



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

Information Note on the Court's case-law 255

October 2021

***Toplak and Mrak v. Slovenia* - 34591/19 and 42545/19**

Judgment 26.10.2021 [Section II]

Article 13

Effective remedy

Lack of effective remedy for disabled applicants' complaints as to accessibility of polling stations and voting procedure in a national referendum: *violation*

Article 1 of Protocol No. 12

General prohibition of discrimination

Adequate positive measures enabling disabled applicants to exercise their right to vote freely and by secret ballot at a national referendum: *no violation*

Article 14

Discrimination

Lack of voting machines not discriminatory for disabled voter allowed to be assisted by a person of his own choice under legal duty to respect secrecy: *no violation*

Facts – The two applicants had muscular dystrophy and used electric wheelchairs for mobility. They both voted during the national referendum in 2015 ("the 2015 Referendum") but only the second applicant voted in the elections of the Members of the European Parliament in 2019 ("the 2019 EP Elections"). The first applicant's condition had deteriorated in 2018 which meant that he had no longer been able to hold a pen and, thus, to mark his ballot paper by himself. The applicants complained of the lack of effective judicial means by which they could have requested an accessible polling station in advance as well as the lack of any effective remedy by which to claim compensation for being discriminated against in exercising their right to vote in elections or referendums. They also complained about the lack of adequate measures to allow them access to the voting procedures of the said referendum and elections.

Law –

Preliminary issue – The first applicant died soon after lodging the application. His two daughters – his sole heirs – had standing to continued proceedings in his stead.

(a) *In relation to both applicants* – Disability fell under "any other status" as a prohibited ground for discrimination. It was also undisputed that the applicants had a right to vote in both the referendum and the elections. Consequently, their complaints under the substantive provisions were arguable and thus Article 1 of Protocol No. 3 and Article 1 of Protocol No. 12 were applicable.

The question was not one of direct discrimination by way of unjustified differentiation but rather of the national authorities' compliance with their positive obligation to take appropriate measures to enable the applicants, whose mobility was impaired due to disability, to exercise their right to vote on an equal basis with others.

(i) Article 13 in conjunction with Article 1 of Protocol No. 12 concerning the 2015 Referendum:

The available domestic remedies had been unable to offer the applicants any meaningful redress. Firstly, the remedy under the Referendums and Popular Initiatives Act could have had an effect only if the grounds for complaint had potentially affected the referendum's outcome. It was not meant to be and was not capable of addressing the kind of individual complaints raised by the applicants. Second, neither an action under the Administrative Disputes Act for a finding of a violation of their human rights nor any other remedy would have enabled them to obtain any form of compensation for the alleged violation. Third, in view of the absence of any legal remedy with a preventive effect, an action of which the sole purpose was to obtain a finding of a violation without the possibility to seek redress would constitute an inadequate remedy. The fact that the Court in some cases concerning the right to vote had not awarded monetary compensation could not alter this finding. In the present case, the Court was not confronted with a domestic decision by which no compensation had been awarded in view of the circumstances of the case, but with a domestic court that had lacked any power to award appropriate redress.

Conclusion: violation (unanimously).

(ii) Article 13 in conjunction with Article 14 of the Convention and Article 3 of Protocol No. 1 with respect to the 2019 EP Elections:

The first applicant claimed that he could have voted by using a voting machine; such equipment, however, was no longer provided for by domestic legislation following the 2017 amendment to the National Assembly Elections Act ("the Elections Act"). The issue at stake was therefore not one of any reasonable accommodation that could have been provided at the polling station but one of alleged discrimination under the relevant legislation. The Constitutional Court, having had regard to all the arguments of those involved as well as the relevant international material, had thoroughly examined whether the removal of the voting machines had been in compliance with the fundamental rights of disabled voters. Although its conclusion had not been favourable to the first applicant, this fact alone did not mean that the remedy had been ineffective. In so far as the second applicant was concerned, it had been open to him to express any concerns that he might have had regarding the accommodation of his needs to the relevant electoral bodies, which ahead of the 2015 Referendum had constructively responded to his requests. Had he considered that he had suffered discrimination in exercising his right to vote he could have lodged a claim for compensation under section 39 of the Protection Against Discrimination Act. This provision had been specifically designed to address discrimination and did not raise any ambiguity that would – prima facie – call the effectiveness of this remedy into question. In the circumstances of his case, a remedy capable of affording appropriate redress in the form of compensation would satisfy the criteria of Article 13.

Conclusion: no violation (unanimously).

(iii) Article 1 of Protocol No. 12 with respect to the 2015 Referendum:

A general and complete adaptation of polling stations in order to fully accommodate wheelchair users would no doubt facilitate their participation in the voting process. The States' margin of appreciation in assessing the needs of people with disabilities in

respect of elections and the means of providing them with adequate access to polling stations within the context of the allocation of limited State resources applied also with respect to referendums. The national authorities were in a better position to carry out such an assessment than an international court.

The applicants had been able to vote at the polling stations in proximity of their residence, in accordance with their wishes, as opposed to having to go to specially designated polling stations. While adaptations to the voting facilities (such as tables, voting booth and ballot box) had not been made in advance, assistance could be provided to the applicants on the spot by means of a reasonable accommodation of their needs. Both applicants had been able to mark their ballot paper by themselves. Since voting in public referendums was organised *ad hoc* in buildings that otherwise served other purposes it might be particularly difficult to ensure full accessibility in respect of the voting process for people with different types of disability in advance – especially if the State aimed to provide a high number of polling stations (as seemed to be the case in Slovenia). As the improvement of accessibility in the built environment could take time it was essential that in the meantime the domestic authorities reacted with the requisite diligence to ensure that people with disabilities could vote freely and by secret ballot. This had been so in the present case; the authorities had responded promptly and constructively to the applicants' requests that their respective polling stations be rendered accessible. On the day of the referendum the entrances to the applicants' respective polling stations had been equipped with ramps, which the applicants had used to enter. At the second applicant's request a visit to the building that would serve as a polling station had been arranged a few days before the day of referendum so as to ensure that he would be able to enter the building and the polling room. Even if the applicants had encountered certain problems, these did not appear to have produced a particularly prejudicial impact on them and been such as to have reached the threshold of discrimination or to indicate indifference to their needs on the part of the respondent State.

Conclusion: no violation (unanimously).

(b) *In relation to the first applicant* – Article 14 in conjunction with Article 3 of Protocol No. 1 concerning the 2019 EP Elections:

Under the Elections Act, the first applicant could have voted either by going physically to his local polling station (which, pursuant to the 2017 Amendment, had to be wheelchair accessible), by post or possibly at his home. He could also have been assisted by another person of his own choice, who could have marked his ballot paper for him and taken care of other practicalities. Actually, the applicant had been assisted by several people during the 2015 Referendum. Although the provision of this kind of assistance would have most likely meant disclosing his electoral choice to the person assisting him, provided that the voter's free will was respected, this was in compliance with the international standards in the field and as confirmed by the Constitutional Court, the voting assistant had been obliged to respect the secrecy of the voting procedure under, *inter alia*, the Penal Code.

It was true that voting machines might afford a higher level of autonomy in voting for some people with disabilities. The importance of the inclusion of people with disabilities in political life (which required accessible voting procedures) had been clearly recognised in international instruments which mentioned technology-assisted voting as one means of ensuring the right of people with disabilities to vote. The use of assistive technology was, however, not a necessary condition requiring immediate implementation. Further, it entailed significant financial investment (especially if it had to be made available on a larger scale), the operation of voting machines posed potential problems for the secrecy of the voting procedure and such machines did not appear to be widely available in the member States. Indeed, there was no indication of a consensus having been reached

among the member States as to the use of voting machines as a requirement for the effective exercise of the voting rights by people with disabilities.

Therefore, and as assistance to people with disabilities might take a variety of forms, the decision as to whether voting machines should be used for that purpose was to be made primarily by the national authorities which had to take great care with the choices they made in this sphere, in view of the impact of those choices on people with disabilities, whose particular vulnerability could not be ignored. In the present case the Constitutional Court – during proceedings in which both applicants participated – had carefully addressed whether the lack of availability of voting machines resulting from the 2017 amendment had been in compliance with the Constitution and with Slovenia's international obligations and had given persuasive reasoning, having also taking into account, *inter alia*, the fact that a very small number of people with disabilities had used voting machines in the past, that such machines could not assist people with all types of disabilities and that the high costs were involved.

Accordingly, and having regard to the other options available to the first applicant, especially the possibility of assistance by a person of his own choice, the respondent State could not be said to have failed to strike a fair balance between the protection of the interests of the community and respect for his rights and freedoms, as safeguarded by the Convention.

Conclusion: no violation (unanimously).

Article 41: EUR 3,200 to the second applicant and EUR 1,600 to each of the first applicant's daughters in respect of non-pecuniary damage.

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This summary by the Registry does not bind the Court.

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