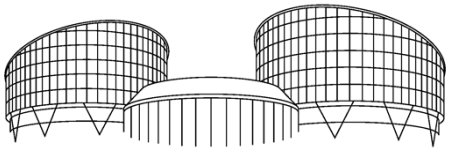

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF ROMANYUK v. UKRAINE

(Application no. 77909/12)

JUDGMENT

STRASBOURG

20 September 2022

This judgment is final but it may be subject to editorial revision.

In the case of Romanyuk v. Ukraine,

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

Lado Chanturia, *President,*
Ganna Yudkivska,
Mattias Guyomar, *judges,*
and Martina Keller, *Deputy Section Registrar,*

Having regard to:

the application (no. 77909/12) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 27 November 2012 by a Ukrainian national, Mr Viktor Mykolayovych Romanyuk, born in 1975 and living in Vasylkiv ("the applicant") who was represented by Mr M.V. Motruk, a lawyer practising in Kyiv;

the decision to give notice of the application to the Ukrainian Government ("the Government"), represented by their then Agent, Mr Ivan Lishchyna.

the parties' observations;

Having deliberated in private on 12 May 2022,

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

SUBJECT-MATTER OF THE CASE

1. The case concerns the alleged breach of the applicant's passive electoral right under Article 3 of Protocol No. 1 in two aspects: the invalidation of the 28 October 2012 election results in his constituency and the cancellation of his registration for the 15 December 2013 partial repeat parliamentary elections, given that he had left for Italy in the meantime. The applicant also complained that the judicial order seeking his pre-trial detention within the criminal proceedings, which had been instituted against him in Ukraine on 30 January 2013 and which had led to his one-week detention in Italy in March 2013, had been in breach of Article 5 § 1 of the Convention.

2. The applicant ran as a candidate for the main opposition party, "Batkivshchyna", in the parliamentary elections of 28 October 2012 in single-seat electoral constituency no. 94[1]. According to the results sheets (referred to as "protocols") drawn up by the Precinct Electoral Commissions (PECs), he won the elections, whereas his main rival, Ms Z., the candidate for the government party, "Party of Regions", arrived second. The Constituency Electoral Commission ("the ConEC"), however, invalidated the voting results in twenty-seven polling stations, in all of which the applicant had been considerably ahead of Ms Z. The ConEC's reasoning was limited to the general reference to the judicial decisions following complaints from

[1] Comprising 136 precincts, with 151,370 voters in total.

twenty-seven observers, mainly from Ms Z. and "Party of Regions", which stated that the PECs had unlawfully restricted their access to those polling stations. The applicant challenged that invalidation arguing, in particular, that the ConEC had not analysed the scope of the restriction in question and how it might have influenced the voting results. The administrative courts of two levels of jurisdiction rejected his complaint on the grounds that the ConEC had acted within its discretionary powers. The Central Election Commission ("the CEC") found it impossible to establish the election results in the constituency and applied to the Parliament for putting in place the necessary modalities for organising partial repeat elections.

3. On 30 January 2013 the Kyiv City Prosecutor's Office instituted criminal proceedings against the applicant on suspicion of "an incomplete attempt" of State funds misappropriation committed in 2008. Namely, the applicant, who had been the deputy director of the "Indar" insulin factory (70.7% of which was owned by the State), was suspected of having conspired with the chairman of the board of directors, Mr L., with a view to misappropriating its funds. They were suspected of having created, in breach of legal rules, a limited liability company and of having transferred to it some real estate from the "Indar" factory. However, that transfer was not completed, because the applicant and L. had not applied for its registration.

4. On 4 February 2013 the applicant left for Italy. Several days later he was declared wanted by the police. The investigating judge ordered the applicant's arrest with a view to ensuring his presence in the court for the examination of the issue of a preventive measure. On 26 March 2013 the Kyiv Shevchenkivskyy District Court ordered the applicant's pre-trial detention. Meanwhile, on 22 March 2013, the applicant had been arrested in Italy. On 29 March 2013 he was released subject to an obligation not to abscond.

5. On 9 July 2013 the Milan City Court of Appeal ("the Milan Court") refused the Ukrainian authorities' request for the applicant's extradition. It noted that, according to the Italian criminal law, there was an incomplete attempt of crime where a person had not been able to complete it for reasons independent of his/her will. The case-file materials clearly indicated that the crime imputed to the applicant had not been completed because he had not pursued the applicable administrative formalities. At no point had it been alleged that the applicant had not been able to complete the supposed crime for reasons beyond his control and independent of his will. The time lapse between the events in question (2008) and the institution of the criminal proceedings (2013) was also noted.

6. In early December 2013 the administrative courts[2], following a voter's complaint, cancelled the applicant's registration as a candidate for the partial repeat parliamentary elections scheduled for 15 December 2013 on the

[2] The Kyiv Administrative Court of Appeal, sitting as a court of first instance, on 1 December 2013 and the Higher Administrative Court on 4 December 2013.

grounds that he did not comply with the five-year residence requirement. The CEC, for its part, argued that he had submitted all the legally required documents, including a copy with his passport with his domicile registration in Ukraine. While the Parliamentary Elections Act of 2011, which was in force at the material time, did not contain any further explanations regarding the residence requirement[3], the courts considered, with the reference to some other legislation[4], that it implied staying more than 183 per year at the territory of Ukraine. Having regard to the applicant's undisputed residence in Italy for the preceding ten months, the courts held that he did not comply with that requirement. They did not comment on his argument that he had been restricted in his freedom of movement, given, firstly, his detention in Italy and, secondly, the pending issue of his extradition to Ukraine.

THE COURT'S ASSESSMENT

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

7. The applicant complained that his detention from 22 to 29 March 2013 had been based on an arbitrary order issued by the Ukrainian authorities and had thus been in breach of Article 5 § 1 of the Convention.

8. The Government submitted that the detention order had been in accordance with the law.

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

10. The general principles of relevance can be found, for example, in *Vasiliciuc v. the Republic of Moldova* (no. 15944/11, §§ 34-36, 2 May 2017).

11. The Court does not consider that the applicant's deprivation of liberty was based on "a reasonable suspicion of having committed an offence". It notes that the charge against him, advanced in 2013, concerned "an incomplete attempt" of funds misappropriation supposedly committed some five years earlier. As explicitly stated in all the relevant documents, the misappropriation in question had not been completed only because the applicant and another suspect had not applied for getting registered the property transfer. It was never alleged that they had had any obstacles for that.

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[3] On 1 January 2020 it was replaced by the Electoral Code (2019), which now contains a detailed explanation what is meant by the residence requirement for parliamentary election candidates: if a person's one-time trip abroad for private reasons did not exceed ninety days and if the duration of his/her stay abroad during each of the five years preceding the election day did not exceed 183 days. There is no breach of the residence requirement if a person stayed abroad for official business or for studies, spent his/her leave, or underwent medical treatment upon a doctor's prescription.

[4] Notably, the definitions of the "continuous residence" in the Citizenship Act, the "permanent residence" in the Tax Code, and "a place of residence" under the Freedom of Movement and Free Choice of Residence in Ukraine Act.

Those considerations led the Milan Court to reject the Ukrainian authorities' request for the applicant's extradition in July 2013 (see paragraph 5 above).

12. There has therefore been a violation of Article 5 § 1 of the Convention.

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

13. The applicant complained that the invalidation of the 28 October 2012 election results in constituency no. 94, as well as the cancellation of his candidacy for the 15 December 2013 partial repeat parliamentary elections, had been arbitrary.

14. The Government submitted that the restriction of numerous observers' access to the polling stations had been a serious irregularity warranting the invalidation of the election results. As regards the second grievance, the Government pointed out that the residence-related legislation had been amended and clarified since the Court had found a violation of Article 3 of Protocol No. 1 in somewhat comparable circumstances in *Melnychenko v. Ukraine* (no. 17707/02, ECHR 2004-X). Notably, the Freedom of Movement Act, in force since 15 January 2004, defined residence as a place where a person lived for more than six months per year.

15. The Court declares both complaints admissible.

16. In so far as the first complaint is concerned, the Court considers that discounting all votes cast in an entire electoral constituency owing merely to the fact that some observers had been restricted in their access to twenty-seven (out of 136) polling stations, without any attempt to establish the extent of that irregularity and its impact on the outcome of the overall election results in the constituency, was contrary to Article 3 of Protocol No. 1 (see *Kovach v. Ukraine*, no. 39424/02, § 60, ECHR 2008, and *Hajili v. Azerbaijan*, no. 6984/06, §§ 49-58, 10 January 2012).

17. In so far as the second complaint is concerned, the Court takes note of the following circumstances indicating that the five-year residence requirement, as worded in the applicable law at the material time, could still be regarded as lacking clarity. The CEC and the courts interpreted it differently. Furthermore, the courts had to refer to a number of legal provisions unrelated to the electoral context in order to explain their approach. Lastly, in the recent amendments to the electoral legislation it was deemed necessary to introduce an additional provision clarifying the residence requirement. That said, the Court does not need to undertake a detailed analysis of the quality of the applicable law. The fact that the domestic courts failed to give any assessment to the applicant's pertinent argument about the particularities of his personal situation (namely, that he had not been able to return to Ukraine, given his detention in Italy and the pending issue of his extradition) is sufficient for the Court to conclude that the cancellation of his candidacy was arbitrary and lacked proportionality

(see, in particular, *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, § 388, 22 December 2020, with further references).

18. There has therefore been a violation of Article 3 of Protocol No. 1 in respect of both complaints.

III. REMAINING COMPLAINT

19. The applicant also complained under Article 18 of the Convention in conjunction with Article 5 § 1 that his detention order had been politically motivated. Having regard to the facts of the case, the submissions of the parties, and its findings, the Court considers that it has examined the main legal questions raised in the present application, and that there is no need to examine separately the above-mentioned complaint (compare *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014).

APPLICATION OF ARTICLE 41 OF THE CONVENTION

20. The applicant claimed the following amounts in respect of pecuniary damage: 550 euros (EUR) as the costs incurred in detention, EUR 14,770 as the expenses related to his stay in Italy for fourteen months thereafter; and EUR 10,491 as the unearned wages of a member of parliament.

21. There is no causal link between the violations found and the pecuniary damage related to the applicant's stay in Italy. He also failed to provide any information about the difference between the salaries that he would have received as a member of parliament and his other income, if any, during the relevant period (compare *Kovach v. Ukraine*, no. 39424/02, § 66, ECHR 2008, and *Kerimova v. Azerbaijan*, no. 20799/06, § 64, 30 September 2010). The Court therefore dismisses the applicant's claim under this head.

22. The applicant also claimed EUR 10,000 in respect of non-pecuniary damage. The Court considers it reasonable to award him EUR 4,000 under this head.

23. Lastly, the applicant claimed EUR 17,350 for costs and expenses. Given his failure to provide any supporting documents, the Court rejects this claim.

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints under Article 5 § 1 of the Convention and Article 3 of Protocol No. 1 admissible;

2. *Holds* that there has been a violation of Article 5 § 1 of the Convention;

3. *Holds* that there has been a violation of Article 3 of Protocol No. 1 in respect of the invalidation of the 28 October 2012 election results in constituency no. 94 and the cancellation of the applicant's registration as a candidate for the 15 December 2013 partial repeat parliamentary elections;

4. *Holds* that there is no need to examine the remaining complaint;

5. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, EUR 4,000 (four thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 20 September 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Martina Keller Deputy Registrar	Lado Chanturia President