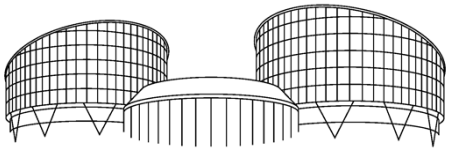

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF MAGYAR KÉTFARKÚ KUTYA PÁRT v. HUNGARY

(Application no. 201/17)

JUDGMENT

Art 10 • Freedom of expression • Freedom to impart information • Insufficiently foreseeable legal basis for a fine on political party for making available a mobile application allowing voters to share anonymous photographs of their ballot papers • Vagueness of the principle of the 'exercise of rights in accordance with their purpose' • Domestic legal framework not ruling out any arbitrariness in its application • Restrictions on the freedom of expression of political parties in the context of an election or a referendum calling for rigorous supervision

STRASBOURG

20 January 2020

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

In the case of Magyar Kétfarkú Kutya Párt v. Hungary,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Linos-Alexandre Sicilianos, *President,*
Guido Raimondi,
Angelika Nußberger,
Robert Spano,
Branko Lubarda,
Ledi Bianku,
Paul Lemmens,
Valeriu Griţco,
Dmitry Dedov,
Jon Fridrik Kjølbro,
Síofra O'Leary,
Stéphanie Mourou-Vikström,
Gabriele Kucsko-Stadlmayer,
Alena Poláčková,
Jolien Schukking,
Péter Paczolay,
Ivana Jelić, *judges,*

and Johan Callewaert, *Deputy Grand Chamber Registrar,*

Having deliberated in private on 21 November 2018 and 30 September 2019,

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

PROCEDURE

1. The case originated in an application (no. 201/17) against Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Hungarian political party, Magyar Kétfarkú Kutya Párt ("the applicant party" or "the MKKP"), on 16 December 2016.

2. The applicant was represented by Mr Cs. Tordai, a lawyer practising in Budapest. The Hungarian Government ("the Government") were represented by their Agent, Mr Z. Tallódi, Ministry of Justice.

3. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). On 23 January 2018 a Chamber of that Section composed of Ganna Yudkivska, President, Vincent A. De Gaetano, Paulo Pinto de Albuquerque, Faris Vehabović, Carlo Ranzoni, Marko Bošnjak, Péter Paczolay, judges, and also of Marialena Tsirli, Section Registrar, delivered a judgment in which it held unanimously that there had been a violation of Article 10 of the Convention. On 23 April 2018 the Government requested the referral of the case to the Grand Chamber in

accordance with Article 43 of the Convention. On 28 May 2018 the panel of the Grand Chamber granted that request.

4. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

5. The MKKP and the Government each filed further written observations (Rule 59 § 1) on the merits.

6. A hearing took place in public in the Human Rights Building, Strasbourg, on 21 November 2018.

There appeared before the Court:

(a) *for the respondent Government*
Mr Z. TALLÓDI, *Agent*,
Ms M. WELLER, *Co-Agent*;

(b) *for the MKKP*
Mr Cs. TORDAI,
Mr T. FAZEKAS,
Mr B. T. TÓTH, *Counsel,*
Ms D. G. SZABÓ, *Adviser*.

The Court heard addresses and replies to the questions put by the judges by Mr Tallódi, Mr Fazekas and Mr Tóth.

THE FACTS

7. The MKKP is a political party active in Hungary. At the 2018 legislative elections it obtained 1.73% of the votes cast on national lists (99,410 votes nationwide) and consequently did not attain the statutory threshold for parliamentary representation; moreover, none of its candidates was elected in the individual constituencies. Its political stance is largely conveyed through satire directed at the political elite and governmental policies, through its website (which includes much humorous content), through purported "campaigns" for clearly absurd causes, and through street art and performances.

8. In 2006 the party presented its candidature for the national elections, with an election manifesto containing ideas such as eternal life, free beer, lower gravitation and two sunsets a day. In their 2006 campaign for the office of mayor of Budapest their slogans included "More of everything, less of nothing!" "Eternal life, free beer and tax deductions!" and "We promise anything!"

9. In the context of the wave of refugees and migrants crossing Hungarian territory in 2015 and in response to the resultant governmental policies on migration, which received widespread media coverage, the MKKP launched what it called an "anti-anti-immigration campaign". It was

financed through micro-donations from private individuals in the amount of some 33,000,000 Hungarian forints (HUF) (approximately 100,000 euros (EUR)). The campaign included the display of billboards caricaturing the government's own media campaign with slogans such as "Feel free to come to Hungary, we already work in England!"

10. On 22 September 2015 the European Union's interior ministers meeting in the Justice and Home Affairs Council approved a plan to relocate 120,000 asylum seekers over two years from the frontline States Italy and Greece to all other EU countries. Under the plan, Hungary was to accept 1,294 persons from other member States.

11. On 24 February 2016 the Prime Minister of Hungary announced that the Hungarian government would hold a referendum on whether to accept the European Union's proposed mandatory quotas for relocating migrants. On the same day the government submitted for approval before the National Election Commission ("NEC") the following question to be put to a referendum: "Do you want the European Union to be entitled to order the mandatory settlement of non-Hungarian citizens in Hungary without Parliament's consent?"

12. On 29 February 2016 the NEC, by nine votes to three, approved the question. On 5 May 2016, after examining the legal challenges, the *Kúria* (the Hungarian supreme court) authorised the holding of the referendum.

13. The National Assembly officially approved the referendum initiated by the government on 10 May 2016. The initiative was approved with 136 votes being cast in favour by the parliamentary majority and the MPs of the opposition party Jobbik, with five votes against; the remaining fifty-three MPs boycotted the session. On 21 June 2016 the Constitutional Court rejected all the appeals against the plan to hold the referendum. It was announced that the referendum would take place on 2 October 2016.

14. Opposition groups including political parties and civil-society actors considered that the question put to a referendum deliberately misrepresented EU policies, since in their view no project existed involving mandatory quotas for the relocation of migrants. They voiced the opinion that the referendum was merely an instrument of government propaganda and did not provide voters with a real choice between real alternatives, and that its tendentious wording served no other purpose than to exacerbate the controversy over migration.

15. The MKKP urged its supporters to participate in the referendum but to cast an invalid ballot. Its main reason for advocating an invalid vote was that the referendum constituted in essence an abuse of a democratic legal institution and that, while boycotting was a passive rejection of the referendum, an invalid vote sent a clear message denouncing its lack of legitimacy in an active manner. Furthermore, according to the announcement posted on the MKKP's website calling on voters to cast

invalid ballots, such ballots could not be forged and would certainly not be taken into account when the votes were counted.

16. In the period preceding the referendum the government engaged in a campaign on migration policy, posting billboards with questions such as: "Did you know? More than 300 people have been killed in terrorist attacks in Europe since the start of the migrant crisis", "Did you know? The Paris terrorist attacks were carried out by immigrants", "Did you know? 1.5 million illegal immigrants arrived in Europe in 2015", "Did you know? Brussels wants the forced resettling of a city's worth of illegal immigrants in Hungary", "Did you know? Almost one million immigrants want to come to Europe from Libya alone" and "Did you know? Since the start of the immigration crisis, sexual harassment of women has increased in Europe".

17. In reaction to this, the MKKP continued its campaign on billboards ("Did you know there's a war in Syria?", "Did you know one million Hungarians want to emigrate to Europe?", "Did you know? The perpetrators in most corruption cases are politicians", "Did you know? A tree may fall on your head", "Did you know? The average Hungarian is more likely to see a UFO than a refugee in his lifetime" and "Did you know? During the Olympic Games, the biggest danger to Hungarian participants came from foreign competitors"). It was again financed by micro-donations.

18. On 29 September 2016 the MKKP made available a mobile application called "Cast an invalid ballot" which enabled users to upload and share with other users, anonymously, photographs of their ballots or a photograph of the activity they were engaged in instead of voting. It was not disputed by the parties that the use of the application remained entirely anonymous, both for uploaders and passive users. The launch of the application was reported on in some major online journals (index.hu, hvg.hu).

19. The iOS version of the application was available from the AppStore, while the Android version could be downloaded from Google Play, without registration and free of charge. The application had access to the status and identifier of the mobile telephone and to its photo gallery. Under the basic settings of the application, the user could take a photograph with the rear camera of his or her telephone. The front camera could not be used, so that voters could not take so-called "ballot selfies", including themselves in the photograph. Besides the photograph, users could also provide a comment, either by choosing a pre-set political message or by adding their own messages. They had the option to indicate in which county they had voted and whether they had participated in the referendum and if so whether they had cast a valid or invalid ballot. These messages appeared together with the photograph. Furthermore, the application generated infographics, broken down by county, about the participation rate and the number of valid and invalid votes. The pictures and messages were accessible to other users of the application. The posting and sharing of photographs were anonymous

and each user could publish only one photograph. By using the application, the voters sent the non-recoverable encrypted code (hash value) generated by the mobile device's identifier, and the picture (with a message hardcoded on it), to the operator of the application. Thanks to the hashing technique, neither the MKKP nor the developer of the application could trace the identifier of the mobile telephones.

20. On 29 September 2016 a private individual lodged a complaint with the NEC about the application.

21. In a decision of 30 September 2016 the NEC found that the mobile application infringed the principles of fairness of elections, voting secrecy, and the exercise of rights in accordance with their purpose (*rendeltetésszerű joggyakorlás*), and ordered the MKKP to refrain from further breaches of section 2(1)(a) and (e) of Act no. XXXVI of 2013 on Electoral Procedure, and Article 2 § 1 of the Fundamental Law. Relying on previous Guidelines issued in 2014, it held that voters could not treat ballot papers as their own [property], and therefore could neither take them out of the polling booths nor take a photograph of them. It held that taking photographs of ballot papers could lead to electoral fraud. Furthermore, although the principle of secrecy did not create any obligation on the voters' side, it nevertheless did not entitle them to abuse their situation, bearing in mind that voting secrecy could be maintained only with their cooperation. The NEC concluded that the mobile application was capable of discrediting the work of the electoral bodies and the tallying systems in the eyes of the public.

22. The MKKP sought judicial review of this decision before the *Kúria.* As a result, the decision of the NEC had not taken effect by the date of the referendum.

23. On 2 October 2016 the referendum on the European Union's migrant relocation plan was held. The mobile application in question was available throughout polling day and altogether 3,894 photos were shared on it. It appears from the case file that the photographs were not made available anywhere other than on the mobile application.

24. On 3 October 2016 the same private individual (see paragraph 20 above) lodged a new complaint with the NEC, in the light of the fact that the MKKP had activated the "Cast an invalid ballot" application on the day of the referendum. The complainant maintained that by operating the mobile application and by encouraging voters to make use of it, the MKKP had infringed the principles of the bona fide exercise of rights and the exercise of rights in accordance with their purpose, and also the principles of fairness and secrecy of elections.

25. In a decision of 7 October 2016 the NEC reiterated its previous finding and fined the political party HUF 832,500 (approximately EUR 2,700). The NEC supplemented its previous reasoning by noting that providing voters with a mobile application and calling on them to upload and publish photographs of ballot papers, and encouraging them to cast an

invalid ballot could have influenced voters and had thus constituted unlawful campaigning.

26. By a decision of 10 October 2016 the *Kúria* upheld the NEC's decision of 30 September 2016 as to its finding regarding the infringement of the principle of the exercise of rights in accordance with their purpose, but dismissed its conclusions regarding the fairness of the referendum. The decision contained the following passages:

> "...
>
> The request for review
>
> The petitioner has lodged a petition for review of the decision of the National Election Commission, requesting that the decision be set aside and the complaint be overturned. In its view, the decision violates Articles 2 § 1 and IX § 1 of the Fundamental Law and section 2(1)(e) of the Electoral Procedure Act.
>
> The petitioner pointed out that it was for the complainant to prove that the application was illegal, and that since he had failed to do so, the complaint should have been rejected without examination on the merits. The NEC did not examine the application, basing its findings on press releases. The petitioner attached the application on an external device and argued that neither it nor the developer of the application could have access to the personal data of the users; the data transferred could not be linked to a user and therefore did not constitute personal data. The Guidelines [of the National Election Commission] did not have binding force and could not constitute a legal basis for the decision. According to the petitioner's reasoning, its conduct in providing publicity for the application and calling on voters to use the application fell on the one hand within the sphere of protection of freedom of expression, and on the other hand called on voters to exercise their right to freedom of expression, protected by Article IX § 1 of the Fundamental Law. The right to freedom of expression was not an unlimited fundamental right. However, regard being had to a number of Constitutional Court judgments, it could only be restricted in so far as necessary and proportionate in relation to another fundamental right or constitutional principle, and any restriction should be capable of achieving the stated aim. The secrecy of the vote had not been infringed by the application since the content of the vote could not be linked to the voter. The secrecy of the vote entailed the right for voters to ensure that no one could gain knowledge of how they had voted, but it did not create an obligation for voters not to share details of their vote with others. Irrespective of the above, the application, which provided a forum for voters to share the content of their vote with others, was incapable of infringing the secrecy of the vote. Therefore, in the petitioner's view, the application did not infringe Article 2 § 1 of the Fundamental Law or section 2(1)(a) and (e) of the Electoral Procedure Act.
> ...
>
> According to the petitioner, the NEC did not give reasons in its decision for finding that the application was particularly likely to shake public confidence in the IT and tallying system for voting and in the work of the electoral bodies.
>
> ...
>
> The decision of the *Kúria* and its reasoning
>
> The NEC was right to find that the application enabled users to upload data in connection with the referendum of 2 October 2016; the information published on the petitioner's website and Facebook page called on voters to post photographs and other

information on the application. The subject-matter of the review is the decision of the NEC coming within the scope of the petition for review, that is, the decision finding that calling on voters to upload and publish photographs of ballot papers from the national referendum on a mobile application infringed the secrecy of voting, the fairness of the voting and the bona fide exercise of rights in accordance with their purpose.

The complainant attached to his complaint as evidence the information about the application published on the petitioner's website and on the websites hvg.hu and index.hu. The reviewing court thus finds that the complainant fulfilled his obligation to adduce the requisite evidence in support of his complaint. The NEC adequately clarified the underlying facts, and did not violate section 43(1) of the Electoral Procedure Act.

The *Kúria* emphasises at the outset that the Guidelines do not constitute a legislative act and do not have binding legal force under section 51(2) of the Electoral Procedure Act; thus, they are irrelevant for the legal assessment of the present case. Although the NEC relied on the Guidelines in taking its decision, the latter should be assessed on its own, applying the relevant provisions of the Fundamental Law and the Electoral Procedure Act to the facts of the present case.

Pursuant to Article 2 § 1 of the Fundamental Law, Members of the National Assembly are elected by universal and equal suffrage in a direct and secret ballot, in elections which guarantee the free expression of the will of the voters in a manner laid down in a cardinal Act. In the view of the reviewing court, the secrecy of voting (voting rights) as regulated by Article 2 § 1 means, firstly, that the right of all voters to a secret vote – not detectable by anybody –- must be secured. Secondly, a system must be developed that does not make it possible to establish how a voter has cast his or her ballot. The *Kúria* does not agree with the reasoning of the impugned decision according to which the application and its functions – and in particular the uploading of photographs, the sending of messages, the participation in voting, and the sending of notifications by voters – were openly aimed at infringing the secrecy of the vote and the referendum. The provisions of the Act on Initiating Referenda, the European Citizens' Initiative and the Referendum Procedure, and of the Electoral Procedure Act, as well as the procedural rules on voting, clearly ensure that voters cast a secret ballot. The application attached to the present petition does not allow access to the personal data of the users, and is thus incapable of linking a cast ballot to a voter. The NEC reached the same conclusion. In the light of the above, the secrecy of the ballot was not infringed by the application or by the use thereof, and the NEC's decision to uphold the complaint in that respect was unlawful.

According to section 2(1) of the Electoral Procedure Act, the following principles shall prevail in the application of the rules of electoral procedure:

(a) the protection of the fairness of the election;

(e) the exercise of rights in good faith and in accordance with their purpose.

The provisions relevant to voting are contained in sections 168-186 of the Electoral Procedure Act. Under section 180(1) of the Act voters must be provided with a polling booth in which to mark their ballot papers. Under section 182(1), the voter must put the ballot paper in an envelope and place it in a ballot box. Section 186(1) states that a valid vote can be given only to the candidates or lists whose names are printed on the official ballot paper.

In the *Kúria's* opinion – contrary to the reasoning of the NEC – the taking of photographs of ballot papers in the polling booth does not infringe the secrecy of

voting and elections. There is no legislative act that forbids the taking of such photographs and the NEC was likewise unable to name any such provision. As stated above, the exercise of secret voting is twofold, and the taking of photographs does not infringe the secrecy of ballots and does not allow a cast ballot to be linked to a voter.

The next question to be decided in the present case is whether calling on voters to upload their ballot photographs to the application and managing that application infringed the secrecy of the ballot and the bona fide exercise of rights in accordance with their purpose. According to the established case-law set out in *Kúria* decision no. Kvk.IV.37.359/2014/2, the exercise of rights in accordance with their purpose is an obligation emanating from the principle of civil law concerning the prohibition of abuse of rights, to be applied in the whole legal system. This means that rights are to be exercised by their holders in conformity with their aim and content. Only such exercise of rights is protected by law, where besides the formal entitlement the real content of the right can be recognised. Thus, an infringement of the exercise of rights in accordance with their purpose amounts to more than establishing an infringement of rights: the intention to abuse the content of a legal institution under the guise of lawful conduct must be recognisable.

The reviewing court attaches particular importance to the role and use of ballot papers in the electoral process. A ballot paper clearly serves the purpose of allowing voters to express their opinion on a question put to the vote; any use of ballot papers contrary to this purpose infringes the principle of the exercise of rights in accordance with their purpose. Accordingly, the application in question and the petitioner's conduct in calling on voters to take photographs and publish them through the application also constitute an infringement of that principle.

Under Article IX § 1 of the Fundamental Law everyone has the right to freedom of expression. The Constitutional Court established in its decision no. 30/1992 (V.26) AB that the State may have recourse to the restriction of fundamental rights if the exercise of another fundamental right or freedom or the protection of any constitutional value cannot be achieved by other means. Thus, it is not enough that the restriction is imposed in order to protect another fundamental right or freedom or for any other constitutional aim; it is also necessary for the restriction to be proportionate, that is, for the importance of the intended aim and the gravity of the violation of the fundamental right to be in balance with each other. The legislature must choose the least restrictive measure that is adequate to achieve the intended aim. Any restriction of a right that does not serve a pressing need or is arbitrary, or any restriction that is disproportionate to the aim, will be unconstitutional.

The reviewing court emphasises that its reasoning regarding the exercise of rights in accordance with their purpose does not infringe voters' right to freedom of expression. In the present case the right of voters to freedom of expression in the context of voting is twofold. Firstly, they express their opinion on the question put to a vote by casting their ballot; secondly, they have the option to share the way they have voted with others orally, in writing, or in any other way, for example on social media or other websites. The *Kúria* finds that the application is in breach of the principle of the exercise of rights in accordance with their purpose not because it enables voters – without them being individually recognisable – to publicise the way they have voted, but rather because of the manner in which it enables them to publicise it, namely through the taking and uploading of ballot photographs.

The petitioner's conduct was therefore in breach of the exercise of rights in accordance with their purpose. However, the breach was not of a degree of gravity that would entail an infringement of the principle of protection of fair elections as set

forth in section 2(1)(a) of the Electoral Procedure Act. The breach had no material impact on the fairness of the national referendum.

The *Kúria* also examined whether the petitioner's conduct infringed the principle of the bona fide exercise of rights. In this context it emphasises that developing the application and calling on voters to use it does not infringe the principle of the bona fide exercise of rights. No malicious intent of the petitioner has been proven and the decision of the NEC does not contain any substantive argument in this regard.

The *Kúria* does not agree with the NEC's reasoning according to which the application is particularly liable to shake people's confidence in the IT and tallying system for voting. The NEC did not provide any substantive argument in this regard. Likewise, in the *Kúria*'s view, there is no aspect of the application or of the call to voters to use the application that would be capable of shaking public confidence in the work of the electoral bodies. Taking ballot photographs does not enable electoral fraud.

The decision of the United States Court of Appeals submitted by the petitioner shows that the sharing of ballot photographs has been the subject of litigation in the United States as well. However, this is irrelevant in the present case.

Under section 231(5)(b) of the Electoral Procedure Act, the *Kúria* hereby amends the NEC's decision as set out in the operative part. The only reason to uphold the complaint is that the conduct of the petitioner was in violation of section 2(1)(e) on the principle of the exercise of rights in accordance with their purpose. The *Kúria* upholds the requirement for the petitioner to refrain from further unlawful conduct.

..."

27. By a decision of 18 October 2016 the *Kúria* upheld the NEC's decision of 7 October 2016 in part. It reduced the fine to HUF 100,000 (approximately EUR 310). It relied on essentially the same reasoning as above, adding the following:

"...

The petitioner lodged a petition for review against the decision of the National Election Commission requesting, firstly, that the decision be set aside and the complaint be overturned and, secondly, the setting-aside of the finding of a violation of section 2(1)(e) of the Electoral Procedure Act, as well as the setting-aside of the fine imposed.

In the petitioner's view the decision infringes Articles 2 § 1 and IX § 1 of the Fundamental Law, sections 2(1)(a) and (e), 47(2) and 218(2)(d) of the Electoral Procedure Act, section 79 of the Referendum Act and sections 223(3)(b) and 219(1) of the Electoral Procedure Act. ....

The petitioner also pointed out that in reviewing NEC decision no. 118/216, the *Kúria* only found that section 2(1)(e) of the Electoral Procedure Act had been infringed and not any other provision. It requested that the *Kúria*'s reasoning be taken into account.

The petitioner also complained about the fine and considered the standard applied in imposing the fine to be unlawful. In its view, it had not been penalised for violating the campaign regulations, since the decision [of the NEC] had not established that calling on voters to cast an invalid ballot was unlawful. The NEC had merely

established that the name of the application was capable of influencing voters' choice; therefore, no fine could be imposed for any possible unlawfulness.

The assessment of the amount of the fine by the NEC was also erroneous, in the petitioner's view. Since the *Kúria* had already found that the finding of unlawfulness in NEC decision no. 118/2016 was erroneous, no such unlawfulness could be established in the present case either. In the petitioner's view, the method it used to express an opinion was not unlawful to an extent that would justify the imposition of a fine. The fact that it did not comply with NEC decision no. 118/2016 could not serve as the basis for a fine, since the decision was not final or legally binding.

...

During the campaign preceding the referendum of 2 October 2016 on the question "Do you want the European Union to be entitled to order the mandatory settlement of non-Hungarian citizens in Hungary without Parliament's consent?", as initiated by the government of Hungary, the campaigning not only addressed the way in which the question was to be answered, but also the question whether to vote or to abstain from voting ...

Based on the above, developing and providing voters with a mobile application encouraging them to cast an invalid ballot is likely to influence voters' choice. Under section 140 of the Electoral Procedure Act, campaign material is any material that is likely to influence, or attempts to influence, voters' choice; this is true also of the present mobile application. Under section 141 of the Electoral Procedure Act campaigning activity is any activity using campaign material during the campaign period, and any other activity likely to influence or attempting to influence voters' choice during the campaign period. The NEC rightly established that the petitioner carried out campaigning activity during the campaign period as provided for in section 139 of the Electoral Procedure Act.

The *Kúria* further examined whether the fine had been imposed in accordance with section 218(2)(d) of the Electoral Procedure Act. The *Kúria* emphasises that the general principles and rules of the voting procedure must be respected also when carrying out campaign activities. It does not share the observation of the applicant in relation to campaign activities to the effect that in the present case no fine could be imposed for the manner in which an opinion had been expressed. The applicant in the present case was not fined solely because of the manner in which an opinion had been expressed. The campaigning activity had been carried out contrary to the principle of exercise of rights in accordance with their purpose as enshrined in section 2(1)(e) of the Electoral Procedure Act. Therefore, imposing a sanction was in compliance with section 218(2)(d) of the Electoral Procedure Act.

..."

28. The MKKP lodged a constitutional complaint under section 27 of the Constitutional Court Act against the *Kúria* decisions of 10 and 18 October 2016. The complaint contained the following passages:

"The complainant developed the application in question, available through the application stores Google Play (Android) and Apple Store (iOS), with a view to the referendum held on 2 October 2016.

The application was developed as a response to the spreading of new communication channels on social media. Nowadays, it is common for citizens to express their experiences, thoughts and opinions by sharing photographs taken with their mobile telephones on various websites (Facebook, Instagram, Tumblr, blogs). In

the course of elections this manifests itself by citizens taking ballot photographs and sharing them with others on social media. In developing the application the complainant's intention was to secure the possibility for voters to exercise their right to freedom of expression by anonymously sharing a photograph of their ballot papers (or, in the case of those who did not participate in the referendum, a photograph of the activity they were otherwise engaged in) and a related comment in a manner that did not allow the cast ballot to be linked to the voter him or herself. ...

In the complainant's view, the interpretation by the Kúria and the legal consequences of that interpretation infringed its rights under Article IX § 1 of the Fundamental Law and is therefore unconstitutional.

The aim of taking photographs of ballot papers and sharing them with others is for voters to express a viewpoint on a matter of public interest; therefore it falls within the scope of freedom of expression, and in particular the salient aspect of the discussion of public matters. Therefore, the complainant's own conduct in enabling the exercise of voters' right to freedom of expression also falls within the sphere of protection of Article IX § 1 of the Fundamental Law. ...

In the complainant's view the purpose of the object shown on a photograph cannot serve as the basis for a constitutionally justified restriction on freedom of expression, exercised through taking photographs and sharing them with others, since such a restriction does not have a legitimate aim and it is not absolutely necessary.

...

The purpose of the object shown on a photograph is not a fundamental right or a constitutional value; therefore, it cannot serve as a legitimate basis for restricting a fundamental right. That is to say, it does not fulfil the conditions required for the restriction of a fundamental right. ... In the complainant's view the impugned decision of the Kúria restricts, without a constitutional basis, its conduct falling within the ambit of freedom of expression, by restricting voters' right to freedom of expression.

...

The complainant notes that it is common practice among voters to share their ballot photographs – like other aspects of their lives – with their friends and third parties on social media. Given the features of social media, this type of photograph-sharing links the cast ballot with the voter, since the photograph appears under the name of the user. By contrast, the application in the present case explicitly provides a possibility for individuals to share ballot photographs, and the content of their vote, with others without revealing their identity; therefore it is even less liable to breach the secrecy of the ballot than photographs shared on Facebook or other social media. If the development and advertising of the application were declared unlawful, this would result in voters sharing their ballot photographs on social media in a manner linking them with their vote, which would increase rather than decrease the hypothetical likelihood of electoral fraud."

29. On 24 October 2016 the Constitutional Court issued two decisions, declaring both the complaint against the *Kúria*'s decision of 10 October 2016 (decision no. 3226/2016 (XI.14) AB) and the complaint against the *Kúria*'s decision of 18 October 2016 (decision no. 3227/216 (XI.14) AB) inadmissible and employing identical reasoning, as follows:

"The Constitutional Court rejects [declares inadmissible] the constitutional complaint lodged against decision no. KvK.II.37.967/2016/2 of the *Kúria*.

...

According to section 56(1) of the Constitutional Court Act, the Constitutional Court, sitting as a committee, decides on the admissibility of constitutional complaints. The committee, within its margin of appreciation, examines the statutory procedural and substantive conditions of admissibility of a constitutional complaint, and in particular the issues of victim status, the exhaustion of remedies under sections 26-27 and the conditions laid down in sections 29-31.

Firstly, the Constitutional Court examined whether the constitutional complaint fulfilled the formal and procedural conditions.

...

Secondly, the Constitutional Court examined whether the constitutional complaint fulfilled the substantive conditions under sections 27 and 29.

Under section 27 persons or organisations affected by a judicial decision may submit a constitutional complaint to the Constitutional Court if the decision on the merits or any other decision terminating the judicial proceedings infringes a fundamental right of the complainant and if the complainant has exhausted available remedies or there were no remedies available.

The Constitutional Court has established that the constitutional complaint does not fulfil the conditions laid down in section 27(a), that is, the impugned judicial decision does not concern a fundamental right of the complainant.

The complainant submitted in its constitutional complaint that 'the impugned decision of the *Kúria* restricts, without a constitutional basis, its conduct falling within the ambit of the exercise of the right to freedom of expression, by restricting voters' right to freedom of expression'.

...

In the present case the Constitutional Court needs to decide whether the decision establishing the unlawfulness of the 'Cast an invalid ballot' application developed by the complainant, a political party, and ordering the applicant to refrain from further unlawful behaviour, concerned the complainant's right to freedom to express opinions, as described above.

...

The Constitutional Court shares the view of the *Kúria* that the present case concerns voters' right to freedom of expression. However, in the view of the Constitutional Court, this does not mean that the right of the complainant to freedom of expression was also the subject of the judicial proceedings.

In the view of the Constitutional Court the complainant, by means of the application, merely provided a possibility for voters to share with each other their ballot photographs or their abstention from the referendum, in the exercise of their right to freedom of expression. Thus the complainant simply provided a forum, an interface where opinions could be published; this in itself does not mean that the complainant itself expressed its opinion.

The complainant merely maintained that the impugned decision of the *Kúria* restricted voters' right to freedom of expression and thus also concerned its own conduct, which in turn fell within the ambit of the exercise of freedom of expression. Thus, it relied only on an indirect infringement of its right to freedom of expression,

alleging that the restriction of voters' right to freedom of expression also infringed its right to freedom of expression.

Based on the above, the Constitutional Court finds that the complainant requested the setting-aside of the impugned decision of the *Kúria* by relying on a violation, not of its own fundamental rights, but of the rights of others. Therefore the complaint does not fulfil the condition set out in section 27(a).

In the light of the above, the Constitutional Court rejects the constitutional complaint pursuant to section 56(1) and (2) of the Constitutional Court Act and Rule 30(2)(h) of the Rules of Procedure."

30. In a dissenting opinion, Judge Czine took the view that the case raised issues of constitutional importance. She commented as follows:

"I do not agree with the decision rejecting the constitutional complaint, for the following reasons.

In my opinion the substantive conditions, in particular those under sections 27 and 29, were met in the present case, since the arguments submitted concerning both the right to freedom of expression and the principle of the exercise of rights in accordance with their purpose under section 2(1)(e) of the Electoral Procedure Act raise doubts about the constitutionality of the judicial decision. They also render it necessary to examine a question of fundamental constitutional importance.

...

In the present case the National Election Commission established, based on the available evidence, that the complainant had 'encouraged voters to take photographs of valid and invalid ballot papers in the course of the referendum and to publish them on the application, thereby sending a message to the Government'.

The complainant clearly argued in its constitutional complaint that 'by making the application available its intention was to provide a possibility for voters to exercise their right to freedom of expression by taking and anonymously sharing photographs of ballot papers, or in the case of those who decided not to participate in the referendum, photographs of the activities they were engaged in instead of voting'. According to the complainant, its conduct in enabling the exercise of voters' right to freedom of expression falls within the sphere of protection of Article IX § 1 of the Fundamental Law.

In my opinion, in the present case, it is a question of fundamental constitutional importance whether the impugned judicial decision restricted the right to freedom of expression and whether the principle of the exercise of rights in accordance with their purpose under section 2(1)(e) could serve as a constitutional ground, within the meaning of Article I § 3 of the Fundamental Law, for restricting the right to freedom of expression. In the light of this, I considered it necessary to declare the constitutional complaint admissible and to examine it on its merits."

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW

A. Act CCXXXVIII of 2013 on Initiating Referenda, the European Citizens' Initiative and the Referendum Procedure

31. The relevant provisions of this Act provide as follows:

Chapter I
General provisions
Section 1

"(1) The general provisions of Act XXXVI of 2013 on Electoral Procedure ... shall apply – with the differences included in this Act – to the procedures falling within the scope of this Act.

(2) The National Election Commission may issue guidelines for the electoral bodies in order to ensure a unified interpretation of the legal provisions relating to the procedures regulated by this Act."

B. Act XXXVI of 2013 on Electoral Procedure

32. The relevant provisions of this Act read as follows:

The basic principles of electoral procedure
Section 2

"(1) The following principles shall prevail in the application of the rules of electoral procedure:

(a) the protection of the fairness of the election;

(b) voluntary participation in the election procedure;

(c) equal opportunities for candidates and nominating organisations;

(d) support for voters with a disability in exercising their right to vote;

(e) the exercise of rights in accordance with their purpose and in good faith;

(f) the publicity of the electoral procedure.

..."

Guidelines
Section 51

"(1) The National Election Commission may issue guidelines to electoral bodies with a view to ensuring the uniform interpretation of legislation relating to elections.

(2) The guidelines shall not be legally binding; they shall serve exclusively as guidance, and no appeal shall lie against them.

(3) The guidelines shall be published on the official website of the elections."

Campaign period and materials
Section 139

"The election campaign period shall last from the fiftieth day before voting until the end of voting on polling day."

Section 140

"Campaign materials shall include all materials which are capable of influencing or which attempt to influence voters' choices, including especially:

(a) posters;

(b) direct contact by the nominating organisation or the candidate;

(c) political advertisements;

(d) election rallies."

Section 141

"The following shall constitute campaigning activities: the use of campaign materials in the campaign period, and any other activity during the campaign period aimed at influencing or attempting to influence voters' choices."

Section 142

"The following shall not be considered election campaigning: the activities of electoral bodies, and personal communication between citizens as private persons, regardless of its content and form."

Section 143

"On election day no election campaign activities may be pursued in public areas within 150 metres of the entrance to the building designated as a polling station."

Decision on complaints
Section 218

"(1) The election commission shall adjudicate complaints based on the available information.

(2) If the election commission upholds a complaint, it shall

(a) establish the fact of unlawfulness;

(b) order the termination of the unlawful conduct;

(c) set aside the election procedure or the part thereof affected by the unlawful conduct and order a new procedure;

(d) have the power to issue a fine in cases of violations of the rules of election campaigns and of the obligations described in sections 124(2) and 155."

C. Constitutional Court Act

33. The Constitutional Court Act (Act CLI of 2011) provides, in so far as relevant, as follows:

Section 26

"(1) Under Article 24 § 2 (c) of the Fundamental Law an individual or organisation involved in a particular case may lodge a constitutional complaint with the Constitutional Court where, owing to the application of a piece of legislation in the court proceedings conducted in the particular case,

allegedly contrary to the Fundamental Law (a) their rights enshrined in the Fundamental Law have been violated, and

(b) they have exhausted the available legal remedies or no remedies are available.

(2) By way of an exception to subsection (1), Constitutional Court proceedings may also be initiated under Article 24 § 2 (c) ... of the Fundamental Law, where

(a) the grievance has occurred directly, without a court ruling, as a result of the application or the entry into effect of a provision of the law [allegedly] contrary to the Fundamental Law, and

(b) no remedy is available for redressing the injury, or the complainant has already exhausted the available remedies."

Section 27

"An individual or organisation involved in a particular case may file a constitutional complaint with the Constitutional Court against a court ruling allegedly contrary to the Fundamental Law under Article 24 § 2 (d) of the Fundamental Law, where the ruling given on the merits of the case, or another ruling closing the court proceedings,

(a) violate the complainant's rights enshrined in the Fundamental Law, and where

(b) the complainant has already exhausted the remedies or no remedies are available to him or her.

..."

Section 29

"The Constitutional Court shall admit the constitutional complaint if a conflict with the Fundamental Law significantly affects the judicial decision, or if the case raises constitutional-law issues of fundamental importance.

..."

Section 56

"(1) The Constitutional Court shall decide on the admission of a constitutional complaint sitting as a committee as determined in its Rules of Procedure.

(2) The committee shall examine, within its margin of appreciation, the content-related requirements for the admissibility of a constitutional complaint – in particular the requirement of being affected, for the purposes of sections 26 to 27, the requirement of exhaustion of legal remedies and the conditions specified in sections 29 to 31.

(3) Where a complaint is not admitted, the committee shall give a decision containing a short summary of the reasons for rejection.

(4) Constitutional complaints that have been admitted shall be submitted by the rapporteur for examination on the merits to the standing committee referred to in the Rules of Procedure of the Constitutional Court, which shall adjudicate the case."

II. DOMESTIC PRACTICE

A. Decision of the Constitutional Court no. 18/2008 (III.12.) AB

34. The case concerned the refusal of the National Election Commission to approve a question for referendum on the grounds that the petitioner had already presented, but subsequently withdrawn, the same referendum initiative. The Constitutional Court held, in so far as relevant, as follows:

"...

The election principles, including the obligation to exercise rights in accordance with their purpose, also flow from the State's obligation to respect and protect fundamental rights (*intézményvédelmi kötelezettség*). As the Constitutional Court has explained, under Articles 2 and 70 of the Constitution the State has an obligation to secure the right to initiate and support referendums. This constitutional obligation is not conditional on necessity and proportionality, but on the realisation of the purpose of the right in question. ... Besides the obligation to respect and protect fundamental rights, the enforcement of the election principles also serves the interests of legal certainty, originating from the principle of the rule of law under Article 2 § 1 of the Constitution. In its decision no. 32/2001 (VII.11) the Constitutional Court interpreted the election principles as guarantees for the rule of law ...

...

The principle of the exercise of rights in accordance with their purpose has been developed by both the legal literature and the case-law relating to the prohibition of the abuse of rights in civil law. The requirement to exercise rights in accordance with their purpose is derived from the civil-law regulations incorporating the statutory prohibition of abuse of rights, and permeates the entire legal system. It means that entitled persons may avail themselves of legal institutions only in a manner which is in compliance with the purpose and content of those institutions. Only when exercised in that way do rights enjoy statutory protection and recognition corresponding to the true content – and not only the formal conditions – of the entitlement. Section 2(2) of Act no. IV of 1959 on the Civil Code provides that 'the law shall ensure that everybody can exercise his or her right in compliance with the societal purpose of the right'.

...

On the basis of the legislative provisions cited above and the examples provided therein, it can be established that the legislature does not define the criteria for determining what constitutes an exercise of rights not in accordance with their purpose or an abuse of rights, but leaves it to the application of the law to decide whether in the given circumstances the person has exercised his or her rights in accordance with their purpose. The examples which are provided of an exercise of rights not in accordance with their purpose and of an abuse of rights imply that the exercise of a right not in accordance with its purpose can be established if it entails negative consequences (for instance, the restriction or infringement of the rights of others).

...

The Electoral Procedure Act is one of the legislative instruments which incorporate the principle of the exercise of rights in accordance with their purpose, by stipulating that everyone participating in the electoral process should respect the principles of section 3, including the principles of bona fide exercise of rights and the exercise of rights in accordance with their purpose. The latter is a basic principle of the electoral procedure under the Electoral Procedure Act. Given that, under section 2, the rules of the Electoral Procedure Act are applicable to national referendums, the basic principles governing elections are also applicable to referendums. The basic principles governing elections are applicable throughout the whole electoral process and to all actors in the process ... The initiators of national referendums, the signatories of the initiative, those seeking redress in the procedure, voters, electoral bodies, and other bodies with the power to decide on legal remedies, are entitled to exercise their rights in accordance with the purpose of that right.

...

The Electoral Procedure Act, in contrast to other legislative provisions, does not establish any criteria for determining which situation constitutes a breach of the requirement to exercise rights in accordance with their purpose; it does not even give any examples of when the exercise of a right in a way which does not correspond to its true content constitutes an abuse of a right or an exercise of rights not in accordance with their purpose. The Electoral Procedure Act leaves this question up to the courts.

It is not possible to establish generally applicable criteria for the exercise of rights not in accordance with their purpose.

The NEC, and the Constitutional Court acting as a forum for redress, can conclude, on the basis of the examination of all the circumstances of a given case, which conduct on the part of voters constitutes an exercise of rights not in accordance with their purpose. The examination of such an exercise of rights is not alien to the practice of the NEC. The NEC has issued a number of decisions in which it has established the unlawfulness of a certain kind of conduct based on a breach of the principle of the exercise of rights in accordance with their purpose. ...

The practice of the Constitutional Court also shows that the court has based its decisions reviewing the decisions of the NEC on the general principles of the electoral procedure, including the exercise of rights in accordance with their purpose.

..."

B. Decision of the Constitutional Court no. 3096/2014 (IV.11) AB

35. The case concerned an article that had appeared in a local newspaper of one of the districts of Budapest, published by a company owned by the local municipality. In the issue of 13 March 2014, preceding the elections, an article appeared with the following title: "The socialist representative voted against Zugló [the district in question] 90 times". The newspaper published a separate article describing a different representative in a positive tone. The Constitutional Court held, in so far as relevant, as follows:

"...

According to the case-law of the Constitutional Court, the limits of press freedom are different depending on the forum of mass communication. The Constitutional Court held that the permissible restrictions on the broadcast media (television and radio) were broader, firstly because of the lack of available frequencies and secondly because of their special impact on society and public opinion. The decision of the *Kúria* finding that an editor's freedom could be restricted on the basis of the general principles of the Electoral Procedure Act was connected to the obligation to provide objective information. In its decision no. 1/2007 (I.18) the Constitutional Court established that the requirement to provide balanced, unbiased and objective information could constitute a restriction on the editorial freedom of the broadcast media, but that these restrictions were relevant only for the specific characteristics of the broadcast media and were not applicable to the printed media. As regards the printed media, the starting-point of the Constitutional Court has always been the unlimited freedom of founding a newspaper; accordingly, the power of the media to influence cannot serve as a ground for restriction. In this sense the printed media cannot be penalised because of the nature and quality of the information they provide.

Under certain circumstances, printed media financed by public money and by public institutions constitute exceptions to the above rule. According to the preamble to Act no. CLXXXXIX of 2011 on local government, municipalities are the community of local citizens, they represent self-government and are part of the unity of State administration. Therefore, because of their exercise of public power and use of public money, they play a different role in providing information to the members of society. Certain obligations can be imposed on this type of printed media.

It follows from the decision of the *Kúria* that the editorial practices of municipal newspapers financed by public money may be restricted by the requirements of the Electoral Procedure Act during a campaign period.

In the present case the Constitutional Court is called on to examine the compliance of this statement of principle with freedom of opinion and editorial freedom, in the light of the right to vote.

Electoral procedure and the exercise of the right to vote are often comprised of individual rights (for instance, the right to be registered on the electoral roll, and passive voting rights). On other occasions they are related to the public interest in free and democratic elections. According to Article 2 § 1 of the Fundamental Law, Members of Parliament should be elected in accordance with legislation adopted by an absolute majority.

The Electoral Procedure Act is one of the pieces of legislation regulating voting. It regulates electoral campaigning in a separate chapter, within which a separate title deals with the role of the media in campaigns, laying down rules for media service providers, the printed media and cinemas.

According to the practice of the *Kúria,* the Electoral Procedure Act prevails in matters concerning electoral procedure, and all other legislation needs to be interpreted in compliance with that Act. In its leading decision no. KvK.II.37.307/2014/3 the *Kúria* established as a general principle that in electoral legal relations, only the provisions of the Electoral Procedure Act are applicable; other types of rules can be applied only if the Electoral Procedure Act so provides.

During the campaign period, providing information to voters is even more important than at other times. The principle of the democratic rule of law requires that representative bodies be elected on the basis of democratic public opinion and well-informed choices of the electorate. Free and democratic elections are not possible

without the press acting upon its constitutional responsibility to provide accurate information. The Constitutional Court emphasises that this requires the State first and foremost to recognise editorial freedom and respect the prohibition of interference with media content. In certain circumstances, however, it can be constitutionally justified and necessary to lay down certain obligations concerning the manner in which information is provided. Besides media service providers, printed media financed by public money fall into this category. The requirements enshrined in the decision of the *Kúria* serve the same goal.

The Constitutional Court notes that this interpretation is in line with the Committee of Ministers' Recommendation adopted in 1999, which provides guidelines concerning media coverage of election campaigns, in accordance with Article 10 on freedom of expression of the European Convention on Human Rights and Fundamental Freedoms [Recommendation No. R (99) 15 of the Committee of Ministers to member States on measures concerning media coverage of election campaigns]. According to the recommendation the print media, in contrast to the broadcast media, are generally not bound by obligations concerning their editorial practice; however, print media outlets owned by public authorities constitute an exception to this rule. These media outlets should cover electoral campaigns in a fair, balanced and impartial manner, without discriminating against or supporting a specific political party or candidate.

Opinion no. 190/2002 of the Venice Commission (Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report – Adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002), CDL-AD (2002) 23 rev)) provides as follows in point 2.3.:

'... Equality of opportunity must be guaranteed for parties and candidates alike. This entails a neutral attitude by state authorities, in particular with regard to:

i. the election campaign;

ii. coverage by the media, in particular by the publicly owned media;

iii. public funding of parties and campaigns. ...'

The constitutional duty of nominating organisations to contribute to the expression of public will and to articulate and convey social issues to citizens functions best if it is clear not only within the nominating organisation but also to the public.

Each candidate is entitled to the same opportunities in election campaigning; hence, competition for votes should be open. This means that the State should be bound by the obligation to interpret laws in a way that ensures the equal treatment of all persons concerned in the electoral process.

Although local municipalities have their general tasks during the campaign period, the specific rules on the exercise of voting rights prevail during this period. From a constitutional perspective, there are no grounds for criticising the fact that, during the election period, the court establishes special requirements for the editorial practice of media outlets owned by the State (including local municipalities) in connection with the exercise of voting rights, in the circumstances of the particular case and on the basis of section 2(1)(e) of the Electoral Procedure Act.

..."

C. *Kúria* leading decision no. 2014.12.376

36. The case concerned the refusal to allow a television channel to air a campaign film in which two monkeys spoke in the voices of two election candidates. The *Kúria*'s reasoning contained the following passage:

> "...
>
> Section 141 of the Electoral Procedure Act defines campaigning activity as the use of any campaign material during the campaign period and any other activity during the campaign period which aims at influencing or attempting to influence voters' choices. According to section 140(c) of the Electoral Procedure Act, political advertisements are campaign materials, whose content is regulated in section 203(55) of the Act on media services and mass communication: 'Political advertisement: any programme which appears or is published as an advertisement which promotes, or calls on others to support, a political party, political movement or the government, or which promotes their name, aims, activities, slogans, or symbols'.
>
> Thus, the Electoral Procedure Act, taken together with the provisions of the Mass Communication Act, does not prohibit negative campaigning. This means that it is permissible to enumerate, magnify and caricaturise the flaws in the opponent candidate's capacities and programme while emphasising the campaigner's own positive characteristics. This type of campaigning is nonetheless restricted by the basic principles of the Electoral Procedure Act
>
> According to section 2(1) of the Electoral Procedure Act, as relied on by the National Election Commission, the principle of the exercise of rights in accordance with their purpose should be taken into account in implementing the rules on the voting procedure. The requirement to exercise rights in accordance with their purpose is derived from the civil-law regulations enshrining the statutory prohibition of abuse of rights, and permeates the entire legal system. It means that entitled persons may avail themselves of legal institutions only in a manner which is in compliance with the purpose and content of those institutions. Only when exercised in that way do rights enjoy statutory protection and recognition corresponding to the true content – and not only the formal conditions – of the entitlement. The right to freedom of expression relied on by the complainant can be exercised in compliance with the right to human dignity enshrined in the Fundamental Law and in the Civil Code. It is from this perspective that this court should examine whether the complainant's campaign film and its content violated the above-mentioned right.
>
> The *Kúria* shares the assessment of fundamental rights made by the National Election Commission. Portraying someone as an animal dehumanises the person concerned and is liable to violate human dignity. In Hungary, portraying someone as a monkey means connecting the negative characteristics of the animal with the candidate (negative campaigning) while presenting the campaigning candidate in his or her human form. In the *Kúria*'s view this is an impermissible type of negative campaigning, against which the person concerned cannot argue or provide evidence. Therefore, it infringes the principle of the bona fide exercise of rights in accordance with their purpose."

D. Position statement of the State Election Commission no. 9/2006

37. In a position statement (no. 9/2006) of 30 March 2006 on the removal of ballot papers from the polling station, the State Election

Commission (SEC), the legal predecessor to the National Election Commission, stated as follows:

> "...
>
> Section 70(1) of the Electoral Procedure Act [Act C of 1997] provides that '[t]he voter shall put the ballot paper into an envelope and place it in the ballot box in front of the polling station committee'.
>
> It follows from the grammatical and logical interpretation of this provision and from the principles governing the election procedure laid down in section 3(a) and (d) of the Electoral Procedure Act, namely the protection of the fairness of elections and the prevention of election fraud, as well as from the principles of good faith and the exercise of rights in accordance with their purpose, that the ballot paper is an authentic document the purpose of which is to reflect the electoral intentions of voters and to establish the election result.
>
> Consequently, it infringes the principle of exercise of rights in good faith and in accordance with their purpose if a voter treats the ballot paper as his or her own and removes it from the polling station. Removal of the ballot paper from the polling station may also be conducive to election fraud, the prevention of which furthers the interest of the public in maintaining the fairness of elections.
>
> The use of the ballot paper in a manner contrary to the purpose for which it was originally intended may also violate the constitutional requirement of the confidentiality of elections.
>
> According to the SEC's position, the physical ballot paper does not constitute the property of the voter. In other words, the principle laid down in section 3(b) of the Electoral Procedure Act (voluntary participation in the vote) does not authorise a voter to remove the ballot paper from the polling station."

E. Guidelines of the National Election Commission no. 12/2014

38. Guidelines no. 12/2014 of the National Election Commission (NEC) on the removal of ballot papers from the polling station and the taking of photographs of ballot papers provide, in so far as relevant, as follows:

> "1. Section 182(1) of the Electoral Procedure Act provides that the voter must place the ballot paper in an envelope and drop it in the ballot box. As is clear from the grammatical and legal interpretation of this provision – taking into account also the protection of fair elections and the bona fide exercise of voting rights in accordance with their purpose – ballot papers are official documents whose purpose is to represent the choice of voters and to establish the results of voting.
>
> 2. Thus, if a voter treats a ballot paper as his or her own and takes it out of the polling station or takes a photograph of it before placing it in the envelope or dropping it in the ballot box, he or she infringes the principle of the bona fide exercise of voting rights in accordance with their purpose. Taking ballot papers out of the polling station, or taking photographs, videos, and so forth of them, can also result in electoral fraud, the prevention of which [furthers] the public interest in protecting the fairness of elections.
>
> 3. The use of ballot papers [in a manner] contrary to their purpose may also infringe the principle of secrecy of elections as enshrined in Hungary's Fundamental Law. The secrecy of elections also encompasses the secrecy of ballot papers; thus, taking

photographs of voting or of ballot papers is in breach of the principles of the Electoral Procedure Act. Voting secrecy serves not only the safe expression of voters' will but also the realisation of the voting procedure in accordance with the rule of law and the principles of democracy. Thus, its importance goes beyond the conduct of individual voters. Obviously, voting secrecy does not create an obligation of confidentiality on the part of voters, but the obligation to exercise rights in accordance with their purpose means that voters should not abuse the fact that voting secrecy can be only partially achieved without their cooperation.

4. In the view of the National Election Commission neither the provisions of the Fundamental Law nor those of the Electoral Procedure Act mean that ballot papers constitute the property of voters; therefore, the latter may not treat ballot papers as their own [property] and may use them only for the purpose of voting. Voluntary participation in the voting procedure does not mean that a voter may take a ballot paper from the polling station.

Reasoning

In the Commission's view ... official ballot papers do not constitute voters' property ... Voters cannot freely dispose even of spoilt ballot papers. The National Election Commission therefore finds that the only conduct that complies with the principles of the bona fide exercise of voting rights in accordance with their purpose, and voting secrecy, as enshrined in Article 2 § 1 of the Fundamental Law ..., is if voters, while casting their vote, do not treat the ballot papers as their own but as a means to express their right to vote and to establish the outcome of the voting process. Thus, they cannot take the ballot paper out of the polling station and cannot take a photograph with a telecommunications, digital or any other device with the intention of showing it to another person.

The purpose of these guidelines is to counteract electoral fraud (for example, through so-called 'chain voting') in the interests of protecting the fairness of elections."

III. COMPARATIVE-LAW MATERIALS

39. The documents available to the Court concerning the legislation of the Council of Europe member States, and in particular a survey of thirty-four of them, indicate that all the States concerned recognise, at constitutional or statutory level, the right to secret voting.

40. The majority of member States do not specifically regulate the publication of information by voters on media channels about the way they cast their ballots.

41. Two member States (Albania and Iceland) have explicitly regulated the issue of revealing voting choices through the publication of photographs, by imposing a ban on such conduct.

42. In two of the member States surveyed (the Czech Republic and Finland), the freedom of voters to publish information on their own electoral decisions through media channels has been upheld at various levels.

43. Three member States (Portugal, Armenia and Estonia) impose general restrictions on the disclosure by voters, by any means, of

information on how they cast their ballots. In addition, in Portugal, the National Electoral Commission has adopted a practice of barring voters from taking and publishing photographs of their ballot papers on Internet platforms.

44. The existing legislation in nine countries (Austria, Georgia, Germany, Lithuania, Moldova, North Macedonia, San Marino, Serbia and Turkey) bans photography, cameras and mobile telephones within polling stations. In Austria, the Constitutional Court ruled that the voluntary publication of information by voters, particularly via social media, concerning the way they had cast their ballot did not violate the principle of free suffrage, since this principle was designed only to protect voters from influence over individuals' electoral decisions.

45. In three countries (Croatia, France and the United Kingdom) the electoral bodies have adopted instructions and recommendations discouraging voters from using mobile telephones in polling stations.

IV. COUNCIL OF EUROPE DOCUMENTS

46. Recommendation 1704 (2005) of the Parliamentary Assembly, entitled "Referendums: towards good practices in Europe", adopted on 29 April 2005, provides in particular as follows:

> "...
>
> 2. The Parliamentary Assembly considers referendums as one of the instruments enabling citizens to participate in the political decision-making process; it also recognises the essential contribution of organised civil society in the framework of participatory democracy.
>
> ...
>
> 12. Confirming its previous positions, the Assembly highlights that direct popular participation in the decision-making process requires the electorate to be adequately informed about those matters to be decided upon, as well as about the democratic decision-making process in general. With these considerations in mind, the Council of Europe should reinforce its activities on media awareness and education for democratic citizenship, also in the context of the elaboration of good practices on referendums.
>
> ..."

47. On 13 and 14 October 2006, at its 68th plenary session, the European Commission for Democracy through Law (the Venice Commission) adopted the "Guidelines on the holding of referendums" which provide, in so far as relevant, as follows:

> "...
>
> 3.2. Freedom of voters to express their wishes and action to combat fraud
>
> a. Voting procedure
>
> ...

ix. unused and invalid voting slips must never leave the polling station;

...

xv. the state must punish any kind of electoral fraud.

...

b. Freedom of voters to express their wishes also implies:

i. that the executive must organise referendums provided for by the legislative system; this is particularly important when it is not subject to the executive's initiative;

ii. compliance with the procedural rules; in particular, referendums must be held within the time-limit prescribed by law;

...

4. Secret suffrage

a. For the voter, secrecy of voting is not only a right but also a duty, non-compliance with which must be punishable by disqualification of any ballot paper whose content is disclosed.

b. Voting must be individual. Family voting and any other form of control by one voter over the vote of another must be prohibited.

c. The list of persons actually voting should not be published.

d. The violation of secret suffrage should be sanctioned.

..."

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

48. The Government objected that Magyar Kétfarkú Kutya Párt ("the MKKP") had failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention in respect of its complaint under Article 10.

A. The Chamber judgment

49. The Chamber observed that the MKKP's constitutional complaint raised the issue whether the sanction imposed on it for operating the mobile application in question had infringed its right to freedom of expression, since that activity had fallen under Article IX § 1 of the Fundamental Law. In those circumstances the Chamber found that the MKKP had raised the essence of its complaint before the Constitutional Court and complied with the obligation to exhaust domestic remedies. In conclusion, the Chamber dismissed the Government's objection.

B. The parties' submissions

1. The Government

50. The Government objected before the Grand Chamber that the applicant had failed to exhaust domestic remedies in the form of the constitutional complaint provided for in section 26(2) of the Constitutional Court Act ("the CCA"), through which the MKKP could have argued before the Constitutional Court that the *Kúria* had applied legislation which was in contravention of the Fundamental Law. The Government further submitted that although the MKKP had lodged a complaint under section 27 of the CCA against the *Kúria*'s decisions, and had thus formally exhausted that option, it had not established its direct interest in the case, which was a precondition of admissibility under domestic law.

2. The MKKP

51. The MKKP did not comment on this issue.

C. The Court's assessment

52. The Court reiterates first of all that under Article 35 § 1 it may only deal with a matter after all domestic remedies have been exhausted. Applicants must have provided the domestic courts with the opportunity, in principle intended to be afforded to Contracting States, of preventing or putting right the violations alleged against them. That rule is based on the assumption that there is an effective remedy available in the domestic system in respect of the alleged breach. The only remedies which Article 35 § 1 requires to be exhausted are those that relate to the breach alleged and are capable of redressing the alleged violation. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness: it falls to the respondent State to establish that these conditions are satisfied (see, among many other authorities, *McFarlane v. Ireland* [GC], no. 31333/06, § 107, 10 September 2010; *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 69-77, 25 March 2014; and *Parrillo v. Italy* [GC], no. 46470/11, § 87, ECHR 2015).

53. In several cases the Court has considered that domestic remedies were exhausted for the purposes of Article 35 § 1 of the Convention despite the fact that the applicant's constitutional complaint had been dismissed as inadmissible, as the substance of the complaint had been sufficiently raised before the Constitutional Court (see, *inter alia*, *Gäfgen v. Germany* [GC], no. 22978/05, § 144, ECHR 2010; see also *Uhl v. Germany* (dec.), no. 64387/01, 6 May 2004; *Storck v. Germany* (dec.), no. 61603/00,

26 October 2004; and *Schwarzenberger v. Germany*, no. 75737/01, § 31, 10 August 2006). In other cases, domestic remedies were considered not to have been exhausted, for instance when an appeal had not been admitted because of a procedural mistake by the applicant (see *Jalloh v. Germany* (dec.), no. 54810/00, 26 October 2004).

54. As regards the Government's reliance on the legal avenue under section 27 of the CCA, the Court notes that it has not been disputed by the parties that this constitutional complaint represented an effective remedy in the circumstances of the present case. Rather, the Government contended that the MKKP had failed to submit its complaint in compliance with domestic law. In particular, the MKKP had not sufficiently substantiated in its constitutional complaint its direct interest in the case as required by section 27(a) of the CCA.

55. The Court observes that the MKKP complained before it that its right to freedom of expression had been violated owing to the domestic authorities' prohibition of the mobile application it had put at voters' disposal during the national referendum, and the resulting sanction. It raised this issue specifically before the *Kúria*, maintaining that calling on voters to use the application was an exercise of its right to freedom of expression and in addition encouraged voters to use the application for the exercise of their freedom of expression (see paragraphs 26-27 above).

56. The Court further notes that in the Constitutional Court proceedings, the MKKP gave a complete account of the proceedings before the National Election Commission ("NEC") and the *Kúria* and alleged a violation of its right to freedom of expression as guaranteed by the Hungarian Fundamental Law as well as by Article 10 of the Convention. In particular, in addition to the explanation in its constitutional complaint that the mobile application had been developed with the aim of providing a possibility for voters to exercise their freedom of expression in the course of the referendum on a matter of public interest, it further argued that its own conduct in calling on voters to exercise their freedom of expression fell within the ambit of Article IX § 1 of the Fundamental Law, which dealt with freedom of expression. The MKKP thus specifically contended in the constitutional complaint that its own right to freedom of expression had been infringed, supplementing this assertion with arguments pointing to the disproportionality of the impugned measure (see paragraph 28 above). Under these circumstances, the Court finds that the applicant party raised in substance the complaint about the infringement of its right to freedom of expression before the Constitutional Court and thus provided the domestic courts with the opportunity to put right the alleged violation.

57. Nonetheless, the Constitutional Court declared the complaint inadmissible, concluding that the case concerned voters' right to freedom of expression, for which the MKKP had merely provided a platform without itself expressing an opinion. The fact that, in the Constitutional Court's

interpretation, the rights invoked by the MKKP did not concern the applicant party's freedom of expression does not prevent the Court from considering the available remedy to have been exhausted.

58. As regards the Government's submissions concerning the constitutional complaint under section 26(2) of the CCA, the Court notes that this type of remedy is applicable solely in cases where the complainant's rights have been violated by the application of an allegedly unconstitutional provision and in the absence of a judicial decision or a legal remedy to redress the alleged violation. A constitutional complaint under section 26(2) cannot serve as an effective remedy for situations where the violation resulted from an allegedly erroneous application or interpretation of a legal provision which, in terms of its content, is not unconstitutional.

59. The Court observes that at no point in the domestic proceedings or in the proceedings before the Court did the MKKP assert that its alleged grievance had flowed from an unconstitutional legal provision. Rather, its complaint concerned the infringement of its freedom of expression as a result of the individual decisions of the domestic authorities. This being so, the issue fell to be considered in the context of proceedings seeking a remedy against those decisions. Therefore, as noted above, the MKKP complained of the restriction of its campaigning activities by means of the appropriate remedies before the *Kúria* and the Constitutional Court.

60. As the MKKP's complaint thus relates in essence to the allegedly erroneous interpretation and application of domestic law, and the Government have not specified in what manner the remedy based on section 26(2) of the CCA would have been effective in practice for the purposes of the present complaint, the Court considers that the MKKP was not required to avail itself of that remedy.

61. Noting that the rule on exhaustion of domestic remedies concerns only remedies that relate to the breaches alleged (see *Ivinović v. Croatia*, no. 13006/13, § 28, 18 September 2014), the Court finds that, by using the only available domestic remedy relating to its complaint, the applicant exhausted domestic remedies as required by Article 35 § 1 of the Convention.

62. The Government's objection of non-exhaustion of domestic remedies must therefore be dismissed.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

63. The MKKP complained that the decisions prohibiting and penalising the operation of a mobile application allowing voters to publish, anonymously, photographs of their ballot papers had violated its right to freedom of expression as provided for by Article 10 of the Convention. That Article reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

64. The Government contested that argument.

A. The Chamber judgment

65. The Chamber noted that the MKKP had been penalised for providing a means of transmission enabling others to impart and receive information. It considered that providing a forum for others to express their opinions in the form of posting ballot photographs constituted conduct in the exercise of the MKKP's right to freedom of expression. Consequently the sanction imposed on it had interfered with that right.

66. The Chamber did not consider it necessary to examine whether the interference was prescribed by law, since the measure in question was in breach of Article 10 for other reasons. It found that the Government had failed to demonstrate what interest under Article 10 § 2 of the Convention the ban had served. As to the asserted interests of the secrecy and fairness of voting, the Chamber agreed with the *Kúria* that nothing in the circumstances of the present case provided any support for the view that the anonymous publication of spoiled ballots had any impact on either. Concerning the interest of the "exercise of rights in accordance with their purpose" enshrined in section 2(1)(e) of the Electoral Procedure Act and relied on by the domestic authorities and the Government, the Chamber was of the view that the principle, although a ground for restrictions under domestic law, could not be linked to any of the aims under Article 10 of the Convention. Therefore, the interference could not be considered to pursue a legitimate aim within the meaning of Article 10 § 2 of the Convention. The Chamber held, unanimously, that there had been a violation of Article 10 of the Convention.

B. The parties' submissions to the Grand Chamber

1. The MKKP

67. The MKKP argued that its right to freedom of expression had been interfered with, in breach of Article 10 of the Convention. In support of this

claim it submitted, firstly, that the mobile application that it had made available was a medium for disseminating political opinions on a topic of major importance and was therefore protected by Article 10. Relying on the decisions of the NEC and the *Kúria*, it also contended that the mobile application itself, named "Cast an invalid ballot", had conveyed a political opinion deserving the protection of Article 10 of the Convention, as it had encouraged voters to cast an invalid ballot and had thus been capable of influencing them. The MKKP also pointed to its role as a political party in contributing to the functioning of democracy, and to the fact that the mobile application had contributed to the electorate's knowledge of its political views, since it had been widely reported on in the media.

68. Referring to the cases of *Társaság a Szabadságjogokért v. Hungary* (no. 37374/05, 14 April 2009) and *Magyar Helsinki Bizottság v. Hungary* ([GC], no. 18030/11, 8 November 2016), the applicant party stressed the importance of the collection of information on matters of public concern by protagonists playing the role of a public watchdog, and argued that the mobile application had been aimed at monitoring the fairness of the referendum through the collection and sharing of anonymous data.

69. As to the legal basis of the interference, the MKKP averred that there was no provision of Hungarian law or any decision by an election commission or a court that prohibited the taking of ballot photographs. It argued that the Guidelines issued by the NEC could not be considered as "law" for the purposes of Article 10 § 2, since they were non-binding in nature. Furthermore, the provision of the Electoral Procedure Act concerning the principle of the exercise of rights in accordance with their purpose could not serve as a legal basis for the restriction of freedom of expression either. The applicant party insisted that, according to the case-law of the Hungarian courts, a violation of the principle was to be found where there was clearly abusive conduct entailing a negative consequence (for instance, the limitation or infringement of the rights of others) under the pretext of formal compliance with the law. It pointed to the Constitutional Court's practice of finding that in an electoral context the principle could only be relied on to restrict freedom of expression if it served the protection of the rights of others, that is, the reputation of candidates and political parties. Moreover, according to the MKKP, voting secrecy was a waivable right and not an obligation under Hungarian law.

70. With regard to the aim of the interference, the MKKP did not dispute that, in principle, the protection of the fairness of elections and voting secrecy could be regarded as legitimate aims justifying the restriction of freedom of expression. However, in the light of the *Kúria*'s findings that neither of these aims had been at stake in the circumstances of the present case, the MKKP questioned whether they could be considered as "legitimate aims" pursued by the restriction on the mobile application. Furthermore, the MKKP argued that the purpose of the ballot paper and the principle of the

exercise of rights in accordance with their purpose could not be linked to any of the reasons listed in Article 10 § 2.

71. Accepting that States enjoyed a wide margin of appreciation when regulating elections, the MKKP argued that this did not extend to freedom of expression; the protection of rights under Article 10 could not be diminished by reference to the right to free elections.

72. In support of the argument that the interference had not been necessary in a democratic society, the MKKP pointed to the fact that the secrecy of the vote was a right but not an obligation under Hungarian law, and that in any event, since the published ballot photographs technically could not be linked to the individual voters, their posting had not infringed the secrecy of the ballot.

73. On the other hand, the MKKP emphasised the relevance of its conduct, submitting that the mobile application had been developed for a highly controversial, "unacceptable" and "unreasonable" referendum. It explained that the vote had been preceded by intense government campaigning to which it had replied on billboards using absurd humour. Most of the opposition parties had emphasised the manipulative and unintelligible nature of the referendum and called for a boycott, while others, such as itself, had encouraged voters to participate but to cast an invalid ballot.

74. The MKKP further stressed that its conduct had contributed to the democratic process, since in the age of the information society, social media had become an important tool of public discourse. Furthermore, sharing the act of casting a vote, besides being an event of contemporary life, was an expression of political speech and a conscious activity of citizens. The applicant party emphasised that posting ballot photographs via the mobile application reinforced democracy as it encouraged others to take part in the voting process. It was also of the view that by providing people with an anonymous forum for doing so, it had made it possible to avoid the possible risk of abuse inherent in other forums such as social media.

75. Finally, the MKKP contended that, as was apparent from the *Kúria*'s decisions, the domestic authorities had not carried out a proper balancing exercise between the protection of the principle of the exercise of rights in accordance with their purpose, on the one hand, and freedom to receive and impart information, on the other. Had such a balancing exercise been carried out, it would have been obvious to the domestic authorities that neither the fairness nor the secrecy of the vote had been jeopardised.

2. The Government

76. The Government did not contest that the MKKP's arguments before the Court disclosed interference with its freedom of expression.

77. As to the legal basis of the interference, the Government maintained that the taking of ballot photographs was contrary to section 2(1)(e) of the

Electoral Procedure Act, which required rights to be exercised in accordance with their purpose. This notion had been interpreted by the NEC in its Guidelines no. 12/2014, applicable in election proceedings and referendums, which had specified that, regard being had to the new technical developments, voters could not take ballot papers outside the polling station, even in virtual form, by recording them in any way. Therefore, voters could not record ballot papers. This interpretation of the law had been both accessible and foreseeable to the MKKP.

78. Turning to the examination of the legitimate aims pursued by the disputed restriction, the Government considered that the measure complained of had been necessary in a democratic society to protect the public interest in ensuring the orderly conduct of the voting procedure (including campaigning) and the "normal" use of ballot papers. They contended that these aims fell within the ambit of "the protection of the rights of others", including the right to the secrecy of the vote, a fair electoral process and the proper functioning of the democratic institutions. The aims in question protected the free expression of voters' political opinions by shielding voters from any coercion.

79. As to the principle of the "exercise of rights in accordance with their purpose" laid down in section 2(1)(e) of the Electoral Procedure Act, the Government argued that this requirement amounted to a prohibition of the abuse of rights and that it followed from the State's obligation to protect democratic institutions in order to ensure the "prevention of disorder" and the "protection of the rights of others". It also guaranteed the rule of law and legal certainty.

80. With regard to the necessity of the interference in a democratic society, the Government emphasised that different societies reacted to the phenomenon of ballot photographs in different ways, depending on their historical experiences and legal and cultural traditions. In the absence of a European consensus, the member States had a wide margin of appreciation in this field and the domestic authorities were better placed to respond to the needs of society.

81. The Government argued that there was a pressing social need to maintain the prohibition on taking ballot papers outside the polling station, in either their physical or virtual form. Firstly, the general prohibition on taking photographs was necessary in order to prevent vote buying. Although it was not suggested that this was an actual problem in the present case, this type of election fraud had previously occurred in the form of chain-voting. Moreover, in the Government's view, the use of mobile applications had an impact on the fairness of the electoral process also because it could undermine the public's trust in the functioning of the electoral bodies and the official results. Applications that processed data on cast ballots without complying with the strict data security standards applicable to official

electoral IT systems might provide results different from those of the electoral bodies, thereby casting doubt on the legality of the latter's work.

82. In the Government's view, where public confidence in the democratic institutions was at stake, it was irrelevant whether there had been actual, proven cases of electoral fraud; the suspicion of such was enough to undermine the public's trust in the democratic process.

83. On the other hand, the Government questioned the relevance of the MKKP's conduct, pointing out that there had been no "societal need" for the electorate to share their votes in the form of photographs. This had been demonstrated by the fact that only 3,894 photos had been shared via the mobile application, while the number of invalid votes had been 224,668 out of a total of 3,643,055 ballots cast.

84. In any event, in the Government's assessment, the measure in question had been proportionate to the aim pursued. They argued that the MKKP had been penalised not for taking a ballot photograph but for applying a campaign material encouraging thousands of voters to disregard the electoral rules. In addition, voters remained free to express their political opinions in any manner other than publishing a picture of their ballot papers. The MKKP itself was not restricted in campaigning for voters to cast invalid ballots by other means than calling on them to publish photographs of ballot papers. Furthermore, it had only been fined a small amount of money.

C. The Court's assessment

1. Existence of an interference

85. It is uncontested between the parties that the domestic authorities' decisions interfered with the MKKP's freedom of expression under Article 10 of the Convention. For the following reasons, the Court sees no grounds to hold otherwise.

86. The Court has held that the use of photographs in general serves important communication functions, as they impart information directly, and has on many occasions recognised that the right to freedom of expression includes the publication of photographs (see *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 103, ECHR 2012; see also *Ashby Donald and Others v. France*, no. 36769/08, § 34, 10 January 2013). For the Court, the posting of ballot photographs is a form of conduct that qualifies as the exercise of freedom of expression.

87. It is true that the MKKP was not the author of the photographs in issue; rather, it participated in their dissemination by providing a mobile application for their publication. In its case-law the Court has established that Article 10 applies not only to the content of information but also to the means of dissemination, since any restriction imposed on the latter necessarily interferes with the right to receive and impart information (see,

inter alia, *Ahmet Yıldırım v. Turkey*, no. 3111/10, § 50, ECHR 2012). In respect of the printed media, the Court has found that publishers, who do not necessarily associate themselves with the opinions expressed in the works they publish, participate in the exercise of freedom of expression by providing authors with a medium (see *Öztürk v. Turkey* [GC], no. 22479/93, § 49, ECHR 1999-VI). In the context of new media, the Court has previously held that a Google service designed to facilitate the creation and sharing of websites within a group constituted a means of exercising freedom of expression (see *Ahmet Yıldırım*, cited above, § 49). Similarly, a video-hosting website represented an important means of exercising the freedom to receive and impart information and ideas. The blocking of these services was found to have deprived users of a significant means of exercising their right to freedom to receive and impart information and ideas (see *Cengiz and Others v. Turkey*, nos. 48226/10 and 14027/11, § 54, ECHR 2015 (extracts)). In a similar vein, the running by the applicants of a website which made it possible for users to share digital material such as movies, music and computer games was considered as putting in place the means for others to impart and receive information within the meaning of Article 10 of the Convention. The applicants' conviction for putting in place a means of disseminating information was therefore held to constitute interference with the right to freedom of expression (see *Neij and Sunde Kolmisoppi v. Sweden* (dec.), no. 40397/12, 19 February 2013).

88. In line with the approach in this line of case-law, the Court accepts that the mobile application was a means put in place by the MKKP for voters to impart their political opinions, allowing them to exercise their right to freedom of expression.

89. In addition, the Court notes that in the course of the domestic proceedings the authorities held that providing voters with a mobile application, calling on them to upload and publish photographs of ballot papers and encouraging them to cast an invalid ballot could be regarded as a campaigning activity, as it was likely to influence voters' choices (see paragraph 27 above). The Court sees no reason to call into question the domestic authorities' interpretation of the MKKP's conduct. It considers that the MKKP was seeking not only to provide a forum for voters to express their opinion, but also to convey a political message itself. Given the context – during a national referendum – and the name of the application – "Cast an invalid ballot" – the operation of this mobile application is to be regarded as an expression of the MKKP's political opinion on the referendum in question.

90. The Court further observes that the MKKP claimed that it had been penalised not for carrying out campaigning activity as such, but for doing so through the mobile application in question (see paragraphs 26-27 above). As the Court has consistently held, the protection of Article 10 extends not only to the substance of the ideas and information expressed but also to the form

in which they are conveyed (see *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298, and *Bédat v. Switzerland* [GC], no. 56925/08, § 58, 29 March 2016). The MKKP's conduct falls into this category.

91. In the Court's view, in the circumstances of the present case, the two aspects – providing a forum for third-party content and imparting information and ideas itself – are inseparably intertwined. The Court accepts that providing voters with a mobile application, calling on them to upload and publish photographs of ballot papers and encouraging them to cast an invalid ballot, thus involved the exercise of the MKKP's right to freedom of expression in relation to both aspects.

92. The authorities' reaction to the MKKP's exercise of its rights under Article 10 of the Convention amounted to interference with those rights.

2. Whether the interference was prescribed by law

(a) General principles

93. The Court reiterates that the expression "prescribed by law" in the second paragraph of Article 10 not only requires that the impugned measure should have a legal basis in domestic law, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects (see, among many other authorities, *Delfi AS v. Estonia* [GC], no. 64569/09, § 120, ECHR 2015, with further references). The notion of "quality of the law" requires, as a corollary of the foreseeability test, that the law be compatible with the rule of law; it thus implies that there must be adequate safeguards in domestic law against arbitrary interferences by public authorities (see *Malone v. the United Kingdom*, 2 August 1984, § 67, Series A no. 82, and *Olsson v. Sweden* (*no. 1*), 24 March 1988, § 61, Series A no. 130).

94. As regards the requirement of foreseeability, the Court has repeatedly held that a norm cannot be regarded as a "law" within the meaning of Article 10 § 2 unless it is formulated with sufficient precision to enable a person to regulate his or her conduct. That person must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty. While certainty is desirable, it may bring in its train excessive rigidity, and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague, and whose interpretation and application are questions of practice (see *Delfi AS*, cited above, § 121, and *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 141, ECHR 2012). The criterion of foreseeability cannot be interpreted as requiring that all detailed conditions and procedures governing the interference be laid down in the substantive law itself, and the requirement of "lawfulness" can be met if points which

cannot be satisfactorily resolved on the basis of substantive law are set out in enactments of lower rank than statutes (see *Association Ekin v. France*, no. 39288/98, § 46, ECHR 2001-VIII). A law which confers a discretion is thus not in itself inconsistent with the requirement of foreseeability, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference (see *Gillow v. the United Kingdom*, 24 November 1986, § 51, Series A no. 109).

95. That said, it is not for the Court to express a view on the appropriateness of the methods chosen by the legislature of a respondent State to regulate a given field. Its task is confined to determining whether the methods adopted and the effects they entail are in conformity with the Convention (see *Magyar Helsinki Bizottság*, cited above, § 184).

96. The Court would also reiterate that in proceedings originating in an individual application under Article 34 of the Convention, its task is not to review domestic law in the abstract but to determine whether the way in which it was applied to the applicant gave rise to a breach of the Convention (see *Perinçek v. Switzerland* [GC], no. 27510/08, § 136, ECHR 2015 (extracts), with further references).

97. Moreover, a margin of doubt in relation to borderline facts does not by itself make a legal provision unforeseeable in its application. Nor does the mere fact that a provision is capable of more than one construction mean that it fails to meet the requirement of "foreseeability" for the purposes of the Convention. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain, taking into account the changes in everyday practice (see *Gorzelik and Others v. Poland* [GC], no. 44158/98, § 65, ECHR 2004-I). At the same time, the Court is aware that there must come a day when a given legal norm is applied for the first time (see, *mutatis mutandis*, *Kudrevičius and Others v. Lithuania* [GC], no. 37553/05, § 115, ECHR 2015).

98. As regards the scope of the notion of foreseeability, it depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed (see, among many other authorities, *Delfi AS*, cited above, § 122, and *Gorzelik and Others*, cited above, § 65).

99. The electoral context takes on special significance in this regard, given the importance of the integrity of the voting process in preserving the confidence of the electorate in the democratic institutions. Accordingly, the Court has found wide and unpredictable interpretations of legal provisions governing elections to be either unforeseeable in their effects or indeed arbitrary and therefore incompatible with Article 3 of Protocol No. 1 (see *Kovach v. Ukraine*, no. 39424/02, §§ 48-62, ECHR 2008; *Lykourezos v. Greece*, no. 33554/03, §§ 50-58, ECHR 2006-VIII; and *Paschalidis,*

Koutmeridis and Zaharakis v. Greece, nos. 27863/05 and 2 others, §§ 29-35, 10 April 2008).

100. When those legal provisions form the basis for restricting the exercise of freedom of expression, this is an additional element to be taken into account when considering the foreseeability requirements which the law must fulfil. In this connection the Court reiterates that free speech is essential in ensuring "the free expression of the opinion of the people in the choice of the legislature". For this reason, it is particularly important in the period preceding an election that opinions and information of all kinds be permitted to circulate freely (see *Orlovskaya Iskra v. Russia*, no. 42911/08, § 110, 21 February 2017). This is especially true when the freedom of expression at stake is that of a political party. As the Court has repeatedly stated, political parties play an essential role in ensuring pluralism and the proper functioning of democracy. Restrictions on their freedom of expression therefore have to be made the subject of a rigorous supervision (see, among other authorities, *mutatis mutandis*, *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98 and 3 others, §§ 87-88 and 100, ECHR 2003-II). The same applies, *mutatis mutandis*, in the context of a referendum aimed at identifying the will of the electorate on matters of public concern.

101. In the Court's opinion, this kind of supervision naturally extends to the assessment of whether the legal basis relied on by the authorities in restricting the freedom of expression of a political party was foreseeable in its effects to an extent ruling out any arbitrariness in its application. A rigorous supervision here not only serves to protect democratic political parties from arbitrary interferences by the authorities, but also protects democracy itself, since any restriction on freedom of expression in this context without sufficiently foreseeable regulations can harm open political debate, the legitimacy of the voting process and its results and, ultimately, the confidence of citizens in the integrity of democratic institutions and their commitment to the rule of law.

(b) Application of these principles in the present case

102. In the present case, the parties' opinions (see paragraphs 69 and 79 above respectively) differed as to whether the legal basis for the interference with the MKKP's freedom of expression had been sufficiently foreseeable and, thus, whether the interference had been "prescribed by law".

103. The MKKP argued that neither domestic law nor judicial practice prohibited the taking of ballot photographs and that the principle of the exercise of rights in accordance with their purpose, as applied by the domestic authorities, could serve as a legal basis for restrictions in an electoral context only if it was relied on in a situation where the restricted conduct entailed a negative consequence, for instance the infringement of

the rights of others, such as the reputation of candidates and political parties (see paragraph 69 above).

104. The Government referred to the principle of the exercise of rights in accordance with their purpose as laid down in section 2(1)(e) of the Electoral Procedure Act, and the domestic courts' interpretation of that provision. They added that, as of 2014 (with the publication of the NEC Guidelines), the MKKP had been in a position to foresee that the taking of ballot photographs would be contrary to that principle (see paragraph 77 above).

105. The Court observes that, in its decisions of 30 September and 7 October 2016, the NEC relied on both section 2(1)(a) of the Electoral Procedure Act ("EPA"), which enshrines the principle of the fairness of the voting process, and section 2(1)(e) of the EPA, which enshrines the bona fide exercise of rights in accordance with their purpose. It further relied on Article 2 § 1 of the Fundamental Law, which relates to the secrecy of voting, and on its own Guidelines, which explicitly stated that the taking of photographs of ballot papers was to be considered as infringing the above-mentioned principles (see paragraphs 21 and 25 above).

106. The *Kúria*, for its part, relied in its decisions of 10 and 18 October 2016 solely on section 2(1)(e) in so far as it relates to the principle of the exercise of rights in accordance with their purpose as the legal basis for the restriction. It found that the MKKP's conduct did not infringe the principle of the bona fide exercise of rights. That court further dismissed the NEC's reasoning and conclusions according to which the MKKP's conduct had jeopardised the principle of the protection of the fairness of elections and the right to voting secrecy. It emphasised that the NEC Guidelines did not constitute a legislative act and did not have binding legal force and were, thus, irrelevant for its assessment (see paragraph 26 above).

107. In the second decision dated 18 October 2016, the *Kúria* also endorsed the NEC's classification of the MKKP's conduct as carrying out campaigning activity during the campaign period within the meaning of section 141 of the EPA, since calling on voters to upload and publish photographs of ballot papers and encouraging them to cast an invalid ballot was likely to influence voters' choice. This conduct was found to be in breach of the rules on election campaigns, for which the MKKP was fined (on the basis of section 2(1)(e) read in conjunction with section 218(2)(d) of the EPA).

108. The Court sees no reason to call into question the existence in Hungarian law of legal provisions designed to deter individuals and entities from engaging in unlawful electoral activity, including by imposing a fine on those who breach the law. It notes that section 2(1) of the EPA stipulates that the basic principles enumerated therein must prevail in the application of the rules of electoral procedure. In addition, section 218 provides for a fine to be imposed in the event of a breach of the campaign regulations. The

Court also observes that in domestic case-law the principle of the exercise of rights in accordance with their purpose, enshrined in section 2(1)(e) of the EPA, has been relied on by the courts, including the *Kúria* and the Constitutional Court, to restrict election-related forms of expression. There is no question of the above legal instruments being insufficiently accessible.

109. The salient issue in the present case remains, however, whether the MKKP, in the absence of a binding provision of domestic legislation (see paragraph 26 above) explicitly regulating the taking of ballot photographs and the uploading of those photographs in an anonymous manner to a mobile application for dissemination while voting was ongoing, knew or ought to have known – if need be, after taking appropriate legal advice – that its conduct would breach the existing electoral procedure law.

110. The vagueness of the principle of the "exercise of rights in accordance with their purpose", enshrined in section 2(1)(e) of the EPA, was pointed out by the Constitutional Court in its 2008 decision. It noted that this principle had been developed by both the legal literature and the case-law relating to the prohibition of abuse of rights in civil law. It further stated that the EPA did not define what constituted a breach of the principle and did not establish any criteria for determining which situation constituted a breach of the requirement to exercise rights in accordance with their purpose, nor did it even give any examples. In the Constitutional Court's understanding, it was likewise not possible to establish generally applicable criteria for the exercise of rights not in accordance with their purpose; rather, it fell to the NEC and eventually the domestic courts to conclude, on the basis of the examination of all the circumstances of a given case, whether a certain conduct was in breach of the principle (see decision no. 18/2008 (III.12.) AB, paragraph 34 above).

111. The Court considers that a situation entailing the judicial interpretation of principles enacted in law will not in itself necessarily fall foul of the requirement that the law should be framed in sufficiently precise terms. However, the fact remains that the domestic regulatory framework applied in the present case provided for the possibility of a restriction on voting-related expressive conduct on a case-by-case basis and therefore conferred a very wide discretion on the electoral bodies and the domestic courts that were to interpret and apply it. Consequently, the lack of clarity of section 2(1)(e) of the EPA and the potential risk inherent in its interpretation for the enjoyment of voting-related rights, including the free discussion of public affairs, called for particular caution by the domestic authorities.

112. As to the interpretation of section 2(1)(e) of the EPA, the Constitutional Court restricted the reach of the provision to voting-related conduct which entailed "negative consequences", including the infringement of the rights of others (see paragraphs 34-35 above). A similar approach transpires from the case-law of the *Kúria* (see paragraph 36 above).

113. The Court cannot but note that the NEC and the *Kúria*, in their examination of all the circumstances of the case at hand, disagreed as to the applicability of the basic principles of electoral procedure. The NEC relied on section 2(1)(e) read in conjunction with section 2(1)(a) of the EPA, arguing that the MKKP's conduct had jeopardised the fairness of the elections and the secrecy of the voting process. For its part, the *Kúria* explicitly dismissed this line of argument, finding that the secrecy of the ballot had not been infringed, as the mobile application had not allowed access to the personal data of the users and had thus been incapable of linking a cast ballot to a voter. It further found that the MKKP's conduct had had no material impact on the fairness of the national referendum and had not been capable of shaking public confidence in the work of the electoral bodies. It remained, however, unestablished how the impugned restriction, based as it was on the principle of the exercise of rights in accordance with their purpose, related to, and addressed, a concrete "negative consequence", whether potential or actual.

114. Finally, in so far as the Government relied on the NEC Guidelines as clarification to the effect that the taking of ballot photographs was in breach of the principle in question, the Court notes that those Guidelines expressed the NEC's view on the interpretation of the basic principles of electoral procedure. They were issued for the electoral bodies and were not legally binding but served exclusively as guidance (see section 51 of the EPA, paragraph 32 above). The Court notes, moreover, that it was only after the referendum that the relevance and the legal effects of the NEC Guidelines in the present circumstances were clarified by the *Kúria* (see paragraph 26 above). This certainly did not contribute to the foreseeability of the impugned restriction in the present case.

115. The present case was apparently the first in which the domestic authorities applied the principle of the exercise of rights in accordance with their purpose to the use of a mobile application for posting ballot photographs in an anonymous manner. As noted above, this does not, as such, make the interpretation of the law unforeseeable, as there must come a day when a given legal norm is applied for the first time (see paragraph 97 above).

116. However, having regard to the particular importance of the foreseeability of the law when it comes to restricting the freedom of expression of a political party in the context of an election or a referendum (see paragraphs 99-100 above), the Court takes the view that the considerable uncertainty about the potential effects of the impugned legal provisions applied by the domestic authorities exceeded what is acceptable under Article 10 § 2 of the Convention.

(c) Conclusion

117. In the light of the foregoing, the Court is not satisfied that the Hungarian law applicable in the present case, on the basis of which the MKKP's freedom to impart information and ideas was restricted, was formulated with sufficient precision, for the purposes of paragraph 2 of Article 10 of the Convention, so as to rule out any arbitrariness and enable the MKKP to regulate its conduct accordingly.

118. There has therefore been a violation of Article 10 of the Convention. In the light of this finding, it is not necessary to examine separately the MKKP's remaining arguments under Article 10 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

119. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

120. The MKKP claimed 100,000 Hungarian forints ((HUF) - approximately 330 euros (EUR)) in respect of pecuniary damage. This sum corresponded to the amount that it had been ordered by the *Kúria* to pay as a fine.

121. The Government did not contest this claim.

122. The Court reiterates that Article 41 empowers it to afford the injured party such satisfaction as appears to it to be appropriate (see *O'Keeffe v. Ireland* [GC], no. 35810/09, § 199, ECHR 2014 (extracts)).

123. The Court finds that the MKKP suffered pecuniary loss as a result of the fine that it was ordered to pay (see paragraph 27 above). Having regard to the link between the fine imposed in the domestic proceedings and the violation of Article 10 found by the Court, the MKKP is entitled to recover the full amount claimed.

B. Costs and expenses

124. The MKKP claimed EUR 3,000 in respect of the costs and expenses incurred in the proceedings before the Chamber and EUR 3,750 in respect of those incurred before the Grand Chamber. These amounts correspond to twenty hours of legal work in respect of the proceedings before the Chamber, charged by its lawyer at an hourly rate of EUR 150, and twenty-five hours of legal work in respect of the proceedings before the

Grand Chamber, charged at the same hourly rate. Furthermore, the MKKP claimed EUR 865 for travel and accommodation expenses related to the public hearing before the Grand Chamber.

125. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the full sum claimed, that is, EUR 7,615.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by sixteen votes to one, that there has been a violation of Article 10 of the Convention;

3. *Holds*, by sixteen votes to one,
   (a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 330 (three hundred and thirty euros), plus any tax that may be chargeable, in respect of pecuniary damage;
      (ii) EUR 7,615 (seven thousand six hundred and fifteen euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 20 January 2020.

Johan Callewaert
Deputy to the Registrar

Linos-Alexandre Sicilianos
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Dedov is annexed to this judgment.

L.-A.S.
J.C.

DISSENTING OPINION OF JUDGE DEDOV

1. With great respect to the opinion of the majority, I believe that the present case deserves a different approach, based on an assessment of the methods of political campaigning in a democratic society. Obviously, taking photographs of ballot papers, publishing them and sharing them with others does not constitute an offence. Formally speaking it could be considered as an innocent expression of opinion. However, the other matter of encouraging voters to cast an invalid ballot was not innocent, in my view.

2. The majority of the Court has found it established that the applicant party, the MKKP, intended to influence voters. The majority of judges preferred not to discuss the nature of that influence; however, it constitutes a crucial point of the present case. The MKKP was not satisfied with the whole idea of the referendum, and organised an "anti-anti-immigration campaign" (see paragraphs 12, 19 and 20 of the judgment).

3. There are, however, no doubts about the legitimacy of the referendum: the question put by the Government was appropriate and necessary for the purpose of administering the public interest through a public vote. The Government expressed concern about the security problems which might be created by the influx of migrants, and those problems deserved a public debate. Moreover, the question was approved by the Supreme Court, the *Kúria*, and concerned the sovereign powers of the national parliament to decide on the immigration issue.

4. Voters have the opportunity to agree or disagree when answering the question on the ballot paper. If they decide not to exercise their voting rights they can abstain from voting. There are no other options. The same procedure applies to parliamentary elections, in which the voting procedure does not usually make it possible to vote against all the candidates. A certain number of people are registered as candidates for the elections, some better, some worse, and the voters have to choose between them. There is no presumption that voters are entitled to intentionally invalidate ballot papers because participation in the decision-making process constitutes one of the values of a democratic society.

5. Within the voting process mistakes happen, and ballot papers may occasionally be spoiled in some way. But the MKKP sought to influence voters to invalidate their ballots intentionally in order to express their disagreement with the whole idea of the referendum. They encouraged voters to draw amusing pictures on ballot papers, showing that those papers could be used for any purpose other than voting. The pictures may not have looked insulting, but they undoubtedly demonstrated disrespect for the referendum. The MKKP's campaign was therefore disrespectful in relation to the democratic institution designed for the purpose of decision-making by society.

6. The Court's approach in such situations was reiterated in the *Taranenko* judgment (*Taranenko v. Russia*, no. 19554/05, 15 May 2014), as follows:

"67. To sum up, the Court reiterates that any measures interfering with freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles do a disservice to democracy and often even endanger it (see *Fáber v. Hungary*, no. 40721/08, § 37, 24 July 2012)".

7. In the *Sinkova* judgment (*Sinkova v. Ukraine*, no. 39496/11, 27 February 2018) the Court found that the form of expression used by the applicant was not appropriate, and stressed the following:

"110... There were many suitable opportunities for the applicant to express her views or participate in genuine protests in respect of the State's policy on the use of natural gas or responding to the needs of war veterans, without breaking the criminal law and without insulting the memory of soldiers who perished and the feelings of veterans, whose rights she had ostensibly meant to defend."

8. I cannot find anything other than a rejection of democratic principles by the MKKP in the present case, although there were many other suitable opportunities for MKKP members, and for those voters who invalidated their ballots, to express their views. Such a conclusion would suffice in order to vote for no violation, to uphold the explanation given by the national authorities relating to the abuse of voting rights and to find that the interference was legitimate and proportionate. The authorities applied sections 2(1)(a) and (e) of the Electoral Procedure Act, which protects the fairness of elections and the exercise of rights in accordance with their purpose and in good faith. In paragraph 9 of its judgment the *Kúria* explained that "[a] ballot paper clearly serves the purpose of allowing voters to express their opinion on a question put to the vote; any use of ballot papers contrary to this purpose infringes the principle of the exercise of rights in accordance with their purpose".

9. The majority of judges preferred not to assess the fact that the ballot papers had been invalidated intentionally and the way in which the opinion had been expressed. Their analysis was very narrow. They seized upon the contradicting approaches of the NEC and the *Kúria* (see paragraph 112 of the judgment). At the same time the Court preferred to close its eyes to the position of the Constitutional Court, which applied the principles of the prohibition of abuse of rights and the exercise of rights in accordance with their purpose. The fact that the Constitutional Court relied on the NEC and the *Kúria* in applying the principles in individual cases (see paragraph 109 of the judgment) does not, in my view, have a decisive effect – contrary to the approach taken by the majority. The Constitutional Court and the *Kúria* made reference to general principles including the abuse of rights and applied them in the MKKP's case.

10. Actually, the MKKP sought to influence voters to invalidate their ballot papers. This is not a case about punishment for taking ballot photographs, as it was presented by the applicant (see paragraph 102 of the

judgment), an approach then followed by the majority. It is a case about showing disrespect for the democratic decision-making process. I therefore believe that the authorities' reaction was foreseeable by the applicant.