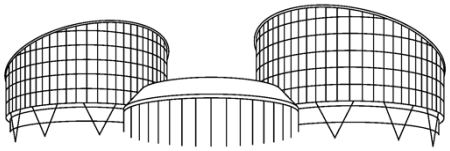

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF GUÐMUNDUR GUNNARSSON AND MAGNÚS DAVÍÐ NORÐDAHL v. ICELAND

(Applications nos. 24159/22 and 25751/22)

JUDGMENT

Art 3 P1 • Stand for election • Failure to discharge positive procedural obligation to secure effective examination of applicants' complaints concerning various irregularities surrounding vote recount in a regional constituency in the 2021 Parliamentary elections • Complaints examined in a fair and objective procedure guaranteeing a sufficiently reasoned decision • Absence of adequate institutional and procedural safeguards of impartiality • In case-circumstances, decision-making body lacked requisite impartiality guarantees and enjoyed discretion which was not circumscribed with sufficient precision by provisions of domestic law
Art 13 (+ Art 3 P1) • Lack of an effective remedy in case-circumstances

Prepared by the Registry. Does not bind the Court.

STRASBOURG

16 April 2024

FINAL

16/07/2024

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

In the case of Guðmundur Gunnarsson and Magnús Davíð Norðdahl v. Iceland,

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

Pere Pastor Vilanova*, President*,
Jolien Schukking,
Yonko Grozev,
Georgios A. Serghides,
Ioannis Ktistakis,
Andreas Zünd,
Oddný Mjöll Arnardóttir*, judges*,
and Milan Blaško, *Section Registrar,*

Having regard to:

the applications (nos. 24159/22 and 25751/22) against the Republic of Iceland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Icelandic nationals, Mr Guðmundur Gunnarsson and Mr Magnús Davíð Norðdahl ("the applicants") on 6 and 20 May 2022 respectively;

the decision to give notice to the Icelandic Government ("the Government") of the complaints concerning the alleged violation of the applicants' right to free elections, under Article 3 of Protocol No. 1 to the Convention, and their right to an effective remedy, under Article 13 of the Convention read in conjunction with Article 3 of Protocol No. 1;

the parties' observations;

Having deliberated in private on 12 March 2024,

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

INTRODUCTION

1. The present case concerns the 2021 Icelandic parliamentary elections, where the applicants stood as candidates on the electoral lists of their respective parties in one of the regional constituencies, but were not elected to the Parliament of Iceland – *Althingi*.

THE FACTS

2. The first applicant, Mr Guðmundur Gunnarsson, was born in 1976 and lives in Kópavogur. The second applicant, Mr Magnús Davíð Norðdahl, was born in 1982 and lives Reykjavík. The applicants were represented by Mr Sigurður Örn Hilmarsson, a lawyer practising in Reykjavík.

3. The Government were represented by their Agent, Mrs Fanney Rós Þorsteinsdóttir, Attorney General for Civil Affairs, and co-Agent Guðrún Sesselja Arnardóttir, Supreme Court Attorney.

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

I. PARLIAMENTARY ELECTORAL SYSTEM OF ICELAND

5. *Althingi* consists of sixty-three members elected for four years through an open-list proportional representation system. Fifty-four parliamentary seats are allocated at constituency level to candidates on party lists, according to the number of votes cast and without any electoral threshold. Nine additional levelling seats are allocated at national level to candidates on party lists if – across the country – their respective parties receive at least 5% of the total votes cast.

6. For the purposes of parliamentary elections, the country is divided into six constituencies. At the time of the events, each constituency elected between eight and thirteen members of *Althingi* (constituency seats). The number of voters in each constituency varies significantly, with the largest constituency (Southwest) having more than three times as many voters as the smallest constituency (Northwest). Constituencies with smaller populations elect proportionally more members of parliament per capita than constituencies with larger populations.

7. The nine levelling seats serve to minimise the above imbalance and make the composition of *Althingi* reflect the national popular vote as closely as possible. Out of the nine levelling seats, the three largest constituencies receive two seats each and the three smallest receive one seat each. These seats are distributed through a complex allocation system driven primarily by the overall national results for each party and the constituency results for unelected candidates on the party lists. While the levelling seats are formally linked to the constituencies, they are allocated nationally, and a party may receive a levelling seat in a constituency where its results were not necessarily the highest. A change in election outcomes for one constituency may trigger changes in the allocation of levelling seats across the country.

8. After the senior electoral commissions for each constituency count the votes, they announce the results and inform the National Electoral Commission of those results. Relying on the information received from across the country, the National Electoral Commission allocates seats and issues election certificates to the elected and substitute candidates.

9. If any complaint is raised by a voter or a candidate concerning the election results, it is examined prior to *Althingi*'s confirmation of the newly elected members' credentials. The Preparatory Credentials Committee, which is appointed by the acting Speaker of *Althingi*, initially considers complaints and prepares scrutiny of election credentials by the Credentials Committee. The Credentials Committee is elected during the first sitting of the newly elected *Althingi*. The members of both committees are selected from the pool of newly elected parliamentarians (whose credentials have not yet been confirmed). The Credentials Committee scrutinises the lawfulness of the elections and the eligibility of members of parliament, and adopts the relevant conclusions.

10. The conclusions of the Credentials Committee are submitted to *Althingi* for a vote, which definitively confirms the credentials of the newly elected members of parliament and the allocation of seats. Only upon such confirmation of credentials do the newly elected members pledge allegiance to the Constitution and acquire the full status of parliamentarians.

II. 2021 ELECTIONS TO *ALTHINGI*

11. The most recent elections to *Althingi* were held on 25 September 2021. In the Northwest constituency – the smallest in the country – the first applicant stood as the top candidate for the Liberal Reform Party (*Viðreisn*), and the second applicant as the top candidate for the Pirate Party (*Píratar*).

12. According to the records of the Northwest constituency's senior electoral commission, the vote count in the constituency was finalised in the early morning on 26 September 2021. In line with that vote count, and as reported by the Icelandic media on that day: (i) the Liberal Reform Party received 1,072 out of 17,666 votes in the constituency and therefore, given the total number of votes cast for his party nationwide, the first applicant qualified for a levelling seat in *Althingi*; and (ii) the Pirate Party received 1,082 out of 17,666 votes in the constituency and therefore the second applicant, as the party leader and the first candidate on the list, fell a few votes short of being elected to a constituency seat.

13. At around 12 noon on the same day the National Electoral Commission contacted the senior electoral commission in the Northwest consistency by phone and signalled that there was a very narrow margin of only two votes in the Northwest and South constituencies, which could affect the allocation of levelling seats. It was suggested that a recount should take place. A recount of the Liberal Reform Party's votes in the Northwest constituency was conducted, which resulted in the party receiving 1,063 votes, which was nine votes less than in the first count. A full recount of all votes in the Northwest constituency followed in the early afternoon, with six parties losing between one and nine votes and four parties gaining between one and ten votes, which confirmed the above result of 1,063 votes for the Liberal Reform Party and established the new count of 1,081 (one vote less than in the original tally) for the Pirate Party. A recount that took place in the South constituency led to no changes in the tally.

14. In line with the principles governing the allocation of seats (see paragraphs 5-7 above), the recount in the Northwest constituency led to a reallocation of nationally distributed levelling seats, with five candidates, including the first applicant, losing their levelling seats. The changes did not affect the strength of the parliamentary parties, only which individuals had received levelling seats and in which constituencies. In the Northwest constituency, the levelling seat went from the Liberal Reform Party to the

Centre Party (*Miðflokkurinn*), which left the Liberal Reform Party with no member of parliament elected from that constituency.

III. INQUIRY OF THE PREPARATORY CREDENTIALS COMMITTEE

15. On 5 and 1 October 2021 respectively the first and second applicants lodged separate complaints challenging the lawfulness of the vote count and the election results. Fifteen other complaints were submitted by other candidates and voters.

16. In his complaint, the first applicant relied on (a) the absence of a legal basis for the recount; (b) the improper storage and handling of the ballots between the initial count and the recount; (c) the failure of the senior electoral commission to inform the parties' agents about the recount, thereby depriving them of the opportunity to observe it; and (d) inconsistent and unexplained changes in the number of votes cast for each party and in the number of blank and invalid ballots, after the recount. The first applicant also (a) raised the issue of whether *Althingi*'s power to decide on electoral disputes complied with the judgment in *Mugemangango v. Belgium* [GC] (no. 310/15, 10 July 2020); and (b) argued that the alleged defects could be considered to have influenced the outcome of the elections and that in any case, under the case-law of the Icelandic Supreme Court, it was enough that they could be assumed to have influenced them.

17. In his complaint, the second applicant relied on (a) the improper storage and handling of the ballots between the initial count and the recount; and (b) the failure of the senior electoral commission to inform him, as the agent for his party's list, about the recount, thereby depriving him of the opportunity to observe it. He further argued, with reference to the case-law of the Supreme Court, that it was enough that the defects had the potential to influence the outcome of the elections.

18. The complaints were assigned to the Preparatory Credentials Committee, which adopted its procedural rules for the examination of ballots on 8 October 2021 (see paragraph 34 below). The Committee's nine members were nominated by the political parties, along with two observers from parties not represented in the Committee. None of its members had been elected to a parliamentary seat in the Northwest constituency.

19. Within the subsequent period of less than two months the Preparatory Credentials Committee conducted an extensive inquiry by, *inter alia*, obtaining relevant documents, correspondence and email exchanges, collecting comments on the applicants' complaints, requesting information from the authorities, questioning complainants and witnesses (officials, candidates and candidates' agents), and hearing experts in constitutional and administrative law. Overall, it held thirty-four open and closed meetings and made three field-visits to the facility where the vote count in the Northwest constituency had taken place to examine it and test different elements of the

count. At least two committee meetings were televised and streamed on *Althingi*'s website.

20. On 20 and 26 October and 2 November 2021 the complainants were invited to appear before the Preparatory Credentials Committee and send written comments on the available material. The applicants appeared before the committee on 22 October 2021. On 8 November 2021 the complainants were invited to provide their comments on a draft description of the events on which the Committee would rely in its assessment. The first applicant provided his comments on 10 November 2021. The repeated request for comments on an updated draft was sent on 17 November 2021, to which the first applicant replied on 18 November 2021.

21. All of the material collected throughout the inquiry was made available on *Althingi*'s website, except for confidential material and material relating to the Committee's closed hearings, which was available only to members of parliament. On 18 October 2021 all members of parliament were notified that the material was available.

22. On 25 October 2021 the first applicant's lawyer requested access to various items used in the inquiry, including documents from a pending criminal investigation against members of the senior electoral commission for violations of the Act on Parliamentary Elections to *Althingi*. By a letter of 4 November 2021 *Althingi* replied to the request, directing him to its website for the published material and providing him with certain email exchanges which had been requested and the call log from the telephone of the senior electoral commission's chairman, but refusing to provide material, which was confidential under the applicable legislation, and material relating to the committee's closed hearings. A letter from the first applicant's lawyer dated 8 November 2021 repeatedly requested access to the material and argued, with reference to the domestic law and the principles established in the judgment in *Mugemangango* (cited above), that the refusal to provide such material was unlawful. By a letter of 10 November 2021 *Althingi* again refused access to certain material, relying on the same grounds as those it had referred to previously.

23. On 23 November 2021 the Preparatory Credentials Committee issued a ninety-page report in which, *inter alia*, it identified a number of irregularities in the vote recount in the Northwest constituency. The report established the relevant facts, recounted the arguments advanced by the complainants and the views expressed by the senior electoral commission, and provided an analysis of the applicable legal norms, the Supreme Court's practice in electoral disputes and scholarly opinions. The report was further informed by an analysis of the consequences of establishing electoral defects, which had been submitted by *Althingi*'s Office on 19 October 2021, and a ministerial memorandum of 22 October 2021 on the Supreme Court's jurisprudence on electoral disputes concerning local government and presidential elections, and elections to the Constitutional Assembly. Those

documents extensively discussed the legal and historical background of establishing electoral defects and the consequences this had on any assessment of the validity of elections, and analysed the relevant case-law on electoral disputes.

24. The Preparatory Credentials Committee's report discussed the following alleged deficiencies in the conduct of the elections in the Northwest constituency, with reference to the requirements of the Act on Parliamentary Elections to *Althingi*:

a. After the initial count of votes, the ballots had not been sealed and had been left unattended until the recount had taken place several hours later. During that period they had been stored in open boxes in a closed, but unsupervised, room in a hotel. The room had three entrances, one of which could not be locked, while hotel staff had had keys to the other two. Surveillance cameras had not covered the area where the ballot papers had been kept, but surveillance footage showed that hotel staff had in fact entered the room. Moreover, during the period in question the chairman of the Northwest senior electoral commission had spent approximately half an hour in the room alone. The Preparatory Credentials Committee concluded that all the above amounted to a serious defect.

b. The recounting of votes after the public announcement of results had not been expressly regulated by law at the time of the elections. The Preparatory Credentials Committee concluded that in order to ensure that the will of voters was properly expressed, senior electoral commissions were authorised to perform such recounts when mistakes or inaccuracies came to their attention or when a legitimate demand for a recount was made.

c. The initial counting of votes and the recount had begun in the Northwest constituency without the candidates' agents knowing about this and without anyone being appointed to act in their stead. Also one of the agents had not been sufficiently notified of the recount and the recount had not been postponed pending his arrival, although he had requested to do so. The number of valid ballot papers had also changed between the initial count and the recount, and the senior electoral commission – contrary to what was legally required – had not secured the participation of the agents in ruling on the validity of ballots. The Preparatory Credentials Committee concluded that all the above were defects in the conduct of the elections.

d. The following were all found to have deviated from the applicable legislation: the procedures for verifying consistency between the ballots cast and the voting results; and the fact that ballots had not been mixed before counting and that counting had started before the polls had closed, in a room that had not been securely locked. In addition, the Preparatory Credentials Committee noted that a change in the

procedure for counting, which was in progress, went against good practice, but concluded that this could not be considered a defect in the conduct of the elections.

e. Lastly, the Preparatory Credentials Committee concluded that it was a significant defect that the minutes of the senior electoral commission had not recorded key events and decisions regarding the counting of votes.

25. In its report, the Preparatory Credentials Committee noted that previously the Supreme Court had used two standards for invalidating elections: (i) a "specific standard", requiring that a defect must in fact have had an effect on the outcome of elections; and (ii) a "general standard", requiring only that a defect was liable to have affected the outcome of elections. The Committee also mentioned scholarly opinion as regards the existence of a third standard, that is, the authorities' inability to establish that a defect had not affected the outcome of elections. The Committee further stated that the scarcity of jurisprudence and the case-by-case approach of the Supreme Court had meant that it was not possible to draw general conclusions on the standard to be applied, and that the choice between the first and second standards would have to depend on the nature of the alleged defects.

26. In assessing the established deficiencies, the Preparatory Credentials Committee concluded that the unsecured and unsupervised storage of the ballots between the first count and the recount was the most serious deficiency. The Committee was, however, divided as to the consequences of this defect. While certain committee members believed that this had not affected the results, others considered that this was a possibility. The report also stated that it had additionally been suggested that the inconsistencies between the first and second counts could be remedied by a third count. In conclusion, on this issue, the report stated that it would be for the Credentials Committee to formulate the relevant proposals. As to the other deficiencies identified, the Preparatory Credentials Committee concluded that they could not be held to have affected the election results.

IV. CONFIRMATION OF CREDENTIALS BY *ALTHINGI*

27. The report of 23 November 2021 was submitted to the nine-member Credentials Committee, which issued its recommendations on 25 November 2021 after holding three meetings. All nine members had previously sat on the Preparatory Credentials Committee.

28. The majority of the Credentials Committee (six members) endorsed the findings of the Preparatory Credentials Committee in an eight-page recommendation. They concluded that the unsecured and unsupervised storage of the ballots between the first count and the recount was not the kind of defect that called for the application of the "general standard", which required only that defects were liable to have affected election results. Having

analysed the facts and explanations provided by hotel staff and the chairman of the senior electoral commission, they further concluded that there was no indication that the ballots had in fact been tampered with, and that the different results between the first count and the recount could be the result of human error. Applying the "specific standard", the majority found that the defect in question had not affected the election results and recommended that *Althingi* should confirm the credentials of all sixty-three newly elected parliamentarians, in line with the results obtained following the recount.

29. The minority of the Credentials Committee also issued detailed recommendations concerning the relevant established facts as regards the storage of the ballots. One member concluded that the "specific standard" applied, but that in cases such as the present one, where it could not be proved that the defect had affected the election, the results had to be annulled if the defect was of a kind which was liable to have affected them. A second member of the committee concluded that the defect was of a kind that jeopardised trust in election results and should therefore lead to their annulment, without proof being required that it had actually had an effect. Both those members of the minority therefore recommended that the results of the election in the Northwest constituency should be annulled and that a re-election should take place in that constituency. A third member of the minority reasoned, *inter alia*, that owing to legislative uncertainties as regards how to conduct re-elections and legislative changes to the number of constituency seats in the Northwest and Southwest constituencies in the intervening period, a re-election would have to take place across the country. He recommended the annulment of the results across the country and a change to Article 46 of the Constitution, which allows *Althingi* itself to decide on the validity of election results (see paragraph 31 below).

30. On the same day, 25 November 2021, the recommendations of the Credentials Committee were presented at the first session of *Althingi* sitting as a full chamber. Each of the recommendations was presented separately and debated publicly and on record by the members of parliament, with the debates on all the recommendations lasting over five hours. The proposals by the minority of the Credentials Committee for a re-election across the country or in the Northwest constituency were rejected. Out of the nine members of parliament who had been allocated levelling seats, three voted in favour of the proposals and four abstained from the vote. Two members who had been allocated levelling seats, including the member who had been elected to a levelling seat in the Northwest constituency instead of the first applicant, voted against the proposals. All members of parliament who had received regular constituency seats in the Northwest constituency also voted against the proposal for a re-election in that constituency. As regards the Northwest constituency and all levelling seats, by forty-two votes to five, with sixteen abstentions (out of a total of sixty-three votes), *Althingi* voted in favour of the proposal by the majority of the Credentials Committee and confirmed the

credentials of the relevant members. Out of the nine members of parliament who had been allocated levelling seats, six abstained from the vote and two voted against the proposal. The member who had been elected to a levelling seat in the Northwest constituency instead of the first applicant voted in favour of the proposal. All members of parliament who had received regular constituency seats in the Northwest constituency also voted in favour of the proposal.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW

A. The Constitution of the Republic of Iceland

31. The relevant parts of the Constitution of the Republic of Iceland provide as follows:

Article 46

"*Althingi* decides itself whether its members are legally elected and also whether a member has lost eligibility for election to *Althingi.*"

Article 60

"Judges settle all disputes regarding the competence of the authorities. No one seeking a ruling thereon can, however, temporarily evade obeying an order from the authorities by submitting the matter for a judicial decision."

Article 70

"Everyone shall, for the determination of his rights and obligations or in the event of a criminal charge against him, be entitled, following a fair trial and within a reasonable time, to the resolution of an independent and impartial court of law ..."

B. The Act on Parliamentary Elections to *Althingi*

32. At the material time, elections to *Althingi* were regulated by Act no. 24/2000 on Parliamentary Elections to *Althingi*, the relevant parts of which provided as follows:

Chapter XXI. Complaints and charges concerning elections
Section 118

"If a voter brings a complaint alleging that a member who has been elected has failed to meet any of the requirements for standing as a candidate, or that a candidate list has unlawfully been put forward for election or elected, with the result that the election ought to be declared invalid, that person shall, within four weeks of the announcement of the election result, butbefore the next *Althingi* convenes, send the Ministry [of Justice] the complaint, in duplicate. The Ministry shall immediately send one copy to

the agent for the candidate list; the other shall be submitted to *Althingi* at the beginning of the parliamentary session."

Section 119

"Where they are not subject to a decision by local authorities, electoral commissions or *Althingi*, complaints arising from violations of this Act shall be directed to the appropriate police commissioners and shall be treated in accordance with the provisions on criminal procedure.

In no case may a voter who casts a vote in a general election be required to reveal in court for whom he or she voted."

Chapter XXII. Rulings by *Althingi* on the validity of elections
Section 120

"If *Althingi* receives a complaint to the effect that a newly-elected member has not met the requirements for standing for election, or has for other reasons unlawfully stood for election or been elected, it shall investigate the complaint and deliver a ruling on it, in addition to which it shall investigate the election certificates of all newly elected members and the material regarding their election that it has received from the National Electoral Commission and the senior electoral commission and it shall deliver a ruling on the validity of the election in the manner prescribed in further detail in its standing orders.

If a member has not met the requirements for standing for election, *Althingi* shall rule that his or her election was invalid.

If there have been flaws in a member's candidature or election that may be considered likely to have had an effect on the outcome of the election, *Althingi* shall rule that the member's election was invalid; it shall also do so without the preceding condition if the member himself or herself, his or her agents, or his or her sponsors deliberately caused the irregularities, providing that these were substantial. If the irregularities apply to the candidate list as a whole, the same as otherwise applies to an individual member shall apply to all members elected from that list.

If, in the same general election, a member has stood for election on two candidate lists in a constituency or constituencies, *Althingi* shall rule that his or her election was invalid."

Section 121

"If *Althingi* rules the election of an entire candidate list in a constituency invalid, a repeat election shall be held there."

C. The Standing Orders of *Althingi*

33. The Standing Orders of *Althingi* (the rules of procedure) is a statutory instrument enacted by Act no. 55/1991. The relevant parts in force at the material time stated as follows:

Article 1

"...

2. At the first sitting of *Althingi* following general parliamentary elections, nine members shall be elected to a committee, in accordance with the provisions of Article 82, in order to verify the election credentials of newly elected members and alternate members and confirm their lawful election ... The committee shall elect a chairman and a rapporteur and return a recommendation to *Althingi* as to whether the election and eligibility of each member should be accepted as lawful. The recommendations may be submitted orally without prior notice, and they may be put to the vote collectively.

3. When election credentials have been issued following parliamentary elections, and prior to the opening sitting of *Althingi*, the acting Speaker ... may appoint a committee composed of nine members for the purpose of preparing the scrutiny of the election credentials that will take place at the opening sitting in accordance with paragraph 2. The choice of members of the committee shall follow the proportion rule of Article 82. Parliamentary groups that are not represented in the committee may nominate an observer.

4. A debate on recommendations pursuant to paragraph 2 shall be subject to the same rules as the second readings of legislative bills.

..."

Article 2

"1. Each new member shall render the following pledge of loyalty to the Constitution as soon as it has been attested that the member has been duly elected in accordance with Article 47 of the Constitution: I, the undersigned, having being elected as a member of *Althingi*, do pledge on my honour and integrity to respect the Icelandic Constitution.

2. Subject to the provisions of paragraph 5 of Article 5, while a member has not rendered a pledge pursuant to this Article, the member shall not participate in the proceedings of *Althingi*."

Article 4

"1. The Credentials Committee elected under Article 1 shall also scrutinise such election credentials as may be presented later and verify the lawfulness of the elections and eligibility of members on which a decision has been deferred by *Althingi*, and any complaints that may arise concerning the election or eligibility of members who have already been accepted by *Althingi*.

2. Should this committee return a written recommendation or move to declare an election invalid, its recommendations shall be debated in accordance with the rules on the second readings of legislative bills. Otherwise, committee recommendations are dealt with in accordance with the rules on such recommendations in Article 1 ..."

Article 5

"1. In the course of scrutiny pursuant to Article 1, *Althingi* may declare a member's election unlawful even when no complaints have been lodged, and it may also defer the acceptance of an election in order to receive reports on the matter. The same applies in relation to the election of a member who is not present or whose election credentials have not been received at the time of the first sitting of *Althingi*.

2. The same rules apply to questions of eligibility.

3. *Althingi* will not otherwise investigate the lawfulness of elections or the eligibility of members on its own initiative, and will do so only if a complaint is lodged.

4. A complaint concerning a member's election or eligibility shall be recognised only if it is lodged at the outset of a session following a general election or before a member's election has been accepted by *Althingi*.

5. During the scrutiny of members' elections and eligibility, every member shall enjoy full parliamentary privileges. However, if *Althingi* votes to defer its decision on a member's election credentials, that member shall not participate in the proceedings of *Althingi* until a decision has been reached in the matter and the member's election and eligibility have been accepted."

Article 82

"1. Elections in *Althingi* shall proceed as provided for in paragraph 2 of Article 3, with the addition that when elections involve two or more candidates, whether for duties inside or outside *Althingi*, the Speaker shall employ a method of proportional voting known as the d'Hondt system (the list system). The method is described in paragraphs 2-4 ...

2. Members who have mutually agreed to vote for the same candidates in the same order shall submit to the Speaker, at the time of the election, a list of their candidates, in that order. When the Speaker has received these lists, each shall be marked with a letter of the alphabet ... [Subsequently, the members of parliament vote on the lists and a record of the votes for each list is made.] The number [of votes] thus achieved by each list is then divided, first by 1, then by 2, then by 3, and so on, as needed [giving the quotient received by each list] ...

3. Results of elections are decided according to quotients, with the list receiving the highest quotient being awarded the first candidate, the list receiving the second highest quotient being awarded the second candidate, and so on, until the required number of candidates has been elected. If two or more lists receive the same quotient, lots are drawn to determine from which list a candidate should be chosen.

4. Candidates on each list shall be elected in the order in which they appear on the list."

D. The Procedural Rules of the Preparatory Credentials Committee

34. The Preparatory Credentials Committee appointed after the elections in 2021 adopted its procedural rules on 8 October 2021, which were endorsed by the Speaker of *Althingi* on 12 October 2021. The rules laid down the basic rules and principles for the committee's functioning, powers and inquiry procedures. The rules stated in particular that the role of the committee was to prepare the material for *Althingi*'s examination of election credentials (Article 1) on the basis of an objective and legal assessment (Article 6). The information was to be in principle collected in writing (Article 2), made available to the members of parliament in time to inform their individual decision-making, and published, unless the applicable rules provided otherwise (Article 5). Complaints were to be examined in accordance with the principles of Administrative Procedures Act no. 37/1993 and the general principles of administrative law, in so far as applicable, and complainants

were to be provided with a reasonable opportunity to clarify their position and object to the data gathered (Article 3). Proposals concerning the legality of elections were to be submitted to the Credentials Committee, which was not bound by them in the exercise of its constitutional duties (Articles 1 and 6).

E. Jurisprudence of the Icelandic Supreme Court

35. The Icelandic Supreme Court has never ruled on the legitimacy of elections to *Althingi*. However, in its decision of 25 July 2012 regarding the 2012 presidential elections it considered that the principle underlying section 120(3) of the Act on Parliamentary Elections was the general principle of electoral law in Iceland and stated the following:

> "Section 120(3) of Act no. 24/2000, cf. also section 94 of Act no. 5/1998 on Local Government Elections, lays down the principle in Icelandic law that general elections should only be declared invalid if they have such defects that may be considered likely to have had an effect on the outcome of the election. An exception to this principle is made by the first mentioned legal provision providing that parliamentary elections shall be invalidated if a member of parliament, his agents or sponsors are found to have deliberately caused the irregularities, and provided they are significant. Act no. 36/1945 does not prescribe when defects in presidential elections should result in their invalidation. Although there is no substantive reference there to section 120(3) of Act no. 24/2000, the same rules must apply, given the nature of the matter, when ruling on the validity of presidential elections and parliamentary elections, since in both cases these are general elections held throughout the country. Accordingly, the above-mentioned flaws in the presidential election on 30 June 2012 should not lead to its invalidation, as they were completely unrelated to the candidate who received the most votes, his agents and supporters, and obviously had no effect on the outcome of the election."

36. In its decision of 25 January 2011, the Supreme Court found that several defects had tainted elections to the Constitutional Assembly which had been conducted in part with reference to the rules of the Act on Parliamentary Elections, and it invalidated the election results. The Supreme Court, *inter alia*, stated the following:

> "Act no. 24/2000 is based on the main perspective of transparency as regards the counting of votes. In this connection, it is to be noted that it is not sufficient that the results of the count are correct if it cannot be trusted that counting was conducted in such a manner ... There are examples from judicial practice where elections have been invalidated when their conduct was not in accordance with legislation and liable to breach the secrecy of elections ... The ... defects in the conduct of the election to the Constitutional Assembly on 27 November 2012 will be taken as a whole in the assessment of the case, and the Supreme Court concludes that on account of those defects the annulment [of the election] is inevitable."

II. INTERNATIONAL INSTRUMENTS

37. The relevant international instruments were previously reproduced in the Grand Chamber judgment in *Mugemangango* (cited above, §§ 32-39).

THE LAW

I. JOINDER OF THE APPLICATIONS

38. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

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

39. The applicants complained that the irregularities in the counting procedures during the parliamentary elections and the lack of an effective examination of their post-election complaints had violated their rights under Article 3 of Protocol No. 1, 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

40. In their submissions, the Government raised a non-exhaustion plea, arguing that while Article 46 of the Constitution provided that *Althingi* itself decided on the legality of the elections of its members, this provision should be interpreted in conjunction with Article 70 of the Constitution, which provided for a general judicial remedy and access to a court. The Government submitted that *Althingi*'s decisions on the legality of elections could be considered to be comparable to acts of public administration, and that Articles 60 and 70 of the Constitution opened up the way for judicial review. In the Government's opinion, any restrictions on access to a court should be construed narrowly, and in the absence of any such restriction in Article 46, the applicants had had at their disposal a judicial remedy to be exhausted. Since the Icelandic courts had never ruled on the matter or been asked to do so, in their submissions, the Government relied on the interpretation of domestic constitutional and statutory provisions, as well as scholarly opinions on this matter.

41. The applicants disagreed with the Government's contention and argued that Article 46 of the Constitution unequivocally stated that *Althingi* itself had the final say on electoral disputes, that there was a need for a clear legal basis confirming the applicability of Article 70 of the Constitution to

disputes following parliamentary elections, and that nothing in the legislation in force or in practice indicated the existence of such a remedy. They further stated that in their opinion, *Althingi*'s rulings on the legality of elections could not be compared to administrative acts, and that nothing in the proceedings in which their complaints had been examined had demonstrated that judicial review was available. In their submissions, they relied on the interpretation of domestic constitutional and statutory provisions, opinions expressed by parliamentarians in relation to the post-election complaints, provisions of the Danish Constitution and the Norwegian Constitution, and scholarly opinions on the matter. Lastly, they submitted that the Government, by indicating a mere hypothetical possibility of judicial review, had failed to discharge their burden of proof as regards the existence of the alleged remedy in theory and in practice.

42. The Court is mindful that Article 3 of Protocol No. 1 does not only impose on the State a substantive positive obligation to hold free elections, but also entails a procedural positive obligation to put in place a domestic system for the effective examination of individual complaints and appeals in matters concerning electoral rights, and this system must be secured with procedural safeguards (see paragraphs 58-59 below). An assessment of the effectiveness of that system forms an integral part of the assessment of the merits of any complaint raised under the above Convention provision. Accordingly, at the present stage, the Court will limit its scrutiny exclusively to the plea of non-exhaustion of domestic remedies, owing to the applicants' alleged failure to bring their grievances before the domestic courts.

43. Turning to the issue at hand, it must be stressed at the outset that the effective domestic remedies should be available in theory and in practice at the relevant time and offer reasonable prospects of success (see *Akdivar and Others v. Turkey*, no. 21893/93, § 68, 16 September 1996). It is well established that the rule of exhaustion of domestic remedies is neither absolute nor capable of being applied automatically; in reviewing whether the rule has been observed, it is essential to have regard to the particular circumstances of the individual case, which means, amongst other things, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned, but also of the general legal and political context in which they operate, as well as the personal circumstances of the applicants (see *Kurić and Others v. Slovenia* [GC], no. 26828/06, § 286, ECHR 2012 (extracts)).

44. In proceedings before the Court, it is incumbent on the Government claiming non-exhaustion to demonstrate the existence and availability of remedies. The availability of a remedy said to exist, including its scope and application, must be clearly set out and confirmed or complemented by practice or case-law, which must in principle be well established and date back to the period before the application was lodged, subject to exceptions which may be justified by the particular circumstances of the case (see

Gherghina v. Romania (dec.) [GC], no. 42219/07, § 88, 9 July 2015, with further references). Once this burden has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact used, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances exempting him or her from this requirement (see *McFarlane v. Ireland* [GC], no. 31333/06, §§ 117 and 120, 10 September 2010, and *Akdivar and Others*, §§ 68 and 96, cited above).

45. It is clear from the text of the Constitution and the parties' submissions in the present case that Article 46 of the Constitution expressly provides for *Althingi* having the power to rule itself on the legality of the elections of its members. While the provisions of Article 70 of the Constitution do provide for a general judicial remedy and access to a court, no provision of the Constitution deals with the interplay of that right with the special rule stipulated in Article 46. The Court further notes that in civil cases the conditions for access to court are set out in detail in the Code of Civil Procedure no. 91/1991. The Government, however, did not submit any explanations on the conditions, modalities and time-limits for the lodging and resolution of the applicants' complaints under that Code.

46. The parties agree that, unlike in *Mugemangango v. Belgium* ([GC] no. 310/15, § 26, 10 July 2020), the Icelandic courts have never ruled or been asked to rule on their jurisdiction to consider disputes following parliamentary elections where *Althingi* has issued a ruling under Article 46 of the Constitution.

47. Lastly, in their submissions, both the Government and the applicants referred to various academic commentaries in the area of constitutional and administrative law to substantiate their opinions on the existence of a judicial remedy. It appears that according to these writings the traditional doctrine is that there is no access to court for individuals wishing to challenge *Althingi*'s ruling on whether its members are legally elected. Without casting any doubt on the repute of the authors referred to, the Court notes that the different positions taken by the scholars are, by their nature, interpretations that are not binding on the authorities in any way.

48. It is not the Court's role to rule in the abstract on whether a judicial remedy exists in Iceland in respect of electoral disputes and rulings by *Althingi* under Article 46 of the Constitution on the lawfulness of the election of members of parliament. In the present case, having raised the non-exhaustion plea, the Government have been unable to substantiate their position with reference to consistent case-law in cases similar to the applicants' (see, similarly, *Mikolajová v. Slovakia*, no. 4479/03, § 34, 18 January 2011). While the Court is, in principle, ready to accept that this may be more difficult in smaller jurisdictions, such as in the present case, where the number of cases of a specific kind may be fewer than in larger jurisdictions (see *M.N. and Others v. San Marino*, no. 28005/12, § 81,

7 July 2015), it notes that the provisions of Article 46 of the Constitution in substance date back to earlier constitutional provisions adopted in 1874 and 1915. The current Constitution has been in force since 1944 and despite regular elections and recurrent election disputes, no such case has ever been brought before the Icelandic Supreme Court or examined by it. Further, the Government have not provided either a reasonable explanation for the absence of case-law on *Althingi's* decisions concerning election of members of parliament (compare *Gherghina*, cited above, §§ 100-106) or any relevant case-law on challenges to similar *Althingi's* decisions in other fields (see *Ádám and Others v. Romania*, nos. 81114/17 and 5 others, §§ 49-50, 13 October 2020). Therefore, at the present moment the existence of the alleged remedy remains theoretical and abstract (compare *McFarlane*, cited above, §§ 117-120). Under these circumstances, the Court finds it unreasonable to expect that the applicants must have attempted to exhaust the remedy relied on by the Government.

49. Accordingly, in the Court's opinion, the Government in the present case have not discharged their burden of proof in relation to the plea of non-exhaustion of a domestic judicial remedy, and have not conclusively demonstrated that such a remedy existed at the material time and was available to the applicant (see *Mocanu and Others v. Romania* [GC], nos. 10865/09 and 2 others, § 225, ECHR 2014 (extracts)). Therefore, their plea of non-exhaustion must be dismissed.

50. The Court is further satisfied that the applicants' complaint are not manifestly ill-founded, nor are they inadmissible on any other grounds listed in Article 35 of the Convention. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

51. The applicants submitted that their right under Article 3 of Protocol No. 1 to stand for election had been violated, on account of various irregularities surrounding the recount of votes in the Northwest constituency and the failure of the Icelandic authorities to effectively examine their complaints. In particular, they pointed out that there had been no sufficient legal basis for the recount, that there had been grave irregularities in the storage and handling of ballots, and that the agents of the parties concerned had had no effective opportunity to observe the recount. In the applicants' opinion, contrary to the assessment of the majority of the Credentials Committee and the vote of *Althingi*, the irregularities which had been identified had jeopardised the reliability of the outcome of the elections and should have led to the election results being invalidated.

52. In respect of the procedure whereby their complaints had been examined, they argued that the Preparatory Credentials Committee was ill-equipped to inquire into such complaints and had not adopted its rules of

procedure until after they had filed their post-election complaint. They also argued that they had not had sufficient opportunity to effectively participate in the procedure, access all the material and present their position and objections to the Committee and the full chamber of *Althingi*. They further maintained that the same nine members of parliament had sat on both the Preparatory Credentials Committee and the Credentials Committee, and that just like all other members of parliament, they had lacked the requisite impartiality in considering the complaints. In the applicants' opinion, members of *Althingi* decided their own fate, and voting in the full chamber largely followed party lines. The fact that such a decision could be taken by a simple majority also raised concerns about it possibly being politically motivated. They contended that nothing had limited *Althingi*'s authority and discretion in the decision-making process relating to the complaints, and that the procedure before the full chamber had been quick and obscure.

53. In the applicants' opinion, all of the above factors undermined public confidence in free elections, cast doubt on the election results and led to a violation of Article 3 of Protocol No. 1.

54. In their submissions, the Government maintained that following the applicants' complaints at national level, the Preparatory Credentials Committee had conducted an extensive and comprehensive inquiry. They claimed that the information and documents which had been collected were available and generally accessible on *Althingi*'s website. The inquiry and the decision-making process had been duly regulated and fair and had allowed for the complainants' effective participation. Although the inquiry had identified irregularities in the handling of ballots between the first and the second counts, the majority of the Credentials Committee had concluded that these flaws had not been likely to have had an effect on the results of the elections. In the Government's opinion, the irregularities had been neither exceptionally widespread nor serious enough to have had an impact on the election results.

55. In the Government's opinion, the proceedings before the Preparatory Credentials Committee had been sufficiently regulated by the applicable legal rules and the general principles of administrative law, as they had afforded the applicants an opportunity to effectively participate in the proceedings and present their opinions and objections orally and in writing. The inquiry of the Preparatory Credentials Committee had been detailed and exhaustive and had taken account of all the complaints and objections raised in connection with the elections. Members of parliament had had continuous access to all the available material used in the inquiry and had therefore been well aware of the facts and reasons underlying the report of the Preparatory Credentials Committee and the proposals of the Credentials Committee. This had allowed the full chamber to make an informed decision. The applicants had had full access to all the material used in the inquiry, except for the material from the closed hearings and material which was otherwise protected by

confidentiality rules. The Government maintained that it had not been necessary to provide the applicants with a further opportunity to present their views to the Credentials Committee and the full chamber, since their position had already been well reflected in the report. They considered that the voting outcomes had clearly demonstrated the absence of bias, since even if none of the members elected in the Northwest constituency or to a levelling seat had voted, the proposal of the majority of the Credentials Committee would still have passed.

56. Overall, the Government's submissions indicated that the applicants' complaints had been appropriately examined at domestic level in an effective procedure, and that the alleged irregularities in the elections had been identified, examined and assessed as having had no impact on the outcome of the elections. Accordingly, in their opinion, there had been no violation of Article 3 of Protocol No. 1.

2. The Court's assessment

(a) General principles under Article 3 of Protocol No. 1

57. Democracy constitutes a fundamental element of the "European public order". The rights guaranteed under Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law and are accordingly of prime importance in the Convention system (see, among other authorities, *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, § 47, Series A no. 113; *Ždanoka v. Latvia* [GC], no. 58278/00, §§ 98 and 103, ECHR 2006-IV; *Sitaropoulos and Giakoumopoulos v. Greece* [GC], no. 42202/07, § 63, ECHR 2012; and *Karácsony and Others v. Hungary* [GC], nos. 42461/13 and 44357/13, § 141, 17 May 2016).

58. Article 3 of Protocol No. 1 does not lay down an obligation of abstention or non-interference, as with the majority of civil and political rights, but one of adoption by the State, as the ultimate guarantor of pluralism, of positive measures to "hold" democratic elections to the legislature (see *Mathieu-Mohin and Clerfayt*, cited above, § 50). As regards the method of appointing the "legislature", Article 3 of Protocol No. 1 provides only for "free" elections "at reasonable intervals", "by secret ballot" and "under conditions which will ensure the free expression of the opinion of the people". Subject to that, it does not create any "obligation to introduce a specific system" (ibid., § 54).

59. Article 3 of Protocol No. 1 contains certain positive obligations of a procedural character, in particular requiring the existence of a domestic system for the effective examination of individual complaints and appeals in matters concerning electoral rights (see *Namat Aliyev v. Azerbaijan*, no. 18705/06, §§ 81 et seq., 8 April 2010, and *Davydov and Others v. Russia*, no. 75947/11, § 274, 30 May 2017). The existence of such a system is one of

the essential guarantees of free and fair elections and is an important safeguard against arbitrariness in the electoral process (see *Petkov and Others v. Bulgaria*, nos. 77568/01 and 2 others, § 63, 11 June 2009). Such a system ensures the effective exercise of the rights to vote and to stand for election, maintains general confidence in the State's administration of the electoral process and constitutes an important device at the State's disposal in achieving the fulfilment of its positive duty under Article 3 of Protocol No. 1 to hold democratic elections. Indeed, the State's solemn undertaking under Article 3 of Protocol No. 1 and the individual rights guaranteed by that provision would be illusory if, throughout the electoral process, specific instances indicative of failure to ensure democratic elections were not open to challenge by individuals before a competent domestic body capable of effectively dealing with the matter (see *Namat Aliyev*, § 81, and *Davydov and Others*, § 274, both cited above).

60. The applicable test for the examination of complaints under Article 3 of Protocol No. 1 has recently been elucidated by the Grand Chamber of the Court in *Mugemangango* (cited above, §§ 80-121). Firstly, the Court must satisfy itself that the applicants' allegations were serious and arguable, and secondly, it has to be ascertained whether the examination of the applicants' allegations was effective. In assessing the effectiveness of such an examination, the following three factors have to be scrutinised in respect of decision-making: (a) the decisions in question must be taken by a body which can provide sufficient guarantees of its impartiality; (b) the discretion enjoyed by the body concerned must not be excessive and must be circumscribed with sufficient precision by the provisions of domestic law; and (c) the procedure must be fair and objective and guarantee a sufficiently reasoned decision.

61. In accordance with the subsidiarity principle, in the above assessment, the Court does not take the place of the national authorities in interpreting domestic law, establishing or assessing the facts and determining whether the alleged irregularities took place and whether they were capable of influencing the outcome of the elections (see *Namat Aliyev*, § 77, and *Davydov and Others*, § 276, both cited above). However, it is for the Court to determine whether the requirements of Article 3 of Protocol No. 1 have been observed and whether the respondent State has complied with its obligation to hold elections under free and fair conditions and has ensured that individual electoral rights were exercised effectively (see *I.Z. v. Greece*, no. 18997/91, Commission decision of 28 February 1994, Decisions and Reports 76-A, p. 65; *Babenko v. Ukraine* (dec.), no. 43476/98, 4 May 1999; and *Gahramanli and Others v. Azerbaijan*, no. 36503/11, § 72, 8 October 2015).

62. In its assessment, the Court is mindful that a mere mistake or irregularity in the electoral process would not, *per se*, signify the unfairness of elections if the general principles of equality, transparency, impartiality and independence in the organisation and management of elections were complied with (see *Davydov and Others*, cited above, § 287). The concept of

free elections would be put at risk only if there was evidence of procedural breaches that would be capable of thwarting the free expression of the opinion of the people, and where such complaints received no effective examination at domestic level (ibid., §§ 283-88). The Court is also mindful that there are numerous ways of organising and running electoral systems, and a wealth of differences in, *inter alia*, historical development, cultural diversity and political thought within Europe (see *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, § 61, ECHR 2005-IX; see also *Ždanoka*, § 103, and *Sitaropoulos and Giakoumopoulos*, § 66, both cited above). While the margin of appreciation in this area is wide, it is limited by the obligation to respect the fundamental principle of Article 3 of Protocol No. 1, namely "the free expression of the opinion of the people in the choice of the legislature" (see *Hirst*, cited above, § 61; *Tănase v. Moldova* [GC], no. 7/08, § 157, ECHR 2010; *Mathieu-Mohin and Clerfayt*, cited above, § 54; and *Podkolzina v. Latvia*, no. 46726/99, § 33, ECHR 2002-II).

(b) Principles established in the Court's case-law concerning parliamentary autonomy

63. The principles concerning parliamentary autonomy were outlined by the Court in *Karácsony and Others* (cited above, §§ 138-47), a case concerning disciplinary proceedings which was examined under Article 10 of the Convention. They may be summarised as follows. Parliament is a unique forum for debate in a democratic society, which is of fundamental importance (ibid., § 138). There is a close nexus between an effective political democracy and the effective operation of Parliament (ibid., § 141). The rules concerning the internal operation of Parliament are the exemplification of the well-established principle of the autonomy of Parliament. In accordance with this principle, Parliament is entitled, to the exclusion of other powers and within the limits of the constitutional framework, to regulate its own internal affairs, for example the composition of its bodies. This forms part of "the jurisdictional autonomy of Parliament" (ibid., § 142). In principle, the rules concerning the internal functioning of national parliaments, as an aspect of parliamentary autonomy, fall within the margin of appreciation of the Contracting States (ibid., § 143). Nevertheless, the breadth of the margin of appreciation to be afforded to the State in this sphere depends on a number of factors (ibid., § 144). As regards Article 10 of the Convention, the Court has noted that the discretion enjoyed by the national authorities is not unfettered, but should be compatible with the concepts of "effective political democracy" and "the rule of law" to which the Preamble to the Convention refers (ibid., § 147). When assessing the weight to be attached to parliamentary autonomy, the Court will also take into account whether or not the issue before it concerns the approval of election credentials before Parliament has been lawfully constituted (see *Mugemangango*, cited above, §§ 89-92).

(c) Application of these principles in the present case

64. Having regard to the above general principles, the Court will now examine the merits of the applicants' complaints, relying on the applicable test to be used in the examination of complaints under Article 3 of Protocol No. 1 as elucidated in *Mugemangango* (cited above).

65. The distinguishing characteristic of the present case is that there was no disagreement between the parties that the 2021 parliamentary elections in the Northwest constituency had been marked by certain irregularities, and this was confirmed by the domestic authorities. The points of disagreement between the parties were whether these irregularities were of a kind that required the annulment of the election results in that constituency, and whether the applicants' complaints had been examined effectively at domestic level. In this regard, the Court reiterates that the concept of free elections would be put at risk only if there was evidence of procedural breaches in the electoral process that would be capable of thwarting the free expression of the opinion of the people, and where such complaints received no effective examination at domestic level (see paragraph 62 above and *Mugemangango*, cited above, § 78).

(i) Whether the applicants' allegations were serious and arguable

66. The Court stresses that what is at stake in the present case is not the applicants' right to win the election in their constituency, but their right to stand freely and effectively for it. The applicants were entitled under Article 3 of Protocol No. 1 to stand for election in fair and democratic conditions, regardless of whether ultimately they qualified for a seat in *Althingi* (see *Namat Aliyev*, cited above, § 75). The Court, further, reiterates that it is not it's task to assume a fact-finding role by attempting to determine whether the irregularities alleged by the applicants took place and whether they were capable of influencing the outcome of the elections (see *Mugemangango*, cited above, § 78-81). A failure to ensure the effective examination of serious and arguable claims concerning election irregularities would constitute a violation of individuals' right to free elections guaranteed under Article 3 of Protocol No. 1 to the Convention be in its active or passive aspects (see *Davydov and Others*, cited above, §§ 289 and 335).

67. The Court observes that according to the initial vote count on 26 September 2021, the first applicant was elected to *Althingi* because the Liberal Reform Party received 1,072 votes, which was not sufficient for a constituency seat in the Northwest constituency, but meant that the applicant qualified for a nationally distributed levelling seat (see paragraph 12 above). The subsequent recount in the Northwest constituency resulted in the applicant's party receiving 1,063 votes (nine votes less than in the first count) and therefore in his loss of the levelling seat (see paragraphs 13-14 above). In his complaint to *Althingi* lodged after the election, he relied on (a) the

absence of a legal basis for the recount; (b) the improper storage and handling of the ballots between the initial count and the recount; (c) the failure of the senior electoral commission to inform the parties' agents about the recount, thereby depriving them of the opportunity to observe it; and (d) inconsistent and unexplained changes in the number of votes cast for each party and in the number of blank and invalid ballots, after the recount (see paragraphs 15-16 above).

68. Turning to the second applicant, the Court observes that according to the initial vote count on 26 September 2021, he was not elected to *Althingi* because the Pirate Party received 1,082 votes, which was not sufficient for a constituency seat in the Northwest constituency (see paragraph 12 above). Furthermore, it was not argued that he had qualified for a levelling seat. After the recount the second applicant's party received one vote less than in the original tally and his situation remained unchanged (see paragraph 13 above). In his complaint to *Althingi* lodged after the election, he relied on the improper storage and handling of the ballots between the initial count and the recount, and on the failure of the senior electoral commission to inform him, as the agent for his party's list, about the recount (see paragraphs 15 and 17 above).

69. The above irregularities were subsequently examined, discussed and partly confirmed by the Preparatory Credentials Committee and the Credentials Committee (see paragraphs 23-24, 26 and 28 above). Despite the ultimate conclusion at national level that those defects had not influenced the outcome of the elections, their significance was not doubted by the parliamentary bodies examining the complaints and, on the contrary, were at the very core of their inquiry and analysis. In this regard, it must be observed that three members of the Credentials Committee recommended either partial or full re-elections (see paragraphs 28-29 above).

70. The Court finds no grounds to diverge from the national authorities' assessment of the seriousness of the applicants' allegations, and therefore finds them "serious and arguable".

(ii) Whether the examination of the applicants' allegations was effective

71. In order to determine whether the applicants' complaints received an effective examination, the Court must ascertain whether the relevant procedure provided for by domestic law afforded adequate and sufficient safeguards ensuring, in particular, that any arbitrariness could be avoided. Such safeguards serve to ensure the observance of the rule of law during the procedure for examining electoral disputes, and hence the integrity of the election, so that the legitimacy of Parliament is guaranteed and it can thus operate without the risk of any criticism of its composition. What is at stake is the preservation of the electorate's confidence in Parliament (see, *mutatis mutandis*, *Magyar Kétfarkú Kutya Párt v. Hungary* [GC], no. 201/17, § 99, 20 January 2020). In that regard, these safeguards ensure the proper

functioning of an effective political democracy and thus represent a preliminary step for any parliamentary autonomy.

72. Admittedly, the rules concerning the internal functioning of a parliament, including the membership of its bodies, as an aspect of parliamentary autonomy, in principle fall within the margin of appreciation of the Contracting States (see *Karácsony and Others*, cited above, §§ 138-147). The discretion enjoyed by the national authorities should nevertheless be compatible with the concepts of "effective political democracy" and "the rule of law" to which the Preamble to the Convention refers (ibid.). It follows that parliamentary autonomy can only be validly exercised in accordance with the rule of law.

73. The present case involves a post-election dispute essentially challenging the lawfulness and legitimacy of the composition of the newly elected Parliament, in so far as it concerned the allocation of the disputed levelling seat and, by inference, several other levelling seats, as well as the procedure for the recount of votes and handling of the ballots. As such, it differs from disputes that may arise after the valid election of a candidate, that is to say, in respect of a full member of parliament at a time when the composition of the legislature has been approved in accordance with the procedure in force in the national system concerned (see, for example, *Kart v. Turkey* [GC], no. 8917/05, ECHR 2009; *Berlusconi v. Italy* (dec.) [GC], no. 58428/13, 27 November 2018; and *G.K. v. Belgium*, no. 58302/10, 21 May 2019).

74. When deciding on the weight to be attached to parliamentary autonomy when examining the applicants' complaints under Article 3 of Protocol No. 1, the Court considers it critical to stress that at the time the Preparatory Credentials Committee conducted its inquiry, the Credentials Committee issued recommendations and the full chamber of *Althingi* voted on them, all those bodies were composed of newly elected members of parliament whose credentials had not been approved and who had not pledged loyalty to the Constitution (see paragraphs 9-10 and paragraph 33 above). Thus *Althingi* – as fully functioning parliament – had yet to be constituted.

75. At the material time new parliamentarians who had yet to become fully-fledged members of parliament were arguably deciding on their own fate. The outcome of the vote on the proposals by the majority and the minority of the Credentials Committee directly implicated either members of parliament who had been allocated levelling seats nationwide and all members who had been elected in the Northwest constituency, or all newly elected members (see paragraphs 28-29 above for the various proposals).

76. The Court notes the range of the recommendations made by the Credentials Committee. The proposals targeted either no newly elected parliamentarians or those who had been elected in one constituency and all members who had received levelling seats, or all parliamentarians who had been elected in all constituencies. As a preliminary matter, the Court further

observes that at the material time Icelandic law contained constitutional and legislative provisions regulating the examination of post-election complaints (see paragraphs 31-35 above). However, these provisions were largely shaped in a general manner and, in the absence of any developed guidance or judicial or customary practice, allowed for diverging interpretations and left their actual implementation to be dealt with by means of *ad hoc* decision-making.

77. The Court will now proceed to examine (α) the guarantees of impartiality provided by the decision-making body; (β) the extent and definition in law of its discretion; and (γ) whether the procedure was fair and objective and guaranteed a sufficiently reasoned decision.

(α) Guarantees of the impartiality of the decision-making body

78. First of all, the bodies responsible for examining the applicants' complaints should have provided sufficient guarantees of their impartiality (see *Podkolzina*, cited above, § 35; *Kovach v. Ukraine*, no. 39424/02, § 54, ECHR 2008; and *Riza and Others v. Bulgaria*, nos. 48555/10 and 48377/10, § 143, 13 October 2015).

79. In cases examined under Article 6 § 1 of the Convention where the impartiality of the judiciary has been challenged, the Court has held that any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. It has pointed out that even appearances may be of a certain importance in this regard (see *Micallef v. Malta* [GC], no. 17056/06, § 98, ECHR 2009; *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 149, 6 November 2018; and *Denisov v. Ukraine* [GC], no. 76639/11, § 63, 25 September 2018).

80. While the Court has consistently held that electoral disputes do not fall within the scope of Article 6 of the Convention, in view of the fact that Article 3 of Protocol No. 1 seeks to strengthen citizens' confidence in Parliament by guaranteeing its democratic legitimacy, it must be considered that certain requirements also flow from that Article in terms of the impartiality of the body determining electoral disputes and the importance that appearances may have in this regard (see *Mugemangango*, cited above, § 96).

81. In the context of the right to free elections secured by Article 3 of Protocol No. 1, the requisite guarantees of impartiality are intended to ensure that the decision taken is based solely on factual and legal considerations, and not political ones. The examination of a complaint about election results must not become a forum for political struggle between different parties (see, *mutatis mutandis*, *Georgian Labour Party v. Georgia*, no. 9103/04, § 108, ECHR 2008).

82. In this connection, the Court has held that members of parliament cannot be "politically neutral" by definition (see *Ždanoka*, cited above, § 117). It follows that in situations such as the one in the present case, where Parliament itself decides on the legitimacy of the election of its members and

no subsequent review by an independent body takes place, particular attention must be paid to the guarantees of impartiality laid down in domestic law as regards the procedure for examining challenges to election results.

83. Turning to the case at hand, the Court observes that the inquiry into the applicants' complaints, the examination of the complaints and the formulating of recommendations to the full chamber of *Althingi* were entrusted to the Preparatory Credentials Committee and the Credentials Committee, which were composed of the same nine members and two observers. In contrast to *Mugemangango* (cited above, §§ 103-104), the members of the committees were not chosen by the drawing of lots in a process which did not necessarily reflect the representation of political groups, but were elected by new members of parliament in accordance with the procedure established under Articles 1 and 82 of the Standing Orders of *Althingi*, which specifically ensured that the larger political groups had representatives and that the smallest political groups (which did not have members in the committees) had observer status (see paragraph 33 above). None of the committee members had been elected from the Northwest constituency or had received a nationally distributed levelling seat. At the same time, the Court notes that the election credentials of the members of the committees had not yet been confirmed at the time of the inquiry, and that the Preparatory Credentials Committee was convened by the Acting Speaker of *Althingi* (see paragraphs 9-10 and 33). The Court further observes that at the material time there existed no applicable provision of law or clear stipulation in the Rules of Procedure adopted by the Preparatory Credentials Committee that provided for the withdrawal of committee members in the event of conflicts of interest or on comparable grounds.

84. The credentials of all newly elected members, including those in the Northwest constituency, were confirmed by the vote of the full chamber of *Althingi*. Two members elected to levelling seats and all members elected to regular constituency seats in the Northwest constituency voted against the proposal for a re-election in that constituency. The proposal by the majority of the Credentials Committee to confirm the election credentials as regards the Northwest constituency and the levelling seats across the country was accepted by forty-two votes to five, with sixteen abstentions (out of a total of sixty-three votes). Out of the nine members of parliament who had been allocated levelling seats, six abstained from the vote and two voted against the proposal. One member, who had been elected to the levelling seat in the Northwest constituency instead of the first applicant, voted in favour of the proposal, as did all members of parliament who had received regular constituency seats in that constituency (see paragraph 30 above). The Court observes that at the material time no applicable rule provided for members of parliament to withdraw from the vote in the event of conflicts of interest or on comparable grounds, for example if they had been allocated a contested levelling seat or had been elected in the disputed constituency.

85. In this connection, it is critical to highlight that should the members of parliament have voted for any recommendation other than that put forward by the majority of the Credentials Committee, to confirm the credentials of all elected members, the seats of a significant number of parliamentarians would have been put in jeopardy. The number of parliamentarians affected and deciding on their own fate could have ranged from those who held levelling seats and all those who held seats in the Northwest constituency (if the recommendation by two members of the minority of the Credentials Committee had been followed), to all parliamentarians (if the recommendation by the third member of the minority had been followed). Therefore, it is clear that during the vote in the full chamber of *Althingi*, a significant number of members of parliament were directly affected and were essentially deciding on their own fate. Moreover, in terms of political competition between parliamentary parties, it has to be taken into account that following the recount and the redistribution of the levelling seats, the Liberal Reform Party lost its only representative in the Northwest constituency, and consequently its opponents strengthened their representation in that constituency.

86. The Court highlights that the absence of procedural rules preventing members of parliament from sitting on committees which inquire into post-election complaints and formulate proposals, as well as from voting in full chamber on those proposals when they are a complainant's direct political competitors in the same constituency or when the allocation of their seats depends on the ruling on a complaint, has the potential to create an impression of political bias and/or conflict of interest. This point was consistently raised by the applicants in their submissions to the Court. The Court has neither the intention nor the grounds to cast doubt on the credibility of the members of parliament's inquiry into the applicants' complaints or the objectivity of the Credentials Committee's proposals. The Court also cannot speculate as to whether any of the votes in the full chamber of *Althingi* were politically motivated. However, in the absence of specific procedural rules ensuring neutrality and the absence of conflicting interests, it would be artificial to maintain that no genuine concern could be expressed as regards the integrity of the vote, from the standpoint of appearances.

87. In the context of Article 6 of the Convention, the Court has previously emphasised that the importance of the appearance of impartiality lies in the fact that "justice must not only be done, it must also be seen to be done", and what is at stake is the confidence which the courts in a democratic society must inspire in the public (see *Micallef*, cited above, § 98, with further references). Following this logic, the Court found violations of Article 6 in cases concerning the presence in a deliberations room of a third party whose objectivity was not in dispute, because the public's increased sensitivity to the fair administration of justice justified the growing importance attached to appearances (see *Kress v. France* [GC], no. 39594/98, § 82, 7 June 2001).

88. Similarly, in the context of Article 3 of Protocol No. 1, appearances matter when it comes to the need to maintain public confidence in free and fair elections and to dissipate, as far as possible, fears of politically motivated decisions on post-election complaints. The standards developed and the recommendations issued by other European and international bodies, while admittedly non-binding and non-decisive, appear to be consistent in the approach that adequate institutional and procedural safeguards against political and partisan decisions and the availability of judicial review are primary instruments to achieve the above goals (see the relevant standards and opinions mentioned in *Mugemangango* (cited above, §§ 32-39, 99-101).

89. In the Court's opinion, the appearance of *Althingi*'s proceedings in relation to the applicants' complaints was capable of creating genuine impartiality concerns. At the heart of these concerns lies the fact that nothing in the regulatory framework prevented the new parliamentarians elected to the Northwest constituency seats and to the nationwide levelling seats from participating in the decision-making process relating to the applicants' complaints. Indeed, all the parliamentarians elected to the Northwest constituency seats and the candidate elected to a levelling seat instead of the first applicant voted to confirm the credentials, and consequently to dismiss the applicants' claims (see paragraph 30 above). If the applicants had succeeded in their complaints then the above parliamentarians would have faced a new round of elections in the constituency and a potential change in the voting results (see the recommendations of the minority of the Credentials Committee in paragraphs 28-29 above). Icelandic law, as it stood at the material time, neither required the withdrawal of parliamentarians who were directly concerned by the results of their vote nor prescribed any rules capable of countering the appearance of a possible lack of impartiality, such as a subsequent review of the relevant decision by an independent body.

90. In the absence of adequate institutional and procedural safeguards against political and partisan decisions by *Althingi*, and in the light of the apparent lack of recourse to an independent appeal procedure in the present case, the above impartiality concerns are irreconcilable with the requirements of Article 3 of Protocol No. 1.

91. The above conclusion, in principle, obviates the need for an assessment under the other two steps of the *Mugemangango* test. However, having regard to the nature of the present case, the Court finds it instructive to continue the examination of the remaining relevant issues.

(β) Discretion enjoyed by the decision-making body

92. The Court has previously held that the discretion enjoyed by a body taking decisions in electoral matters cannot be excessive; it must be circumscribed, with sufficient precision, by the provisions of domestic law. The applicable rules must be sufficiently certain and precise (see *Ždanoka*, cited above, § 108). The rule of law, as one of the fundamental principles of

a democratic society, entails a duty on the part of the State to put in place a regulatory framework for securing its obligations under the Convention in general and Article 3 of Protocol No. 1 in particular (see *Paunović and Milivojević v. Serbia*, no. 41683/06, § 61, 24 May 2016).

93. In the present case, the Act on Parliamentary Elections to *Althingi*, the Standing Orders of *Althingi* and the Procedural Rules of the Preparatory Credentials Committee provided for a procedure to deal with post-election complaints and the exercise of *Althingi*'s constitutional powers under Article 46 of the Constitution (see paragraphs 31-34 above). Specifically, (i) the Act on Parliamentary Elections provided for the complaint procedure and established grounds for the invalidation of election results and the consequences of any decision taken on the matter; (ii) the Standing Orders of *Althingi* established the decision-making mechanism and the distribution of powers between the Preparatory Credentials Committee, the Credentials Committee and the full chamber of *Althingi*, and prescribed the selection process for the committees as well as the relevant debating and voting procedures; and (iii) the Procedural Rules of the Preparatory Credentials Committee set out the principles and rules for an inquiry into the legality of elections and the validity of members' credentials. In sum, the regulatory framework existing at the material time created a decision-making mechanism by which the Preparatory Credentials Committee conducted a full inquiry into the complaints and prepared the relevant report, the Credentials Committee formulated proposals on the basis of that report, and the full chamber of *Althingi* debated and voted on the relevant proposals.

94. However, in this regard, the Court observes that at the time of the elections and the lodging of the applicants' complaints, the Act on Parliamentary Elections and the Standing Orders of *Althingi* provided only the most basic regulatory framework for the examination of post-electoral disputes. In addition, the Procedural Rules of the Preparatory Credentials Committee were adopted only after the applicants had lodged their complaints (see *Mugemangango*, cited above, §§ 112-13).

95. Substantively, section 120 of the Act on Parliamentary Elections in its third paragraph sets the criteria for decisions on electoral complaints and provided that if there were flaws in a member's candidature or election that "[might] be considered likely to have had an effect" ("*ætla má að hafi haft áhrif*") on the outcome of the election, *Althingi* should rule that the member's election was invalid (see paragraph 32 above). However, at the time of the elections there existed considerable uncertainty as to the meaning of this criterion and its consequences in practice (see paragraphs 35-36 above). This was reflected in the Preparatory Credentials Committee's inability to reach a conclusion on the standard to be applied and the different reasoning and recommendations of the majority and the minority of the Credentials Committee (see paragraphs 25-26 and 28-29 above). The applicable constitutional and legislative provisions on the criteria to be applied by

Althingi when deciding on the applicants' complaint therefore gave limited direction and allowed for diverging interpretations, leaving the realities of their implementation to *ad hoc* decision-making marked by unrestrained discretion.

96. Accordingly, at the material time the decision-making on complaints concerning parliamentary elections was regulated from both a procedural and substantive standpoint, as stages, actors, powers and assessment criteria were defined. However, the discretion of the full chamber of *Althingi* regarding the practical consequences of the defects identified was virtually unlimited.

97. Therefore, it must be concluded that the discretion enjoyed by *Althingi* when ruling on the applicants' complaints was not circumscribed with sufficient precision by provisions of domestic law.

(γ) Fair and objective procedure and reasoned decision

98. The Court has also held that the procedure in the area of electoral disputes must be fair and objective and guarantee a sufficiently reasoned decision (see *Podkolzina*, § 35, and *Davydov and Others*, § 275, both cited above).

99. In particular, complainants must have the opportunity to state their views and to put forward any arguments they consider relevant to the defence of their interests by means of a written procedure or, where appropriate, at a public hearing. In this way, their right to an adversarial procedure is safeguarded. In addition, it must be clear from the public statement of reasons by the relevant decision-making body that the complainants' arguments have been given a proper assessment and an appropriate response (see, to similar effect, *Babenko*; *Davydov and Others*, §§ 333-34; and *G.K. v. Belgium*, §§ 60-61, all cited above).

100. The general rules for lodging post-election complaints and the decision-making process in *Althingi* were prescribed at the material time by sections 118-120 of the Act on Parliamentary Elections and Articles 1, 4 and 5 of the Standing Orders of *Althingi*. None of the relevant legislative provisions regulated the powers of the Preparatory Credentials Committee for the purposes of its inquiry or provided complainants with procedural rights (see paragraphs 32-33 above).

101. The procedure for inquiries into the legality of elections and the examination of complaints was, however, regulated by the Procedural Rules of the Preparatory Credentials Committee adopted on 8 October 2021 (see paragraph 34 above). In particular, the Rules called for the objective and legal assessment of the available material and claims, ensured that the claimants had reasonable opportunity to clarify their position and object, and prescribed that the procedure should, in so far as applicable, be conducted in accordance with the administrative legislation in force and administrative law principles, and that all non-confidential information gathered by the Preparatory Credentials Committee should be made public.

102. While the Procedural Rules of the Preparatory Credentials Committee were admittedly adopted after the applicants lodged their complaints, they were *per se* accessible and foreseeable in their application (see, among other authorities, *De Tommaso v. Italy* [GC], no. 43395/09, §§ 106-09, 23 February 2017). In practice, the applicants had at their disposal a possibility to effectively participate in the procedure concerning their electoral complaint by providing factual and legal arguments in support of their position, appearing before the Preparatory Credentials Committee and making comments on the available inquiry material and draft statements of established facts. These safeguards were provided to them in the inquiry proceedings conducted by the Preparatory Credentials Committee, whose report served as the exclusive basis for the proposals by the Credentials Committee. In addition, both the Preparatory Credentials Committee and the members of the majority and the minority of the Credentials Committee gave reasons for their recommendations and proposals. The formulation of those recommendations and proposals and the subsequent debate in the full chamber of *Althingi* essentially equated to a decision-making body preparing alternative draft decisions and deliberating on them, which logically did not require further intervention by the complainants.

103. The vote on the credentials and the validity of the elections in *Althingi*'s full chamber was supported by the exhaustive inquiry material available to the members of parliament, the report of the Preparatory Credentials Committee addressing pertinent factual and legal considerations, detailed and reasoned alternative proposals by the Credentials Committee, and an extensive five-hour debate on each of the proposals. Except for confidential material, all of the above information was freely accessible and should have provided the complainants and the public in general with a sufficient understanding of the reasons behind *Althingi*'s decision.

104. Therefore, it must be concluded that the procedure for the examination of the applicants' complaints was fair and objective and guaranteed a sufficiently reasoned decision.

(δ) Conclusion

105. It follows from all the foregoing considerations that while the applicants' complaints were examined in a procedure which was fair and objective and guaranteed a sufficiently reasoned decision (see paragraph 104 above), the concerns about the impartiality of the decision-making body and the exercise of its discretion (see paragraphs 89 and 97 above) are irreconcilable with the requirements of Article 3 of Protocol No. 1. Accordingly, in the present case, the Icelandic authorities have not discharged their positive obligation of a procedural character to secure the effective examination of complaints in matters concerning electoral rights, as required by Article 3 of Protocol No. 1 (see *Mugemangango*, cited above, § 69).

106. There has therefore been a violation of that Article in respect of both applicants.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION READ IN CONJUNCTION WITH ARTICLE 3 OF PROTOCOL No. 1

107. The applicants complained that there was no effective remedy at national level for their complaints under Article 3 of Protocol No. 1 – a remedy as provided for in Article 13 of the Convention, which reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

108. Previously, in cases where a post-election dispute has not been examined by a judicial body at domestic level, the Court has conducted a separate assessment of the complaint under Article 13 of the Convention (see *Mugemangango*, cited above; *Grosaru v. Romania*, no. 78039/01, ECHR 2010, and *Paunović and Milivojević*, cited above). Since there was no examination by a judicial body in the present case, the Court sees no reason to depart from this approach and will examine separately the applicants' complaints under that Article.

109. These complaints are intrinsically linked to the complaints the Court has examined above under Article 3 of Protocol No. 1. Accordingly, they must be declared admissible.

A. The parties' submissions

110. The applicants submitted that no remedies had been available to them in respect of their complaints under Article 3 of Protocol No. 1, since they could not have reasonably initiated judicial proceedings capable of examination of their claims and offering them appropriate redress.

111. The Government reiterated their opinion that despite the provisions of Article 46 of the Constitution, the applicants should have brought their complaints before the domestic courts, challenging *Althingi*'s decision. They further repeated that Article 70 of the Constitution provided general access to a court and that any exception to this had to be construed narrowly, and that no such limitation stemmed from Article 46 of the Constitution.

B. The Court's assessment

112. While the scope of the obligation under Article 13 varies depending on the nature of an applicant's complaint, the remedy required by Article 13 must be "effective" in practice as well as in law (see, for example, *İlhan v. Turkey* [GC], no. 22277/93, § 97, ECHR 2000-VII, and *Khlaifia and*

Others v. Italy [GC], no. 16483/12, § 268, 15 December 2016). The "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the "authority" referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (see *Kudła v. Poland* [GC], no. 30210/96, § 157, ECHR 2000-XI, and *Khlaifia and Others*, cited above, § 268).

113. In *Mugemangango* (cited above, §§ 137-139, with further references) the Court reaffirmed that the "authority" referred to in Article 13 of the Convention did not necessarily have to be a judicial authority in the strict sense, and that in relation to disputes about election results and the distribution of seats, it was necessary and sufficient for the competent body to offer sufficient guarantees of its impartiality, for its discretion to be circumscribed with sufficient precision by the provisions of domestic law, and for the procedure to be fair and objective and guarantee a sufficiently reasoned decision. Furthermore, having regard to the subsidiarity principle and the diversity of the electoral systems existing in Europe, the Court reasoned that it was not its role to indicate what type of remedy should be provided for in the national legal order, while noting that a judicial or judicial-type remedy, whether at first instance or following a decision by a non-judicial body, was in principle such as to satisfy the requirements of Article 3 of Protocol No. 1.

114. The Court is mindful that unlike in *Mugemangango* (ibid.), the Icelandic courts have never examined or declined to examine post-election disputes concerning parliamentary elections. Although in the present case the Government claimed that an effective domestic judicial remedy existed, they failed to discharge their burden of proof as regards their submissions (see paragraphs 44-49 above).

115. Turning to the procedure before the Preparatory Credentials Committee, the Credentials Committee and the full chamber of *Althingi* in the circumstances of the present case, it has been established above that it lacked the requisite guarantees of impartiality and was marked by virtually unrestrained discretion (see paragraph 105 above), and therefore fell short of the requirements under Article 3 of Protocol No. 1.

116. The foregoing considerations are sufficient to enable the Court to conclude that in the circumstances of the present case, it has not been demonstrated that the applicants had at their disposal an effective domestic remedy satisfying the requirements of Article 13 of the Convention.

117. There has accordingly been a violation of Article 13 of the Convention in conjunction with Article 3 of Protocol No. 1.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

118. 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

119. The applicants claimed 20,000 euros (EUR) each in respect of non-pecuniary damage.

120. The Government claimed that the finding of a violation in this case should in itself constitute just satisfaction for any non-pecuniary damage sustained by the applicants, and that in any case the amounts claimed were excessive and should not exceed the awards in previous cases (with reference to *Mugemangango*, cited above, § 146).

121. The Court, acting on an equitable basis and having regard to the circumstances and the nature of the violations of the applicants' rights, awards them EUR 13,000 each in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

122. The applicants also claimed 858,390 Icelandic króna (ISK – approximately EUR 5,600) each for the costs and expenses incurred before the Court.

123. The Government considered that the claims in this regard were not excessive, but should nevertheless be dismissed, since the applicants had failed to produce any invoice or other document proving that the costs had actually been incurred.

124. It is firmly established in the Court's case-law that 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, and that any relevant claim should be backed up by supporting documents (see, among other authorities, *Merabishvili v. Georgia* [GC], no. 72508/13, §§ 370-373, 28 November 2017).

125. In the present case, the Court notes that the applicants' claims are not supported by any contract, invoice, receipt or other document which legally binds them to cover the amounts claimed. It should also be noted that the amount of ISK 858,390 was claimed by each applicant as a lump sum, with no indication of the specific services provided or a breakdown of expenses and working hours.

126. Having regard to the above considerations, the Court is unable to satisfy itself that the amounts claimed were either actually incurred or

reasonable as to quantum. Accordingly, the claim for costs and expenses for the proceedings before the Court must be rejected.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;

2. *Declares* the applicants' complaints under Article 3 of Protocol No. 1 and Article 13 of the Convention admissible;

3. *Holds* that there has been a violation of the applicants' rights under Article 3 of Protocol No. 1;

4. *Holds* that there has been a violation of the applicants' rights under Article 13 of the Convention in conjunction with Article 3 of Protocol No. 1;

5. *Holds*
   (a) that in respect of non-pecuniary damage, the respondent State is to pay each of the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 13,000 (thirteen thousand euros), plus any tax that may be chargeable, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicants' claims for just satisfaction.

Done in English, and notified in writing on 16 April 2024, 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 opinion of Judge Ktistakis is annexed to this judgment.

P.P.V.
M.B.

CONCURRING OPINION OF JUDGE KTISTAKIS

1. I agree with the finding of a violation of Article 3 of Protocol No. 1 and of Article 13 of the Convention. In this separate opinion I would like to focus on one aspect of the reasoning under Article 13, namely the effectiveness of the remedy.

2. In relation to Article 13 of the Convention, the judgment concludes that the applicant did not have an "effective remedy" in so far as the procedure before the Preparatory Credentials Committee, the Credentials Committee, and the full Chamber of *Althingi* "lacked the requisite guarantees of impartiality and was marked by virtually unrestrained discretion" (see paragraph 115 of the judgment). Unlike in the Grand Chamber judgment in the case of *Mugemangango v. Belgium* ([GC], no. 310/15, 10 July 2020), where the Court suggested that "a judicial or judicial-type remedy, whether at first instance or following a decision by a non-judicial body, [was] in principle such as to satisfy the requirements of Article 3 of Protocol No. 1" (ibid., § 139), my esteemed colleagues in the present judgment found that the above-mentioned conclusion was sufficient to find a violation of Article 13 (see paragraph 116 of the judgment), and they proceeded no further.

3. For my part, although I am attached to the principle of the subsidiarity of the Court's review, I would have preferred the Court to take a clear stand and to infer from Article 13 (in conjunction with Article 3 of Protocol No. 1) a proper obligation for the respondent State to amend its Constitution in such a way as to provide for a judicial (or quasi-judicial) remedy in respect of decisions taken by the Icelandic Parliament in electoral matters.

This is because, unlike the Belgian courts (see *Mugemangango*, §§ 26-27), "Icelandic courts have never examined or declined to examine post-election disputes concerning parliamentary elections" (see paragraph 114 of the judgment); no change in case-law is therefore expected, because there has never been any case-law: "no such case has ever been brought before the Icelandic Supreme Court or examined by it" (see paragraph 48 of the judgment).

Why has no one ever tried to bring such an appeal in the Supreme Court? Simply because the relevant constitutional provision, Article 46, is so clear that it cannot be interpreted in any other way: "*Althingi* decides itself whether its members are legally elected and also whether a member has lost eligibility for election to *Althingi*" (see paragraph 31 of the judgment). This is a very old provision, deeply rooted in the national legal order. As the Court states, "the provisions of Article 46 of the Constitution in substance date back to earlier constitutional provisions adopted in 1874 and 1915. The current Constitution has been in force since 1944" (see paragraph 48 of the judgment).

Details on the constitutional provision were, at the relevant time, provided in the 2000 Act on Parliamentary Elections to *Althingi* (see paragraph 32 of

the judgment), which left no room for the existence of a judicial (or quasi-judicial) remedy.

Lastly, and most importantly, on 1 January 2022 a new – general – Elections Act[1] came into force, which also leaves no room for the recognition of a judicial (or quasi-judicial) remedy in respect of decisions taken by the Icelandic Parliament in electoral matters. The new first paragraph of section 127 of that Act reproduces Article 46 of the Constitution verbatim: "*Althingi* decides itself whether its members are legally elected and also whether a member has lost eligibility for election to *Althingi*". Moreover, in the event of a complaint (first paragraph of section 132 of the Act): "*Althingi* shall make rulings on the validity of parliamentary elections, the eligibility of members to stand and their election, on its own initiative or on the basis of a complaint received. *Althingi* shall also make rulings on the validity of disputed ballot papers". Lastly, the fourth paragraph of section 132 of the Act states: "In the event that *Althingi* rules that the election of an entire candidate list in a constituency is invalid, a repeat election shall be held there". In conclusion, the legislature of the respondent State, although aware of the *Mugemangango* judgment (published on 10 June 2020), has reiterated its faithful adherence to Article 46 of the Constitution, which, I repeat, does not provide for any judicial (or quasi-judicial) remedy in respect of decisions taken by the Icelandic Parliament in electoral matters.

4. It is noteworthy that, since the *Mugemangango* judgment, the Norwegian Constitution, which has many similarities with the Icelandic Constitution, has been amended (May 2023) and the second paragraph of the new Article 64 provides, for the first time, that "[the] Supreme Court makes the final decision on appeals"[2]. In terms of comparative European law, the overview of existing systems provided in the *Mugemangango* judgment (cited above, §§ 44-45) shows that in the vast majority of States there is a possibility of judicial remedy. Indeed, only a few States, including Iceland, have maintained a system in which electoral disputes are resolved by the Parliament itself, with no possibility of appeal against its decisions (ibid. §§ 41-42).

5. Undoubtedly, as mentioned above, Article 46 of the Icelandic Constitution echoes the country's constitutional tradition. However, the Court took a position in the *Mugemangango* judgment regarding the margin of appreciation of States. The Belgian Government, supported by Denmark, which intervened as a third party, argued that the principle that Parliament is the judge of its own elections, without recourse to a judicial body, was an integral part of those countries' constitutional structures and

[1] Act no. 112 of 25 June 2021: https://www.stjornarradid.is/library/03-Verkefni/Kosningar/Kosningalog_enska.pdf (non-official translation from Icelandic - last accessed on 2 April 2024)

[2] Amended Constitution of Norway: https://lovdata.no/dokument/NLE/lov/1814-05-17/KAPITTEL_3#KAPITTEL_3 (non-official translation from Norwegian - last accessed on 2 April 2024).

"long-established and firmly entrenched democratic traditions" (ibid., §§ 58 and 65). Accordingly, Belgium and Denmark held that their particular democratic traditions and context had to be taken into account when assessing the right to free elections under Article 3 of Protocol No. 1. While the Grand Chamber faithfully reiterated the wide margin of appreciation in the field of electoral law and the importance attached in previous cases to the political development and context of the country, it did not satisfy the request of Belgium and Denmark for a lower threshold. There is nothing in the *Mugemangango* judgment to suggest that Belgium's particular democratic traditions were in fact taken into consideration.

6. Lastly, it should be noted that a review of a constitutional provision under Article 3 of Protocol No. 1 to the Convention has already been carried out by the Court in *Paksas v. Lithuania* ([GC] no. 34932/04, ECHR 2011 (extracts), adopted by a large majority) and in *Lykourezos v. Greece* (no. 33554/03, ECHR 2006-VIII, adopted unanimously). In both cases, the respective Parliaments amended their Constitutions to comply with the Court's judgments[3].

[3] Resolution CM/ResDH(2022)253 (amendment of Article 56 of the Lithuanian Constitution) and Resolution CM/ResDH(2010)171 (amendment of Article 57 of the Greek Constitution).