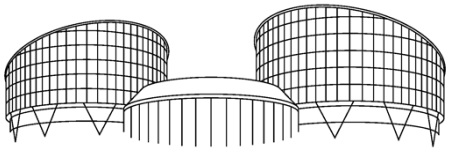

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF KALDA v. ESTONIA (No. 2)

(Application no. 14581/20)

JUDGMENT

Art 3 P1 • Thorough assessment by domestic courts of the proportionality of statutory blanket voting ban as applied specifically to applicant, life prisoner convicted of several serious offences • Margin of appreciation not overstepped

STRASBOURG

6 December 2022

FINAL

22/05/2023

This judgment has become final under Article 44 § 2 of the Convention.
It may be subject to editorial revision.

In the case of Kalda v. Estonia (no. 2),

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Pere Pastor Vilanova, *President,*
Georgios A. Serghides,
Yonko Grozev,
Jolien Schukking,
Darian Pavli,
Peeter Roosma,
Andreas Zünd*, judges*,
and Milan Blaško, *Section Registrar,*

Having regard to:

the application (no. 14581/20) against the Republic of Estonia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Estonian national, Mr Romeo Kalda ("the applicant"), on 12 March 2020;

the decision to give notice to the Estonian Government ("the Government") of the complaint concerning prisoners' voting rights under Article 3 of Protocol No. 1 to the Convention;

the parties' observations;

Having deliberated in private on 8 November 2022,

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

INTRODUCTION

1. The case concerns the statutory ban on persons who have been convicted of a crime and who are serving their prison sentence from voting in the European Parliament elections. The applicant is serving a life sentence and wanted to vote in the 2019 European Parliament Elections.

THE FACTS

2. The applicant was born in 1974 and is detained in Viru Prison. He was granted legal aid and was represented by Mr J. Valdma, a lawyer practising in Tallinn.

3. The Government were initially represented by their Agent, Ms M. Kuurberg, Representative of Estonia to the European Court of Human Rights, and subsequently by Mr T. Kolk, her successor in that office.

4. The facts of the case may be summarised as follows.

5. The applicant has been convicted in different sets of criminal proceedings for numerous criminal offences, including twice for murder (one of them being the murder of a police officer), twice for illegal possession, use, storage or transfer of a firearm or ammunition, twice for escaping from custody or from the place of serving a sentence, and twice for robbery. He

was sentenced to life imprisonment and has been serving his sentence since 1996. He has since also been convicted of inciting the murder of another prisoner in a tortuous or cruel manner.

6. According to the 2019 internal prison risk assessment report, the applicant was generally considered highly dangerous. Referring, *inter alia*, to the applicant's character, the circumstances of the offences he had committed, his earlier life and the risk assessment report, the domestic courts – while noting a certain improvement in his behaviour – nonetheless dismissed his request for parole in 2020.

7. On 4 April 2019 the applicant applied to the Märjamaa Rural Municipal Government requesting to be allowed to vote in the European Parliament Elections taking place on 26 May 2019.

8. On 8 April 2019 the Märjamaa Rural Municipal Government dismissed his request. He appealed, requesting, *inter alia*, to be allowed to vote as an interim measure.

9. On 9 May 2019 the Tallinn Administrative Court rejected his appeal and refused to examine his request for the application of an interim measure. He lodged a further appeal.

10. On 31 May 2019 the Tallinn Court of Appeal dismissed his appeal, finding that it had no prospects of success. The court referred to the Supreme Court's judgments in cases nos. 3-4-1-2-15 and 3-3-1-49-15 (see paragraphs 16-23 below). In these cases, the Supreme Court had addressed the applicant's previous applications to vote in the national parliament (*Riigikogu*) elections and European Parliament elections. It had found that although domestic law imposed a blanket ban on prisoners' voting rights, such a prohibition had been proportionate in the applicant's specific case, given his criminal record and sentence. In the case at hand, the Tallinn Court of Appeal saw no reason to depart from these earlier judgments of the Supreme Court.

11. On 10 September 2019 the Supreme Court refused to examine the applicant's subsequent appeal on points of law. The decision was served on him on 13 September 2019.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. RELEVANT LEGAL FRAMEWORK

A. The Constitution

12. Article 57 § 1 of the Constitution of the Republic of Estonia (*Eesti Vabariigi põhiseadus*) provides that Estonian citizens who have reached the age of eighteen have the right to vote.

13. Article 58 provides that participation in voting may be restricted by law for Estonian citizens who have been convicted by a court and are serving a sentence in a penal institution.

B. European Parliament Election Act

14. Section 4(3)(2) of the European Parliament Election Act (*Euroopa Parlamendi valimise seadus*) provides that a person who has been convicted of a criminal offence by a court and is serving a prison sentence does not have the right to vote.

15. Section 20(3)(1) provides that a person who, according to information in the criminal records database, has been convicted of a criminal offence by a court and whose prison sentence will last until election day (as assessed on the thirtieth day before the elections) will not be entered in the list of voters.

II. RELEVANT DOMESTIC PRACTICE

16. The Supreme Court's judgment of 1 July 2015 in constitutional review case no. 3-4-1-2-15 concerned the applicant's right to vote in the 2015 parliamentary (*Riigikogu*) elections. The Riigikogu Election Act (*Riigikogu valimise seadus*), similarly to the European Parliament Election Act, imposes a statutory ban on voting for persons who have been convicted of a crime and who are serving a prison sentence. In that case, the Tallinn Court of Appeal had previously considered the ban to be unconstitutional and had initiated constitutional review proceedings in the Supreme Court. As the Tallinn Court of Appeal had declared its decision immediately enforceable, the applicant was able to cast his vote in the parliamentary elections.

17. In its judgment, the Supreme Court *en banc* explained that the prisoners' voting ban served the purpose of temporarily preventing persons who had seriously undermined the fundamental values of society (including those protected by the Penal Code) from exercising State power through participating in the elections of the legislature. In addition, this restriction protected the rights of those who had not demonstrated such disrespect towards the values underlying collective life, and promoted the rule of law. The Supreme Court considered these aims to be lawful but emphasised that the right to vote, which was of utmost importance in a democratic society, could not be restricted lightly. In any event, the court stressed that mere technical difficulties could not be sufficient to justify voting restrictions in prison.

18. The Supreme Court *en banc* further noted, referring to the Court's case-law, that it interpreted Article 57 of the Constitution in a manner similar to how the Court interpreted Article 3 of Protocol No. 1 to the Convention. It agreed that the ban according to which no one who was serving a prison

sentence could vote at the parliamentary elections was in principle unconstitutional.

19. However, the Supreme Court *en banc* explained that it could only assess the constitutionality of a certain legal norm within the framework of a specific procedure and in accordance with the request made to it. In the proceedings under consideration (*konkreetne normikontroll*), it was therefore tasked to assess whether the legislature had used its discretion to restrict voting rights in a proportionate manner in the specific circumstances of the applicant's case. It explained that an absolute voting ban which applied to a certain defined group of individuals and did not allow any balancing of interests to take place could nonetheless prove to be proportionate with respect to certain persons belonging to that group.

20. The Supreme Court then listed all the offences of which the applicant had been convicted (more than ten, including, but not limited to those mentioned in paragraph 5 above). Noting that the Constitution *expressis verbis* permitted restricting the voting rights of at least some prisoners and taking into account the number, nature and gravity of the offences committed by the applicant, as well as the fact that he had been sentenced to life imprisonment and had continued committing offences while in prison, the Supreme Court *en banc* concluded that the voting ban was proportionate in his case. Accordingly, it dismissed the Tallinn Court of Appeal's request to declare the ban unconstitutional in this particular case.

21. It added that the Chancellor of Justice could initiate constitutional review proceedings that would enable it to assess the constitutionality of the provisions in question in an abstract manner (*abstraktne normikontroll*). Parliament also had the power to amend the unconstitutional provisions of its own motion.

22. The Supreme Court's judgment of 9 November 2015 in case no. 3-3-1-49-15 concerned the applicant's right to vote in the 2014 European Parliament elections. In that case, the Tallinn Court of Appeal had previously considered the ban to be in violation of European Union law and had refused to apply it. By the time of the Tallinn Court of Appeal's judgment on 30 January 2015 the elections had already taken place. The applicant appealed against the judgment to the extent that the Tallinn Court of Appeal had not found the ban to be unconstitutional.

23. The Supreme Court reiterated that in the proceedings at hand the proportionality of the prisoners' voting ban had to be assessed from the perspective of the specific applicant. It considered that banning the applicant from exercising his voting rights at the European Parliament elections did not restrict the right under Article 3 of Protocol No. 1 to the Convention to the extent that it undermined free elections in a manner that thwarted the free expression of the people in the choice of the legislature. Referring, *inter alia*, to its finding in case no. 3-4-1-2-15, the Supreme Court concluded that the voting restriction had been proportionate in the applicant's specific

circumstances. Although the ban in question clearly violated the rights of many prisoners, the applicant could not rely on the violation of the rights of others in demanding to be granted the right to vote. The Supreme Court therefore refused to declare the prisoners' voting ban unconstitutional in this particular case.

III. EUROPEAN UNION LAW AND PRACTICE

24. Article 14(3) of the Treaty on European Union (OJ 2016/C 202/01) provides that the members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret ballot.

25. Article 39(2) of the Charter of Fundamental Rights of the European Union (OJ 2016/C 202/2) also provides that members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.

26. The Court of Justice of the European Union examined, in the case of *Delvigne* (C-650/13, EU:C:2015:648, judgment of 6 October 2015), the compatibility with Article 39 (2) of the Charter of Fundamental Rights of the European Union of the exclusion, by operation of French law, from those entitled to vote in elections to the European Parliament persons convicted of a serious crime. In *Delvigne*, the Court of Justice held that the French limitation of prisoners' voting rights did not call into question the essence of those rights since it had the effect of excluding certain persons, under specific conditions and on account of their conduct, from those entitled to vote in elections to the Parliament, as long as those conditions are fulfilled. In addition, it considered the French limitation was proportionate in so far as it took into account the nature and the gravity of the criminal offence committed and the duration of the penalty (ibid., paragraphs 48-49).

THE LAW

ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL No. 1 TO THE CONVENTION

27. The applicant complained that the prisoners' voting ban had violated his right to free elections as guaranteed by Article 3 of Protocol No. 1 to the Convention, which reads as follows:

> "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

A. Admissibility

1. The parties' arguments

28. The Government submitted that at the domestic level the applicant had already contested the statutory ban on prisoners' voting rights in 2014 in relation to the European Parliament elections and in 2015 in relation to the parliamentary elections. Given that there had been no change in his status and circumstances since then, his application should be considered to have been lodged outside the six-month time-limit. The same complaint could have already been lodged after the Supreme Court's judgments in 2015 (see paragraphs 16-23 above). Alternatively, in the event that the applicant's previous applications on the same subject matter were declared inadmissible by the Court in the single-judge formation, his present application should also be considered inadmissible as it was substantially the same as the matter that had already been examined by the Court. In any event, the Government considered the complaint to be manifestly ill-founded for the reasons referred to under the merits (see paragraphs 34-35 below).

29. The applicant contested the Government's argument, asserting that the voting ban constituted a continuous, ongoing violation. As he had been able to vote in the 2015 parliamentary elections (see paragraph 16 above), there had been no reason for him to lodge a complaint with the Court back then. In any event, the subject matter of the complaint had changed as in the present case he had relied on different arguments before the domestic courts in comparison to the earlier cases. In addition, he had been in contact with the European Commission regarding the voting ban.

2. The Court's assessment

30. In response to the Government's inadmissibility objections, the Court reiterates that, as a rule, the six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies (see, among many authorities, *Anchugov and Gladkov v. Russia*, nos. 11157/04 and 15162/05, § 73, 4 July 2013).

31. In the instant case, the applicant's complaint concerns the inability to vote in particular European Parliament elections in 2019. The applicant lodged his application with the Court on 12 March 2020, that is to say within six months from the date when the Supreme Court's refusal to examine his appeal on points of law concerning these particular elections was served on him (see paragraph 11 above). The Government did not argue that the remedy which the applicant had used – lodging an application with the local municipality requesting that he should be allowed to vote in the European Parliament Elections and then challenging the dismissal of his application before the domestic courts – could not be considered an effective remedy (compare and contrast *Anchugov and Gladkov*, cited above, §§ 75-76). It also

appears that the domestic courts addressed the applicant's complaints on the merits, albeit in a succinct manner and by referring to the earlier judgments. In such circumstances, the Court cannot conclude that his application has been lodged out of time.

32. The Court moreover notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. The fact that the applicant had already been in prison during some earlier elections and had brought proceedings before the courts in relation to them has no bearing on this conclusion. Those earlier proceedings did not relate to the 2019 European Parliament elections, which, in turn, were subject to separate domestic proceedings. The application must therefore be declared admissible.

B. Merits

1. The parties' arguments

33. The applicant put an emphasis on his positive behaviour, referring to his progress in terms of education, work experience and discipline in prison. He submitted that the criminal offences referred to by the Government had been committed some ten to twenty years earlier. He added that the absolute ban on voting rights also violated EU law.

34. The Government pointed out that the rights enshrined in Article 3 of Protocol No. 1 to the Convention were not absolute and that the Court should not assess the ban on prisoners' voting rights *in abstracto*. Instead, it should assess – as the domestic courts had done – whether the manner in which the ban had affected the specific applicant in the circumstances pertaining to him had resulted in a violation of the Convention. In other words, the proportionality of the voting ban should be assessed in relation to the specific applicant. In the Government's view, the voting ban had been proportionate as regards the applicant, given the nature, gravity and number of offences he had committed (justifying a life sentence) and the continuous danger he posed.

35. The Government further explained that the voting ban only applied to convicts serving a sentence in prison. It did not apply to convicted offenders who were not sentenced to prison but who had received a pecuniary punishment, whose sentence had been suspended on probation (possibly along with subjecting the person to the supervision of conduct) or whose imprisonment had been replaced by treatment, electronic monitoring or community service. The voting ban did not concern persons detained on remand. When deciding whether to impose a custodial sentence, the domestic courts had to consider the severity of the offence committed, the degree of the offender's guilt, various aggravating and mitigating circumstances, the possibility of influencing the offender to refrain from committing offences in the future and possible alternatives of imposing a more lenient punishment.

According to statistics, a custodial sentence was imposed on approximately 30% of convicts.

36. In addition, the Government referred to the conclusions of the Committee of Ministers of the Council of Europe with respect to supervising the execution of the Court's judgments against the United Kingdom and Russia concerning the prisoners' voting ban in those countries. The prisoners' voting ban in force in Estonia had never been as extensive as the ban subject to a finding of a violation in these countries. Instead, the voting restrictions in Estonia were more comparable to the restrictions in force in the United Kingdom and Russia following the supervision of the execution of the Court's judgments.

2. The Court's assessment

(a) General principles

37. The Court reiterates that Article 3 of Protocol No. 1 to the Convention guarantees subjective rights, including the right to vote and to stand for election (see *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, §§ 46-51, Series A no. 113).

38. It further notes that the rights guaranteed by this Article are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law (see *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, § 58, ECHR 2005-IX, and *Scoppola v. Italy (no. 3)* [GC], no. 126/05, § 82, 22 May 2012). In addition, the right to vote is not a privilege. In the twenty-first century, the presumption in a democratic State must be in favour of inclusion and universal suffrage has become the basic principle (see *Hirst*, § 59, and *Scoppola*, § 82, both cited above).

39. Nevertheless, the rights enshrined in Article 3 of Protocol No. 1 are not absolute. There is room for implied limitations and the Contracting States must be afforded a margin of appreciation in this sphere. The Court has repeatedly affirmed that the margin in this area is wide (see *Mathieu-Mohin and Clerfayt*, cited above, § 52; *Matthews v. the United Kingdom* [GC], no. 24833/94, § 63, ECHR 1999-I; and *Labita v. Italy* [GC], no. 26772/95, § 201, ECHR 2000-IV). There are numerous ways of organising and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into its own democratic vision (see *Hirst*, § 61, and *Scoppola*, § 83, both cited above).

40. However, it is for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate (see *Mathieu-Mohin and*

Clerfayt, cited above, § 52). In particular, any conditions imposed must not thwart the free expression of the people in the choice of the legislature – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage. Any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws it promulgates. Exclusion of any groups or categories of the general population must accordingly be reconcilable with the underlying purposes of Article 3 of Protocol No. 1 (see *Hirst*, § 62, and *Scoppola*, § 84, both cited above).

41. The Court also reiterates that removal of the right to vote without any *ad hoc* judicial decision does not, in itself, give rise to a violation of Article 3 of Protocol No. 1 (see *Scoppola*, cited above, § 104). With a view to securing the rights guaranteed by Article 3 of Protocol No. 1, the Contracting States may decide either to leave it to the courts to determine the proportionality of a measure restricting convicted prisoners' voting rights, or to incorporate provisions into their laws defining the circumstances in which such a measure should be applied. In the latter case, it will be for the legislature itself to balance the competing interests in order to avoid any general, automatic and indiscriminate restriction (see *Anchugov and Gladkov v. Russia*, nos. 11157/04 and 15162/05, § 107, 4 July 2013, and *Kulinski and Sabev v. Bulgaria*, no. 63849/09, § 37, 21 July 2016).

(b) Application of these principles to the present case

42. Turning to the facts of the present case, the Court observes that the applicant was deprived of the right to vote at the European Parliament elections of 2019 as a result of a statutory blanket ban automatically applicable to all convicts in detention (see paragraph 14 above).

43. As to the applicant's claim that the impugned ban violated EU law – while noting that the subject matter of the present case falls within the scope of EU law (see paragraph 24 above) – the Court reiterates that under the terms of Articles 19 and 32 § 1 of the Convention it is not competent to apply or examine alleged violations of EU rules unless and in so far as they may have infringed rights and freedoms protected by the Convention. More generally, it is primarily for the national authorities, notably the courts, to interpret and apply domestic law, if necessary in conformity with EU law, the Court's role being confined to ascertaining whether the effects of such adjudication are compatible with the Convention (see *K.I. v. France*, no. 5560/19, § 123, 15 April 2021).

44. Analysing the alleged violation of Convention rights, it is not disputed by the parties that the ban constituted an interference with the applicant's right to vote, as enshrined in Article 3 of Protocol No. 1 to the Convention, or that the interference pursued a legitimate aim. The Court sees no reason to reach a different conclusion on these aspects.

45. As regards the assessment of proportionality of the impugned voting ban, the Court observes that the domestic law restricting convicted prisoners' right to vote in the European Parliament elections was indiscriminate in its application in that it did not take into account the nature or gravity of the offence, the length of the prison sentence or the individual circumstances of convicts. The Government did not put forward any evidence that the Estonian legislature had ever sought to balance the competing interests or assess the proportionality of a blanket ban on the right of convicted prisoners to vote.

46. While the Court accepts that when sentencing someone to prison, the domestic courts would have to have regard to all the various circumstances before choosing a sanction (see the Government's argument in paragraph 35 above), there is no evidence whether those courts, in the instant case, took into account – at the time of deciding on a sentence – the fact that a prison sentence would involve the disenfranchisement of the applicant.

47. The Court observes that in the light of the foregoing, the circumstances of the present case seem, on the face of it, similar to those examined in earlier cases where a blanket ban on prisoners' voting rights was in question (see *Hirst*; *Anchugov and Gladkov*; and *Kulinski and Sabev,* all cited above; see also *Söyler v. Turkey*, no. 29411/07, 17 September 2013).

48. However, unlike the above-mentioned cases where the Court found a violation of Article 3 of Protocol No. 1 to the Convention, it notes that in the present case – in the proceedings concerning the applicant's right to vote – the domestic courts assessed the proportionality of the application of the voting ban in the specific circumstances pertaining to the applicant and concluded that it had indeed been proportionate (see paragraphs 10 and 16-23 above; compare, *Strøbye and Rosenlind v. Denmark*, nos. 25802/18 and 27338/18, §§ 103-110, 2 February 2021, where the domestic court had thoroughly examined the justification and proportionality of the limitation of the applicants' voting rights; compare and contrast, *Hirst*, cited above, § 80, where the Court noted that the domestic courts, when addressing the question of the voting ban, had themselves not undertaken any assessment of proportionality of the ban).

49. In that connection, it is important to reiterate that, in cases arising from individual applications, the Court's task is not to review the relevant legislation in the abstract. Instead, it must confine itself, as far as possible, to examining the issues raised by the case before it (see, for example, *Anchugov and Gladkov,* §§ 51-52, and *Strøbye and Rosenlind*, § 115, both cited above).

50. The Court must therefore examine the manner in which the domestic legislation was applied to the specific applicant in his particular circumstances, taking into account, *inter alia*, the findings of the domestic courts (compare *Scoppola*, cited above, § 99 and 104; see also*, mutatis mutandis*, *Vool and Toomik v. Estonia*, nos. 7613/18 and 12222/18, §§ 90-93, 29 March 2022; and *Advisory opinion on the assessment, under Article 3 of Protocol No. 1 to the Convention, of the proportionality of a general*

prohibition on standing for election after removal from office in impeachment proceedings [GC], request no. P16-2020-002, Lithuanian Supreme Administrative Court, § 92, 8 April 2022). The Court would require strong reasons to substitute its own view for that of the domestic courts, particularly when the latter have carried out their review in a manner consistent with the criteria established by the Court's case-law.

51. In the instant case, the domestic courts (the Tallinn Court of Appeal referring back to the earlier Supreme Court judgments) reasoned that the voting ban had been proportionate in respect of the applicant, given the number, nature and gravity of the offences he had committed (see paragraph 5 above), his continued criminal behaviour while in prison, as well as the fact that, as a result, he had been sentenced to life imprisonment (see paragraph 20 above). In that connection, the Court observes that the seriousness of the offences committed was also one of the factors taken into account by the Grand Chamber in the case of *Scoppola* in reaching its conclusion that the Convention had not been violated (see *Scoppola*, cited above, § 107, and compare and contrast *Söyler*, cited above, § 44, where the Court referred to the relatively minor nature of the offence).

52. The Court takes note of the fact that the Estonian Supreme Court – despite deeming the voting ban to be constitutional with respect to the applicant – took an overall critical stance against the blanket ban on prisoners' voting rights, referring extensively to the Convention and the Court's case-law, and considered that the ban clearly violated the rights of many prisoners (see paragraphs 18 and 23 above).

53. Taking the above considerations into account, the Court finds that, in the circumstances of the present case, there is no basis for finding that the domestic courts, when assessing the proportionality of the voting ban with respect to the applicant, overstepped the margin of appreciation afforded to them.

54. It follows that there has been no violation of Article 3 of Protocol No. 1.

FOR THESE REASONS, THE COURT

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

2. *Holds*, by five votes to two, that there has been no violation of Article 3 of Protocol No. 1 to the Convention.

Done in English, and notified in writing on 6 December 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško Registrar	Pere Pastor Vilanova President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinions of Judges Serghides and Zünd are annexed to this judgment.

P.P.V.
M.B.

DISSENTING OPINION OF JUDGE SERGHIDES

I. Introduction

1. The applicant is serving a life sentence and wished to vote in the 2019 European Parliament elections. He complained that the prisoners' voting ban had violated his right to participate in free elections under Article 3 of Protocol No. 1 to the Convention.

2. Under section 4(3)(2) of the European Parliament Election Act, a person who has been convicted of a criminal offence by a court and is serving a prison sentence does not have the right to vote. The Tallinn Court of Appeal held that although this law imposed a blanket ban on prisoners' voting rights, such a prohibition had been proportionate in the applicant's specific case, considering his criminal record and sentence (see paragraph 10 of the judgment).

3. I agree with point 1 of the operative provisions that the application is admissible. I disagree, however, with the finding in paragraph 54 of the judgment and point 2 of its operative provisions that there has been no violation of Article 3 of Protocol No. 1 to the Convention.

4. The judgment observes that the applicant was deprived of the right to vote in the European Parliament elections as a result of a statutory blanket ban automatically applicable to all convicts in detention (see paragraphs 42 and 14 of the judgment). The judgment makes it clear that the relevant statutory ban was indiscriminate in its application (see paragraphs 42 and 45 of the judgment). It also observes that it was not disputed by the parties – and it sees no reason to reach a different conclusion – that the ban in question constituted an interference with the applicant's right to vote and that this interference pursued a legitimate aim (see paragraph 44 of the judgment). I agree with all the above observations.

5. In view of the above, I consider that the previous case-law of the Court (referred to in paragraphs 38 and 47 of the present judgment), such as the judgment in *Hirst v. the United Kingdom (no. 2)* ([GC], no. 74025/01, § 58, ECHR 2005-IX), where the Court found a violation of Article 3 of Protocol No. 1 to the Convention due to a blanket ban on prisoners' voting rights, is applicable to the present case.

6. I disagree, therefore, with the judgment that the present case should be differentiated from the other cases mentioned in paragraphs 38 and 47 of the judgment where the Court found a violation, on the basis "that in the present case the domestic courts assessed the proportionality of the application of the voting ban in the specific circumstances pertaining to the applicant and concluded that it had indeed been proportionate" (see paragraph 48 of the judgment).

7. My disagreement with the judgment boils down to the fact that I do not accept that an absolute statutory ban can be turned by the domestic courts

(i.e., the Tallinn Court of Appeal, referring back to the earlier Supreme Court judgments, and with the Supreme Court refusing to examine the applicant's appeal on points of law – see paragraphs 10-11 of the judgment) into a relative or qualified one, and I thus disagree with the subsequent finding, by applying the proportionality test, that there has been no violation of Article 3 of Protocol No. 1 to the Convention.

II. Article 3 of Protocol No. 1 to the Convention should be interpreted and applied in compliance with the principle of the rule of law

8. It is my submission that the relevant provision of the domestic legislation, i.e., section 4(3)(2) of the European Parliament Election Act, should not be applied in a manner which is not compatible with the principle of the rule of law and its aspects, namely, the principles of separation of powers and legal certainty.

9. The rule of law is "one of the fundamental principles of democratic societies" (*Broniowski v. Poland* [GC], no. 31443/96, § 147, 22 June 2004) and the cornerstone of European Democracies. It is not only a fundamental Convention principle but can be characterised as the lodestar of the Convention system.

10. In particular, I submit that the respondent State breached the applicant's right to free elections under Article 3 of Protocol No. 1 to the Convention in two respects which are incompatible with the principle of the rule of law, as follows:

(a) The relevant provision, namely, section 4(3)(2) of the European Parliament Election Act, by imposing a total, absolute, blanket and indiscriminate ban on any person who has been convicted of a criminal offence by a court and is serving a prison sentence, prevented the applicant from exercising his right to vote, and, consequently, it violated Article 3 of Protocol No. 1 to the Convention, as interpreted by the Court in its relevant case-law (see relevant case-law in paragraphs 38 and 47 of the judgment)[1].

(b) The domestic courts (i.e., the Tallinn Court of Appeal, referring back to the earlier Supreme Court judgments), although acknowledging that the ban imposed by the legislature on the applicant's right was a blanket one and was indiscriminate, and, as such, contravened the Convention and the relevant case-law of the Court, instead of finding a violation of Article 3 of Protocol No. 1 in the applicant's case, they bafflingly applied the blanket ban

[1] On the point that there is no room for absolute prohibitions in the case-law of the Court, see paragraphs 63-71 of my partly dissenting opinion in *Regner v. the Czech Republic* [GC], no. 35289/11, 19 September 2017. In paragraph 71 of that opinion it is stated that *until now we have known that the Convention makes provision for some absolute rights, but not for absolute restrictions. An absolute restriction leads to the death of a right or to no right at all*.

as if it were imposing a relative or qualified rather than an absolute or blanket restriction, thus allowing a balancing or proportionality test which led them to justify the ban on the exercise of the applicant's right, taking his circumstances into account (see, *inter alia,* paragraphs 48 and 51-52 of the judgment, on the domestic courts' proportionality test in the present case). The domestic courts weighed up the interests in the usual way, despite the fact that the relevant legislation prohibited them from engaging in any balancing exercise at all. Stated otherwise, although the domestic courts interpreted the relevant legislation correctly as imposing an absolute ban, when applying it in practice they paradoxically modified it, in effect, by assuming that they had some discretion which allowed them to conduct a proportionality test, thus treating the ban as a relative or qualified restriction.

11. The domestic courts should, in my humble view, have interpreted and applied the ban as an absolute ban unless they had first considered it as violating Article 3 of Protocol No. 1 to the Convention or unless there had been a decision of the Supreme Court that the ban was unconstitutional. However, neither in the present case nor in the applicant's cases of 2015 did the Supreme Court ultimately consider the relevant law unconstitutional or contrary to the Convention in respect of the applicant. In this connection, paragraph 20 of the judgment states that: "Accordingly, [the Supreme Court] dismissed the Tallinn Court of Appeal's request to declare the ban unconstitutional". Similarly, paragraph 52 of the judgment states that: "The Court takes note of the fact that the Estonian Supreme Court – despite deeming the voting ban to be constitutional with respect to the applicant – took an overall critical stance against the blanket ban on prisoners' voting rights ...".

12. In a case where the domestic courts were to apply the relevant law as it was, thus imposing an absolute ban, but without, at the same time, examining its compatibility with Article 3 of Protocol No. 1 to the Convention or finding that it was in breach of this provision, the respondent State would again, in my view, have to be found liable under the Convention for violating Article 3 of Protocol No. 1, since the law in question clearly breaches this provision. If, on the other hand, the domestic courts were to find that the relevant domestic provision was in breach of Article 3 of Protocol No. 1 and to give a judgment to that effect, there would be no need for recourse before the Court to decide the same issue.

13. I humbly submit that it is contradictory, on the one hand, for the Supreme Court *en banc* to note that the relevant law is in principle unconstitutional (see paragraph 18 of the judgment), and, on the other hand, when it comes to applying it to the facts of the case, to consider it constitutional, merely because the circumstances of the applicant are not such as to render him entitled to exercise his right to vote (see paragraph 11 above). A law should be either constitutional or unconstitutional, in the same way that it should be either Convention compatible or Convention incompatible, and

the answers to these questions should not depend on the circumstances of an individual. It is not the circumstances of the applicant which are to be assessed in considering whether a law is constitutional or Convention compatible, but the compatibility of the law with the Constitution or the Convention, respectively.

14. The circumstances of the applicant would be relevant only if the law did not impose an absolute ban. It is a different thing to argue, however, that the constitutionality or Convention compatibility of a domestic provision of law should be examined not in the abstract but in the context of a concrete case where the issue is raised, as this does not make the determination of the legal issue dependent on the facts of the case. The compatibility of a provision of law with the Convention, as well as its constitutionality, are legal issues and should be treated as such by the domestic courts, even if they are raised in a concrete case and with regard to the particular circumstances. Of course, our concern here is not the constitutionality of section 4(3)(2), but only its Convention compatibility, as the Court cannot act as a fourth-instance court. The constitutionality issue is mentioned here only to demonstrate that the domestic courts, without considering the relevant provision of law unconstitutional, in effect modified it when applying it.

15. As said above, in applying the relevant domestic law the way they did, the domestic courts applied the relevant provision of the domestic law, which imposes a blanket and indiscriminate ban, to the facts of the case, by in effect modifying it. The said modification had an effect on the text, purpose, absoluteness, application and consequences of the relevant law.

16. As a result, the domestic judiciary arbitrarily applied the relevant law in disregard of the principle of the rule of law, but, worse still, it entered into the sphere or power of the legislative authority without observing the principle of the separation of powers and, consequently, also disregarding the principle of the rule of law of which the former principle is an aspect. In this connection, it is to be noted that an important feature of the rule of law is that laws are the result of democratic processes which require that no one, including courts, can apply them in a modified manner. In *Grzęda v. Poland* ([GC], no. 43572/18, § 339, 15 March 2022) the Court reiterated its finding that "the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention". This, of course, includes the relevant provision in question, namely, Article 3 of Protocol No. 1 to the Convention, to be interpreted in the light of the Preamble to the Convention, which declares the rule of law to be part of the common heritage of the Contracting States. Moreover, the judgment in paragraph 38 notes that the rights guaranteed in Article 3 of Protocol No. 1 to the Convention are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by law. Arbitrariness entails a negation of the rule of law and cannot be tolerated in respect of any procedural or substantive rights (ibid.).

17. Some clarification is called for as to the application of the principle of separation of powers in the present case, because the Court in *Ramos Nunes de Carvalho e Sá v. Portugal* ([GC], nos. 5539/13, 57728/13 and 74041/13, § 144, 6 November 2018) and in other cases, has observed that, though the notion of the separation of powers between the executive and the judiciary has assumed growing importance in the Court's case-law, neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the interaction between powers. As the Court held in *Henryk Urban and Ryszard Urban v Poland* ([GC], no. 23614/08 § 46, 30 November 2020), the question is always whether, in a given case, the requirements of the Convention are met. In my view, one of the requirements of the Convention which must be met is that the principle of the rule of law be respected and applied by the domestic courts regarding the Convention right at issue before the Court. This is so, as according to the case-law of the Court, the principle of the rule of law is inherent in all Convention provisions, and, therefore, is an indispensable component thereof. I use the principle of separation of powers in this opinion not as a theoretical constitutional principle but as an aspect or part of the principle of the rule of law, which is in its turn an aspect or component of the relevant Convention provision. And I seek to show that the principle of the rule of law was breached in the present case, not merely because the domestic courts did not follow and apply the relevant domestic law, but because they in effect modified it, without having such power to do so; such power exclusively falling within the ambit of competence of the legislature.

18. To recapitulate, in their application of the statutory ban the domestic courts did not merely fail to apply the relevant law as it was enacted by the legislature, but rather proceeded with an intentional modification of the law for the purpose of examining the compatibility of that law with the Convention. By using this approach of transforming the law into something it was not intended by the legislature to be, in order to examine its compatibility with the Convention in the circumstances of the present case, the domestic courts avoided the relevant question and, at the same time, and most importantly, they breached the principle of the rule of law. These are very serious reasons, in my view, for the Court to intervene in the present case and find a violation.

19. Although the intention of the domestic courts to apply the relevant domestic legislation in line with the Convention is not only understandable but also commendable by the Court ("the principle of subsidiarity imposes a shared responsibility between the States Parties and the Court, and ... national authorities and courts must interpret and apply domestic law in a manner that gives full effect to the Convention", see *Grzęda*, cited above, § 324), the Court, at the same time, should not encourage an approach that employs an arbitrary and even *contra legem* application of the national legislation.

20. It is my submission that the breach of the principle of the rule of law at the domestic level by the domestic courts, as explained above, also led to a breach of the same principle in its international dimension regarding the issue of the right to vote guaranteed in Article 3 of Protocol No. 1 to the Convention, which requires that the domestic law should be applied by the domestic courts, provided that it is not incompatible with the Convention. Every Convention provision, including Article 3 of Protocol No. 1 to the Convention is a rule of international law. As such, it is submitted that all Convention provisions contribute to the realisation of the general principle of the rule of law. Consequently, the relationship of the rule of law principle with the Convention means more than just the fact that the principle of the rule of law is a norm inherent in every Convention provision: each Convention provision is also, in itself, a rule of international law, and part of the international rule of law. It is this rule of international law which needs interpretation and application according to the principle of effectiveness (i.e., the principle of effective protection of human rights). The norm of effectiveness is an indispensable component of each Convention provision. The principle of effectiveness helps the rule of law to always remain practical and effective, thus going beyond merely paying lip service to it.

21. In my humble view, the principles of the rule of law and the principle of effectiveness are interdependent, as the latter simply exists to serve the former, and the former is deprived of its meaning and aim without the latter. I submit that neither of these principles were applied by the domestic courts in the present case. It is my further submission that the principle of the rule of law is also a method or means or tool of interpretation in the hands of the Court in exercising its task under Article 32 of the Convention, which provides "that the jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto".

22. In my opinion, the manner in which the judgment reached its conclusion that there had been no violation of Article 3 of Protocol No. 1 to the Convention, by adopting the arbitrary and *contra legem* approach of the domestic courts, cannot be considered to be in line with the principle of effectiveness as a method of interpretation and as a norm of international law. The exercise of a right under the Convention cannot be practical and effective according to the principle of effectiveness if domestic authorities treat it in an arbitrary and contradictory manner. Arbitrariness is, in my view, an enemy of the principle of effectiveness, the aim of the latter being the same as the aim and the *raison d'être* of the Convention, namely, the effective protection of human rights.

23. The judgment (see paragraph 41) reiterates the case-law of the Court which, when it comes to a restriction of the right to vote, makes clear that there are only two available routes for a Contracting State: "either to leave it to the courts to determine the proportionality of a measure restricting

convicted prisoners' voting rights, or to incorporate provisions into their laws defining the circumstances in which such a measure should be applied". It adds that "[i]n the latter case, it will be for the legislature itself to balance the competing interests in order to avoid any general, automatic and indiscriminate restriction ..." In the present case, Estonia has not provided a right to its courts to determine the proportionality of a measure, nor has its legislature itself weighed up the competing interests in order to avoid any "general, automatic and indiscriminate restriction" (ibid.).

24. The judgment, by accepting a third route to the restriction of the right to vote under Article 3 of Protocol No. 1 to the Convention enters murky waters. In fact, with this approach, the judgment not only puts at risk the principles of the rule of law and the separation of powers, as elaborated above, but also endangers the principle of legal certainty. In the absence of any legislative provision allowing the proportionality assessment of each specific case by the domestic courts, there are no safeguards in place to require and guarantee the proportionality assessment which is necessary under the case-law of the Court.

25. The principle of the rule of law, which is an inextricable component or element of the Convention provision invoked by the applicant, i.e., Article 3 of Protocol No. 1, does not need to be explicitly invoked by an applicant. The Court has repeatedly underlined that it is within its powers to decide under which provision of the Convention the established facts, constituting the complaint of an applicant, should be examined ("the Court is master of the characterisation to be given in law to the facts of the case" see for example *Schwizgebel v. Switzerland*, no. 25762/07, § 69, 10 June 2010; *Guerra and Others v. Italy*, 19 February 1998, § 44, *Reports of Judgments and Decisions* 1998-I; and *Glor v. Switzerland* no. 13444/04, § 48, ECHR 2009)[2]. Nevertheless, in the present case, a violation of the principle of the rule of law is not founded on an examination of a different Article from that invoked by the applicant, but instead it arises because the principle of the rule of law, as mentioned above, is "inherent in all the Articles of the Convention" (see *Grzęda*, cited above, § 339). *A fortiori*, the principle of the rule of law does not need to be explicitly invoked by the applicant, since it is one of the indispensable tools in the interpretation and application of the Convention toolbox in the hands of the Court. Therefore, in examining the applicant's complaint under Article 3 of Protocol No. 1 to the Convention, the Court is not only allowed to take into account the principle of the rule of law, and all its aspects, *inter alia*, the principle of the separation of powers and the principle of legal certainty, but even more, the Court is *obliged* to interpret

[2] On this, see also Dean Spielmann, "The European Court of Human Rights: Master of the Law but not of the Facts?" in L.-A. Sicilianos, I. A. Motoc, R. Spano and R. Chenal (eds), *Intersecting views on national and international human rights protection :* liber amicorum *Guido Raimondi* (Wolf Legal Publishers, 2019), 909 *et seq*.

and apply Article 3 of Protocol No. 1 in the light of the principle of the rule of law.

26. In view of the above, I submit that the decision of the domestic courts was not compatible with the principles of the rule of law, separation of powers and legal certainty and consequently violated the applicant's right under Article 3 of Protocol No. 1 to the Convention.

III. Can an indiscriminate and disproportionate law give rise to a proportionate decision?

27. The judgment, in paragraph 49, adopts the view that any examination of the relevant law (the European Parliament Election Act) *per* se, would amount to a "review [of] the relevant legislation in the abstract", contrary to the need to examine "the manner in which the domestic legislation was applied to the specific applicant in his particular circumstances" (see paragraph 50 of the judgment).

28. Of course, it is true that in cases arising from individual applications, the Court should examine how the relevant domestic legislation has specifically affected the applicant. However, it is my submission that in the course of examining the final administrative act of the Märjamaa Rural Municipal Government which dismissed the applicant's request to be allowed to vote in the European Parliament Elections of 2019 (see paragraph 8 of the judgment), it is necessary to examine the law serving as the legal basis for this act and establishing its legal parameters.

29. Consequently, the Court should not only assess the legitimate aim and proportionality of the administrative act of the Märjamaa Rural Municipal Government which dismissed the applicant's request to be allowed to vote in the European Parliament Elections of 2019, but it should also assess the law (i.e., section 4(3)(2) of the European Parliament Election Act) which forms the legal basis of this administrative act and examine its compatibility with the Convention.

30. This does not amount, however, to a "review of the relevant legislation in the abstract", as the judgment argues (see paragraphs 49 and 50). If the domestic legislation, which forms the legal basis of this administrative act, fails to live up to the proportionality test required by the Court's case-law (cited in paragraph 47 of the judgment), then the administrative act based on that legislation also fails to comply with the Convention. In other words, the blanket and indiscriminate ban under the domestic legislation renders impossible any decision specific to the applicant that would be compatible with the Convention. There can be no proportionate application of a disproportionately restrictive, and thus Convention incompatible, law.

31. This approach, which tends to bypass the law serving as the legal basis of the administrative act, is also problematic in its correlated aspect of reversing the general rule pronounced in *Hirst* (cited above, § 69), namely,

"that prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty", by making the right to vote an exception and requiring every prisoner to apply to the domestic courts in order to vindicate their rights. At the same time, this results also in reversing the burden of proof: instead of the State through its legislature permitting a proportionality test and its authorities proving that a prisoner should be disenfranchised on the basis of the examination of his or her individual circumstances, the approach of the domestic courts, also approved by the Court, requires that the prisoner should find recourse to the courts and prove himself or herself that he or she should be allowed to retain his or her right to vote.

32. In this connection, it should not be forgotten that the Court's case-law confirms that "prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention" (see, *inter alia, Boulois v Luxembourg* [GC], no. 37575/04, § 82, ECHR 2012, and *Hirst,* cited above, § 67). In *Hirst* (cited above, § 70) the Court underlined that "[t]here is no question, therefore, that a prisoner forfeits his Convention rights merely because of his status as a person detained following conviction". It subsequently added that "nor is there any place under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for automatic disenfranchisement based purely on what might offend public opinion".

33. It can therefore be argued that human rights protection "cannot stop at the prison gate" (see similarly the phrase "justice cannot stop at the prison gate", used by the Court when referring to Article 6 of the Convention, in particular to emphasise that prisoners are not excluded from the scope of this Article – see, *inter alia, Enea v. Italy* [GC], no. 74912/01, § 105, ECHR 2009, and *Ezeh and Connors v. the United Kingdom* [GC], nos. 39665/98 and 40086/98, § 83, ECHR-X).

34. Consequently, it should be stressed that the lack of legal certainty and clarity for prisoners, including, of course, the applicant in the present case, as to the exercise of their voting rights, should be avoided in a democratic society, where the human rights of everyone should be respected.

35. Based on the above, I disagree with the finding in paragraphs 50 and 53 of the judgment that there are no strong reasons for the Court to substitute its own view for that of the domestic courts. It is not correct to argue that the domestic courts carried out their review in a manner consistent with the criteria established by the Court's case-law and that they did not overstep the margin of appreciation afforded to them, when in fact they acted *contra legem*, against the clear wording and meaning of the domestic law which did not allow for a proportionality test.

IV. Conclusion

36. In the light of all the above, I find that there has been a violation of Article 3 of Protocol No. 1 to the Convention, and, if I were not in the minority, I would award the applicant sums for non-pecuniary damage, and for costs and expenses, the amount of which it is not necessary to determine.

DISSENTING OPINION OF JUDGE ZÜND

1. The majority have found no violation of Article 3 of Protocol No. 1 to the Convention despite, in their own words, the indiscriminate nature of the domestic law restricting the right to vote of prisoners (paragraph 45 of the judgment) and the fact that domestic courts had not at the time of sentencing taken into account that the applicant would be disenfranchised (paragraph 46). They have thus approved the application of an automatic blanket ban on prisoners' voting rights. In the light of the foregoing, I respectfully dissent.

2. Prisoners remain part of society, in particular of a democratic society. Save for their right to liberty, they continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention (see *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, § 69), including their right to vote. This is the *status quo* and point of departure for all decisions on disenfranchising prisoners. Narrow exceptions may be carved out from this principle, if valid reasons present themselves to justify excluding certain prisoners from the democratic process. Such severe measures of disenfranchisement should not be taken lightly. They therefore require a discernible and sufficient link between the removal of the right to vote and the conduct and circumstances of the individual concerned. The Court has held on multiple occasions that this applies when an individual has engaged in and was convicted for criminal activities related to civil and political rights, such as election fraud or abuse of public office (see *Hirst*, ibid., § 77; *Calmanovici v. Romania*, no. 42250/02, § 153; *Frodl v. Austria*, no. 20201/04, § 28; and *Anchugov and Gladkov v. Russia*, nos. 11157/04 and 15162/05, § 97). It is insufficient, on the other hand, to base disenfranchisement on the severity of the criminal activity alone, as this is wholly unrelated to the applicant's civil and political rights. In so far as the Court does not reject such elements (see *Scoppola v. Italy* (no. 3), no. 126/05, §§ 106-108), they are incompatible with the legitimate aim of restricting electoral rights, i.e., protecting the democratic process.

3. A decision to disenfranchise requires the prior legislative determination of specific situations in which a person may lose their right to vote. A blanket ban is strictly prohibited (see *Hirst*, cited above, § 71). Alternatively, it is for the judge presiding over a criminal procedure to evaluate in sentencing the proportionality of excluding a defendant's right to vote for a certain duration (see *Frodl*, cited above, § 34). The judge's margin of appreciation in this regard must, however, also be specified in legislation.

4. Neither of the two alternative requirements above are respected in this case: the blanket ban – and not the intact right to vote – appears to be the point of departure for the majority. The fact that the applicant had the possibility of seeking a review of the proportionality of the blanket ban *ex post facto* in relation to a specific election justifies, in the majority's view,

this blanket ban. This solution therefore turns on its head the narrow and exceptional nature of a decision to disenfranchise.

5. Finally, the solution envisaged by the majority contributes to a class-based voting system. It is well-known that incarceration affects people of lower classes or backgrounds disproportionally – those who may also not have the means to challenge disenfranchisement. A blanket voting ban for prisoners, without any *ex ante* evaluation of its legality, particularly risks stripping marginalised groups of people of their right to participate in the democratic process.