



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

FIFTH SECTION

CASE OF KORNATSKYY v. UKRAINE

(Application no. 19854/13)

JUDGMENT

STRASBOURG

20 September 2022

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

In the case of Kornatskyy v. Ukraine,

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

Ivana Jelić, *President*,

Ganna Yudkivska,

Arnfinn Bårdsen, *judges*,

and Martina Keller, *Deputy Section Registrar*,

Having regard to:

the application (no. 19854/13) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) on 4 March 2013 by a Ukrainian national, Mr Arkadiy Oleksiyovych Kornatskyy, born in 1953 and living in Kyiv (“the applicant”) who was represented by Mr S.I. Rokhmanov, 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 7 April 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.

2. The applicant stood as a candidate for the main opposition party, “Batkivshchyna”, in the parliamentary elections of 28 October 2012 in single-seat electoral constituency no. 132 in Mykolayiv Region.

3. According to the results established by the Constituency Election Commission (“the ConEC”) on the basis of the original results sheets (referred to as “protocols”) from the Precinct Election Commissions (“the PECs”), the applicant won the elections¹, whereas Mr T., the candidate for the government party, “Party of Regions”, arrived second². Once the ConEC transmitted those results electronically to the Central Election Commission (“the CEC”), they were published on the CEC website for information purposes early in the morning on 30 October 2012. However, later that day the CEC unexpectedly modified the results on its website, allegedly without any decision having been taken to that effect by the ConEC: while the number of votes for the applicant remained unchanged, those for Mr T. increased to 29,910 at the expense of several candidates with a minor

¹ With 29,678 votes.

² With 25,511 votes.

score³. As a result, Mr T. was indicated as the winner, with 232 votes ahead of the applicant.

4. The above-mentioned changes on the CEC website were noted in the observation mission report of the Office for Democratic Institutions and Human Rights of the Organisation for Security and Co-operation in Europe (“the OSCE/ODIHR”) published in January 2013.

5. In the results tabulation protocol drawn up shortly thereafter, the ConEC allegedly relied on the modified results published by the CEC instead of those in the original PECs’ protocols. Four of the ConEC members⁴ wrote a dissenting opinion in that regard.

6. Following Mr P.’s administrative claim challenging the ConEC’s protocol on the grounds of some alleged isolated irregularities in four polling stations, on 1 November 2012 the Mykolayiv Circuit Administrative Court (“the Mykolayiv Court”) instructed the ConEC to provide it with the originals or duly certified duplicates of all the PECs’ protocols.

7. Under Section 91 of the Parliamentary Elections Act (as worded at the material time), each PEC drew up its protocol on voting results in a number of originals exceeding the number of the PEC members by four: the first and the second originals were to be transferred to the ConEC, the third one was kept with the PEC secretary, the fourth one was publicly displayed at the PEC premises, whereas the remaining originals were distributed among the PEC members. All the originals had equal legal validity. Candidates and their representatives, as well as official observers present during the count, were entitled to a duly certified duplicate of the protocol. All the protocols were drawn up on pre-printed blanks, each of which had its unique serial number.

8. The ConEC decided that it would be appropriate to provide duplicates rather than originals to the Mykolayiv Court. Accordingly, a duplicate of the “first original” of each PEC’s protocol (see paragraph 7 above) was prepared. The accuracy of duplicates was certified by the chairman’s signature and the ConEC stamp. However, during the night of 1 to 2 November 2012, the State Bailiffs Service, assisted by the heavily numbered special police unit, withheld the first and the second originals of all the PECs’ protocols from the ConEC with a view to delivering them to the Mykolayiv Court.

9. The applicant alleged that the duration of the transportation was inexplicably long – four hours for 170 km. As reported by the Mykolayiv Court’s administrative office, the protocols arrived in a damaged packaging and “were in disorder”. According to a representative of the “Batkivshchyna” party, involved in the proceedings as a third party, after the delivery of the PECs’ protocols to the court, the blanks’ serial numbers in thirty-four of them no longer corresponded to those in the “first originals” as recorded, in particular, by the ConEC chairman in the duplicates produced on 1 November

³ Including Mr P., a self-nominated candidate, whose initial result of 1.5% had dropped to 1.4%.

⁴ Out of eighteen.

2012 (see paragraph 7 above). The voting results were allegedly modified in those protocols with a view to inflating Mr T.'s score.

10. Although the Mykolayiv Court attached the received protocols as evidence, it did not mention them in its decision of 3 November 2012 rejecting Mr P.'s claim as unsubstantiated. On 4 November 2012 it also rejected the applicant's claim in respect of the alleged falsifications at the tabulation stage, having held that it was the CEC's competence to deal with that matter.

11. On 5 November 2012 the CEC found it impossible to establish the election results in constituency no. 132. Its reasoning was limited to a broad reference to "numerous statements from participants of the electoral process about the impossibility to accurately establish the voting results". The CEC applied to the Parliament for putting in place the necessary modalities for organising partial repeat elections.

12. The applicant brought an administrative claim against the CEC submitting that he should have been declared the winner of the election. He complained, notably, that the ConEC's protocol had not accurately reflected the voting results, that thirty-four PECs' protocols had subsequently been falsified, and that the CEC had had no grounds for invalidating the election results in his constituency in spite of having conclusive evidence of his victory. According to him, that was proved by a significant number of the original PECs' protocols in the possession of the PECs' members, duly certified duplicates of the PECs' protocols in the official observers' possession, as well as the additional duplicates of "the first original" of all the PECs' protocols certified by the ConEC chairman on 1 November 2012 (see paragraph 8 above).

13. On 9 and 12 November 2012 the Kyiv Administrative Court of Appeal and the Higher Administrative Court, respectively, found against the applicant. They held that the CEC's decision was related to numerous complaints received by it rather than to any issues with the ConEC's protocol.

THE COURT'S ASSESSMENT

14. The applicant complained under Article 3 of Protocol No. 1 that his right to stand as a candidate in free elections had been infringed on account of: the arbitrary review by the ConEC of the initial results, according to which he had won; the subsequent falsification of the PECs' protocols in order to legitimise the above-mentioned review; the arbitrary invalidation of the election results in his constituency; and the authorities' failure to effectively address his complaints concerning those irregularities.

15. The Government observed that the applicant had run as a candidate in the partial repeat parliamentary elections of 15 December 2013, which he had lost. Referring to the applicant's failure to inform the Court thereof, the Government submitted that he had abused the right of application. They also

noted that the invalidation of the election results by the CEC had been an adequate response to the applicant's allegations of falsifications.

16. The applicant submitted that the invalidation of the election results in his constituency had been arbitrary and that he should have been declared the winner. In so far as the Government's reference to the partial repeat parliamentary elections was concerned, the applicant argued that it was of no relevance for his application.

17. Given that the applicant's omission to inform the Court about his participation in the partial repeat parliamentary elections does not concern "the very core of the case" and in the absence of any indication of the applicant's intention to mislead the Court, the Government's objection must be dismissed (compare *Beg S.p.a. v. Italy*, no. 5312/11, §§ 74-81, 20 May 2021). The application being neither manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention nor inadmissible on any other grounds, the Court declares it admissible.

18. The general principles of relevance can be found in *Davydov and Others v. Russia* (no. 75947/11, §§ 271-77 and 283-88, 30 May 2017) and *Mugemangango v. Belgium* [GC], no. 310/15, §§ 67-73, 10 July 2020). The Court has held, in particular, that a mere mistake or irregularity in the electoral process would not, *per se*, signify unfairness of the elections, if the general principles of equality, transparency, impartiality and independence in the organisation and management of elections were complied with (see *Davydov and Others*, cited above, § 287). The concept of free elections would be put at risk only if there was evidence of procedural breaches that would be capable of thwarting the free expression of the opinion of the people, and where such complaints received no effective examination at the domestic level (*ibid.*, §§ 283-88).

19. There is no doubt that the irregularities alleged by the applicant in the present case were serious enough to thwart the free expression of the people in the choice of the legislature. The domestic authorities, however, dismissed his allegations in a formalistic manner, without any meaningful attempt to establish what had really happened or to examine any primary evidence submitted by the applicant in support of his statement that he had been the rightful winner of the elections (see paragraphs 9-10 above). Discounting all the votes cast in the entire electoral constituency on vaguely formulated grounds only added to the applicant's concerns rather than provided any response to them.

20. The Court therefore concludes that the applicant was arbitrarily prevented from exercising effectively his right to stand for election (see *Hajili v. Azerbaijan*, no. 6984/06, §§ 49-58, 10 January 2012).

21. There has accordingly been a violation of Article 3 of Protocol No. 1.

APPLICATION OF ARTICLE 41 OF THE CONVENTION

22. The applicant claimed 10,000 euros (EUR) in respect of pecuniary damage. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 3 of Protocol No. 1;
3. *Rejects* 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

Ivana Jelić
President