiliated independent candidates and independent candidates affiliated to a political party. The Government submitted that if the State had to give every candidate even just five minutes' airtime on TRT, it would take several weeks, and that that was why the political leaders and leaders of political parties with a parliamentary group were entitled to speak on TRT for between 10 and 20 minutes.

48. The Government pointed out that Denmark, France, the United Kingdom and the Republic of Ireland had similar legislation allowing only political party leaders to transmit election broadcasts on the public media at election time. They argued that under section 55A of Law no. 298, all candidates, including both independent candidates and political parties, were entitled to electioneer on private television channels and radio stations. They therefore considered that the applicant could have transmitted election broadcasts on the national or regional private radio stations and TV channels, and that he also had the possibility of creating a website for electioneering purposes, disseminating his ideas and receiving information. Moreover, under the relevant provisions of Law no. 298, the applicant could have electioneered in public or private venues, and, for example, affix electoral posters comprising his photograph or distribute leaflets in order to express his ideas. The Government submitted that the applicant had had a range of possibilities for expressing his ideas and electioneering during the parliamentary elections. They found it excessive for the applicant to argue that his right to freedom of expression had been restricted because he had not been allowed to electioneer for a few minutes on TRT.

B. Relevant general principles

49. The Court reiterates that Article 3 of Protocol No. 1, which provides for "free" elections "at reasonable intervals", "by secret ballot" and "under conditions which will ensure the free expression of the opinion of the people", involves the subjective rights to vote and to stand for election. Yet however important they may be, those rights are not absolute. Since Article 3 recognises them without setting them forth in express terms, let alone defining them, there is room for "implied limitations" (see *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, § 52, Series A no. 113). Under their respective legal systems, the Contracting States enjoy a wide margin of appreciation in imposing conditions on the right to vote, which conditions are not, in principle, precluded by Article 3, but 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 right to vote to such an extent as to impair its very essence and deprive it of effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate (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; *Aziz v. Cyprus*, no. 69949/01, § 25, ECHR 2004-V; *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, § 62, ECHR 2005-IX; *Yumak and Sadak*, cited above, § 109; and *Tănase v. Moldova* [GC], no. 7/08, § 161, ECHR 2010).

50. In particular, any conditions thus 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 (*Ždanoka v. Latvia* [GC], no. 58278/00, § 104, ECHR 2006-IV).

51. Moreover, free elections and the freedom of expression, particularly the freedom of political debate, form the foundation of any democratic system. Those two rights are interdependent and mutually reinforcing: for example, as the Court has found in the past, freedom of expression is one of the "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). That is why it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely (see *The Communist Party of Russia and Others v. Russia*, no. 29400/05, § 107, 19 June 2012).

52. Nonetheless, in certain circumstances the two rights may come into conflict and it may be considered necessary, in the period preceding or during an election, to place certain restrictions, of a type which would not usually be acceptable, on freedom of expression, in order to secure the "free expression of the opinion of the people in the choice of the legislature". The

Court recognises that, in striking the balance between these two rights, the Contracting States have a margin of appreciation, as they do generally with regard to the organisation of their electoral systems (see *Bowman*, § 43, cited above).

53. As regards restrictions on the exercise of the right to vote abroad based on the criterion of the voter's place of residence, Convention institutions have in the past accepted several reasons justifying such restrictions: first of all, the presumption that a non-resident citizen is less directly or less continually concerned with his country's day-to-day problems and has less knowledge of them; secondly, the fact that it is impracticable for the parliamentary candidates to present the different electoral issues to citizens abroad and that non-resident citizens have no 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 v. Liechtenstein* (dec.), no. 31981/96, ECHR 1999-VI ; *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-B, p. 5). More recently the Court held 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, and *Sitaropoulos and Giakoumopoulos v. Greece* [GC], no. 42202/07, § 69, ECHR 2012).

54. 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 *Sukhovetsky v. Ukraine*, no. 13716/02, § 52, ECHR 2006-VI ; *Russian Conservative Party of Entrepreneurs and Others v. Russia*, nos. 55066/00 and 55638/00, § 49, 11 January 2007; *Krasnov and Skuratov v. Russia*, nos. 17864/04 and 21396/04, § 41, 19 July 2007; and *Kovach v. Ukraine*, no. 39424/02, § 50, ECHR 2008).

C. Application of these principles to the present case

1. Application no. 28881/07: as regards section 94 II a) of Law no. 298

55. The Court first of all notes that the applicant's situation differs from other cases in which it considered the inability expatriate nationals to vote in parliamentary elections from their current place of residence and whether there was an obligation on States Parties under Article 3 of the Additional Protocol , to enact legislation enabling such expatriates to exercise their voting rights from abroad (see *Sitaropoulos and Giakoumopoulos* [GC], cited above, § 70, and *Shindler v. the United Kingdom*, no. 19840/09, § 109, 7 May 2013).

56. The Court observes that the applicant complained that Turkish citizens who are expatriates or have been living abroad for more than six months can only vote for political parties, not for independent candidates such as himself, in the polling stations set up at customs posts, in accordance with section 94 II a) of Law no. 298 as amended on 28 March 1986. The applicant's complaint therefore concerns the inability of such expatriate voters to vote for him, to the extent that, in his capacity as an independent candidate, his name was not included on the ballot papers provided in the customs posts. In this context, the situation in the present case, in which expatriate electors are unable to vote for the applicant, might to some extent be compared with that of an applicant who could not vote for the political party of his choice because this party had not been allowed to register for the election in question (see *Russian Conservative Party of Entrepreneurs and Others v. Russia*, nos. 55066/00 and 55638/00, § 78, 11 January 2007).

57. In this latter context, the Court found that the right to vote cannot be construed as laying down a general guarantee that every voter should be able to find on the ballot paper the candidate or the party he had intended to vote for. It reiterates, nevertheless, that the free expression of the opinion of the people is inconceivable without the participation of a plurality of political parties representing the different shades of opinion to be found within a country's population (see *Russian Conservative Party of Entrepreneurs and Others*, cited above, § 79, and *Federación nacionalista Canaria v. Spain* (dec.), no. 56618/00, ECHR 2001-VI).

58. That having been said, as regards the present case the Court has already held that the strong showing by independent candidates was one of the main features of the elections of 22 July 2007. This was aimed at circumventing the national 10% threshold imposed on all political parties hoping to stand for the parliamentary elections. Even if this threshold seems excessive, its purpose was nonetheless to guarantee governmental stability without undermining the substance of the rights secured under Article 3 of Protocol No. 1 (see *Yumak and Sadak*, cited above, § 147, and paragraph 7 above).

59. Considering the applicant's situation in the light of this finding of the *Yumak and Sadak* judgment, it should be noted that fourteen political parties took part in the parliamentary elections of 22 July 2007. The applicant stood as an unaffiliated independent candidate in the second electoral district of Istanbul. Unlike other independent candidates, he opted not to stand as an independent candidate affiliated to a political party. Having failed to obtain the requisite number of votes as compared with all the other candidates register in the electoral district where he was standing, the applicant was not elected to parliament as an unaffiliated independent candidate during the 22 July 2007 parliamentary elections.

60. The Court reiterates that national practices concerning voting rights for expatriates and the exercise of such rights are far from being uniform across the States Parties. Broadly speaking, Article 3 of Protocol No. 1 does not impose on States Parties any obligation to enable citizens resident abroad to exercise their right to vote (see *Sitaropoulos and Giakoumopoulos* [GC], cited above, §§ 74 and 75). Furthermore, the work of the Venice Commission has shown that withholding or limiting the voting rights of expatriates does not amount to a restriction on the principle of universal suffrage. In fact, the different interests involved should be weighed up, including the State's choice to enable its expatriate citizens to exercise their voting rights, practical and security considerations relating to the exercise of this right, and the technical arrangements for implementing it.

61. In the instant case the Court notes that the national legislature did in fact weigh up the different interests involved, namely those of the expatriate electorate, the political parties and the independent candidates. The national legislature also took account of the technical difficulties of implementing such a right, such as the venue for exercising it, possible restrictions on the scope of this right in relation to the votes cast by electors residing in the national territory, and the means of tallying the votes cast. That is why the national legislature opted for granting voting rights to expatriate voters accompanied by a limitation on the grounds that it was impossible to create a full electoral constituency for such voters or to assign them to one of the existing electoral constituencies, whereas electors residing in the national territory voted in a specific electoral district, that is to say the district in which they resided. The respondent State thus granted voting rights to Turkish citizens resident abroad with the proviso that they could only vote for the political parties taking part in the parliamentary elections. Furthermore, for technical reasons the national legislature deemed it legitimate to tally the votes cast by expatriate voters together with those cast for political parties in the national territory.

62. The Court notes in this context that the grounds given by the national legislature were deemed constitutional by the Constitutional Court in its judgment of 22 May 1987 ... In reaching this conclusion the Constitutional Court considered that in view of the difficult of ensuring voting rights for

nationals who had been expatriated for more than six months in a specific constituency, as compared with nationals living in the national territory, the legislature's decision to allow such electors only to vote for political parties and not for independent candidates had struck a fair balance between the expatriate voters and those living in the national territory.

63. The Court therefore considers that the national legislature's desire to establish such voting rights for expatriate nationals could only be made possible by restricting theirs in such a way that they could not vote for independent candidates. This restriction must be seen in the light of the place-of-residence criterion *vis-à-vis* electors living abroad and of the reasons provided by the Constitutional Court in its aforementioned judgment of 22 May 1987. Moreover, this limitation must also be assessed in the light of the generally agreed restrictions on the exercise of voting rights by expatriates (see *Sitaropoulos and Giakoumopoulos* [GC], cited above, § 69, and *Shindler*, cited above, § 105). The restriction is based, in particular, on the legitimate concern the legislature may have to limit the influence of citizens resident abroad in elections on issues which, while admittedly fundamental, primarily affect persons living in the country.

64. Furthermore, the Court highlights the primordial role played by political parties, the only bodies which can come to power and have the capacity to influence the whole national regime. By the proposals for an overall societal model which they put before the electorate and by their capacity to implement those proposals once they come to power, political parties differ from other organisations which intervene in the political arena (see *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 87, ECHR 2003-II).

65. Moreover, as regards the present application, the Court takes the view that the fact that non-residents could only vote for political parties in the polling stations set up at customs posts also pursued two further legitimate aims: 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, *mutatis mutandis*, *Özgürlük ve Dayanışma Partisi (ÖDP) v. Turkey*, no. 7819/03, § 42, ECHR 2012).

66. In the light of the above considerations, the Court holds that the fact that non-resident voters can only vote for political parties and not for unaffiliated independent candidates, such as the applicant, in the polling stations set up at customs posts meets the legislature's legitimate concern to ensure the political stability of the country and of the government which will be responsible for leading it after the elections. Consequently, taking into consideration the respondent State's broad margin of appreciation in this field, the Court considers that the treatment complained of by the applicant in his capacity as an unaffiliated independent candidate was based on an objective and reasonable justification.

67. Accordingly, there was no infringement, in the present case, of the very substance of the right to the people's freedom of expression or of the applicant's right to stand in elections, for the purposes of Article 3 of Protocol No. 1, taken alone or in conjunction with Article 14 of the Convention.

68. Therefore, there was no violation of these provisions.

2. Application no. 37920/07: as regards section 52 of Law no. 298

69. In the context of the present application, the Court reiterates first of all that the TRT television channels and radio stations broadcast nationwide. The Court also notes that the applicant submitted that under section 52 of Law no. 298, the political parties which had taken part in the 22 July 2007 parliamentary elections had had airtime on TRT for their electoral broadcasts, whereas he himself, as an unaffiliated independent candidate, had had no such advantage. The Government argued that the provisions of this section also applied to any candidate designated by a political party, where they were acting on their own behalf and not on behalf of the political party having designated him or her. Moreover, the applicant did not contest this argument.

70. In support of his submissions in reply to the Government's observations, the applicant further argued that he had also been unable to transmit election broadcasts on private television and radio. The Court notes that in a decision of 4 May 2007, the Higher Electoral Council laid down the rules on election broadcasts for political parties and independent candidates on all TV channels and radio stations in the run-up to the 22 July 2007 parliamentary elections. The Higher Electoral Council thus established the rules on fairness and neutrality applicable to all political parties and independent candidates standing in parliamentary elections.

71. That having been said, the Court stresses that the subject-matter of the present application as communicated to the Government concerns the applicant's inability to electioneer on TRT. It will therefore confine its assessment to the applicant's allegation that under section 52 (1) of Law no. 298 he could not, as an independent candidate, transmit election broadcasts on TRT in the same way as the political parties taking part in the 2007 parliamentary elections.

72. The Court reiterates that Article 3 of Protocol No. 1, or indeed other Convention provisions, do not in principle prevent Contracting States from introducing general policy schemes by way of legislative measures whereby a certain category or group of individuals is treated differently from others, provided that the interference with the rights of the statutory category or group as a whole can be justified under the Convention (see *Ždanoka*, cited above, § 112).

73. In the instance case the Court observes that political parties can transmit election broadcasts on TRT but that unaffiliated independent

candidates such as the applicant cannot. The role played by political parties, the only bodies which can come to power, gives them the capacity to influence the whole national regime. This is why parties are destined to address all the strata of national society and present to them the social blueprint which they hope to implement if they are successful in the elections. This means that political parties do not confine their electioneering to the constituency or district in which they have put up a candidate but attempt to cover all the constituencies, taken as a whole. On the other hand, an unaffiliated independent candidate such as the applicant is destined to address only the constituency in which he is standing. The role played by unaffiliated independent candidates, and the scale of that role, prevent them from influencing the whole national regime in the same way as the political parties.

74. Furthermore, the Court has noted that the applicant was not a member of any political formation and that he accordingly did not stand as an independent candidate affiliated to a given political party with a view to circumventing the 10% national electoral threshold indirectly helping elect his formation to the National Assembly. Consequently, the Court is not convinced that the applicant, in his capacity as an unaffiliated independent candidate, on the one hand, and the political parties, on the other, can be deemed to be "placed in a comparable situation" for the purposes of Article 14 of the Convention.

75. The Court in fact accepts 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 its own democratic vision (see *Scoppola v. Italy (no. 3)* [GC], no. 126/05, § 83, 22 May 2012). By reason of their direct and continuous contact with the vital forces of their countries, their societies and their needs, the national authorities, both legislative and judicial, are better placed to assess the difficulties faced in establishing and safeguarding the democratic order in their state (see *Ždanoka*, cited above, § 134, and *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 111, ECHR 2013).

76. It should be noted in the instant case that during the parliamentary elections of 22 July 2007 several hundred independent candidates had stood in the various electoral districts nationwide. In the light of this finding, the electoral process as a component of the democratic order must be weighed up against the regulation of the relevant public resources during the election period. The Court has already had occasion to hold that special importance attaches to the role played by the national legislature in the choice and optimum use of national resources (see *James and Others v. the United Kingdom*, 21 February 1986, § 46, Series A no. 98, and *Uzan and Others v. Turkey* (dec.), no. 18240/03, § 83, 29 March 2011). In this context, the

applicant was not prevented from conducting a campaign in the electoral district in which he was standing as an independent. While he did not have access to election broadcasts on TRT – whose TV channels and radio stations broadcast nationwide – he was not prevented from using all the other available methods of electioneering, which were accessible to all the unaffiliated independent candidates at the material time. Consequently, in the light of all these considerations, the Court takes the view that the measure criticised by the applicant in his capacity as an unaffiliated independent candidate was based on objective and reasonable justification.

77. Accordingly, having weighed up the different interests at stake, the Court holds that the fact that the applicant, as an unaffiliated independent candidate, was not granted airtime on TRT for electioneering purposes, unlike the political parties, during the 22 July 2007 parliamentary elections, may be seen as a measure consonant with the requirements of Article 3 of Protocol No. 1. The impugned measure, as applied to the applicant, does not disproportionately 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, taken alone or in conjunction with Article 14 of the Convention.

78. It follows that there was no violation of those provisions.

...

FOR THESE REASONS, THE COURT,

1. *Decides*, unanimously, to join the applications;

...

3. *Holds*, by four votes to three, that there has been no violation of Article 3 of Protocol No. 1 to the Convention taken alone or in conjunction with Article 14 of the Convention as regards application no. 28881/07;

4. *Holds*, by four votes to three, that there has been no violation of Article 3 of Protocol No. 1 to the Convention taken alone or in conjunction with Article 14 of the Convention as regards application no. 28881/07;

...

Done in French, and notified in writing on 15 April 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 Mr Sajó, Mr Keller and Mr Lemmens are annexed to this judgment.

G.R.A.
S.H.N.

PARTLY DISSENTING, PARTLY CONCURRING OPINION OF JUDGES SAJÓ, KELLER AND LEMMENS

(Translation)

1. We unfortunately cannot agree with the majority's findings in the present case as regards the complaints of a violation of Article 3 of Protocol No. 1 to the Convention and Article 14 of the Convention. Our disagreement concerns both the method used by the majority to analyse the case and the application of the general principles to the instant case.

Furthermore, even though we have fallen into line with our colleagues' opinion regarding the complaint of a violation of Article 13 of the Convention, we would have preferred the opinion to be based on a rather different line of reasoning.

I. Alleged violation of Article 3 of Protocol No. 1 to the Convention and Article 14 of the Convention

A. General considerations

2. We concur with the majority on general principles. The present case concerned in particular the general principles governing the right to stand in elections.

Like the majority, we accept that this right is not absolute and that there is room for "implied limitations", that is to say implicitly accepted restrictions, and that the States Parties to the Convention enjoy a wide margin of appreciation in this regard (see paragraph 49 of the judgment).

We must stress that the instant case does not concern restrictions to the right to stand for election as such. The Turkish system permits independent candidates to stand in elections, and it was in this capacity that the applicant presented his candidature. Again, inasmuch as the applicant complained of the fact that Turkish citizens living abroad could not vote for independent candidates, the application did not raise the question whether there had been a legitimate restriction on such electors' voting rights as in any case they had been included in the voting and been able to express their opinion.

The present case mainly concerned the question whether the applicant had been able to take part as a candidate in a set of elections under conditions that complied with Article 3 of Protocol No. 1, that is to say "under conditions which ... ensure the free expression of the opinion of the people in the choice of the legislature". The questions at issue were the electoral system (application no. 28881/07) and the regulations on the electoral campaign (application no. 37920/07).

3. As regards the determination of the voting system, the Court accepts that there are many ways of organising and running electoral systems. All electoral legislation should be assessed in the light of the political development of the country in question. The States Parties are, in principle, free to adopt the system of their choice, at least so long as the system they choose provides 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, and *Sitaropoulos and Giakoumopoulos v. Greece* [GC], no. 42202/07, § 66, ECHR 2012).

The phrase "conditions which will ensure the free expression of the opinion of the people in the choice of the legislature" implies, apart from freedom of expression, which is in fact already protected by Article 10 of the Convention, the principle of equality of treatment of all citizens in the exercise of their right to vote and their right to stand for election. Clearly this does not imply that all votes must have equal weight as regards the outcome of the election or that all candidates must have equal chances of victory (see *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, § 54, Series A no. 113; *Bompard v. France* (dec.), no. 44081/02, ECHR 2006-IV; and *Yumak and Sadak*, cited above, § 112). However, freedom of voters to express their wishes requires that "in practice, electors should be able to cast their votes for registered lists or candidates" (see European Commission for Democracy through Law [the "Venice Commission"], explanatory report to the Code of Good Conduct in Electoral matters, adopted at the Commission's 52nd session (18-19 October 2002), paragraph 27, document CDL-AD (2002) 23 rev).

4. As regards access by candidates to radio and television, the majority rightly mentions the importance in the period preceding an election of ensuring that opinions and information of all kinds can circulate freely (see paragraph 51 of the judgment, which refers to *The Communist Party of Russia and Others v. Russia*, no. 29400/05, § 107, 19 June 2012).

Accordingly, access to the media must be regulated so as to take into account the principle of equal suffrage. We set great store by the Venice Commission's position that the important thing is "to make sure that the candidates or parties are accorded sufficiently balanced amounts of airtime or advertising space, including on state radio and television stations" (explanatory report cited above, paragraph 19), even though the Court noted, in connection with the above-mentioned position, 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 (see *The Communist Party of Russia and Others v. Russia*, cited above, § 108).

5. We would also emphasise that the principles of legality and non-discrimination take on special importance in the electoral field. Elections are a competition in which the political parties and candidates must vie for

the electors' votes. Any obstacle to the equality principle favours one side and prejudices the others, and can have an impact on the results.

The importance of the principle of equal suffrage was recently reaffirmed by the German Federal Constitutional Court. In a judgment of 26 February 2014 (relating to the electoral threshold for European elections, *2 BvE 2/13 and Others* and *2 BvR 2220/13 and Others*), the Constitutional Court reiterated that while the equality principle was not incompatible with differences in treatment, the latter were subject to strict criteria in the electoral field. Differences in treatment could only be justified on constitutionally admissible grounds of sufficient importance to be weighed against electoral equality (see C, I, 3, a), ff.), 1).

According to our Court's well-known case-law, 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, for applications of this principle to the electoral field, *Sejdić and Finci v. Bosnia-Herzégovine* [GC], nos. 27996/06 and 34836/06, § 42, ECHR 2009, and *Özgürlük ve Dayanışma Partisi (ÖDP) v. Turkey*, no. 7819/03, § 26, ECHR 2012). In our view, in the electoral field the Court must carry out a strict verification of the justification put forward.

B. Assessment of the complaints

1. The applicant's inability to stand as a candidate for Turkish voters living abroad

6. The applicant was an independent candidate standing in an electoral district of Istanbul. He was able to stand as a candidate for electors residing in this district but not for those residing abroad, who could only vote for the political parties. And yet the political parties and the independent candidates were fighting for the same seats in the applicant's electoral district.

This restricted the applicant's chances of winning votes. Such a restriction "infringes the principle of equal suffrage" (see Opinion no. 269/2003 adopted by the Venice Commission on 17 December 2003, setting out joint recommendations by the Venice Commission and the Office for Democratic Institutions and Human Rights (ODIHR) of the Organisation for Security and Cooperation in Europe (OSCE) on the electoral law and the electoral administration in Armenia, paragraph 30, document CDL-AD (2003) 21). The restriction is compatible with Article 3 of Protocol no. 1 only if it does not thwart the "free expression of the opinion of the people in the choice of the legislature".

7. The majority takes the view that this restriction of the applicant's right to stand as a candidate for Turkish voters residing abroad was justified on a number of grounds.

First of all, the majority refers to the "technical difficulties" of implementing voting rights for expatriate Turkish citizens (see paragraph 61 of the judgment), thus reprising the Government's argument. We realise that the exercise of voting rights by electors living abroad raises specific problems (see *Shindler v. the United Kingdom*, no. 19840/09, § 114, 7 May 2013). However, those difficulties are not insurmountable. In the report on out-of-country voting which it adopted at its 87th session (17-18 June 2011), the Venice Commission pointed out that there were two possible ways of ensuring that the votes of expatriate citizens were taken into account fairly. The first was to allow such electors to participate in the electoral process in ordinary constituencies, which presupposed a system of attaching each voter to a specific constituency. The second was to create one or more specific constituencies for nationals living abroad (see paragraphs 77-84, document CDL-AD (2011) 022). Turkish law provides for a hybrid system which does not attach expatriate voters to any specific constituency or create any specific separate constituency, but tallies their votes at the national level. We are not convinced that a system allowing independent candidates to stand for expatriate electors is technically impossible.

The majority also refers to the 22 May 1987 judgment of the Turkish Constitutional Court finding that the current system "struck a fair balance between expatriate voters and those living in the national territory" (see paragraph 62). We do not consider such a balance relevant under Article 3 of Protocol No. 1. The important thing is the free expression of the people's opinion on the choice of legislature. The fact of prohibiting certain electors from voting for independent candidates and forcing them to vote for a political party is not such as to allow the "free expression of the opinion" of this section of the electorate.

The majority takes the view that the impugned restriction is also based "on the legitimate concern the legislature may have to limit the influence of citizens resident abroad in elections on issues which, while admittedly fundamental, primarily affect persons living in the country" (see paragraph 63). Apart from the fact that the Government would not appear to have mentioned such a justification, we consider it completely irrelevant. The legislature has granted voting rights to citizens resident abroad. That means that they consider them capable of participating, together with citizens living in Turkey, in choosing individuals apt to govern the country. If the legislature had wished to restrict the influence of voters residing outside the national territory, they would have opted for methods other than prohibiting them from voting for independent candidates, naturally with respect for the requirements of Article 3 of Protocol No. 1.

Another ground put forward by the majority concerns the importance of the role played by political parties (see paragraph 64). Their role is undeniably important. However, in a system which allows independent candidates to stand apart from the political parties, voters must be permitted to choose between the two. In our view, the role played by political parties cannot be used to justify prohibiting independent candidates from standing for a section of the electorate.

Lastly, the majority refers to the legislature's legitimate concern to obviate excessive fragmentation of the electoral process, thus ensuring the political stability of the country and of the government, and therefore to reinforce the expression of the opinion of the people in the choice of the legislature (see paragraphs 65 and 66 of the judgment, where the Court refers to *Özgürlük ve Dayanışma Partisi (ÖDP)*, cited above, § 42). This argument does not convince us. The way to prevent excessive fragmentation of the movements represented in Parliament is to set an electoral threshold (see *Yumak and Sadak*, cited above, § 125). In our view, however, simply making it impossible for independent candidates to stand for a section of the electorate is not an appropriate means of achieving that aim.

We therefore take the view that none of the grounds advanced by the majority can justify the impugned restriction.

8. The majority could have invoked another ground by noting, firstly, that the electoral threshold only exists at the national level and only applies to political parties, and secondly, that the votes cast by Turkish citizens resident abroad, which are added to those cast nationwide for the different political parties, are only relevant in deciding whether the parties have exceeded the threshold (see section 94 II h) para. 2 of Law no. 298; see paragraph 23 of the judgment).

Such an argument would, however, fly in the face of the fact that at constituency level the independent candidates are in direct competition with the political parties. The question whether a political party has exceeded the electoral threshold at national level can have an impact on the distribution of seats at the constituency level. It follows that the issue of the national threshold applicable to political parties concerns not only the parties themselves but also the independent candidates.

Furthermore, it would appear to follow from section 94 II h) [3] and [4] of Law no. 298 (not incorporated into paragraph 23 of the judgment) that the number of votes cast in the polling stations set up a customs posts is taken into account in calculating the total number of votes cast for the political parties in each electoral district, in accordance with a formula based on the number of votes obtained in the aforementioned polling stations and the number of votes obtained in each of the electoral districts.

Moreover, one way to mitigate the negative effects of a 10% electoral threshold, which is, in principle, "excessive" according to the Court (see *Yumak and Sadak*, cited above, § 147), lies in the possibility of standing as

an independent candidate who is not subject to that threshold (ibid., §§ 135 and 136). The Court nevertheless found that "this was a makeshift solution compared with the position of a candidate officially sponsored by his or her political party" (ibid., § 138). We consider that the conclusions should be fully drawn from this latter finding.

9. Drawing on the foregoing comments, we consider that the applicant's inability to stand for electors residing abroad imposed a restriction on his right to stand as a candidate which was incompatible with Article 3 of Protocol No. 1.

10. As regards the nature of the complaints under Article 3 of Protocol No. 1 and Article 14 of the Convention and the conclusion adopted under the first of these two provisions, we consider it unnecessary to consider separately the complaint of a violation of Article 14 of the Convention in conjunction with Article 3 of Protocol No. 1.

2. The applicant's lack of access to airtime on national radio and television stations

11. In connection with the regulations on electioneering on radio and television, the applicant complained of the privileges granted to political parties in this field. Under section 52 of Law no. 298 political parties are allowed airtime on the national public radio and television stations (TRT) for electioneering purposes. Independent candidates are not allowed to participate in such broadcasts.

Since the applicant's complaint mainly concerned a difference in treatment between political parties and independent candidates, we consider that it should be examined first of all under Article 14 of the Convention.

12. Like the majority, we consider that the possibility of conducting an election campaign is an integral part of the exercise of the right to stand in elections. This issue therefore falls within the ambit of Article 3 of Protocol No. 1 (see *The Communist Party of Russia and Others v. Russia*, cited above, §§ 107-108).

Consequently, Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1 is applicable in the present case.

13. Unlike the majority (see paragraph 74 of the judgment), we do not doubt that, from the angle of the election campaign the applicant and the political parties can be deemed to have been in a comparable situation for the purposes of Article 14.

14. It remains to be seen whether the difference in treatment between political parties and independent candidates was based on objective and reasonable justification.

We accept that no system for granting access to the national radio and television stations can ensure access for all candidates. On the contrary, it is necessary to restrict the number of persons or groups benefiting from election broadcasts in order to preserve the effectiveness of the system. The

fact of limiting access to specific categories of candidates and excluding other is therefore not in itself contrary to Article 14 of the Convention. In other words, we acknowledge that the impugned difference in treatment pursued a legitimate aim.

It remains to be seen whether the establishment of differential treatment between political parties and independent candidates can be deemed proportionate and suited to the aim pursued.

According to the majority, the difference in treatment was justifiable by the fact that political parties have the power to influence the whole national regime and can electioneer nationwide, while independent candidates have no such power and can only stand for voters in their local constituency (see paragraph 73). We consider that this affirmation suggests a bias towards the political parties to the detriment of independent candidates. It is not impossible for an independent, especially if he or she is elected, to play a major, or indeed crucial, role in the political life of the country.

We can understand that access to the national media should be reserved for candidates who can lay claim to a specific level of representativeness (compare, as regards public funding for political parties, the aforementioned judgment *Özgürlük ve Dayanışma Partisi (ÖDP)*, §§ 43-49). Nevertheless, section 52 § 2 a) of Law no. 298 grants access rights to all political parties standing for election (additional airtime is granted to parties meeting other criteria as listed in section 52 § 2 b) and c)). We take the view that the mere fact of being either a political party or an independent candidate is not an appropriate criterion for differentiating between candidates allowed access to election broadcasts and those not allowed such access.

This finding leads us to conclude that there was no reasonable relationship of proportionality between the means used and the aim pursued, and that there was consequently a violation of Article 14 of the Convention in conjunction with Article 3 of Protocol No. 1.

15. Having regard to this conclusion, we consider that there is no need to examine the complaint separately under Article 3 of Protocol No. 1 taken alone.

II. The alleged violation of Article 13 of the Convention

16. As regards Article 13 of the Convention, we subscribe to our colleagues' conclusion that there has been no violation of this provision.

We do, however, consider that the judgment does not correspond precisely to the complaints as submitted.

We take the view that the applicant's complaint concerns the lack of an effective remedy enabling him to complain of the alleged violations of his rights under Article 3 of Protocol No. 1. In our opinion the applicant complained in particular of the unfairness of the proceedings before the Higher Electoral Council which had resulted in the decision of 4 July 2007

(see paragraph 11 of the judgment), of the fact that the decree issued by this authority on 27 May 2007 (see paragraph 9 of the judgment) and the decision which it adopted on 4 July 2007 (cited above) were not open to appeal before a judicial authority, and lastly of the fact that no appeal lay with the Constitutional Court against section 94 II of Law no. 298.

Inasmuch as the applicant complained of the unfairness of the proceedings before the Higher Electoral Council, his complaint concerned the fact that this authority dismissed his appeal on 4 July 2007 without having held a hearing at which he might have appeared in order to explain his point of view. We consider that, having regard to the nature of the applicant's complaint, which related to the electoral rules applicable to Turkish citizens resident abroad, the fact that the proceedings before the Higher Electoral Council were written does not allow the conclusion that the remedy before this authority was ineffective.

As regards the other complaints, we subscribe to the line of reasoning set out in paragraphs 86 and 87 of the judgment.