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

COURT (CHAMBER)

CASE OF GITONAS AND OTHERS v. GREECE

(Application no. 18747/91; 19376/92 ; 19379/92)

JUDGMENT

STRASBOURG

1 July 1997

In the case of Gitonas and Others v. Greece[1],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A[2], as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr Thór VILHJÁLMSSON,
Mr L.-E. PETTITI,
Mr C. RUSSO,
Mr A. SPIELMANN,
Mr N. VALTICOS,
Mr R. PEKKANEN,
Mr P. KURIS,
Mr J. CASADEVALL,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 22 March and 23 June 1997,

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

PROCEDURE

1. The case was referred to the Court as three separate cases (Gitonas and Others v. Greece, Kavaratzis v. Greece and Giakoumatos v. Greece) by the European Commission of Human Rights ("the Commission") on 28 May 1996 and 22 and 27 January 1997, within the three-month period laid down by Article 32 para. 1 and Article 47 of the Convention (art. 32-1, art. 47). It originated in five applications (nos. 18747/91, 19376/92, 19379/92, 28208/95 and 27755/95) against the Hellenic Republic lodged with the Commission under Article 25 (art. 25) by five Greek nationals, Mr Konstantinos Gitonas, Mr Dimitrios Paleothodoros, Mr Nicolaos

---

[1] The case originated in a decision to join cases 68/1996/687/877-879, 17/1997/801/1004 and 23/1997/807/1010. In each individual case number, the first number is that case's position on the list of cases referred to the Court in the relevant year (second number). The third number indicates that case's position on the list of cases referred to the Court since its creation and the last number or numbers indicate its position on the list of the corresponding originating applications to the Commission.

[2] Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

Sifounakis, Mr Ioannis Kavaratzis and Mr Gerassimos Giakoumatos on 12 June 1991, 22 November 1991 and 16 and 28 May 1995. The Commission's requests referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Greece recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the requests was to obtain a decision as to whether the facts of the cases disclosed a breach by the respondent State of its obligations under Article 3 of Protocol No. 1 (P1-3).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicants stated that they wished to take part in the proceedings and designated the lawyers who would represent them (Rule 30).

3. The Chamber to be constituted in the case of Gitonas and Others included ex officio Mr N. Valticos, the elected judge of Greek nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 4 (b)). On 10 June 1996, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr L.-E. Pettiti, Mr C. Russo, Mr A. Spielmann, Mr R. Pekkanen, Mr L. Wildhaber, Mr P. Kuris and Mr J. Casadevall, (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43). Subsequently Mr Thór Vilhjálmsson, substitute judge, replaced Mr Wildhaber, who was unable to take part in the further consideration of the case (Rules 22 para. 1 and 24 para. 1). On 29 January 1997 the President decided that, in the interests of the proper administration of justice, the cases of Kavaratzis and Giakoumatos should be considered by the Chamber already constituted to hear the case of Gitonas and Others (Rule 21 para. 7).

4. As President of the Chamber (Rule 21 para. 6), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Greek Government ("the Government"), the applicants' lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received on 17 and 20 January 1997 respectively the applicants' and the Government's memorials in the case of Gitonas and Others, and on 19, 20 and 24 February the Government's and the applicants' memorials in the cases of Kavaratzis and Giakoumatos.

5. On 19 March 1997 the Chamber decided to join the three cases (Rule 37 para. 3). In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 19 March 1997. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr G. KANELLOPOULOS, Legal Assistant,
Legal Council of State, *Delegate of the Agent*,

Mrs K. GRIGORIOU, Legal Assistant,
Legal Council of State, *Adviser*;
(b) for the Commission
Mr L. LOUCAIDES, *Delegate*;
(c) for four of the applicants (Mr Gitonas, Mr Paleothodoros, Mr Sifounakis and Mr Giakoumatos)
Mr C. MAVRIAS, university professor, *Counsel*;
(d) for the fifth applicant (Mr Kavaratzis)
Mr G. THEOFANOUS, of the Athens Bar, *Counsel*.

The Court heard addresses by Mr Loucaides, Mr Mavrias, Mr Theofanous and Mr Kanellopoulos.

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

A. The case of Mr Gitonas

6. On 18 November 1986 Mr Gitonas, then an employee of the Investment Bank (Trapeza Ependisseon), was seconded to the post of Deputy Head (Anaplirotis Genikos Diefthindis) of the Prime Minister's private office. He occupied that post for a period of approximately thirty months until 24 May 1989, when his secondment ended.

7. In the general election of 8 April 1990 the applicant stood as a candidate for the Socialist Party (PA.SO.K) in the second Athens constituency. As he obtained more than the required minimum number of votes for election, the Athens Court of First Instance (Polymeles protodikio) declared in a decision of 17 April 1990 that he had been elected.

8. On 26 and 27 April and 2 May 1990 three members of the constituency's electorate lodged an application with the Special Supreme Court (Anotato Idiko Dikastirio) for an order annulling Mr Gitonas's election. They relied on Article 56 para. 3 of the Constitution (see paragraph 29 below) and maintained, inter alia, that the applicant's election was a nullity as, before the election, he had held the post of Deputy Head of the Prime Minister's private office, a ground for disqualification from standing for election under that Article.

9. In the proceedings the applicant argued that as an employee of the Investment Bank, a private-law entity, he could not be considered a civil servant and he pointed out that he had become deputy head of the Prime Minister's private office by secondment.

10. The Special Supreme Court considered the three applications together and gave its judgment (no. 16/1991) by nine votes to two on 23 January 1991. It annulled Mr Gitonas's election on the following grounds:

> "Under [Article 56 para. 3], as is apparent both from its wording (the disqualification applies in `any' constituency) and from its purpose (to deter civil servants ... from using their posts to prepare for a political career, and at the same time to ensure that civil servants are politically neutral in the performance of their duties as required by the Constitution and by statute), the disqualification covers the whole geographical area in which those duties were performed ..., so that a civil servant who has general responsibility throughout Greece may not become an elected member of parliament in any constituency. The bar applies in all cases where the post has been occupied for more than three months during the three years preceding the election even if, in the interval between the post being taken up and the election, another general election took place in which the person concerned stood as a candidate ...
>
> The aforementioned constitutional provision means that the bar applies irrespective of the lawfulness of the administrative act whereby the post was filled ...
>
> The provision applies to salaried civil servants appointed to established posts expressly created by law and governed exclusively by public-law rules; included within that category are dismissable civil servants in temporary posts within the meaning of Article 103 para. 5 of the Constitution ...
>
> Law no. 1299/1982 on `the organisation of the Prime Minister's private office' established an independent public service to assist and directly serve the Prime Minister in the performance of his duties. To this political private office of the Prime Minister ... were subsequently added - by decision of the Prime Minister taken under section 12 (b) of Law no. 1299/1982 - the special office of the deputy head responsible for supervising and implementing the decisions of the public government bodies and of the Prime Minister, and a category A post of Deputy Director-General. Generally speaking, the ordinary rules do not apply to recruitment to posts in the Prime Minister's political private office, which are filled, without any competition being held, either by appointment or secondment from the civil service or a public-law or public-sector entity, or by assignment of duties which the person concerned performs concurrently ... with those of his usual occupation, as determined by the Prime Minister, in a decision published in the Official Gazette (section 6). Under section 6 (1), persons seconded to the political private office of the Prime Minister must elect whether to receive their entire remuneration of all kinds from their permanent post or from the post to which they have been seconded ... It is apparent from the aforementioned provisions that the post of Deputy Head of the Prime Minister's political private office ... is a remunerated post occupied by a dismissable civil servant within the meaning of Article 103 para. 5 of the Constitution, with general and decision-making responsibility for the entire country, and as such is covered by Article 56 para. 3.
>
> ... The documents in the case file show that [the applicant] was seconded from the Investment Bank to the post of Deputy Head of the Prime Minister's political private office by decision no. Y311/1986, of the then Prime Minister, published in the Official Gazette of 18 November 1986, and served in that post continuously until 24 May 1989, when his secondment was ended by a similar decision of the Prime Minister ...

> By a written declaration of 18 November 1986 [the applicant] elected to receive the remuneration attaching to his permanent post. Consequently, as he occupied a remunerated post in category A, with nationwide responsibility, for more than three months during the three years preceding the general election of 8 April 1990, he was barred from standing as a candidate or being elected as a member of parliament in that election even if, in the interval between his taking up that post and the latest election, another election had been held in which [the applicant] had stood."

In a dissenting opinion two members of the Special Supreme Court took the view that section 12 (b) of Law no. 1299/1982 did not authorise the creation of a post of Deputy Director-General and that the applicant had never acquired the status of salaried civil servant; even supposing that the Investment Bank belonged to the public sector and that the post had been created under the provisions of Law no. 1299/1982, the applicant's secondment had been temporary, which meant that he had retained his former status as an employee of the bank, which continued to pay his salary.

B. The case of Mr Paleothodoros

11. On 10 November 1987 Mr Paleothodoros was appointed Director-General of Greece's second television channel (Elliniki Tileorassi 2, "ET2") by a resolution of the board of governors of the Greek Broadcasting Company (ERT-AE), a public company. He occupied that post for approximately a year, until 23 November 1988.

12. In the election of 8 April 1990 the applicant stood as a candidate for the electoral coalition "Zante Initiative for Progress, Development and Simple Proportional Representation" (Zakinthini Protovoulia gia proodo - anaptixi - apli analogiki) in the Zante constituency. As he obtained more than the required minimum number of votes for election, the Zante Court of First Instance declared, in a decision of 11 April 1990, that he had been elected.

13. On 25 April 1990 a member of the constituency's electorate, relying on Article 56 para. 3 of the Constitution (see paragraph 29 below), lodged an application with the Special Supreme Court for an order annulling Mr Paleothodoros's election on the ground that during the period preceding the election Mr Paleothodoros had occupied the post of Director-General of ET2.

14. The Special Supreme Court, by six votes to five, annulled the election in a judgment (no. 41/1991) of 29 May 1991 in these terms:

> "...
>
> The disqualification [from standing for election] also applies where, in the interval between the disqualifying post being taken up and the relevant election, another election took place in which the person concerned stood as a candidate. The possibility that a civil servant will use his post to prepare for his political career does in fact exist in this case too, as the effects of such preparations are not limited to the election

immediately following the taking up of the post but may extend to subsequent elections; consequently, it has to be accepted that the civil servant continues to be disqualified under the Constitution, if the election takes place within three years as specified in the Constitution. A public undertaking is an undertaking which under the law ... exists to promote the general interest, in the form of a legal entity over which the State exerts a decisive influence and which operates according to economic criteria, not by speculating ... but by making profits that will enable it to achieve its fundamental objectives ... Section 1 of Law no. 1730/1987 established a private-law entity in the form of a company called 'Greek Radio-Television'... Section 1 (3) provides that ERT-AE is a public undertaking belonging to the public sector (Law no. 1256/1982); it is controlled and supervised by the State. By section 2 (1) of the aforementioned Law, the objects of ERT-AE are to organise, operate and develop radio and television broadcasting, and contribute to informing, educating and entertaining the Greek people. That provision also lays down that ERT-AE is not a profit-seeking entity ... The [ERT-AE's] main departments set out and apply, for the areas within their responsibility, the basic principles laid down by the board of governors and are financially independent ... The board of governors appoints a director-general to head each department (section 3). It follows that a director-general - appointed by the board of governors and given the task of applying in the area for which he is responsible the basic principles laid down by the board, to whose supervision he is moreover subject - is the employee of a public undertaking within the meaning of Article 56 para. 3 of the Constitution; because of that position ..., he is liable to the disqualification referred to in that Article.

...

It is apparent from the aforementioned provisions, and in particular those providing that ET1 and ET2 enjoy independence in programme scheduling, that ... the director-general participates in the choice or may influence the content of television programmes, and the programmes ... are broadcast throughout Greece and can be received in all areas of the country. In the course of his duties a director-general may, through his role in determining television programme scheduling, have an advantage over other Greek citizens in preparing for a political career. ... Mr Paleothodoros was appointed as Director-General of ET2 by the ERT-AE's board of governors and remained in that position from 10 November 1987 to 23 November 1988 ... In the light of the foregoing, [the applicant] was a member of staff of a public entity for a period of more than three months during the three years preceding the election; as his authority was by its nature general, he is disqualified from standing for election under Article 56 para. 3 of the Constitution ..."

In a dissenting opinion five members of the Special Supreme Court expressed the view that the responsibilities of the directors-general of ET1 and ET2 were not such as to create a link between the head of a department and a particular constituency. The mere fact that the television channel's credits were broadcast in a particular constituency did not amount to performing official duties in that constituency.

C. The case of Mr Sifounakis

15. On 25 February 1987 Mr Sifounakis was appointed Director-General of the Greek Broadcasting Company (ERT) and on

10 November 1987 Director-General of its first television channel (ET1). The applicant occupied that post until 8 July 1988.

16. In the general election of 8 April 1990 the applicant stood as a candidate for the Socialist Party (PA.SO.K) in the Lesbos constituency. As he obtained more than the required minimum number of votes for election, the Lesbos Court of First Instance declared in a decision of 12 April 1990 that he had been elected.

17. On 25 April 1990 a candidate from the same party in the same constituency lodged an application with the Special Supreme Court for an order annulling Mr Sifounakis's election and a declaration that he himself, as first substitute member for Lesbos, was the member of parliament. In support of his application he relied on Article 56 para. 3 of the Constitution (see paragraph 29 below), maintaining in particular that the applicant's election was a nullity as, before the election, the applicant had held the post of Director-General of ERT and ET1 and was consequently barred from standing as a candidate.

18. In a judgment (no. 40/1991) of 29 May 1991 the Special Supreme Court annulled Mr Sifounakis's election for the same reasons as it gave in Mr Paleothodoros's case. It found that ERT, a company wholly owned by the State but administratively and financially independent and operating in the public interest according to the rules governing the private economy (Law no. 230/1975), had merged with the ERT-AE by virtue of Law no. 1730/1987.

D. The case of Mr Kavaratzis

19. From 23 May 1990 to 13 September 1993 Mr Kavaratzis occupied the post of First Deputy Director of the Social Security Fund (Idryma Koinonikon Asfalisseon - "IKA").

20. In the general election of 10 October 1993 he stood as a candidate for the "Nea Dimokratia" Party in the Evros constituency. As he obtained more than the required minimum number of votes for election, the Alexandroupolis Court of First Instance declared in a decision no. 126/1993 that he had been elected.

21. On 2 November 1993 another candidate for that constituency from the same party lodged an application with the Special Supreme Court for an order annulling Mr Kavaratzis's election and for a declaration that he, as first substitute candidate for the Evros constituency, had been elected a member of parliament. He relied on Article 56 para. 3 of the Constitution (see paragraph 29 below) and maintained in particular that Mr Kavaratzis's election was a nullity as, before the election, he had held the post of First Deputy Director of the IKA.

22. On 22 March 1995 the Special Supreme Court annulled (by six votes to five) his election on the following grounds (judgment no. 10/1995):

"...

Under this Court's case-law:

(1) the governor of a public-law company or public undertaking - who, by virtue of Article 56 para. 1 of the Constitution, cannot be elected as a member of parliament if he has not resigned before becoming a candidate, but who is not disqualified under paragraph 3 of that Article - is the sole organ ... running that entity or undertaking, in other words having the exclusive right to decide ... questions relating to its management (see judgment no. 46/1990 of the Special Supreme Court).

(2) What matters for the purposes of determining whether in law an organ is a `governor' is not merely that the term `governor' is used in the law or the articles of association, but also the powers which the organ is given by those provisions (see judgments nos. 46/1990, and 4 and 5/1991 of the Special Supreme Court).

(3) Persons classified by the law as governors of public-law entities but who, by virtue of the provisions governing their occupational status, are nevertheless subordinate to the entity are subject to the disqualification provided for in paragraph 3 of Article 56 of the Constitution (see judgments nos. 4 and 5/1991 of the Special Supreme Court).

The Social Security Fund is managed by its governor and a board of directors. The governor is the highest-ranking administrative organ of the IKA; he [is empowered] to decide any question not expressly reserved by law to the board of directors, to act as the head of all the Fund's departments and to supervise them and review their actions, to take all appropriate measures, to recruit staff and take disciplinary action, to represent the Fund in court and other proceedings, to chair the board of directors; more generally, he is the highest-ranking administrative organ of the Fund; that organ is not subordinate to any other organ of the entity and manages the IKA jointly with the board of directors (see judgments nos. 4 and 5/1991 of the Special Supreme Court).

The post of First Deputy Director of the IKA was created by Royal Decree no. 11 of 15 May 1957, and that of Second Deputy Director by section 15 of Law no. 1573/1985. Neither organ, which the aforementioned provisions ... classify as deputy director, is a governor of the IKA so as to be subject to disqualification from election under Article 56 of the Constitution ... The fact that the deputy director acts as the governor's replacement is not sufficient for him to be ascribed governor status, especially as by law, and in particular section 15 (2) of Law no. 1573/1985, it is the governor who appoints one of the deputy directors to act as his replacement and as that delegation [of powers] ... does not alter the nature of that organ even during periods when the replacement is effective ...

In the instant case, during the period in issue, the governor of the IKA, by decisions ..., delegated to the [applicant] - the first deputy director - certain powers concerning questions within the remit of the IKA's departments, but excluding matters relating to `the development of the Fund's general strategy'. By a decision of 23 September 1991 the governor of the IKA appointed the [applicant] to act as his replacement for the period from 1 October to 31 March of each year. The first deputy director is appointed for three years and takes part in deliberations of the board of directors in a consultative capacity. It is apparent from the foregoing that, although the first deputy director of the IKA is not subject to the Civil Service Code ..., his relationship with the IKA is

that of employee and more particularly of a dismissable salaried member of staff (Article 103 paras. 5 and 6 of the Constitution) of that public-law entity; consequently, he is subject to the disqualification from election provided for in Article 56 para. 3

...

... The first deputy director of the IKA is a member of staff with nationwide responsibilities and for that reason he cannot be elected as a member of parliament in any constituency.

..."

23. In a dissenting opinion five members of the Special Supreme Court took the view that, like the governor, the deputy directors were the highest-ranking organs of the IKA, and not members of its staff, for five reasons: (a) a distinction was drawn in the IKA's articles of association (Article 2) between the "management", which included the board of directors, the governors and the deputy directors, and the "departments", to which the IKA's "members of staff" were attached; (b) the deputy directors were excluded from the provisions of the royal decree ... "on the application of the Civil Servants Code to the IKA's members of staff" by Article 2 of that Code; (c) deputy directors were not subject to disciplinary measures, whereas being so subject was a decisive factor for classification as a civil servant or as a member of staff of a public-law entity; (d) deputy directors were not subordinate to the governor in the exercise of the powers he had delegated them, which they would necessarily have been if they were civil servants; and (e) they had a right to vote when chairing meetings of the IKA's board of directors as the governor's replacement.

E. The case of Mr Giakoumatos

24. From 11 September 1991 to 13 September 1993 Mr Giakoumatos occupied the post of Second Deputy Director of the Social Security Fund.

25. In the general election of 10 October 1993 the applicant stood as a candidate for the "Nea Dimokratia" Party in the second Athens constituency. As he obtained more than the required minimum number of votes for election, the Athens Court of First Instance declared in a decision no. 3131/1993 that he had been elected.

26. On 2 November 1993 another candidate for that constituency from the same party lodged an application with the Special Supreme Court for an order annulling Mr Giakoumatos's election and for a declaration that he, as first substitute candidate for the second Athens constituency, had been elected a member of parliament. He relied on Article 56 para. 3 of the Constitution (see paragraph 29 below) and maintained in particular that the applicant's election was a nullity as, before the election, he had held the post of Second Deputy Director of the IKA.

27. On 22 March 1995 the Special Supreme Court annulled (by six votes to five) Mr Giakoumatos's election on the following grounds (judgment no. 9/1995):

"...

Under this Court's case-law:

(1) the governor of a public-law company or public undertaking - who, by virtue of Article 56 para. 1 of the Constitution, cannot be elected as a member of parliament if he has not resigned before becoming a candidate, but who is not disqualified under paragraph 3 of that Article - is the sole organ ... running that entity or undertaking, in other words having the exclusive right to decide ... questions relating to its management (see judgment no. 46/1990 of the Special Supreme Court).

(2) What matters for the purposes of determining whether in law an organ is a `governor' is not merely that the term `governor' is used in the law or the articles of association, but also the powers which the organ is given by those provisions (see judgments nos. 46/1990, and 4 and 5/1991 of the Special Supreme Court).

(3) Persons classified by the law as governors of public-law entities but who, by virtue of the provisions governing their occupational status, are nevertheless subordinate to the entity are subject to the disqualification provided for in paragraph 3 of Article 56 of the Constitution (see judgments nos. 4 and 5/1991 of the Special Supreme Court).

The Social Security Fund is managed by its governor and a board of directors. The governor is the highest-ranking administrative organ of the IKA; he [is empowered] to decide any question not expressly reserved by law to the board of directors, to act as the head of all the Fund's departments and to supervise them and review their actions, to take all appropriate measures, to recruit staff and take disciplinary action, to represent the Fund in court and other proceedings, to chair the board of directors; more generally, he is the highest-ranking administrative organ of the Fund; that organ is not subordinate to any other organ of the entity and manages the IKA jointly with the board of directors (see judgments nos. 4 and 5/1991 of the Special Supreme Court). The post of First Deputy Director of the IKA was created by Royal Decree no. 11 of 15 May 1957, and that of Second Deputy Director by section 15 of Law no. 1573/1985. Neither organ, which the aforementioned provisions ... classify as deputy director, is a governor of the IKA so as to be subject to disqualification from election under Article 56 of the Constitution ... The fact that the deputy director acts as the governor's replacement is not sufficient for him to be ascribed governor status, especially as by law, and in particular section 15 (2) of Law no. 1573/1985, it is the governor who appoints one of the deputy directors to act as his replacement and as that delegation [of powers] ... does not alter the nature of that organ even during periods when the replacement is effective ... In the instant case, during the period in issue, the governor of the IKA, by decision ..., delegated to the [applicant] - the second deputy director - certain powers concerning questions within the remit of the IKA's departments, but excluding matters relating to `the development of the Fund's general strategy'. By the same decision the governor of the IKA appointed the [applicant] to act as his replacement for the period from 1 April to 30 September of each year. The second deputy director is appointed for three years and takes part in deliberations of the board of directors in a consultative capacity. It is apparent from the foregoing that, although the second deputy director of the IKA is not subject to the Civil Service

Code ..., his relationship with the IKA is that of employee and he is a salaried member of staff - for the duration of his term in office - of a public-law entity; consequently, he is subject to the disqualification from election provided for in Article 56 para. 3 ...

..."

28. In a dissenting opinion five members of the Special Supreme Court took the view that, like the governor, the deputy directors were the highest-ranking organs of the IKA, and not members of its staff, for five reasons: (a) a distinction was drawn in the IKA's articles of association (Article 2) between the "management", which included the board of directors, the governors and the deputy directors, and the "departments", to which the IKA's "members of staff" were attached; (b) the deputy directors were excluded from the provisions of the royal decree ... "on the application of the Civil Servants Code to the IKA's members of staff" by Article 2 of that Code; (c) deputy directors were not subject to disciplinary measures, whereas being so subject was a decisive factor for classification as a civil servant or as a member of staff of a public-law entity; (d) deputy directors were not subordinate to the governor in the exercise of the powers he had delegated them, which they would necessarily have been if they were civil servants; and (e) they had a right to vote when chairing meetings of the IKA's board of directors as the governor's replacement.

II. RELEVANT DOMESTIC LAW

A. The Constitution

29. The relevant Articles of the Constitution provide:

Article 15 para. 2

"Radio and television shall be subject to direct State control. Their aim shall be the objective, even-handed broadcasting of information and news and of literary and artistic works; quality of programmes must be maintained in all cases, in view of their social role and the country's cultural development."

Article 56

"1. Salaried civil and public servants, officers of the armed forces and the security forces, employees of local authorities or other public-law entities, the mayors of municipalities, the governors or chairmen of boards of directors of public-law entities or public or municipal undertakings, notaries and land registrars may not stand as candidates or be elected as members of parliament if they have not resigned before becoming candidates. Resignation shall take effect as soon as it is submitted in writing. A member of the armed forces who resigns may not be reinstated. Civil and public servants may not be reinstated until a year has elapsed after their resignation. ...

3. Salaried civil servants, active members of the armed forces and officers of the security forces, members of staff of public-law entities in general, and the governors and members of staff of public or municipal undertakings or charitable bodies may not stand as candidates or be elected as members of parliament in any constituency where they have performed their duties for more than three months during the three years preceding the elections. The permanent secretaries of ministries during the last six months of the four-year parliamentary term shall be subject to the same restrictions. Candidates for election to the State Parliament and subordinate civil servants from the central departments of State shall not be subject to these restrictions.

..."

Article 58

"Where the validity of legislative elections is contested because of irregularities in the electoral process or a candidate's failure to meet the requirements laid down by law, the elections shall be reviewed and any disputes arising from them heard by the Special Supreme Court referred to in Article 100."

Article 103

"1. Civil servants shall carry out the State's will and serve the people; they shall abide by the Constitution and be devoted to their country. The qualifications and procedural requirements for their appointment shall be laid down by law.

...

5. The benefit of irremovability may be withdrawn by statute from senior civil servants on secondment, persons directly appointed as ambassadors, members of the private offices of the President of the Republic, the Prime Minister, ministers and ministers of State. ..."

B. The case-law of the Special Supreme Court

30. In a judgment (no. 46/1990) of 12 December 1990 the Special Supreme Court held that the chairman of the board of directors of a public undertaking (the Greek Organisation for Small and Medium-Sized Businesses in the Craft Industry - "EOMMEX") could not be equated with the governor of such an undertaking and was not therefore subject to the disqualification from standing for election provided for in Article 56 para. 3 of the Constitution. In particular, the Special Supreme Court said:

"... In using the word `governor', the Constitution is referring to the single person, the organ of the undertaking that, under the provisions governing the undertaking and the general law, runs it, that is to say the organ that alone decides, under its powers as laid down by law or in the articles of association, questions concerning the management of the undertaking (such as achieving its objectives, managing staff and making agreements). What matters for the purposes of [Article 56 para. 3] is to know what the powers concerned are, not the description of the elected member as

> `governor', as it cannot be ruled out that a person who is not so described in the articles of association of the undertaking ... may perform such duties even though his title is that of chairman of the board of directors.
>
> ... It is apparent from the foregoing that the person who acts as chairman of the board of directors of EOMMEX cannot be described as `governor' in the aforementioned sense.
>
> The chairman (a) draws up the agenda; (b) receives reports on the functioning of the entity from its manager; (c) supervises the manager's implementation of the board of directors' resolutions; and (d) represents EOMMEX in court proceedings whilst being empowered to assign that task to other people ... He cannot, by virtue of these functions, which are the only ones the law allocates to him, be described as a `governor' of the organisation, since none of them, not even the last one, corresponds to the concept of managerial act ... The position would be different had the manager's functions been assigned to the chairman, since in that eventuality the chairman of the board of directors would actually be `managing' the organisation.
>
> ..."

31. The Special Supreme Court has also held that the Secretary-General of the Greek Tourist Board ("EOT") and the Governor of the Social Security Fund ("IKA") were not caught by the disqualification in Article 56. With regard to the Secretary-General, it held (in judgment no. 15/1978) that he was not subordinate to EOT's board of directors, to which he was in no way answerable, not even for disciplinary purposes; with regard to the Governor it held (in judgments nos. 4 and 5/1991): "It is apparent from paragraph 3 of Article 56 - in which the grounds for disqualification from standing for election, which must be strictly construed, are exhaustively set forth - read together with paragraph 1 of that Article that the governors of public-law entities, who are covered by the disabilities referred to in paragraph 1 ... are not covered by those in paragraph 3 as they are not included among the exhaustive list of persons subject to disqualification."

PROCEEDINGS BEFORE THE COMMISSION

32. Mr Gitonas applied to the Commission on 12 June 1991, Mr Paleothodoros and Mr Sifounakis on 22 November 1991, Mr Kavaratzis on 16 May 1995 and Mr Giakoumatos on 28 May 1995. Relying on Article 3 of Protocol No. 1 (P1-3), they complained that their election to the Greek Parliament had been annulled because they had been in public office within the three preceding years.

33. In a decision of 10 October 1994 the Commission joined the three applications of Mr Gitonas, Mr Paleothodoros and Mr Sifounakis (nos. 18747/91, 19376/92 and 19379/92). It declared their applications admissible on 1 March 1995 and those of Mr Kavaratzis (no. 28208/95) and

Mr Giakoumatos (no. 27755/95) admissible on 24 June and 14 May 1996 respectively.

In its reports of 7 March 1996, 28 November 1996 and 21 January 1997 (Article 31) (art. 31), it expressed the opinion, by nine votes to eight in the case of Mr Gitonas and Others, sixteen votes to twelve in the case of Mr Kavaratzis and fourteen votes to twelve in the case of Mr Giakoumatos that there had been a violation of Article 3 of Protocol No. 1 (P1-3). The full text of the Commission's opinions on the three applications and of the separate opinions contained in the reports is reproduced as an annex to this judgment[3].

FINAL SUBMISSIONS TO THE COURT

34. In their memorials the Government submitted: "In the present case the disqualifications referred to in Article 56 para. 3 of the Greek Constitution and the annulment of the applicants' election by the judgments of the Special Supreme Court pursuant to that provision are neither arbitrary nor irrational and do not infringe the free expression of opinion of the electorate; on the contrary, they are consistent with the principle of equality of treatment for all citizens in the exercise of their right to stand for election and with the political evolution and the reality of public political life in Greece. Consequently, they do not exceed the margin of appreciation reserved to the States." They invited the Court "to reject the applications ... in their entirety".

35. Mr Giakoumatos concluded as follows:

> "There is no statutory basis whatsoever for assimilating the applicant to a member of staff of a public-law corporation. On the other hand, the law provides that the deputy directors are not members of the administrative staff of the Social Security Fund (Article 2 of Presidential Decree no. 266/1989), just as it also expressly precludes them from the scope of the Civil Servants Code (Article 2 of Royal Decree no. 993/1966).
>
> Furthermore, where the citizen's right to be elected to Parliament is concerned, the Constitution must be strictly, not broadly, construed to the letter of the provisions on disqualification, so as not to introduce new grounds for disqualification from holding parliamentary office.
>
> However, the Special Supreme Court assimilated the status of second deputy director to that of a member of staff of a public corporation operating in the public interest and followed a line of reasoning that was contrary to the above-mentioned legislation and also to the principle that fundamental rights are not to be subject to

[3] For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1997-IV), but a copy of the Commission's report is obtainable from the registry.

restrictions, especially not grounds for disqualification without statutory basis because such grounds cannot be presumed.

Accordingly, the Special Supreme Court violated Article 3 of Protocol No. 1 to the Convention (P1-3) in its judgment no. 9/1995, since it reduced the scope of the electorate's right to elect the candidates of its choice and at the same time infringed my right to be elected to Parliament."

AS TO THE LAW ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL No. 1 (P1-3)

36. The applicants alleged that the annulment of their election by the Special Supreme Court pursuant to Article 56 para. 3 of the Constitution infringed the right of the electorate freely to choose its representatives and, by the same token, their own right to be elected. They relied on Article 3 of Protocol No. 1 (P1-3), 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."

They said that Article 56 para. 3 was imprecise and incoherent, but the substance of their complaints concerned the decisions of the Special Supreme Court, which, contrary to its case-law, had construed Article 56 para. 3 broadly thereby creating a new ground for disqualification not contained in that Article. That was despite the fact that the grounds for disqualification were exhaustively set out in the Constitution itself and had to be strictly construed.

37. The Government maintained that the restrictions laid down by Article 56 para. 3 of the Constitution on public and civil servants, such as the applicants, standing for election were not arbitrary and did not prevent the free expression of the opinion of the people in the choice of the legislature. They were known in advance to prospective candidates thus enabling them to make appropriate arrangements and were aimed at ensuring both the genuine manifestation of the people's will through equality of treatment of candidates for election and the full exercise of the individual right guaranteed by Article 3 of Protocol No. 1 (P1-3). Moreover, the realities of Greek political life had been taken into account in the restrictions, which in addition tended to preserve the neutrality of the civil service, the independence of members of parliament and the principle of the separation of powers. Lastly, in requiring civil servants wishing to stand as candidates to vacate office thirty-three months before the elections, the constitutional legislature had not exceeded the margin of appreciation afforded Contracting States by Article 3 of Protocol No. 1 (P1-3).

38. In the Commission's view, the system for disqualification instituted by Article 56 para. 3 was incoherent. The incumbents of posts in public

office that were far more important than those occupied by the applicants - such as ministers, mayors or several other high-ranking civil servants - and which gave much more scope for influencing the electorate, were not subject to the restrictions set out in that paragraph. Secondly, no account was taken of the exact period - which in addition was very short - when the position giving rise to disqualification had been held during the three years preceding the elections. Thirdly, the virtually irrebuttable presumption of disqualification created by the said paragraph prevented the courts considering the nature of the post concerned, the effective length of time it had been held and the level of responsibility it implied. Lastly, it had not been shown in the instant case that the applicants had derived a benefit from their positions or gained an advantage over other candidates. Considering that the annulment of their election was not justified by the need to protect the Greek electorate, it concluded that there had been a violation of Article 3 of Protocol No. 1 (P1-3).

39. The Court reiterates that Article 3 of Protocol No. 1 (P1-3) implies subjective rights to vote and to stand for election. As important as those rights are, they are not, however, absolute. Since Article 3 (P1-3) recognises them without setting them forth in express terms, let alone defining them, there is room for "implied limitations" (see the Mathieu-Mohin and Clerfayt v. Belgium judgment of 2 March 1987, Series A no. 113, p. 23, para. 52). In their internal legal orders the Contracting States make the rights to vote and to stand for election subject to conditions which are not in principle precluded under Article 3 (P1-3). They have a wide margin of appreciation in this sphere, but it is for the Court to determine in the last resort whether the requirements of Protocol No. 1 (P1) 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 (ibid.).

More particularly, the States enjoy considerable latitude to establish in their constitutional order rules governing the status of parliamentarians, including criteria for disqualification. Though originating from a common concern - ensuring the independence of members of parliament, but also the electorate’s freedom of choice -, the criteria vary according to the historical and political factors peculiar to each State. The number of situations provided for in the Constitutions and the legislation on elections in many member States of the Council of Europe shows the diversity of possible choice on the subject. None of these criteria should, however, be considered more valid than any other provided that it guarantees the expression of the will of the people through free, fair and regular elections.

40. The Court notes that paragraph 3 of Article 56 of the Constitution, which was applied in the applicants’ case, establishes grounds for disqualification that are both relative and final in that certain categories of

holders of public office - including salaried public servants and members of staff of public-law entities and public undertakings - are precluded from standing for election and being elected in any constituency where they have performed their duties for more than three months in the three years preceding the elections; the disqualification will moreover stand notwithstanding a candidate's prior resignation, unlike the position with certain other categories of public servant under paragraph 1 of that Article (see paragraph 29 above).

Such disqualification, for which equivalent provisions exist in several member States of the Council of Europe, serves a dual purpose that is essential for the proper functioning and upholding of democratic regimes, namely ensuring that candidates of different political persuasions enjoy equal means of influence (since holders of public office may on occasion have an unfair advantage over other candidates) and protecting the electorate from pressure from such officials who, because of their position, are called upon to take many - and sometimes important - decisions and enjoy substantial prestige in the eyes of the ordinary citizen, whose choice of candidate might be influenced.

41. The Court acknowledges that the system introduced by Article 56 is somewhat complex. However, it has not encountered any of the incoherencies referred to by the Commission and still less would it say that the system is arbitrary.

With regard to the alleged special treatment that paragraph 1 of Article 56 affords to certain categories of civil servant and politician who, through their position, are better placed to influence the electorate, the Court agrees with the Government's arguments. Unlike the positions referred to in paragraph 3 of Article 56, which are purely administrative posts, the feature common to those referred to in paragraph 1 is their political nature and the political responsibility which that entails. Mayors and heads of municipalities, in company with members of parliament, owe their position directly to the electorate. Governors and presidents of public-law entities and other high-ranking civil servants appointed by the Government conceive and implement Government policy in their field of activity and are thus subject, like ministers, to parliamentary scrutiny.

As for the objective establishment of criteria for disqualification, which is laid down by paragraph 3 of Article 56 and prevents the Special Supreme Court from having regard to any special features of the case, the Court does not find it unreasonable having regard to the enormous practical difficulty in proving that a position in the civil service has been used to electoral ends.

42. The applicants' case was in substance aimed at showing that not only did their positions fall outside the scope of Article 56 para. 3, but also that there was nothing in the Special Supreme Court's case-law to suggest that it would come to the decision it did. More particularly, Mr Gitonas's secondment could not alter his status as an employee of the Investment

Bank and could not be compared with an appointment as a civil servant since the post of Deputy Head of the Prime Minister's private office had been created illegally, as it had no statutory basis. The posts of Mr Paleothodoros and Mr Sifounakis (Directors-General of the first and second national television channels) could not be equated with that of the Chairman of the Greek Broadcasting Company or of a member of staff of a public undertaking with responsibilities in all Greek constituencies. Lastly, Mr Kavaratzis and Mr Giakoumatos, first and second deputy directors of the IKA, could not be considered to be members of staff of a public-law entity with nationwide activities since the nature of their duties meant that their posts were more akin to that of the Governor of the IKA, which the Special Supreme Court had already found was not caught by Article 56 para. 3.

43. The Government agreed with the reasoning of the Special Supreme Court in its decisions concerning the applicants. It emphasised that if the European Court were to embark on its own analysis of the relevant legislation, it would become a further level of jurisdiction superimposed on those existing in the Contracting States.

44. The Court points out that it is primarily for the national authorities, and in particular the courts of first instance and of appeal, which are specially qualified for the task, to construe and apply domestic law.

It notes that the positions held by the applicants were not among those expressly referred to in Article 56 para. 3. However, that did not guarantee them a right to be elected. The Special Supreme Court has sole jurisdiction under Article 58 of the Constitution (see paragraph 29 above) to decide any dispute over disqualifications and, as in any judicial order where such a system exists, anyone elected in breach of the applicable rules will forfeit his position as a member of parliament.

In the instant case the Special Supreme Court, after analysing the nature of the posts held by the applicants and the applicable legislation, held that the posts were similar to the ones described in paragraph 3 of Article 56; it further found that the conditions relating to when the position was held, and the duration and extent of the duties, were met in the case of each of the applicants. On reasonable grounds it considered it necessary to annul their election (see paragraphs 10, 14, 18, 22 and 27 above).

The Court cannot reach any other conclusion; there is nothing in the judgments of the Special Supreme Court to suggest that the annulments were contrary to Greek legislation, arbitrary or disproportionate, or thwarted "the free expression of the opinion of the people in the choice of the legislature" (see, mutatis mutandis, the aforementioned Mathieu-Mohin and Clerfayt judgment, p. 25, para. 57).

Consequently, there has been no violation of Article 3 of Protocol No. 1 (P1-3).

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been no violation of Article 3 of Protocol No. 1 (P1-3).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 1 July 1997.

Rolv RYSSDAL
President

Herbert PETZOLD
Registrar